

1995

# In the Matter of the Estate of Marjorie S. Sims, Neil R. Mitchell v. Lynda Wood : Reply Brief

Utah Court of Appeals

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BRIEF

DOCKET NO. 950734

IN THE UTAH STATE COURT OF APPEALS

In the Matter of the Estate of  
Marjorie S. Sims,

Deceased,

Appeal No. 950734 CA

Neil R. Mitchell,

(Civil No. 933900278 ES)

Petitioner / Appellant /  
Cross-Appellee.

Priority No. 15

Lynda Wood,

(ORAL ARGUMENT REQUESTED)

Respondent / Appellee /  
Cross-Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, DISTRICT JUDGE

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**FILED**

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COURT OF APPEALS

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### III. INTRODUCTION

This Reply Brief of Appellant/Cross-Appellee, Neil R. Mitchell ("Mr. Mitchell") responds to issues raised in the brief of Appellee/Cross-Appellant, Lynda Wood ("Ms. Wood").

The facts relevant to this Reply Brief are set forth in Part VIII of Mr. Mitchell's principal brief and are incorporated herein by this reference. For consistency and convenience, the same abbreviations are used in both briefs.

### IV. ARGUMENT

#### POINT I

#### MARGE'S ESTATE IS LIABLE FOR THE RETURN OF THE ESTATE FUNDS

As set forth in Appellant's principal brief, Marge's sole right and responsibility under the clear, express terms of Grant's Will was to fund the Trust. She admittedly failed to do this. The Trial Court therefore found that Marge breached her fiduciary duty as personal representative. Her only right of access to those funds was through the Trust. Because she converted the Estate Funds in contravention of the express terms of the Will, this Court need look no further in determining that Marge's estate is liable for the return of both components of the Estate Funds--the Estate Cash Deficiency and the Checking Account Payments.



A. Mr. Mitchell Is Entitled to Judgment as a Matter of Law on the Estate Cash Deficiency in the Amount of \$52,875.40, as that Amount was Properly Before the Trial Court.

The Trial Court erred in concluding that Mr. Mitchell did not dispute Ms. Wood's allegation that the Estate Cash Deficiency was only \$48,100.00, and Ms. Wood's reliance upon that argument in her brief is similarly misplaced. As Mr. Mitchell argues in his principal brief, he clearly disputed Ms. Wood's figure in the statement of facts supporting his Motion for Summary Judgment. There, he set forth the amount of \$52,875.40 as the undisputed amount of the Estate Cash Deficiency, based on the Affidavit of Scott Livingston, an accountant with the firm of Grant Thornton. He also disputed the basis for Ms. Wood's figure in his memorandum opposing her motion. R. 259, 352, 415. The amount of \$52,875.40 was the only figure properly before the Trial Court pursuant to Rule 56(e), Utah R. Civ. P. The Trial Court should have adopted that figure as the correct amount of the Estate Cash Deficiency.

Ms. Wood argues that Marge need only return \$48,100.00 of the Estate Cash Deficiency. The difference--\$4,775.40--is supposedly comprised of \$1,900.00 in personal representative fees and \$2,875.40 in interest on the \$50,000.00 Certificate of Deposit Marge converted. Marge, however, was not entitled to either interest or fees.

Marge was not entitled to take a fee for her services as personal representative. The \$1,900.00 figure is arbitrary and unsupported. There is no evidence that Marge ever submitted a petition for compensation or ever received court authorization to receive compensation, as required by Utah Code Ann., § 75-3-718. Further, because Marge admittedly breached her fiduciary duty as personal representative, she would not have been entitled to a fee for acting as such.

Marge was only entitled to the income from the Trust which she never formed. She was not entitled to anything from the Estate directly. To the extent she claims any amount as income in addition to her support, she is making a claim in excess of even her interpretation of Grant's Will. Additionally, there is nothing in the record to support the \$2,875.40 claimed by Ms. Wood as interest on the Certificate of Deposit that Marge converted. Her accounting is simply incorrect.

This Court should direct entry of judgment as a matter of law in the amount of \$52,875.40 as the Estate Cash Deficiency.

**B. Marge Was Not Entitled to the Checking Account Payments in the Amount of \$96,642.00, nor any Other funds from the Estate.**

Ms. Wood argues that even though Marge admittedly breached her fiduciary duty under the Will, her breach was not actionable because (1) Grant's Estate was not damaged, and (2) Marge would

have been entitled to the money anyway had the Trust been funded. In the event the Court reaches this issue, it cannot adopt Ms. Wood's position. The Estate has been damaged by Marge's breach and conversion. As set forth more fully in Mr. Mitchell's principal brief, the express terms and structure of the Will demonstrate that Marge would not have been entitled to the money because she had ample resources of her own. Because Marge was not entitled to the Checking Account Payments, or any other funds from the Estate, as the following points illustrate, such funds would have remained in the Estate.

1. The "As Is Necessary" Clause in the Will Evidences Grant's Intent that Marge Not Receive Principal of the Trust Unless Her Own Resources Were Insufficient.

The Will instructed Marge to establish the Trust, appointing Marge and Mr. Mitchell as co-trustees. The co-trustees were only authorized to distribute "as much of the principal as is necessary for [Marge's] proper health, support, and maintenance and to maintain her in the standard of living that she enjoyed during [Grant's] lifetime." R. 62-63. Ms. Wood suggests that this clause created a duty on the part of Mr. Mitchell to disburse Trust principal to Marge to support her lifestyle. She argues that the phrase "as is necessary" referred to how much Mr. Mitchell should pay her, not whether he should invade the principal, regardless of Marge's independent resources.

The Will, in reality, created the opposite duty for Mr. Mitchell. The "as is necessary" clause placed a duty upon Mr. Mitchell, as co-trustee, to consider Marge's own resources before invading the principal of the Trust on her behalf. Because of his fiduciary obligation as a co-trustee, he would not have been entitled to invade the principal as long as Marge had sufficient independent resources to pay for her maintenance and support herself.<sup>1</sup>

a. Case Law Supports Mr. Mitchell's Position.

Although this is an issue of first impression before this Court, several jurisdictions have analyzed similar testamentary language with similar facts and held that a trustee cannot invade principal if (1) the gift of principal is "conditioned upon need" and (2) the life beneficiary has sufficient independent resources.

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<sup>1</sup> On pages 32 and 33 of her brief, Ms. Wood cites her own affidavit testimony that Marge's expenditures of the Estate Funds were "reasonable," as conclusive support for her argument that Marge was entitled to the converted Estate Funds. Ms. Wood's testimony is not relevant as to whether or not the expenditures were "reasonable" for purposes of disbursements from the Trust because she was not one of the co-trustees. Whether a disbursement was "reasonable" or "necessary" was left to the discretion of the co-trustees. Ms. Wood's opinion on this issue, therefore, carries no weight.

The only salient opinion as to whether Marge's expenditures were reasonable, is that of Mr. Mitchell, the other co-trustee. Ms. Wood argues that it is speculative for Mr. Mitchell to assert that he would have denied the disbursements had Marge even sought his approval. The fact that Mr. Mitchell has pursued this litigation, however, is ample evidence that, had the Trust been established, he would have opposed disbursements of Trust principal.

Dunklee v. Kettering, 225 P.2d 853 (Colo. 1950) is a well-reasoned and well-supported decision on this issue. There, the Colorado Supreme Court analyzed testamentary language and facts similar to the present case and concluded that the beneficiary did not have a right to principal of the trust because of his abundant independent resources. The will provided:

Upon my death, provided Dr. George K. Dunklee of San Luis Obispo, California, is then living, that said trustee pay the entire income of my estate to him during his lifetime. I further authorize my said trustee to use as much of the principal of my estate, in addition to said income, as may be necessary to provide him with the necessities of life.

Id. at 853. The remainder beneficiaries argued and offered proof that Dr. Dunklee enjoyed a large income from his private clinic, as well as other investment income sources, that his personal resources were more than sufficient for his support, and that he could demonstrate no "need" that would warrant an invasion of the principal of the trust.

The court concluded that "the language used by the testatrix seems to us to be clear, understandable and unambiguous, and that she intended that Dr. Dunklee was to receive only the income from her estate unless it became necessary to use the principal to provide him with the necessities of life." Id. at 854-55.

Because Dr. Dunklee's assets were so numerous, the court held

that it was inappropriate for the trustee to invade the principal of the Trust.

The present case is similar. The testamentary gift of principal was conditioned upon Marge's "need." It is undisputed that Marge was worth over one-half million dollars at the time of Grant's death and that she did not need Grant's principal to pay for her support, maintenance, and lifestyle. In addition to being entitled to the income from the Trust, her other independent resources were more than ample. Because no need existed, it would have been improper for her to invade the principal.

The Dunklee court relies upon and carefully analyzes several similar cases where courts prohibited invasions of principal, or at least required the trustees to examine the life beneficiaries' independent resources.<sup>2</sup>

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<sup>2</sup> See In re Martin's Will, 199 N.E. 491, 492 (N.Y. 1936) ("the private income of the beneficiary must be considered in determining whether such need exists"); In re Seacrist's Estate, 66 A.2d 836, 838 (Pa. 1949) ("To know the quality and quantity of [the beneficiary's] private estate becomes very material in order to determine his good faith and his necessities."); Board of Visitors v. Safe Deposit and Trust Company, 46 A.2d 280 (Md. Ct. App. 1946) ("circumstances and income of the beneficiary should be taken into consideration in determining whether to invade the principal of the trust."); Bridgeport City Trust Company v. Beech, 174 A. 308 (Conn. 1934) (holding under similar circumstances and testamentary language that, without a showing of need, principal may not be invaded.); Hull v. Holloway, 20 A. 445, 447 (Conn. 1889) ("So long as [the husband] is able to support himself . . . , the trustee has no right to pay over to him, . . . , any portion of the income or principal of the trust fund."); Stemple v. Middletown Trust Company, 15 A.2d 305 (Conn. 1940) ("[beneficiary's] personal estate, . . . is to be taken into account by the trustees in future payments to her."). Copies of these supporting cases are attached in the Addendum of Mr. Mitchell's principal brief.

After Dunklee, several jurisdictions have analyzed this issue and rendered similar decisions. For example, in Sibson v. First National Bank & Trust Company, 165 A.2d 800 (N.J. Supp. Ct. 1960),<sup>3</sup> the will provided that the trustee pay to the decedent's wife "as much of the principal as my trustee in its sole discretion shall determine necessary for her support, health and maintenance." As in the present case, the decedent had no children of his own and the remainder beneficiaries under the trust were his brother and sister and their children. Based on the implied intention to benefit the remainder beneficiaries with some portion of the trust, the court concluded:

"[W]here the life tenant is given the income of the trust, with a further provision authorizing the trustee to invade corpus if necessary for the life tenant's support, the separate income of the life tenant must be considered in determining whether it is necessary to invade corpus."

Id. at 803. Because the life beneficiary under the trust had sufficient assets of her own, distributions of trust principal "could result in plaintiff's amassing a large estate for her own testamentary purposes, more or less at the expense of decedent's estate and the remaindermen named in decedent's will. Clearly this is contrary to the testamentary plan expressed by decedent." Id. Similarly, Marge's actions in the present case also created

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<sup>3</sup>A copy of Sibson, as well as the other cases discussed in this section, are attached in the Addendum to this Reply Brief.

a situation that was "clearly contrary" to Grant's testamentary plan. See pp. 32-33 of Mr. Mitchell's principal brief.

In Security-People's Trust Company v. United States, 238 F. Supp. 40 (W.D. Pa. 1965), the testator authorized the trustee "to advance portions of the principal of the trust estate to or for use or benefit of the following beneficiaries . . . at such times, in such amounts, and for such purposes as my trustee in its discretion may deem advisable." The trust then provided for distribution to remainder beneficiaries upon the death of the testator's wife, the life beneficiary. The court found that the trustee was familiar with the extent of the wife's estate, which was approximately five times the size of the testamentary estate. In light of the abundance of the wife's separate assets, the court concluded:

Since there are a series of further life beneficiaries and remaindermen, the trustee would be under a strong duty to protect their interests in the face of any request of the [wife] for invasion. Under the Pennsylvania decisions, a court would be bound to look into the assets of her own estate, which were well known to the trustee, who managed them.

Id. at 49 (emphasis added). The court then held that the size of her estate, alone, would not only "compel the trustee to resist her request for invasion except for clear necessity, but it would also guide the court in any attempt to determine the testator's intent." The testator was familiar with his wife's assets, and



it became clear to the court that the testator's intent was to benefit the remainder beneficiaries and only provide for his wife should her personal assets be insufficient.<sup>4</sup>

Similarly, in the present case, Grant knew of his wife's resources. It should likewise be clear to this Court that based on the size of Marge's own estate, Grant only intended for her to have access to his money should her independent resources be insufficient.

In N.C.N.B. National Bank of Florida v. Shanaberger, 616 So.2d 96 (Fla. Ct. App. 1993), the trust in question named Mark Shanaberger as the income beneficiary. Upon his death, two remainder trusts were to be created for the benefit of the trustor's nieces. The Will instructed the trustee to "invade the principal of the trust estate and pay from the said principal so much of it as in the sole discretion of the trustee is necessary for the care and maintenance, support and medical attention of Mark Shanaberger." Id. at 97. The parties stipulated that the settlor and Mr. Shanaberger had full knowledge of each other's respective financial situation and that the settlor knew that Shanaberger's assets and "income exceeded her own and were sufficient to meet his anticipated medical costs and expenses

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<sup>4</sup>The Security-People's Trust case cites several Pennsylvania cases for the same proposition.

without contribution from her trust funds." Id. The court determined that the trustee was accountable to the remaindermen. In order to fulfill that fiduciary obligation, the trustee was required to look at the life beneficiary's own assets to determine whether there was a need to invade the principal. Likewise, in the present case, Mr. Mitchell would have been under a similar duty to the Trust, and any invasion of principal would have been a breach of that duty.

In re Will of Flyer, 245 N.E.2d 718 (N.Y. 1969) is a seminal case. There, the will established a trust for the benefit of the decedent's widow for life, and for the benefit of the couple's children, as remainder beneficiaries. The trust provided that the income be used directly for the widow's benefit and that, "if such income be insufficient for the support and maintenance of Elsie, my trustee shall so pay or use from principal sufficient monies to provide for Elsie's support and maintenance, in the sole, absolute and uncontrolled discretion of the trustee." Id. at 719 (emphasis added). In construing this provision, Chief Judge Fuld determined that even though the trustee had absolute and sole discretion, the testamentary gift of principal was conditioned upon the widow's need. Accordingly, the trustee was entitled to take into account the widow's private resources

before making an invasion of principal. Specifically, the court stated:

The principle which emerges from the case may be briefly stated. A trustee, particularly when given uncontrolled discretion to invade principal . . . , may, before deciding to effect an invasion, take into account the beneficiary's independent resources where there is no "absolute" gift of principal, the prime gift being that of income, and the testator intended that the invasion of the principal be dependent upon the needs or requirements of the beneficiary.

Id. at 720.

In the present case, had Mr. Mitchell been informed of Marge's desire to invade the principal, he would have been required to look at Marge's independent resources in order to fulfill his fiduciary obligation to the Trust. He would have found ample liquid assets and, as such, would have been constrained to avoid depletion of the principal.

b. Case Law Refutes Ms. Wood's Argument.

In addition to showing that Marge was not entitled to the Estate Funds, these cases bring to light two additional points that counter Ms. Wood's arguments. First, several of the wills analyzed in the above-cited cases state that the trustee "shall" distribute principal to the beneficiary as is necessary. See e.g., In re Will of Flyer, 245 N.E.2d at 720; Hull v. Holloway, 20 A. at 447; Stemple v. Middletown Trust Co., 15 A.2d at 307. In spite of Ms. Wood's argument to the contrary, whether the will

says the trustee "shall" or "may" distribute principal appears to be an insignificant point in those cases. If a will says "shall distribute", but that directive is then qualified by the phrase "as is necessary," the beneficiary is not entitled to principal disbursements unless a "need" truly exists because the beneficiary's own resources are insufficient.

Second, Ms. Wood argues that the "as is necessary" language only places a qualification on the amount of the distribution, not whether such distribution is appropriate. The wills in Stemple, Sibson v. First National Bank & Trust Co., and N.C.N.B. Bank v. Shanaberger instructed their trustees to "pay so much of the principal as is necessary . . . " --similar to the instructions in Grant's Will. Contrary to Ms. Wood's contention, however, the courts in those cases indicated that the testamentary language placed a condition on whether the trustee should make a distribution, not how much the distribution should be.

Finally, the cases cited by Ms. Wood in support of her position are factually distinguishable from the present case. In First National Bank & Trust Co. v. Finkbiner, 416 P.2d 224 (Wyo. 1966), for example, the life beneficiary of the trust had limited assets. Her husband died in 1936, and the case was brought in 1960. If her own assets were not depleted by then, they were likely nearly gone, in spite of her remarriage. In In re

Lindgren, 885 P.2d 1280 (Mont. 1994) and Godfrey v. Chandley, 811 P.2d 1248 (Kan. 1991), both life beneficiaries were alive, living in nursing homes, and legally incompetent or suffering from Alzheimer's. In Lindgren, the Will expressly stated that the purpose of the testamentary trust was to "provide for and assure so far as possible, the generous care and support of the beneficiary during her lifetime." Because of Mrs. Lindgren's financial condition, her conservator was required to pay for her nursing home care out of the conservator's own pocket, and the action was brought mainly to recover the conservator's losses. 885 P.2d at 1281. In Godfrey, the grantor devised substantially all of his property to the life beneficiary. 811 P.2d at 1250.

These are very different factual settings than those of the present case. Marge was neither destitute nor in a nursing home at the time of Grant's death. Nothing in the express terms of the Will evidence an intent that Marge have unrestricted use of the principal. She enjoyed her own estate of over one-half million dollars which continued to grow as she helped herself to the resources of Grant's Estate. The life beneficiaries in Finkbiner, Lindgren, and Godfrey were all destitute, or nearly destitute, widows who had little or no means to support themselves, other than with their late husbands' money. Here, even though Marge was advanced in years, her own personal wealth

would have precluded her inappropriate invasions of the Estate Funds.

2. The Will, as Supplemented by Surrounding Circumstances, is Sufficient to Ascertain Grant's Intent.

Based on the foregoing arguments and cases, it is Mr. Mitchell's position that the Will clearly expresses Grant's intent that Marge only receive Trust principal if her ample independent resources were insufficient for her support. If, however, the Court finds an ambiguity as to the interpretation of this clause, it is entitled to look beyond the "four corners" of the Will for guidance. In fact, Finkbiner, cited by Ms. Wood, as well as other cases, instructs courts in such situations to look to the circumstances surrounding the execution of the will in order to ascertain testamentary intent. 416 P.2d at 228; See also, In re Will of Flyer, 245 N.E.2d at 720.

The record of "surrounding circumstances" in this case is relatively sparse, as the matter was summarily decided below. To the extent surrounding circumstances are in the record, they support Mr. Mitchell's position. For example, Marge had ample assets of her own, and the couple was advanced in years at the time of the execution of the Will. Marge clearly did not need Grant's money. She could easily pay her own expenses with her own money.

The record of surrounding circumstances, on the other hand, does not support Ms. Wood's contentions. The "facts" in Ms. Wood's brief are either not in the record or are misrepresented. For example, Ms. Wood repeatedly asserts that Marge was bedridden and therefore Grant intended her to have free reign of the Estate Funds. This however, is a mischaracterization of Ms. Wood's own affidavit testimony. Ms. Wood's Affidavit does not indicate that Marge was bedridden at the time Grant executed his Will, which is the critical time for determining his testamentary intent. Further, Ms. Wood testifies that "[a] few months after Grant's death, [Marge] discontinued the night nursing care," which implies that Marge was not confined to her bed or in need of such assistance. R. 406-408. Marge's subsequent physical condition has not been accurately defined by Ms. Wood's Affidavit, cannot be considered in ascertaining testamentary intent, and should not be used to play on the sympathies of the Court. Marge was represented by counsel at the time, and there is no evidence that she was not in full control of her faculties.

Ms. Wood also incorrectly asserts on pages 20 and 21 of her brief that if Marge had to use her own resources instead of converting the Estate Funds, she would have been required to sell her home in order to do so. This is patently untrue. The record reflects that at the time of Grant's death, Marge had over

\$150,000.00 in cash and \$286,500.00 held in certificates of deposit. See Ms. Wood's Answers to Interrogatories, R.281-83. Marge would have been required to spend over \$400,000.00 of her net worth of \$515,455.21 before depleting her liquid assets.

Ms. Wood's affidavit does not address many relevant surrounding circumstances and distorts some facts that are addressed, such as gifts made by Marge. Even considering Ms. Wood's Affidavit, the present record does not support her position.<sup>5</sup> While Mr. Mitchell believes Grant's intent is clearly expressed in the Will, if this Court determines that the record should be augmented to more fully elucidate Grant's intent, the matter should be remanded to the Trial Court for further factual determination.

3. Grant's Estate Planning Strategies Were Intended to Benefit the Remainder Beneficiaries, Not Marge.

As Ms. Wood concedes in her brief, Grant's design in creating the Trust was to reduce exposure to estate tax liability. However, Ms. Wood attempts to argue that Grant's tax planning was designed to benefit Marge, not the remainder beneficiaries, and

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<sup>5</sup>The affidavit of John McCoy, upon which Ms. Wood relied below and now relies in her brief, should also be disregarded or given little weight. Mr. McCoy attempts to establish Grant's testamentary intent through inadmissible hearsay as to statements Grant made at or near the time he executed his Will. See Rules 801, 802, Utah R. Evid. Additionally, Mr. McCoy, as counsel for Ms. Wood, is not permitted to testify in this proceeding. See Rule 3.7, Utah Rules of Professional Conduct.

This issue was raised below in Mr. Mitchell's Memorandum in opposition to Ms. Wood's Motion for Summary Judgment. R. 412-17.



that Grant intended her to have unrestricted access to the Estate Funds. In fact on pages 28 and 29 of her brief, Ms. Wood argues that "Grant's Will makes perfectly clear that these intentions [to avoid excessive estate taxation] superseded any desire to preserve the Estate for residuary beneficiaries."

Ms. Wood's arguments, however, do not make sense for two reasons. First, there is absolutely no tax benefit that could have been conferred on Marge by virtue of the Trust. Had Grant intended for her to have unlimited access to his assets, he could have left his entire Estate to her, tax free. See 26 U.S.C. § 2650. The tax benefits intended, therefore, could only have been intended for the remainder beneficiaries.

Second, in order to realize such a tax benefit to the remainder beneficiaries of the surviving spouse, Marge needed to fund the Trust so that her access to the principal of the Trust was restricted. An individual may create a trust whereby his estate will be placed in trust for the benefit of his surviving spouse for life, to then be distributed to remainder beneficiaries upon the death of the survivor. As long as the principal is only distributed to the life beneficiary pursuant to the restrictions in the trust, the trust will not be taxed in the survivor's estate. See 26 U.S.C. § 2041(b)(1)(A).

By failing to fund the Trust, Marge risked destroying Grant's tax planning. In light of this risk, the Trial Court's ruling is contrary to public policy. If this Court were to affirm that ruling, it would establish precedent in this state, allowing personal representatives to ignore testators' intent regardless of the potential tax consequences to others.

C. Mr. Mitchell's Estoppel Argument Is Appropriately Before this Court.

In his principal memorandum, Mr. Mitchell argues that Ms. Wood and Marge's estate should be equitably estopped from denying liability for the missing Estate Funds, particularly in light of Marge's shortcomings as personal representative. Ms. Wood, however, claims that this argument is inappropriate because it was not raised below. Mr. Mitchell acknowledges the rule that an appellant cannot raise new issues on appeal. This, however, is not a new issue. It is simply a new argument. The issue remains the same as in the Trial Court: Did Marge breach her fiduciary duty and is her estate now liable for the return of the Estate Funds because of that breach? This new estoppel argument simply proposes another reason why Marge's estate cannot escape liability. Marge's disregard for her duty and the fact that her revision of her own will thwarted Grant's estate planning, are examples of inequitable conduct that should preclude Ms. Wood's attempt to avoid liability.

POINT II

MS. WOOD IS NOT ENTITLED TO THE RELIEF REQUESTED IN HER  
CROSS APPEAL

A. The Personal Injury Settlement Proceeds Are Property of  
Grant's Estate.

Marge was not entitled to the proceeds of the settlement of Grant's personal injury action, as Ms. Wood argues in her cross-appeal. According to Utah's Survival Statute, Utah Code Ann., § 78-11-12(b), the settlement proceeds belong to Grant's Estate.

That statute reads:

If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury.

(Emphasis added.) Thus, the proceeds of such a settlement would go to the personal representative of the estate, if the plaintiff died with a valid will, or to the intestate heirs if the plaintiff died without a will.

Grant died before resolution of the lawsuit. After his death, his Estate settled the claim for \$12,445.86. Grant had his Will and did not die intestate. Therefore, according to the statute, the proceeds of the settlement were to go to Marge in her capacity as personal representative of the Estate, and not in

her individual capacity. Her duty, which she failed to execute, was to place the proceeds of the settlement into the Estate where they could be applied to the purposes and in the manner prescribed by the Will. Because she converted those proceeds in contravention of that duty, her estate is liable for the return of \$12,445.86.<sup>6</sup>

Ms. Wood's reliance on In re Behm's Estate, 213 P.2d 657 (Utah 1950) is misplaced because Behm, as well as the other cases she cites, dealt with a cause of action for wrongful death, not a personal injury settlement. The policy considerations as to who owns a cause of action are very different between wrongful death and personal injury claims. As Judge Hanson clearly and correctly articulated at the hearing on the Motions for Summary Judgment below, in a wrongful death action, the heirs of the decedent personally hold claims for loss of consortium, lost support, and other personal losses. See In re Estate of Haro, 887 P.2d 878 (Utah Ct. App. 1994). In a personal injury case, on the other hand, the only party that has a claim for damages is the injured person-- "not their spouse or their children or anybody else." Transcript of Oral Argument, R. 563-64.

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<sup>6</sup>Marge was not entitled to the settlement proceeds as Grant's "only surviving intestate heir," as Ms. Wood argues, because Grant did not die "intestate." He died with his Will in place. The Will did not name Marge as a devisee of anything except personal property. It only named her as the personal representative responsible for including the settlement proceeds in the Estate.

If the injured party dies from causes other than the original injury, the heirs do not inherit the cause of action. Pursuant to the Survival Statute, the decedent's estate is entitled only to the out-of-pocket expenses paid by the decedent prior to his death, and any settlement proceeds should therefore go directly into the decedent's estate. The following exchange at the hearing in the Trial Court emphasizes the intent of that statute:

MR. MCCOY: Well, I think that the [survival] statute intended to benefit those heirs that were directly affected by the tort case ...

THE COURT: Well, and that's exactly what it would do if it went into the estate of [Grant], not directly but indirectly it would benefit the heirs that he said should benefit....

R. 564. Thus, in order to properly carry out the letter and intent of the survival statute, to properly benefit Grant's Estate, and to properly reimburse the Estate for expenses incurred prior to Grant's death, the settlement proceeds from the personal injury action should be returned to Grant's Estate.

B. The Trial Court Was Correct in Awarding Interest to Mr. Mitchell on the Estate Cash Deficiency.

An award of interest by a trial court is within the court's equitable discretion. Such a decision, therefore, will only be disturbed if there has been an abuse of discretion. Ms. Wood claims her alleged settlement offer is tantamount to a "tender."

On her denial of Mr. Mitchell's claim, however, she denied liability on the entire amount and refused the claim. R. 17, 47, 161. Further, the Affidavit of John McCoy states that the \$48,100.00 was offered in settlement of the entire matter, including the issue of the personal injury settlement, which was decided below in favor of Mr. Mitchell. In light of this, the Trial Court's award of interest is appropriate, authorized, and should therefore stand.

V. CONCLUSION & RELIEF REQUESTED

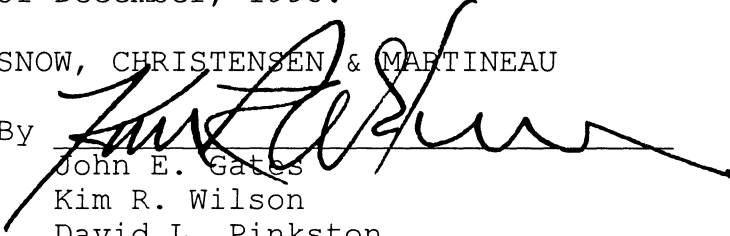
Mr. Mitchell respectfully requests that this Court find in his favor and reverse that part of the Trial Court's Order denying part of Mr. Mitchell's Motion for Summary Judgment on his claim and granting Ms. Wood's Motion for Summary Judgment in part. Accordingly, Mr. Mitchell requests that this Court reverse the Trial Court's Order as to the Checking Account Payments and Estate Cash Deficiency by granting Mr. Mitchell judgment as a matter of law on the full amount of \$96,642.58 and \$52,875.40, respectively.

Mr. Mitchell also hereby requests oral argument on this appeal.

DATED this 21st day of December, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By

  
John E. Gates  
Kim R. Wilson  
David L. Pinkston  
Attorneys for Appellant, Neil R.  
Mitchell

Certificate of Mailing

I hereby certify that on the 21st day of December, 1995, I mailed two true and correct copies of the **Reply Brief of Appellant** first class, postage prepaid, to the following:

John L. McCoy, Esq.  
310 South Main, #1305  
Salt Lake City, UT 84101

SNOW, CHRISTENSEN & MARTINEAU

By 

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Attorneys for Neil R.

Mitchell, Appellant



# ADDENDUM

**Grace M. SIBSON, Plaintiff-Respondent,**  
v.  
**FIRST NATIONAL BANK AND TRUST**  
**COMPANY OF PAULSBORO, Trustee**  
**under the Will of**  
**William A. Sibson, Deceased, Defendant-**  
**Respondent,**  
and  
**Walter W. SIBSON et al., Defendants-**  
**Appellants.**

**No. A-782.**

Superior Court of New Jersey  
Appellate Division.

Argued Nov. 7, 1960.

Decided Dec. 6, 1960.

Action by widow for construction of trust provision of her husband's will. From adverse judgment of the Superior Court, Chancery Division, Gloucester County, 61 N.J.Super. 88, 160 A.2d 76, the remaindermen appealed. The Superior Court, Appellate Division, Sullivan, J.A.D., held that under testamentary trust directing payment of income therefrom to testator's wife for life and authorizing trustee to pay such portion of corpus to wife as should be necessary for her support, health and maintenance, it was not intention of testator, who had received substantial legacies from his family and who had no children of his own and who was friendly with his brother and sister and their children and who left remainder to his brother and sister, that wife was to be supported wholly out of trust income and corpus without regard to her own separate income, and separate income of wife had to be considered in determining whether it was necessary to invade the corpus, but it was not necessary that wife exhaust her separate estate before recourse could be had to corpus of trust.

Judgment modified.

[1] WILLS ⇨ 440  
409k440

In construing a will, function of court is to ascertain and give effect to purpose of testator

as set forth in his will, and court is not limited by form or terminology in its quest of what testator meant by his testamentary language, and entire will must be considered rather than an isolated portion thereof, and where there is an ambiguity, surrounding facts and circumstances are proper objects of consideration.

[1] WILLS ⇨ 441  
409k441

In construing a will, function of court is to ascertain and give effect to purpose of testator as set forth in his will, and court is not limited by form or terminology in its quest of what testator meant by his testamentary language, and entire will must be considered rather than an isolated portion thereof, and where there is an ambiguity, surrounding facts and circumstances are proper objects of consideration.

[1] WILLS ⇨ 470(1)  
409k470(1)

In construing a will, function of court is to ascertain and give effect to purpose of testator as set forth in his will, and court is not limited by form or terminology in its quest of what testator meant by his testamentary language, and entire will must be considered rather than an isolated portion thereof, and where there is an ambiguity, surrounding facts and circumstances are proper objects of consideration.

[2] WILLS ⇨ 684.10(5)  
409k684.10(5)

Under testamentary trust directing payment of income therefrom to testator's wife for life and authorizing trustee to pay such portion of corpus of trust to wife as should be necessary for her support, health and maintenance, it was not intention of testator, who had received substantial legacies from his family and who had no children of his own and who was friendly with his brother and sister and their children, who left remainder to brother and sister, that wife was to be supported wholly out of trust income and corpus without regard to her own separate income, and separate income of wife had to be considered in determining whether it was necessary to

invade the corpus, but it was not necessary that wife exhaust her separate estate before recourse could be had to corpus of trust.

[3] WILLS ⇐ 441

409k441

In determining intent of testator, only those circumstances which were known to testator when he made his will will be considered in determining his intent.

**\*\*801 \*226** Martin F. Caulfield, Woodbury, for plaintiff-Respondent (Hannold & Hannold, Woodbury, attorneys).

Robert E. Gladden, Camden, for defendant-respondent (Ross & Gladden, Camden, attorneys).

John P. Hauch, Jr., Camden, for defendants-appellants (Archer, Greiner, Hunter & Read, Camden, attorneys).

Before Judges PRICE, GAULKIN and SULLIVAN.

**\*227** The opinion of the court was delivered by

SULLIVAN, J.A.D.

This appeal is from the judgment of the trial court construing certain provisions of the will of William A. Sibson (hereinafter referred to as decedent) who died on August 17, 1955, a resident of Gloucester County. Plaintiff is his widow. Defendants-appellants are the remaindermen under the will.

Plaintiff married the decedent on February 3, 1931. No children were born of this marriage, which was decedent's first and plaintiff's second. Plaintiff had no children by her previous marriage. During her marriage to decedent, plaintiff appears to have had not separate estate or income of her own and was entirely dependent on her husband for her support.

The will of decedent had been executed on May 14, 1951. Briefly, it provided in paragraph Fifth that if plaintiff survived

decedent for 30 days, a trust was to be established of the residue of the estate, and

'(A) To pay in quarter-annual installments the net income arising from the said residuary estate, hereinafter designated 'principal', to my said wife for as long as she shall live, such payments to commence as soon after my death as may be reasonably convenient for my Trustee, and further to pay to my said wife, freed and discharged from all trusts and uses, as much of the principal as my Trustee in its sole discretion shall determine necessary for her support, health and maintenance.'

Upon the death of plaintiff, 'the remaining principal, if any,' was to be distributed to decedent's brother and sister or their issue.

Pursuant to the will the trust was set up by defendant-respondent trustee, and the income thereof, approximating \$3,750 annually, has been paid to plaintiff. In addition, the trustee has advanced to plaintiff, out of trust principal, the sum of \$1,075 for painting and repairs to the house in which plaintiff lives.

In April 1959 plaintiff filed this suit seeking construction of decedent's will and directing the trustee to make payments **\*228** to her out of the Corpus of the trust. The case was submitted to the trial court on the pleadings, pretrial order and the depositions of plaintiff and her brother-in-law, who handled all of plaintiff's business affairs.

The record indicates the following. At the present time plaintiff is the sole owner of the home in which she lives in Woodbury, New Jersey. The property, which is unencumbered, originally belonged to plaintiff and decedent as tenants by the entirety. Plaintiff also has a life estate in a summer home in Canada. Shortly before decedent's death he gave plaintiff \$2,000, and on his death she collected \$2,500 on **\*\*802** a life insurance policy and also received \$21,600 over a period of three years from a group life insurance policy which covered decedent. Plaintiff is the beneficiary of a non-taxable annuity of \$1,200 paid by decedent's former employer, and since 1957 has been receiving Social Security payments at a current rate of \$83.30 per month. Since

(Cite as: 64 N.J.Super. 225, \*228, 165 A.2d 800, \*\*802)

decedent's death she has invested \$34,242.19 in securities which produce an annual income of \$1,200. She also has bank accounts totaling \$4,000 and a 1959 automobile purchased for \$2,750.

It thus appears that plaintiff is in receipt of independent income of her own approximating \$3,400 annually which, together with her income from the trust, gives her a total income of approximately \$7,150. Her federal income tax is about \$600. Plaintiff's average expenses for the past four years were shown to be \$3,300 per year and, while plaintiff asserted that they represented a thrifter manner of living than that to which she was accustomed while her husband was living, the trial court found that her total income from all sources was quite adequate to maintain her according to her former standard of living.

At the trial plaintiff took the position that paragraph Fifth (A) of the will meant that (1) plaintiff was to receive all of the income from the trust, and (2) all of the expenses necessary for plaintiff's support, health and maintenance were to be paid out of the principal of the trust. The \*229 trial court rejected the latter contention and held that the provision 'necessary for her support, health and maintenance' referred to the possible inadequacy of trust income for these purposes.

The court, in effect, construed paragraph Fifth (A) to mean that to the extent that the income of the trust was inadequate to provide for plaintiff's support, health and maintenance, recourse was to be had to trust Corpus. The court therefore directed the trustee not to take plaintiff's separate income into consideration in determining what payments should be made out of Corpus.

The trial court attached particular significance to the gift over of 'the remaining principal, if any,' after plaintiff's death. This indicated to the trial court that decedent contemplated the very real possibility that there might be no Corpus left over for the remaindermen. The court held that such provision indicated that plaintiff was to be the primary object of decedent's bounty in the use

of the Corpus, which was 'to be liberal and not just a stopgap against the vicissitudes of life.' The trial court's opinion is reported in 61 N.J.Super. 88, 160 A.2d 76 (Ch.Div.1960)

[1] In construing a will the function of the court is to ascertain and give effect to the purpose of the testator as set forth in his will. *Busch v. Plews*, 12 N.J. 352, 96 A.2d 761 (1953). The court is not limited by form or terminology in its quest of what the testator meant by his testamentary language. The entire will must be considered rather than an isolated portion thereof, and where there is an ambiguity, surrounding facts and circumstances are proper objects of consideration. *Morristown Trust Co. v. McCann*, 19 N.J. 568, 118 A.2d 16 (1955).

[2] The provisions of the will at hand indicate that decedent wanted his wife amply provided for during her lifetime but, save for a bequest of his 'strictly personal effects' to plaintiff, he did not want her to receive any part of the principal of his estate unless necessary for her support. To that end his estate is preserved during plaintiff's \*230 lifetime, but upon her death it goes to decedent's blood relatives.

The record shows that decedent had received substantial legacies from his family. He had no children of his own and was friendly with his brother and sister and their children. It was therefore perfectly natural for decedent to provide that his entire estate should go to his blood relatives \*\*803 after his wife had been amply taken care of during her lifetime.

We do not agree with the trial court's ruling that decedent intended that plaintiff was to be supported wholly out of trust income and Corpus without regard to plaintiff's separate income. We do not interpret paragraph Fifth to have that meaning. Normal understanding of the language used by decedent would indicate that plaintiff's separate income was to be considered. How else would the trustee determine what was necessary for her support? In addition, the greater part of plaintiff's separate income comes from sources provided or arranged for by decedent during

his lifetime. The provisions in the will are all part of the same pattern and must be interpreted in the light of these surrounding facts and circumstances.

[3] Plaintiff argues that there is nothing in the record to show that in April 1951, the date decedent's will was executed, any of these circumstances were in existence or had been arranged for by decedent, and cites *Zwoyer v. Hackensack Trust Co.*, 61 N.J.Super. 9, 160 A.2d 156 (App.Div.1960), for the proposition that only those circumstances which were known to decedent when he made his will may be considered in determining his intent.

The rule cited is correct but its application to the facts of this case is invalid. Decedent's will speaks as of the date of his death, and it is only reasonable to assume that decedent, in expressing his testamentary plan for his wife, intended that such plan would fit in with whatever other arrangements he either had made or would make in the future for her. So, too, with plaintiff's Social Security \*231 payments which commenced about 1957. Certainly decedent, in planning for his wife's security, would have been aware that plaintiff would eventually come into these benefits.

There are cases where a testator establishes a trust 'for support,' and specifies that if the income from such trust is insufficient for that purpose, then so much of Corpus as may be necessary for that purpose shall be used. In such instance the courts have held that the testator has clearly indicated that the trust is to provide the entire support without considering the beneficiary's separate income. *Pearce v. Marcellus*, 137 N.J.Eq. 599, 45 A.2d 889 (E. & A. 1945); *Hicks v. Jones*, 138 N.J.Eq. 280, 47 A.2d 894 (Ch.1946); *Orange First National Bank v. Preiss*, 2 N.J.Super. 486, 64 A.2d 475 (Ch.Div.1949).

However, where the life tenant is given the income of the trust, with a further provision authorizing the trustee to invade Corpus if necessary for the life tenant's support, the separate income of the life tenant must be considered in determining whether it is necessary to invade Corpus. *Stetson v.*

*Community Chest*, 24 N.J.Super. 243, 93 A.2d 796 (Ch.Div.1952); *In re Willey's Estate*, 139 N.J.Eq. 118, 48 A.2d 789 (Prerog.1946). Cf. *Renner v. Castellano*, 21 N.J.Super. 331, 91 A.2d 176 (Ch.Div.1952).

In 2 A.L.R.2d, at p. 1431, in discussing this question, it is stated that no general rule is available other than that the intention of the testator must govern in each particular case. The Annotation adds, at p. 1432, that:

'By the weight of authority, unless the language of the trust instrument affirmatively reveals an intention to make a gift of the stated benefaction regardless of the beneficiary's other means, the trustee should consider such other means in exercising his discretion to disburse the principal for the purpose.'

The construction given the will by the trial court could result in plaintiff's amassing a large estate for her own testamentary purposes, more or less at the expense of decedent's estate and the remaindermen named in decedent's will. \*232 Clearly, this is contrary to the testamentary plan expressed by decedent.

We hold that under a proper construction of decedent's will the separate income \*\*804 of plaintiff is to be considered by the trustee. It has been suggested by appellants that not only plaintiff's separate income but also her separate estate would have to be exhausted before recourse could be had to trust Corpus. We do not read the will to mean that the use of trust Corpus is so limited. If the trust income, together with plaintiff's separate income, is insufficient to provide for plaintiff's support, health and maintenance, trust Corpus is to be used, and the trustee is to administer the trust accordingly.

The judgment of the trial court is modified to the extent indicated herein.

END OF DOCUMENT

**SECURITY-PEOPLES TRUST  
COMPANY, Executor of the Estate of  
Edna Buhl Putts,  
Deceased, Plaintiff,**

**v.**

**UNITED STATES of America, Defendant.**

**Civ. A. No. 1101- Erie.**

United States District Court W.D.  
Pennsylvania.

Feb. 2, 1965.

Action to recover estate taxes paid. The District Court, Weber, J., held that decedent did not possess, for estate tax purposes, general power of appointment over assets in trust estate established under will of her husband where (1) title and possession of trust assets was in hands of independent corporate trustee legally accountable under state law, for its administration, not only to decedent but to successive life income beneficiaries and remaindermen and (2) trustee alone was vested with discretion to make invasion of principal.

Order accordingly.

**[1] INTERNAL REVENUE ⇌ 4157.10(1)**

220k4157.10(1)

Formerly 220k994

It was congressional intent to tax as part of estate of decedent any property over which decedent had such power of control as to be able to (1) apply it to his own benefit or benefit of his creditors, (2) dispose of it by will, (3) appoint it to his estate or creditors of his estate, or (4) consume it without restriction. 26 U.S.C.A. (I.R.C.1954) § 2041.

**[2] WILLS ⇌ 470(3)**

409k470(3)

Under Pennsylvania law, true intention of testator, as found within four corners of will, must govern.

**[3] POWERS ⇌ 32**

307k32

Life tenant has, under Pennsylvania law,

obligation to exercise in good faith power to use, occupy, consume, sell or dispose of property.

**[4] TRUSTS ⇌ 135**

390k135

An "active trust", in Pennsylvania, is one in which active duties are imposed on trustee with respect to control and management of subject matter, and trust remains active so long as it is necessary that legal title to assets remain in trustee to enable him to perform his duties.

See publication Words and Phrases for other judicial constructions and definitions.

**[5] TRUSTS ⇌ 131**

390k131

When there is no longer any duty in trustee except to transfer over to beneficiaries income and corpus of trust estate, trust becomes a "dry trust," and statute of uses, as part of common law of Pennsylvania, terminates trust.

See publication Words and Phrases for other judicial constructions and definitions.

**[5] TRUSTS ⇌ 136**

390k136

When there is no longer any duty in trustee except to transfer over to beneficiaries income and corpus of trust estate, trust becomes a "dry trust," and statute of uses, as part of common law of Pennsylvania, terminates trust.

See publication Words and Phrases for other judicial constructions and definitions.

**[6] TRUSTS ⇌ 276**

390k276

Pennsylvania courts compel exercise of trustee's discretion to pay principal only when there has been showing of necessity and clear direction in trust instrument.

**[7] TRUSTS ⇌ 276**

390k276

Where there was series of further life

beneficiaries and remaindermen, trustee would be under strong duty to protect their interests in face of any request of life beneficiary for invasion of corpus and, under Pennsylvania law, would be bound to look into assets of life beneficiary's own estate to determine necessity.

**[8] WILLS ⇨ 441**  
409k441

Court may look to extrinsic and contemporaneous circumstances to ascertain testator's intent.

**[9] INTERNAL REVENUE ⇨ 4157.10(3)**  
220k4157.10(3)  
Formerly 220k994

Not every case must meet the "ascertainable standards" test but only those in which there is first shown a power in decedent to transfer or appropriate to himself; and even where such power is held by decedent, exception to taxation may still result if power of decedent was limited by "ascertainable standards." 26 U.S.C.A. (I.R.C.1954) § 2041.

**[10] INTERNAL REVENUE ⇨ 4157.10(3)**  
220k4157.10(3)  
Formerly 220k1004

If power of decedent was not of standard defined by Code as "general power", as measured by state law, "ascertainable standards" test need not be applied to determine taxability. 26 U.S.C.A. (I.R.C.1954) § 2041.

**[11] INTERNAL REVENUE ⇨ 4169(4)**  
220k4169(4)  
Formerly 220k1008.3

Statute requires, as test of eligibility for marital deduction, that surviving spouse who has life estate must also have power to appoint which is exercisable in all events. 26 U.S.C.A. (I.R.C.1954) § 2056.

**[12] INTERNAL REVENUE ⇨ 4157.10(1)**  
220k4157.10(1)  
Formerly 220k1004

The "general power of appointment" which is standard for determining inclusion of assets in gross estate of decedent is power of same kind and quality as "power of appointment

exercisable in all events" by surviving spouse which qualifies assets for marital deduction. 26 U.S.C.A. (I.R.C.1954) §§ 2041, 2055, 2056 and subd. (b) (5).

**[13] INTERNAL REVENUE ⇨ 4157.10(1)**  
220k4157.10(1)  
Formerly 220k1004

If decedent had no power to appoint to herself exercisable in all events she had no "general power of appointment", for estate tax purposes. 26 U.S.C.A. (I.R.C.1954) § 2041.

**[14] INTERNAL REVENUE ⇨ 4157.10(1)**  
220k4157.10(1)  
Formerly 220k1004

Decedent did not possess, for estate tax purposes, general power of appointment over assets in trust estate established under will of her husband, where (1) title and possession of trust assets was in hands of independent corporate trustee legally accountable under state law, for its administration, not only to decedent but to successive life income beneficiaries and remaindermen and (2) trustee alone was vested with discretion to make invasion of principal. 26 U.S.C.A. (I.R.C.1954) § 2041.

\*41 Daniel L. R. Miller, McClure & Miller, Erie, Pa., for plaintiff.

Gustave Diamond, U.S. Atty., Pittsburgh, Pa., for defendant.

WEBER, District Judge.

This case involves an action in the United States District Court to recover estate taxes paid by decedent's estate on the corpus of a testamentary trust established under the will of decedent's husband. The government claims that the tax is due under the provisions of § 2041(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C.1958 Ed. § 2041; 26 U.S.C.A. § 2041.

Decedent, Edna Buhl Putts, died testate June 7, 1960, a resident of Erie, Pennsylvania. A deficiency in estate taxes was assessed against her estate by the Internal Revenue Service by reason of its inclusion in her estate

of the corpus of the trust in question. This was paid, a timely claim for refund was made and disallowed, and this action followed.

A trial was held before this Court without jury. Most of the matters in evidence were stipulated between the parties. Taxpayer produced two witnesses, trust officers of plaintiff bank, to testify as to the computation of the refund claimed by plaintiff, and to testify, under objection by the government, that there had been no invasion of the principal of the trust fund during decedent's life, and no request from decedent for such invasion, that the trustee was familiar with the extent of decedent's own estate which was approximately four and one-half times as large as the trust estate, that her income from the trust estate was approximately twelve percent of her total income, that her income exceeded her expenditures and she increased the corpus of her own estate, and that the trustee was personally familiar with her manner of living. The Government objected that such evidence was irrelevant and immaterial to the legal issues involved here.

The government contends that the decedent possessed at the time of her death a general power of appointment over the corpus of the trust created by her husband's will, and further that this general power of appointment was not limited to an ascertainable standard. Because of this the government claims that the corpus of this trust is includable in the gross estate of decedent for federal estate \*42 tax purposes under § 2041 of the Internal Revenue Code. The applicable provisions of the statute are as follows:

'§ 2041. POWERS OF APPOINTMENT

'(a) In General.-- The value of the gross estate shall include the value of all property.--

'(2) Powers created after October 21, 1942.-- To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, \* \* \*.

'(b) Definitions.-- For purposes of subsection (a)--

'(1) General power of appointment.-- The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that--

'(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment. '\* \* \*' (26 U.S.C. 1958 Ed. § 2041)

Decedent's husband, B. Swayne Putts, predeceased his wife on January 31, 1952. By his will, executed on October 4, 1948, except for personal effects given to his wife, he left his entire estate to the Security-Peoples Trust Company in trust. [FN1]

\*43 We have appended the trust provisions in full because we believe that this instrument determines the problem confronting us, whether this instrument confers \*44 a 'general power of appointment' upon the decedent, Edna Buhl Putts, which she possessed at the time of her death.

The Treasury Regulations on Estate Tax (1954 Code) § 20.2041-1(b)(1), further defines a power of appointment to include 'all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of the local property law connotations.' § 20.2041-1(c) of the Regulations defines a general power of appointment as a power 'exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.'

The legislative history of § 2041 may throw some light on the intention of Congress in adopting the above definition.

§ 2041 of the Internal Revenue Code of 1954 originated in the Powers of Appointment Act



of 1951, which amended the prior Act of 1942. The Senate Committee on Finance reported on the bill (H.R.2084), Senate Report No. 382, June 4, 1951:

'General Statement

This bill simplifies sections 811(f) and 1000(c) of the Internal Revenue Code, relating to estate and gift tax on powers of appointment.

The present law taxes all powers to appoint, whether exercised or not, except two specified classes of powers. One of these exempts powers to appoint to certain near relatives. The other is intended to exempt fiduciary powers but has proved inadequate for the purpose. (Emphasis supplied.) (p. 1530)

'The provisions of the 1942 act, taxing the exercise of limited powers of appointment and the mere possession of unexercised powers, were new to the Federal tax system. They extended, or might be construed to extend, to emergency powers to invade principal, discretionary powers given to trustees, and other types of powers which had theretofore not been regarded as powers of appointment. \* \* \* (Emphasis supplied.) (p. 1531)

'As to powers created after the passage of the 1942 act, the bill subjects to estate tax the possession of a general power to appointment, whether or not the power is exercised, \*45 and subjects to gift tax the exercise or release of such power. The bill defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. This includes a general beneficial power to appoint by will. It also includes certain rights to consume principal. It provides a test of taxability which is simple, clear-cut, and easy to apply. (Emphasis supplied.) (p. 1531)

\* \* \* Your committee believes that the most important consideration is to make the law simple and definite enough to be understood and applied by the average lawyer, and that the present bill will accomplish that purpose. (p. 1531) 'Discussion of Specific Provisions

'The definition provides that, if certain limitations or restrictions are present, a power is not a general power even though exercisable by the decedent in his own favor. (p. 1533)

'If the holder of a power is legally accountable for its exercise of non-exercise, the power is not deemed to be a general power. However, a power which is exercisable in favor of the holder, his estate, his creditors, or the creditors of his estate, is not regarded as a power for which the holder is legally accountable.' (Emphasis supplied.) (p. 1534) 2 U.S. Code Congressional and Administrative Service, 82nd Congress 1st Session 1951, p. 1530 et seq.

[1] From these statements, we draw the conclusion that Congress intended to tax as part of the estate of a decedent any property over which the decedent had such a power of control as to be able to apply it to his own benefit, or the benefit of his creditors, to dispose of it by will, or to appoint it to his estate or the creditors of his estate, or to consume it without restriction. This fits the ordinary definitions of what lawyers call a 'general power of appointment.' 41 Am.Jur. 'Powers', §§ 3, 4, pp. 807, 808; 72 C.J.S. Powers § 1, p. 401.

The Senate report indicates a different treatment where the holder is not completely free from legal control or restraint in the disposition of the property. It states that where the holder of the power is 'legally accountable' for its exercise it is not deemed a general power. This can only refer to fiduciary powers which are always subject to the control of the courts and for which the holder is always under a legal duty to account. The Senate speaks of its intention, in passing the Act, of making the intended exemption of fiduciary powers in the prior law more adequate.

The decided cases which have construed this section of the Internal Revenue Code, [FN2] as well as those cases which construed the provisions relating to powers of appointment for determining the right to a charitable deduction (§ 2055), and the right to the

marital deduction (§ 2056), all resort to an examination of the scope or breadth of the power under local law.

'The initial step is to determine in light of local law, the interest conveyed to the decedent under this trust, i.e., the extent to which, consonant sonant with testamentary trust provision, the decedent could invade and consume the principal. *Morgan v. Commissioner*, 309 U.S. 78, 60 S.Ct. 424, 84 L.Ed. 585 (1940); *Commissioner of Internal Revenue v. Ellis' Estate*, 252 F.2d 109, 113 (3 Cir. 1958); *Hoffman v. McGinnes*, 277 F. \*46 2d 598, 602 (90 A.L.R.2d 405) (3 Cir.1960).' *Strite v. McGinnes*, 330 F.2d 234, at pp. 238 and 239, (3d Cir.1964).

[2] In Pennsylvania the cardinal rule of construction is that the true intention of the testator must govern, as that intention may be found within the four cornes of the will. *Fox Appeal*, 99 Pa. 382, *Anderson's Estate*, 243 Pa. 34, 89 A. 306; *In re Keefer's Estate*, 353 Pa. 281, 45 A.2d 31, 165 A.L.R. 1277.

'This is but one of the hundreds of expressions of the cardinal rule in the interpretation of wills to find the testator's intent, and by that is meant his actual, personal, individual intent, not a mere presumptive conventional intent inferred from the use of a set phrase or a familiar form of words.' *Tyson's Estate*, 191 Pa. 218 at p. 225, 43 A. 131 at 132 (1899).

With this in mind let us examine the instrument by which this power was created. From it we find the following:

1. Testator left his entire estate (except for his personal effects) to the trust.

2. Testator chose a sole, independent, corporate trustee to administer the trust.

3. Testator provided detailed powers and limitations over the Trustee in the management of the trust assets, its allocations of principal, capital growth, income, accumulations and distribution.

4. Testator intended a long term administration of this trust. Testator created several successive beneficiaries; first his wife, during her lifetime; then his daughter, for her lifetime; then after his daughter's death, one-half to his son-in-law for his lifetime; the remaining one-half of the income to his granddaughters until they become 45 years of age; after the death of his son-in-law all the income to the grandchildren; and if the grandchildren should die before reaching age 45, then to issue of the grandchildren until they become 21 years of age.

5. From the above we conclude that his wife, Edna Buhl Putts, the within decedent, was not the primary object of his bounty.

6. The power to invade is spoken of in terms of 'advance portions of principal.' Such advances were to be made a charge and deduction from any principal payment later due to the recipient of said advancement or any person claiming through or under the same. Since no principal payment would be due to either Testator's wife (the within decedent); his daughter or his son-in-law, the only conclusion that we can make from this language is that the Testator did not contemplate principal advancements in the ordinary course of events to these income beneficiaries (a factor which is demonstrated by other evidence in this case outside the Will).

7. Testator did not authorize invasion of principal for all of the income beneficiaries, he lists only his wife, his daughter and the children of his daughter.

8. Testator directed that Trustee exercise its discretion liberally for the beneficiaries named, i.e., his wife, his daughter, and his grandchildren, with no indication of preference, but only for the specific purposes of promoting their health, comfort, maintenance or welfare.

9. Testator provided that none of the shares of income or principal of the respective beneficiaries should be in any way or manner subject or liable to their anticipation, sale,

pledge, debts, contracts, engagements or liabilities, and shall not be liable to attachment or execution or sequestration under any legal or equitable or other process.

10. Finally, the power to make advancements of principal is vested solely in the independent corporate Trustee, at such times, in such amounts, and for such purposes as the Trustee in its discretion may deem advisable.

The government argues that it is the substance and effect of the transaction that will govern, rather than the form.

'Technical considerations, niceties of the law of trusts or conveyances, \*47 or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue.' *Helvering v. Clifford*, 309 U.S. 331, at p. 334, 60 S.Ct. 554, at p. 556, 84 L.Ed. 788 (1940).

Under its view, 'a power to consume, invade, or appropriate for the benefit of a decedent' is a general power of appointment, taking these words from the specific exception of § 2041(b)(1)(A) as to those powers limited to an ascertainable standard. Without going further into the question of ascertainable standard, we must proceed with our inquiry into the effect of the law of Pennsylvania on the language of the will here.

The Government argues that 'under Pennsylvania law a beneficiary can compel a trustee to exercise its discretion to use the trust property for the benefit of the beneficiary.' We have examined the Pennsylvania cases cited by it and we do not find that to be a complete statement of the law of Pennsylvania. Rather the Pennsylvania rule appears to be that in a proper case, after considering the instrument creating the trust and ascertaining from it the donor's or testator's intentions; and considering the circumstances calling for the exercise of discretion, a Pennsylvania court can compel a Trustee's exercise of discretion to carry out the donor's or testator's intention, and conversely, under the proper circumstances, it will uphold

the refusal of the Trustee to make payments under discretion granted it.

[3] First, we must distinguish between the cases where a legal trust estate has been created and those cases where there is no legal trust estate but rather where an individual has been given an estate for life in real or personal property with a power to use, occupy, consume, sell or dispose of, with a gift over of the remainder. In the latter class of cases the Pennsylvania courts hold that the life tenant is still under a legal obligation to exercise this power in 'good faith.' *Rumsey's Estate*, 287 Pa. 448, 135 A. 119 (1926); 'honestly and fairly,' *Zumbro v. Zumbro*, 69 Pa.Super. 600 (1910), and not to defeat the intention of the testator, *In re Tyson's Estate*, 191 Pa. 218, 43 A. 131 (1899).

'\* \* \* the court can only interfere to protect the remaindermen when the widow attempts to divert the fund from the purpose for which it was bequeathed her.' *Watson's Estate*, 241 Pa. 271, at p. 280, 88 A. 433 at p. 436 (1913).

See also *Powell's Estate*, 340 Pa. 404, 17 A.2d 391 (1941).

In *Tyson's Estate*, *supra*, the Pennsylvania Supreme Court, said, 191 Pa. at p. 225, 43 A. at p. 132:

'The court below held that \* \* \* the personalty passed to his widow absolutely, on the ground that a bequest of personalty, with power to consume, sell, and dispose of, carries an absolute and unrestricted title to it. That such is the general rule cannot be disputed. It is not, however, a rule of law, but a rule of construction in aid of reaching the intent of the testator; and, where a different intent is clear, the rule cannot be applied to defeat it.'

In *Tyson's Estate*, *supra*, it was held that the widow's power did not include a power of testamentary disposition to exclude the remaindermen.

A stronger rule applies where the testator has given title and possession of the trust assets to an independent trustee with

discretion to invade corpus for the benefit of an income beneficiary. In such cases the trustee in Pennsylvania is controlled in his administration and disposition of assets by the provisions of the Pennsylvania Fiduciaries Act, Act of April 18, 1949, P.L. 512, 20 P.S. § 320. 101 et seq. This Act imposes duties of accounting, control of the court, audit, notice to parties in interest, and approval of distributions. While the Federal tax cases look to the substance rather than the form of a transaction, nevertheless we see a difference in substance rather than form where the power or the discretion is imposed on one who is subject \*48 to control of the laws of Pennsylvania governing trustees.

[4][5] An 'active' trust in Pennsylvania is one in which active duties are imposed on the trustee with respect to the control and management of the subject matter. *Bowman's Estate*, 332 Pa. 197, 2 A.2d 725 (1938). It remains an active trust so long as it is necessary that legal title to the assets remain in the trustee to enable him to perform his duties. *Rehr v. Fidelity-Philadelphia Trust Co.*, 310 Pa. 301, 165 A. 380, 91 A.L.R. 99 (1933). When there is no longer any duty in the trustee except to transfer over to the beneficiary the income and the corpus of the trust estate, the trust becomes a 'dry' trust, *Bergland's Estate*, 372 Pa. 1, 92 A.2d 207 (1952); *Hemphill's Estate*, 180 Pa. 95, 36 A. 409 (1897), and the Statute of Uses as part of the common law of Pennsylvania terminates the trust. *Sheridan v. Coughlin*, 352 Pa. 226, 42 A.2d 618 (1945); *Overbeck v. McHale*, 354 Pa. 177, 47 A.2d 142 (1946); *Sheasley's Trust*, 366 Pa. 316, 77 A.2d 448 (1951).

[6] The government, in its brief, has cited a number of Pennsylvania cases to support the proposition that this decedent could have compelled the trustee to pay over principal to her without regard to her need or the assets of her own estate, except only for the limitation of the 'good faith' standard. The good faith standard, in our view, has been limited to the life estate cases. Our examination of the Pennsylvania trustee cases reveals that the Pennsylvania courts will only compel the exercise of a trustee's discretion to invade

principal when there has been a showing of necessity and a clear direction in the trust instrument.

In *Walter's Case*, 278 Pa. 421, 123 A. 408 (1923); *Erismann v. Directors of the Poor*, 47 Pa. 509 (1864); and *Hohenschildt's Estate*, 105 Pa.Super. 18, 159 A. 71 (1932); the courts in each case compelled the trustee to exercise his discretion to invade the principal of a trust for the benefit of the beneficiary who had been declared an incompetent or a lunatic and was being maintained at public expense in a public institution. In such cases Pennsylvania statutes allow public bodies to recover this expense of support from any property or estate of the inmates.

In *Walter's Case*, supra, the Pennsylvania Supreme Court said with respect to the discretion of a trustee:

'\* \* \* his discretion is but a legal one, and, whenever the law determines that a proper case has arisen in which the trustee's discretion should have been exercised on a particular way, he will be constrained to act in accordance therewith.' (278 Pa. at p. 423, 123 A. at p. 409).

In other cases such as *Keller v. Commercial Trust Co.*, 73 Pa.Super. 533 (1919); *In re Rudy's Estate*, 71 Pa.Super. 448 (1918); *Hughes' Estate*, 231 Pa. 475, 80 A. 1104 (1911); and *Minnich v. People's Trust*, 29 Pa.Super. 334 (1905), the Court authorized or compelled the trustees to exercise discretion to invade corpus to provide for the needs of incompetents out of corpus of estates provided for their benefit. In the *Minnich v. People's Trust* case, supra, the court held that the fact that the beneficiary had other assets was immaterial since the trust fund was expressly created for the benefit of the incompetent. In *Hughes' Estate*, supra, where the question of the extent and quality of the provisions for the beneficiary was involved, the Court stated.

'It is held in *Steele's Appeal*, 47 Pa. 437, that a comfortable maintenance, measured by the station, habits, and tastes of the testator and the beneficiary, was intended, no more

and no less, without extravagance either as to place or material.' (231 Pa. at p. 477, 80 A. at p. 1105).

In both *Hill v. Hill*, 277 Pa. 165, 120 A. 775 (1923); and *In re Brown's Appeal*, 345 Pa. 373, 29 A.2d 52 (1942), the Court compelled the exercise of the trustee's discretion to pay out funds despite the availability of other assets for the use of the beneficiaries because it \*49 found an absolute mandate in the trust instrument directing the use of the trust estate for such purposes. There was also evidence in these cases of the trustee withholding distribution because of family disagreements.

But in the ordinary trust case the Pennsylvania Courts will restrict and control the trustee's exercise of discretion, and support the trustee's discretion to refuse or withhold invasion of principal. In *Seacrist's Estate*, 362 Pa. 190, 66 A.2d 836 (1949), the Court upheld the trustee's refusal to pay from principal to a disabled son, stating:

To know the quality and quantity of petitioner's private estate becomes very material in order to determine his good faith and his necessities. (p. 194, 66 A.2d p. 838).

In *Briggs' Estate*, 150 Pa.Super. 66, 27 A.2d 430 (1942), the Court held:

'\* \* \* the exercise of discretion by trustees is nevertheless subject to the limitation that they must not act outside the bounds of reasonable judgment.' (p. 67, 27 A.2d p. 433).

There, at the objection of a remainderman, the Court held that the Trustees had abused their discretion in making payment because the beneficiary had other means of support and would not personally benefit by payment.

As stated by Circuit Judge Kalodner in *Hoffman v. McGinnes*, 277 F.2d 598, at p. 603, 90 A.L.R.2d 405 (3rd Cir.1960):

'The rationale of the Pennsylvania decisions, cited in *Ellis' Estate* (252 F.2d 109), limiting a life tenant's withdrawals from principal, is the

judicial safeguarding of remainder interests to assure compliance with the testator's intent as to such interests.'

[7] In the present case, since there are a series of further life beneficiaries and remaindermen, the trustee would be under a strong duty to protect their interests in the face of any request of the decedent for invasion. Under the Pennsylvania decisions, a Court would be bound to look into the assets of her own estate, which were well known to the trustee, who managed them.

[8] The fact that this decedent had an estate of her own almost five times as great as that of her husband would not only compel the trustee to resist her request for invasion except for clear necessity, but it would also guide the court in any attempt to determine the testator's intent. The extent of testator's wife's personal estate would be a strong factor in his plan for the disposition of his own estate and the court may look to such extrinsic and contemporaneous circumstances to ascertain his intent. *Scholler Trust*, 403 Pa. 97, 169 A.2d 554 (1961); *Wolters' Estate*, 359 Pa. 520, 59 A.2d 147 (1948).

The cases in which the Federal Courts have construed 2041 fall into two classes; those involving the question of whether decedent held a general power under the law, and those which, after finding that decedent possessed a power to appoint to himself, seek to find if it is limited by an ascertainable standard relating to health, education, support and maintenance.

[9][10] Not every case must meet the 'ascertainable standards' test, but only those in which there is first shown a power in the decedent to transfer or appropriate to himself. Where such power is held by the decedent, it may still result in an exception to taxation where the power of decedent is limited by the 'ascertainable standards.' If the power of the decedent is not of the standard defined by the Code as a 'general power', as measured by state law, we need not consider the 'ascertainable standards' measure.

In *Pittsfield National Bank v. United States*, 181 F.Supp. 851 (D.Mass.1960), where testatrix created a trust with an independent corporate trustee, with children as remaindermen, giving her husband a life income, 'together with all or such part of the principal of same as he may from time to time request, he to be the sole judge of his needs,' the \*50 court held that the word 'needs' was a limitation because under local law husband only had the power to invade corpus in the event he was in financial or physical need. The court held that the words 'his needs' established an ascertainable standard. The court further paid regard to the evidence that Testatrix clearly intended to provide for remaindermen and that the husband had substantial property of his own so that it was unlikely that the corpus would be invaded.

In *Strite v. McGinnes*, 330 F.2d 234 (3d Cir.1964) affirming 215 F.Supp. 513 (E.D.Pa.1963), the Court of Appeals held that under Pennsylvania law, a beneficiary who was also the trustee, who had the power to appropriate to herself for her own 'benefit', was not limited to the ascertainable standard, particularly where 'the will emphatically reveals that the (beneficiary and trustee) (is) intended to be the main objects of the testatrix's bounty.' (330 F.2d p. 239, quoting from the District Court's opinion 215 F.Supp. at p. 517).

The remainder of the Federal Court decisions under § 2041 all turn on whether the power to invade was a general or a limited power under applicable local law. [FN3]

While the analogy between the § 2041 'general power' cases and the § 2055 'charitable deduction' cases has frequently been discussed in connection with the determination of the 'ascertainable standard', despite the different qualities which each attempts to define, we are of the opinion that decisions of the § 2056 cases, concerning the marital deduction, have a closer parallel to the interpretation of § 2041.

[11][12] Section 2056(b)(5) requires as a test of eligibility for the marital deduction that the

surviving spouse who has a life estate must also have a power to appoint which is exercisable in all events. *Hoffman v. McGinnes*, 277 F.2d 598 (3rd Cir.1960). In other words, we believe that the 'general power of appointment' which is the standard for determining the inclusion of assets in the gross estate of a decedent under § 2041 is a power of the same kind and quality as the 'power of appointment exercisable in all events' in the surviving spouse which qualifies the assets for the marital deduction under § 2056.

In discussing the analogy of ascertainable standards in a § 2041 and § 2055 case, Judge Freedman stated in *Strite v. McGinnes*, 215 F.Supp. 513 at page 514 (note 2) (E.D.Pa.1963):

'Cases under § 2056 have only limited relevance since the question which arises is not whether an ascertainable standard exists but whether any standard exists. In order to qualify for the marital deduction, the surviving spouse must have an unqualified power to appoint the principal to herself during her lifetime. The power must be one that may be exercised 'in all events.'

The wording of the two Code sections strengthens our belief that the powers of appointment under § 2041 and § 2056 are powers of the same kind and quality.

#### '§ 2041(b) Definition

'(1) General Power of Appointment.-- The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.'

'§ 2056(b)(5) Life estate with power of appointment in the surviving spouse.--In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or \* \* \* a specific portion thereof \* \* \* with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such

surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in \*51 each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse--

'(A) the interest of such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, \* \* \*'

[13] Thus if a spouse has a 'general power of appointment' as defined in Section 2041(b)(1) over property in which she has a life estate, it would qualify for the marital deduction of § 2056. Conversely, we believe that if she has no power to appoint to herself exercisable in all events under the terms of § 2056, she has no 'general power of appointment' in the terms of § 2041(b)(1).

Following this line of reasoning we may consider two cases involving § 2056 decided in the United States Court of Appeals for the Third Circuit, both of which arose in Pennsylvania and both of which were ultimately determined under the Pennsylvania law applicable.

In *Commissioner v. Ellis's Estate*, 252 F.2d 109 (3rd Cir.1958), decedent left his estate in trust, \$5,000 per annum to be payable to his wife for life. He further provides that should his wife 'require' sums in excess of \$5,000 per annum, 'she, and she alone, shall be the judge of how much shall be required,' the same should be paid to her, any deficiency of income to be supplied out of principal. On the death of his wife there were gifts of remainders, one-half to the wife's estate, one-half to the children. The will also contained a spendthrift clause preserving the estate from pledge, assignment, anticipation, debts, or liabilities of any beneficiary. The estate claimed a marital deduction for assets of the trust. Chief Judge Biggs says, 252 F.2d at p. 113:

'\* \* \* We come then to the issue as to what was the exact nature of the power given Mrs. Ellis over the residuary estate during her

lifetime.

'The law of Pennsylvania must be applied to determine what was the nature of the power Mrs. Ellis possessed. *Morgan v. Commissioner*, 1939, 309 U.S. 78, 626, 60 S.Ct. 424, 84 L.Ed. 585, 1035; *Helvering v. Stuart*, 1942, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. 154 \* \* \*.'

Chief Judge Biggs first determines that the power to consume corpus for herself under Pennsylvania law was limited by the 'good faith' standard which the Pennsylvania courts have imposed on life tenants. *Rumsey's Estate*, 287 Pa. 448, 135 A. 119 (1926); *Zumbro v. Zumbro*, 69 Pa.Super. 600 (1918); *Degenkolv v. Daube*, 143 Pa.Super. 579, 18 A.2d 464 (1941); *Tyson's Estate*, 191 Pa. 218, 43 A. 131 (1899).

Secondly, decedent had named remaindermen. Therefore, the court concluded that she had no power to appoint by will.

The court also found that there was no merger of a life estate and the one-half remainder given the life tenant's estate here under the general Pennsylvania rule (*Conley's Estate*, 197 Pa. 291, 47 A. 238 (1900)), because of the spendthrift provision of the will.

'\* \* \* The Pennsylvania courts jealously uphold spendthrift trusts and see to it that the will of the testator is given effect as he expressed it. In *re Bosler's Estate*, 1954, 378 Pa. 333, 107 A.2d 443, 444. In the cited case the Supreme Court of Pennsylvania stated categorically that 'A life estate under a spendthrift trust will not coalesce or merge with an estate in remainder,' citing *In re Moser's Estate*, 1921, 270 Pa. 217, 113 A. 199.' (252 F.2d at page 114).

The conclusion of Chief Judge Biggs was therefore that one-half of the trust \*52 estate which passed to other remaindermen, and to which the life tenant's power to consume was limited by the good faith standard and by the spendthrift provisions, did not qualify for the marital deduction. In other words the widow

did not possess a 'general power of appointment' as to that one-half of the trust estate. (The other half went to her estate by the terms of the will).

A second case of the United States Court of Appeals for the Third Circuit which also applies the Pennsylvania law to a § 2056 situation is *Hoffman v. McGinnes*, 277 F.2d 598, (3rd Cir. 1960). Here again the Court considered the scope of the power to invade principal under a different set of testamentary directions. The Testator gave his wife 'the right to use and spend any or all of the principal of my said estate, if she so desires, and upon her request or requests made to (trustees) they shall pay to her from time to time any part of the principal of my estate she may desire and said trust shall cease as to that part of the principal so paid to her. \* \* \*.'

The Court of Appeals (Kalodner, C.J.) said, 277 F.2d at p. 603:

'It would be difficult, if not impossible, to state any more explicitly an intent to confer 'an unrestricted power exercisable at any time during her life to use all or any part of' the principal of the decedent's trust estate.'

Judge Kalodner cites a number of Pennsylvania cases where the courts held the testator's intention to be that the beneficiary's demand was the sole requirement for invasion of principal. [FN4] In none of these cases is there any qualification, the beneficiary may use the proceeds for whatever purpose she sees fit, the trustee has no discretion but to pay over whatever is demanded.

The cases fall into the classification described in *Scott on Trusts*, § 128.3, 'Discretionary Trusts,' p. 67:

'In such a case the amount to which the life beneficiary is entitled depends wholly upon his own desires, and the trustee has no discretion to withhold.'

The court in *Hoffman v. McGinnes*, supra, held that this power satisfied the requirements for the marital deduction. It

distinguished the case from *Commissioner v. Ellis*, supra, by stating:

'\* \* \* *Commissioner of Internal Revenue v. Ellis' Estate*, supra, where it was held that a provision in the decedent's will authorizing the surviving wife's withdrawal from principal of such sums as she 'should require's did not vest in her a power of appointment, since under Pennsylvania law the surviving wife '\* \* \* under the terms of the will did not possess an 'unlimited' power to invade the corpus or appoint the corpus to herself as unqualified owner', in view of the will's creation of 'remainder' (252 F.2d 113) interests.' 277 F.2d 598, at p. 600.

It may be of interest to note the hope of the Senate Finance Committee (supra) that:

'The most important consideration is to make the law simple and definite enough to be understood and applied by the average lawyer, and that the present bill will accomplish that purpose.'

Not only the average lawyer, but the writers in the field of estate planning and estate taxation have placed a uniform construction on § 2041. [FN5]

\*53 [14] We are, therefore, of the opinion that the decedent, Edna Buhl Putts, did not possess at the time of her death a general power of appointment over the assets in the trust estate established under the will of her husband, B. Swayne Putts, held by the trustee, Security-Peoples Trust Company. We do not find that she held any power exercisable in her favor, or in favor of her estate, her creditors, or the creditors of her estate. We find that title and possession of the trust assets was in the hands of an independent corporate trustee, which under the law of Pennsylvania was legally accountable for its administration, not only to the decedent, but to successive life income beneficiaries and remaindermen. We find that the Trustee alone was vested with the discretion to make invasion of principal, which discretion had to be exercised reasonably, and solely for the benefit of the named



beneficiaries, and with regards to the needs and the other available assets of such beneficiary, and with regard to the protection of interests of other future beneficiaries and remaindermen. The decedent had no power to make an appointment, gift, transfer or testamentary disposition of any part of the trust assets to herself or her estate, and the assets were protected from the pledge, encumbrance, sale, anticipation, debts and liabilities of decedent by the testator's spendthrift provision.

An appropriate order will be entered.

FN1. The relevant portions of the will are: 'ARTICLE THIRD 'I give, devise and bequeath all the rest, residue and remainder of my Estate, real, personal and mixed, of whatsoever kind, nature and description, wheresoever situated, unto the SECURITY-PEOPLES TRUST COMPANY, a banking corporation located at Erie, Pennsylvania, IN TRUST, nevertheless for the use and benefit of the beneficiaries hereinafter named in the manner hereinafter designated. 'ARTICLE FOURTH 'My executor while in possession and control of my Estate, and thereafter my Trustee, is hereby authorized to retain, hold, possess, manage, control, sell, convey, encumber, lease, invest and reinvest, and successively invest and reinvest the assets thereof according to its sole judgment and discretion, in such securities or other property, personal or real, and upon such terms and for such length of time, as to it shall seem advisable, without any limitation upon its power or authority so to do, either by statute or otherwise. I further authorize my Trustee to charge all premiums on investments against principal, and to credit all discounts on investments to principal. Any and all cash dividends, whether ordinary or extraordinary or special, shall be considered as income; and any and all stock dividends, rights, warrants, or other things of value, shall be considered as corpus and added to the principal of the estate. Any profit realized from the sale of any security or investment shall be considered as corpus and added to the principal of the trust, and likewise any loss on any such sale shall be deducted from the principal and not from the income of the Trust. The Trustee, in its discretion, may apportion between principal and income any expenditure which in its opinion should be apportioned, notwithstanding any rule or any

provision hereof to the contrary. 'In any case in which the Trustee is required to divide the principal of the estate in parts or shares or to distribute the same, it is hereby authorized and empowered in its sole discretion to make division or distribution in kind or partly in kind and partly in money. 'The judgment of the Trustee concerning values for the purpose of such division or distribution of property or securities shall be binding and conclusive on all persons interested therein. My trustee may accumulate such portion of the income payable to any minor beneficiaries that may be entitled to participate hereunder as my Trustee in its discretion may deem (deem) advisable 'ARTICLE FIFTH 'Section 1. In the event that my wife, EDNA BUHL PUTTS, is living at the time of my death, my Trustee shall pay the income from the Trust Estate in convenient installments unto her during the term of her natural life. 'Section 2. On the death of my said wife, EDNA BUHL PUTTS, or on my death in the event my said wife shall predecease me, my trustee shall pay the income from the Trust Estate in convenient installments unto my daughter, CHRISTENE PUTTS BUHL, during the term of her natural life. 'Section 3. On the death of my daughter, CHRISTENE PUTTS BUHL, or in the event that she shall predecease me, or die before my wife, EDNA BUHL PUTTS, then on my death or the death of my said wife, EDNA BUHL PUTTS, which ever shall last occur, my Trustee shall pay the income from the Trust Estate in convenient installments as follows, to wit: one-half (1/2) thereof unto my son-in-law, HENRY W. BUHL, during the term of his natural life, and one-half (1/2) thereof equally to or for the use of the children of my daughter, CHRISTENE PUTTS BUHL, to wit: LOIS CHRISTENE BUHL, NANCY ANNE BUHL, and any other children of my said daughter, CHRISTENE PUTTS BUHL, that may be hereafter born or adopted until they respectively become forty-five (45) years of age. Should my son-in-law, HENRY W. BUHL, not be living at the time he would otherwise have been entitled to receive one-half (1/2) of the net income of the Trust Estate under the foregoing provisions, or on his death if the same should occur subsequent thereto, I direct that my Trustee shall pay all of the income from the Trust Estate to or for the use of LOIS CHRISTENE BUHL, NANCY ANNE BUHL, and any other children of my said daughter, CHRISTENE PUTTS BUHL, that may be hereafter born or adopted. As the children of my daughter,

CHRISTENE PUTTS BUHL, respectively become forty-five (45) years of age, or, if they or either of them have become forty-five (45) years of age at or prior to the time of the happening of a contingency which would entitle said child or children unto one-half (1/2) or all of the income from the Trust Estate, I direct that the principal of the Trust Estate from which said child or children would otherwise be entitled to receive income shall be paid over to said child or children free and clear of the terms hereof. 'Section 4. In the event that any of the children of my daughter, CHRISTENE PUTTS BUHL, shall die leaving issue her surviving, either before or after becoming entitled to receive income or principal under the terms of this my Will, I give, devise and bequeath the shares of income and principal to which such decedent would have been entitled if living, unto her issue, per stirpes, or, if such decedent shall leave no issue her surviving, I give, devise, and bequeath her shares of income and principal hereunder unto the survivor or survivors of said children, with the surviving issue of any who may then be deceased taking per stirpes the share to which their parent would have been entitled if living. On becoming twenty-one (21) years of age, said issue of my daughter's children shall receive their share of principal and accumulated income of the Trust Estate free and clear of the terms hereof. 'Section 5. If the survivor of the children of my daughter, CHRISTENE PUTTS BUHL, and their issue shall die without leaving issue surviving either before or after becoming entitled to receive income and/or principal under the terms of this my Will, but prior to said Trust Estate being completely distributed, I give, devise and bequeath the portions of the Trust Estate from which said children or their issue would have been entitled to receive income or principal therefrom if living, as follows: to wit: Two-thirds (2/3) thereof unto the heirs-at-law of my wife, EDNA BUHL PUTTS, as determined by the Intestate Laws of the Commonwealth of Pennsylvania existing at said time or times, and one-third (1/3) thereof unto my heirs-at-law as determined by said Laws. 'Section 6. I direct that the gifts of principal of the Trust Estate herein made shall include also accumulated income thereon; further, that the words, 'children and 'issue' as herein used shall include adopted as well as natural children and issue and that adopted children and their issue shall be entitled to participate hereunder to the same extent as if natural children or issue of

the persons herein named or described. 'ARTICLE SIXTH 'I hereby authorize my Trustee to advance portions of the principal of the Trust Estate to or for the use or benefit of the following beneficiaries of income therefrom, to wit, my wife, EDNA BUHL PUTTS, my daughter, CHRISTENE PUTTS BUHL, and children and issue of my said daughter, CHRISTENE PUTTS BUHL, during the periods in which said beneficiaries shall be entitled to receive income, at such times, in such amounts, and for such purposes as my Trustee in its discretion may deem advisable. I direct that my Trustee shall exercise liberally the power to advance principal herein conferred to promote the health, comfort, maintenance or welfare of the income beneficiaries hereinabove referred to. Such principal advancements, when made, shall be charged to and deducted from any principal payment later due hereunder to the recipient of said advancement or to any person claiming under or through the same. Prior to such principal distribution, said advancements shall be chargeable against the portion of the Trust Estate from which the recipient thereof or persons thereunder claiming shall be entitled to receive income and shall not diminish the principal from which income may be due concurrent beneficiaries under the terms hereof. 'ARTICLE SEVENTH 'None of the shares of income or principal by this instrument given to or directed to be held for the use and benefit of the several and respective beneficiaries herein specified, shall be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities, and shall not be subject or liable to attachment or execution or sequestration under any legal or equitable or other process. 'ARTICLE EIGHTH 'During the administration of my Estate my Executor shall disburse the income received from investments to the person or persons who would be entitled thereto if my estate were then fully administered, and may make expenditures for obligations and expenses of my estate from the principal assets thereof. 'ARTICLE NINTH 'I hereby nominate, constitute, and appoint the SECURITY-PEOPLES TRUST COMPANY, of Erie, Pennsylvania, as Executor of this my Last Will and Testament and Testamentary Guardian of the estates of any minors entitles to participate hereunder.'

FN2. Phinney v. Kay, 275 F.2d 776 (5th Cir.

1960); *Barritt v. Tomlinson*, 129 F.Supp. 642 (S.D.Fla.1955); *Snyder v. United States*, 203 F.Supp. 195 (W.D.Ky.1962); *Pittsfield Nat. Bank v. United States*, 181 F.Supp. 851 (D.Mass.1960); *Strite v. McGinnes*, 215 F.Supp. 513 (E.D.Pa.1963), *Aff'd*, 3 Cir., 330 F.2d 234, *Cert. Den.* 379 U.S. 836, 85 S.Ct. 69, *Rehearing Denied* 379 U.S. 910, 85 S.Ct. 185 (3rd Cir. 1964).

FN3. *Phinney v. Kay*, 275 F.2d 776 (5th Cir. 1960); *Barritt v. Tomlinson*, 129 F.Supp. 642 (S.D.Fla.1955); *Snyder v. United States*, 203 F.Supp. 195 (W.D.Ky.1962).

FN4. *Keen's Estate*, 80 Pa.Dist. & Co.R. 377 (1951); *Arrott's Estate*, 36 Pa.Dist. & Co.R. 546 (1939); *Estate of George M. Morris*, 26 Dauph.Co. 137 (1922).

FN5. 'If the power of invasion is given to the trustee and not to the beneficiary, there are no estate or gift tax consequences to the beneficiary.' *Lifetime and Testamentary Estate Planning in Pennsylvania*, Edward M. Davis American Law Institute 1958 (p. 94). (See also 'Lifetime and Testamentary Estate Planning' Harrison Tweed and William Parsons, *Am.Law Inst.*) 'Therefore where it is intended that the principal of the trust may be invaded for the benefit of the income beneficiaries, the power to invade should be reposed in the discretion of those trustees who are not beneficiaries.' 2 *Polisher, Estate Planning and Estate Tax Saving*, p. 494. '\* \* \* it is clear that giving the wife power over her husband's property will often result in income, gift and estate tax problems for her. Clearly, the surest way to avoid such problems is to name some other person trustee and to give the widow no powers over the husband's property.' Andrew H. Cox 'Income and Estate Tax Aspects of Surviving Spouse Beneficiary Serving as Executor-Trustee.'; 22 *Institute on Federal Taxation* (p. 1041) New York University 1964. See also 'Trusts in Estate Planning' by Sidney C. Winton, and Sherwin Kamin in *Lasser 'Estate Tax Techniques.'* Vol. 2, p. 1300.

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**NCNB NATIONAL BANK OF FLORIDA f/  
k/a The Exchange National Bank of  
Tampa, as  
Trustee of the Florence E. Hoard Trust,  
Appellant,  
v.  
Richard L. SHANABERGER, as Guardian  
of the Property of Mark E. Shanaberger,  
incapacitated, Appellee.**

**No. 92-01226.**

District Court of Appeal of Florida,  
Second District.

March 19, 1993.

Son and guardian of income beneficiary requested that trustee invade principal of trust for payment of income beneficiary's nursing home expenses and related charges. Trustee requested information of beneficiary's outside sources of income prior to granting the beneficiary's principal invasion demand. The Circuit Court for Pinellas County, Frank H. White, J., entered declaratory judgment in determining that trustee had abused its discretion, and trustee appealed. The District Court of Appeal, Ryder, Acting C.J., held that trustee did not abuse its discretion in requesting information of income beneficiary's outside sources of income prior to satisfying the beneficiary's trust invasion demand for his nursing home and related medical expenses.

Reversed and remanded.

**[1] TRUSTS ⇨ 177**  
390k177

Trustee's exercise of its discretion is not subject to control by court except to prevent an abuse of discretion.

**[2] TRUSTS ⇨ 177**  
390k177

Trustee is always subject to accountability to remaindermen where discretion is improperly, arbitrarily or capriciously exercised.

**[3] TRUSTS ⇨ 276**  
390k276

Even an unlimited power of invasion of a trust is subject to implied limitations to protect the remaindermen.

**[4] TRUSTS ⇨ 276**  
390k276

Trustee did not abuse its discretion in requesting information of income beneficiary's outside sources of income prior to satisfying the beneficiary's trust invasion demand for his nursing home and related medical expenses; there was no evidence that the trustee acted dishonestly, arbitrarily or from improper motive.

**\*96** Stacy D. Blank and Steven L. Brannock of Holland & Knight, Tampa, for appellant.

Mark I. Shames, St. Petersburg, for appellee.

RYDER, Acting Chief Judge.

NCNB National Bank of Florida, as Trustee of the Florence E. Hoard Trust, **\*97** disputes the trial court's declaratory judgment determining that the trustee had abused its discretion by requiring information as to other sources of income from Mark E. Shanaberger, Sr. prior to satisfying his trust principal invasion demand for his nursing home and related medical expense. Because we hold that the trustee must under these circumstances look to outside resources to evaluate in its sole discretion what is "necessary" in order to invade the principal, we reverse.

NCNB is the trustee of the Florence E. Hoard Trust which names Mark E. Shanaberger, Sr. as the income beneficiary and directs the trustee to pay the trust's income to him for his life. The trust further provides that upon the income beneficiary's death, two remainder trusts are to be created for the benefit of Hoard's nieces. Like the income beneficiary, the nieces are to receive the trust income until their deaths, after which the trust principal is to be distributed to their surviving children.

Under the trust, NCNB's obligation to pay the income of the trust to Mark is mandatory, not discretionary. The trust also provides that the trustee "may invade the principal of the trust estate and pay from the said principal so much of it as in the sole discretion of the Trustee is necessary for the care, maintenance, support and medical attention" of Mark Shanaberger. The trust further allows that principal invasions may be made by the trustee in its sole discretion. The trust, however, set no criteria in making the necessity determination. But the trust prohibits the trustee from paying any amounts for the maintenance, support or care of any heirs or dependents of Mark Shanaberger.

The parties stipulated that the settlor, Florence Hoard, and Mark Shanaberger had a close, personal relationship that began in the early 1940's. At all times relevant to the execution of the Hoard trusts, amendments, wills and codicil, both parties had full knowledge of each other's respective financial situation, and, as part of that knowledge, Hoard knew that Shanaberger's assets and income at that time exceeded her own and were sufficient to meet any of his anticipated medical costs and expenses without contribution from her trust funds. The parties also stipulated that due to his age and condition, Mark Shanaberger required nursing home care and has resided in a nursing home in Pennsylvania since June 1989.

In July 1989, Richard E. Shanaberger, the son and guardian of Mark Shanaberger, requested NCNB to invade the principal of the trust for the payment of the senior Shanaberger's nursing home expenses and related charges. The expenses averaged \$3,100.00 each month. The initial request was for a principal invasion in the amount of \$6,245.27. At that time, the entire principal of the trust was approximately \$120,000.00. NCNB concluded that it could unconditionally invade the trust principal in the amount of \$2,500.00, but it was concerned that repeated requests to invade principal for the payment of Shanaberger's nursing home expenses would deplete the trust. Before invading principal to any greater extent, NCNB requested

information regarding Mark Shanaberger's other sources of income in an effort to reasonably evaluate whether the invasion was necessary for his care.

Richard Shanaberger refused to provide that information and initiated this litigation, claiming that NCNB abused its discretion by requesting information regarding outside sources of income prior to satisfying his invasion request in full. At trial, it was disclosed that information of outside sources of income was within Richard Shanaberger's knowledge. After the trial court's ruling, Richard Shanaberger served an additional demand on NCNB for \$64,425.13. This timely appeal ensued.

The sole issue presented to this court is whether the trustee's request for information of outside sources of income was an abuse of discretion. Whether, after considering such information, the trustee abuses its discretion in later approving or denying a trust principal invasion is not before the court. Because we need not consider now the settlor's intent concerning principal invasions, we review only the trustee's scope of discretion.

[1][2][3] A trustee's exercise of its discretion is not subject to control by the court \*98 except to prevent an abuse of discretion. *Sarasota Bank & Trust Co. v. Rietz*, 297 So.2d 91 (Fla. 2d DCA 1974). A trustee is always subject to accountability to remaindermen where discretion is improperly, arbitrarily or capriciously exercised. *Mesler v. Holly*, 318 So.2d 530 (Fla. 2d DCA 1975). Even an unlimited power of invasion is subject to implied limitations to protect the remaindermen. *Mesler*.

[4] NCNB has never denied the principal invasion request, but only determined in its sole discretion that it could unconditionally distribute only the sum of \$2,500.00. The trustee concluded that any additional principal invasion would require consideration of the income beneficiary's other sources of income to make an informed decision whether it was necessary for his care, maintenance and medical attention. Our review of the record

discloses no evidence that the trustee acted dishonestly, arbitrarily or from an improper motive. Absent other criteria upon which to base a decision that a principal invasion is necessary, we hold that the trustee's request was reasonable. For the foregoing reasons, we reverse and remand for further proceedings.

Reversed and remanded.

FRANK and PARKER, JJ., concur.

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**In the Matter of the Construction of the  
WILL of Jacob FLYER, Deceased.  
Phyllis KAVETT, as Trustee, et al.,  
Appellants,**

**v.**

**Jeannette G. LEAVITT, as Committee of  
the Incompetent, Elsie Flyer, et al.,  
Respondents.**

Court of Appeals of New York.

Jan. 23, 1969.

Proceeding to construe will with respect to power of trustee to invade principal. The Surrogate's Court of Bronx County, Christopher C. McGrath, S., entered decree requiring trustee to invade corpus for benefit of incompetent widow without regard to her private resources and an appeal was taken. The Appellate Division of the Supreme Court in the First Judicial Department, 29 A.D.2d 8, 284 N.Y.S.2d 891, affirmed by a divided court and there was an appeal. The Court of Appeals, Fuld, C.J., held that upon considering surrounding circumstances and reading as a whole will which testator had executed after his wife had become incurably ill and after he had used her social security payments for her support, trustee who was given an absolute discretion to invade principal for benefit of wife if income were insufficient for wife's support was privileged to consider beneficiary's independent resources including social security benefits before deciding to invade principal.

Order appealed from reversed and matter remitted for further proceedings.

Scileppi and Breitel, JJ., dissented.

**[1] WILLS ⇔ 684.2(5)**

409k684.2(5)

In determining whether trustee is privileged to consider beneficiary's independent income before effecting an invasion of principal the language of will may not be entirely disregarded but, as in every case in which a will is ambiguous or silent with respect to a controverted matter, it is testator's intent

which must control, and court educes his design not only from language employed but from sympathetic reading of will as an entirety while considering circumstances under which provisions were framed.

**[2] WILLS ⇔ 684.10(5)**

409k684.10(5)

Trustee, particularly when given uncontrolled discretion to invade principal, may before deciding to effect an invasion, take into account beneficiary's independent resources where there is no absolute gift of principal and testator intends that invasion of principal be dependent upon needs or requirements of the beneficiary.

**[3] WILLS ⇔ 684.2(5)**

409k684.2(5)

Trustee may not consider beneficiary's income before deciding to effect an invasion of principal where testator attached no condition of need and intended that gift of principal be as broad as gift of interest and the first inseparable from the other.

**[4] WILLS ⇔ 684.10(5)**

409k684.10(5)

Upon considering surrounding circumstances and reading as a whole will which testator had executed after his wife had become incurably ill and after he had used her social security payments for her support, trustee who was given an absolute discretion to invade principal for benefit of wife if income were insufficient for wife's support was privileged to consider beneficiary's independent resources including social security benefits before deciding to invade principal.

**\*\*\*957 \*\*718 \*580** Herbert Monte Levy, New York City, for appellants.

**\*581** Richard E. Leavitt, Brooklyn, for Jeannette G. Leavitt, respondent.

**\*582** FULD, Chief Judge.

In this proceeding to construe a will, we are presented with the question whether a **\*\*719** trustee, vested with sole and absolute

discretion to invade the principal of the trust for the support of the life beneficiary, may take the latter's private resources into account before deciding to effect an invasion.

The testator, Jacob Flyer, died in August of 1964. He was survived by three daughters of a deceased first wife and by a second spouse, Elsie, whom he had married in 1945. In 1960, the latter suffered a severe stroke which left her a hopeless and incurable invalid. Soon thereafter, the testator executed his will giving two thirds of his estate outright--or his entire estate if his wife predeceased him--to his three children in \*\*\*958 equal shares. Out of the last third, 'or the sum of \$20,000, whichever is greater,' he created a trust for his widow, with the remainder to be equally divided at her death among the three daughters. The estate was valued at over \$50,000.

The particular clause which prompted the present construction proceeding, after reciting that one third of the testator's estate was to be given in trust to one of his daughters as trustee 'to pay to (his) wife Elsie or her representative, or to use for (her) benefit \* \* \* the income thereof for (her) life', went on to provide that,

'if such income be insufficient for the support and maintenance of Elsie, my Trustee shall so pay or use from principal sufficient moneys to provide for Elsie's support and maintenance, in the sole, absolute and uncontrolled discretion of the Trustee. If, in the sole, absolute and uncontrolled discretion of the Trustee, any part of the net income thereof need not be used for the support and maintenance of my said wife, such part of the income shall be added to and become part of the principal of the trust estate.'[FN1]

FN1 If any daughter died before the widow, the testator provided, that daughter's share was to be held in trust for her children until they reached the age of 21 and, again, the trustee was given 'sole, uncontrolled and absolute discretion' to invade the principal for their benefit or to add to it any income which remained unused.

\*583 The testator's wife spent virtually the entire four-year period, between the execution of the will by her husband and his death, in hospitals and nursing homes and was finally confined to Pilgrim State Hospital after she had attempted suicide. She has a sister--who was appointed her committee in 1965--and a daughter by a previous marriage. Her assets, in addition to the trust set up for her benefit, consist of cash and personal property, worth about \$10,000, and income from social security payments amounting to about \$1,800 a year.

There is due and unpaid a hospital bill of more than \$10,000. The petitioner in this construction proceeding--the incompetent's sister who, as noted, is her committee--contends that the testator 'intended' an absolute gift of both income and principal to his widow, without regard to her independent resources, and that, accordingly, the trustee should be required to pay that bill as well as any others which may be incurred. The trustee, one of the testator's daughters, finds no such requirement in the will. It is her position that her father, though desiring to provide for his widow's maintenance out of principal in case of necessity, intended her private income to be used and, in support of this claim, calls attention to the fact that the testator had actually used his wife's social security moneys in paying her hospital bills during his lifetime.

The Surrogate agreed with the petitioner, concluding that the trustee was required to pay all amounts necessary for the widow's support and \*\*\*959 maintenance out of both principal and income 'without regard to (her) private resources'. A closely divided Appellate Division affirmed. The minority took the view that it was clear from the will, as well as from the circumstances existing between the time of its execution \*\*720 and the testator's death, that he intended his widow's independent income to be applied toward her support. If the result be otherwise, Justice McGivern pointed out in his dissenting opinion,

'The corpus will be eroded--for as it decreases, its yield will correspondingly diminish, to the point of destruction, if the



widow lives long enough. And an injury is wrought to the children of the testator. All the while, the social security payments of the widow here will batten and pointlessly accumulate. Social security was devised to allay the fears and mitigate the \*584 privations of old age, not to multiply for some one else, other than the subject, to enjoy.' (29 A.D.2d 8, 11, 284 N.Y.S.2d 891, 894.)

We agree with the dissenting justices of the Appellate Division that the present case falls within the decisions holding that a trustee is privileged to consider the beneficiary's independent income before effecting an invasion of principal.

[1] Although the decisions in this area of the law place emphasis on the precise verbiage found in the provision creating the trust, close analysis reveals that they take into consideration more than such verbiage alone in seeking to ascertain the testator's intent. The language may not, of course, be entirely disregarded but, as in every case in which a will is ambiguous or silent with respect to a controverted matter, it is the testator's intent which must control, and we educe his design not only from the language employed but from a 'sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which (its) provisions \* \* \* were framed.' (Matter of Fabri's Will, 2 N.Y.2d 236, 240, 159 N.Y.S.2d 184, 187, 140 N.E.2d 269, 271; see, also, Matter of Clark's Will, 280 N.Y. 155, 160, 19 N.E.2d 1001, 1003.)

[2][3] The principle which emerges from the cases may be briefly stated. A trustee, particularly when given uncontrolled discretion to invade principal (see, e.g., Matter of Bisconti's Will, 306 N.Y. 442, 446, 119 N.E.2d 34, 36; Matter of Messer's Will, 34 Misc.2d 416, 420, 231 N.Y.S.2d 201, 205), may, before deciding to effect an invasion, take into account the beneficiary's independent resources where there is no 'absolute' gift of principal, the prime gift being that of income, and the testator Intended that the 'invasion of the principal \* \* \* (be) dependent upon the needs or

requirements of the beneficiary.' (Matter of Martin's Will, 269 N.Y. 305, 312, 199 N.E. 491, 493; see, also, \*\*\*960 Matter of Garrett's Will, 9 A.D.2d 545, 190 N.Y.S.2d 758, affd. 8 N.Y.2d 725, 201 N.Y.S.2d 102, 167 N.E.2d 644; Matter of Hogeboom's Will, 219 App.Div. 131, 219 N.Y.S. 436; Marrer of Messer's Will, 34 Misc.2d 416, 231 N.Y.S.2d 201, Supra.) The rule is, however, different--that is, the trustee may not consider the beneficiary's income--where the testator attached no condition of need and Intended that 'The gift of principal (be) as broad as the gift of interest' and the first inseparable from the other. (Matter of Martin's Will, 269 N.Y. 305, 310, 199 N.E. 491, 493, Supra; see, also, Matter of Clark's Will, 280 N.Y. 155, 19 N.E.2d 1001, Supra; Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237; Holden v. Strong, 116 N.Y. 471, 22 N.E. 960.)

[4] In the case before us, as already noted, the trustee was given an absolute discretion to invade principal if the income were \*585 'insufficient' for the wife's support. Silent though the will itself is as to whether her own income was to be considered, study of the testament as a whole, in the light of the attendant circumstances, makes it plain beyond doubt that, although the testator wished to provide for his wife during her lifetime, his paramount concern was for his daughters and their children and his desire was to preserve his estate for them.

Turning, first, to the testator's will, it is instinct with his affection and concern for \*\*721 his descendants. He left his total estate to his three daughters in equal shares if his wife predeceased him. Any income from the trust which she did not need for her support was to be added to the principal which they were to inherit. In the event of a daughter's predeceasing his wife, he made elaborate provision for gifts over to his grandchildren. Inclusion of the latter provision goes far toward establishing that he did not envisage a possible exhaustion of the trust corpus--a result which might ensue if the principal is to be invaded without regard to his wife's own income.

(Cite as: 23 N.Y.2d 579, \*585, 245 N.E.2d 718, \*\*721, 297 N.Y.S.2d 956, \*\*\*960)

As for the situation existing at the time he made his will--which continued until his death--the testator's wife was incurably ill. The trust which he created for her benefit was designed to assure her an income which would take care of her probable needs if, and only if, her social security payments were also applied to her support. In point of fact, he had actually used those payments for that purpose while he was alive, and there is no reason to believe that he wished that practice to be discontinued after he died. He certainly did not intend the social security payments of his hopelessly ill and incompetent wife to accumulate for her heirs and permit the trust principal, which he wished to preserve for his own issue, to be diminished and, perhaps, consumed.

As already appears from our treatment of the cases, the decisions relied upon by the petitioner (see *Matter of Clark's Will*, 280 N.Y. 155, \*\*\*961 19 N.E.2d 1001, Supra; *Rezzemini v. Brooks*, 236 N.Y. 184, 140 N.E. 237, Supra; *Holden v. Strong*, 116 N.Y. 471, 22 N.E. 960, Supra) are inapposite. The court in those cases concluded, not on the basis of the trust language alone, but on the strength of the will as a whole and other relevant factors, that a gift of principal was intended and that the testator's almost exclusive interest was in the beneficiary, the remaindermen occupying a completely subsidiary position. \*586 On the other hand, as we have seen, the present testator made it quite plain that his children were his primary concern and any provision for his wife from trust principal, as opposed to income, was clearly secondary.

It follows from what we have said that in the present case the trustee was privileged to take the beneficiary's independent income into account before invading principal.

The order appealed from should be reversed and the matter remitted to the Surrogate's Court for further proceedings in accordance with this opinion, with costs to all parties appearing separately and filing separate briefs payable out of the estate.

SCILEPPI, Judge (dissenting).

I dissent and vote to affirm.

In my view, the result reached by the majority is not only contrary to well-settled law, but completely disregards the plain language of the will.

It is axiomatic that the courts do not have the power--nor is it their function--to remake the will of a testator. Thus, if the language used in the will is clear, precise and unambiguous, there is no problem of construction; rather, there is an obligation of enforcement.

As this court stated in *Matter of Bisconti's Will*, 306 N.Y. 442, 445, 119 N.E.2d 34, 35 'The application of the rules of construction of wills is for the purpose of determining the intent of the testator where that intent is not clearly expressed by the testamentary words, and the rules of construction are to be disregarded when the language is clear and definite. It is well established that rules of construction are merely subsidiary aids. *Matter of Watson's Will*, 262 N.Y. 284, 293, 294, 186 N.E. 787, 788, 789. If intention of a will-maker is to be found in the words used in the will and these are clear and definite there is no power to change them. *Matter of Watson's Will*, Supra. As is stated in *Dauids on the New York Law of Wills*: 'When intention can be ascertained as a fact from \*\*722 the instrument itself \* \* \* there is no occasion for a presumption in respect thereof, and the decision should not be affected by the rules in question. Hence the rules of construction are to be disregarded where the decedent's intention is clearly or sufficiently manifest, or where the language of the instrument is plain and its meaning \*\*\*962 obvious.' Vol. I, s 491, p. 805; see *Matter of Rollins' Will*, 271 App.Div. 982, 68 N.Y.S.2d 116, affd. 297 N.Y. 612, 75 N.E.2d 627.'

\*587 The clause in question on this appeal is clear and unequivocal. It establishes a trust, the income of which is to be paid for life to the testator's incompetent widow, and then provides that, 'if such income be insufficient

for the support and maintenance of (my wife), my Trustee shall so pay or use from principal sufficient moneys to provide for (my wife's) support and maintenance, in the sole, absolute and uncontrolled discretion of the Trustee'.

This language clearly makes the gift of principal as broad as the gift of interest. The gift of principal is not conditioned upon the particular needs of the widow but rather upon the insufficiency of the income to provide support and maintenance. In such a situation, the private income of the beneficiary cannot be considered. The applicable rule was succinctly stated by this court in *Matter of Martin's Will*, 269 N.Y. 305, 312, 199 N.E. 491, 495: 'The primary question in this class of cases always is, does the will constitute an absolute gift of support and maintenance which it makes a charge upon the income from the estate and upon principal? If, so, then the private income of the beneficiary cannot be considered. If, however, the gift is of income coupled with a provision that the principal may be invaded in case of need, the private income of the beneficiary must be considered in determining whether such need exists.'

In *Martin*, the court held that the private income of the beneficiary was to be considered in determining whether to invade principal. But, there, unlike the present case, the will provided for the invasion of principal 'as (the beneficiary) may require for her care, support and comfort, during her natural life'.

In almost every case where the will in question provided for the invasion of principal, if the income from the trust was insufficient or in cases where the trust provided for the use of income and so much of principal 'as may be necessary' with no limitation of the amount of principal which may be invaded, the courts of this State have uniformly found that such language constituted an absolute gift of support and maintenance without regard to the private income of the beneficiary.

Contrary to the assertion of the majority herein, the case of *Rezzemini v. Brooks*, 236 N.Y. 184, 140 N.E. 237, is directly in point. In that case, as in this one, the committee of

an adjudged incompetent alleged that it was the duty of the trustee to pay for the \*588 support and maintenance of the incompetent out of the income and principal of the trust which had been created by the will of the incompetent's mother. At the time that the testatrix executed her will she was aware that her son owned certain valuable property and was in receipt of an income from \*\*\*963 the estate of his father. As in the instant case, the trustee in *Rezzemini* represented the vested remaindermen and claimed that the incompetent's income from all other sources must be exhausted before any invasion of principal was warranted.

In construing the clause in question, which reads as follows: 'If the income from my estate shall be insufficient for the proper support of my said son, then in that event, I authorize and empower my said trustee to expend so much of the principal thereof as may be necessary for that purpose', this court held: 'Our decision in the case of *Holden v. Strong*, 116 N.Y. 471, 22 N.E. 960, involved the construction of a will wherein the testator gave to a trustee 'full power and authority to use so much \*\*723 of the trust fund, either interest or principal, as shall, in his judgment and discretion, be necessary for the proper care, comfort and maintenance' of the plaintiff so long as he should live. We held that the plaintiff there was entitled to support and maintenance even though he was able to support himself and had accumulated a fund which he had on deposit in a bank. The reasoning and principal laid down in that case we regard as controlling the case under consideration.' (*Rezzemini v. Brooks*, *Supra*, p. 193, 140 N.E. p. 240.)

In other words, since the language of the clause--which is almost identical to language of the clause now before us--clearly conditioned the gift from principal solely upon the insufficiency of the income to provide for care and support and not upon the necessity of the beneficiary, it was held that the private income of the beneficiary could not be considered.

*Matter of Clark's Will*, 280 N.Y. 155, 19

(Cite as: 23 N.Y.2d 579, \*588, 245 N.E.2d 718, \*\*723, 297 N.Y.S.2d 956, \*\*\*963)

N.E.2d 1001, is another case in point. In Clark (pp. 158-159, 19 N.E.2d p. 1002) the testator established a life trust for his widow and then provided: 'In the event that the income provided for my said wife under paragraph 'Fourth' above shall, in the judgment of my trustee, be insufficient for her every comfort and support, I authorize may said trustee to pay to her, in addition to income, such portion of the principal of the said trust as it shall from time to time deem necessary.'

\*589 In a proceeding for the settlement of the accounts of the trustee, an objection was made to the allowance of an amount paid out of principal for the benefit of the widow. This court held:

'The provisions of the will are not ambiguous, the intent of the testator is clear from the face of the instrument, and we may determine for ourselves what the instrument itself contains. Ascertainment of the intent of the testator as shown by his will, taken as a whole, is our primary purpose, and, when ascertained, is to prevail over all other canons of construction. Matter of James, 146 N.Y. 78, 100, 40 N.E. 876; Matter \*\*\*964 of Buechner, 226 N.Y. 440, 123 N.E. 741. The will clearly provides for payment by the trustee in quarterly installments of the entire income from the trust and of so much of the principal in addition thereto as, in the sole judgment of the trustee, shall by it be deemed necessary for every comfort and support of the widow.

'In conformity to that purpose and intent, the trustee is required to furnish every comfort and support for the widow which it may deem in a sound discretion necessary out of income and, if required, out of the corpus, even to the extent of exhausting the entire corpus of the trust, without taking into consideration or account the personal income of the beneficiary from any other source. Holden v. Strong, 116 N.Y. 471, 22 N.E. 960; Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237. What is necessary for the purpose is limited only by the amount of the income and the corpus of the trust. Whatever income the beneficiary may have from sources other than

the trust is of no concern to the trustee in forming its judgment as to the amount necessary for her every comfort and support. The testator did not contemplate that his widow should be required to use her own personal income or to incur individual obligations for her comfort and support as long as there was anything in the trust that might, in the sound discretion of the trustee, be used for that purpose.' (Matter of Clark's Will, Supra, pp. 160-161, 19 N.E.2d p. 1003.)

Matter of Johnson's Estate, 46 Misc.2d 52, 258 N.Y.S.2d 922, also involved a proceeding concerning an incompetent. In that case the will provided (p. 54, 258 N.Y.S.2d p. 924): 'If, at any time, in their sole and unrestricted judgment and discretion, my Trustees shall determine that the income from said trust shall not be adequate for the comfortable support \*590 and maintenance of my said wife, then and in that event, I authorize and empower my \*\*724 Trustees, from time to time, to encroach upon the principal of said trust fund and pay therefrom to, or for the benefit of, my said wife, such portion of the principal of said trust as, in their sole and unrestricted judgment and discretion, my Trustees may deem necessary and proper for the comfortable support and maintenance of my wife'.

In construing this provision of the will, the Surrogate found as follows (p. 56, 258 N.Y.S.2d p. 927): 'When the language of earlier cases, beginning with Holden v. Strong, 116 N.Y. 471, 22 N.E. 960 (1889), Rezzemini v. Brooks, 236 N.Y. 184, 140 N.E. 237 (1923), and that of Matter of Martin's Will (supra), and Matter of Clark's Will (supra) is compared with the language above quoted in Paragraph 'FIFTH (2)' of the will of decedent, it appears to this court that the decedent intended to make an absolute gift of support and maintenance, \*\*\*965 which was a charge upon income and principal, and the Court so decides. Therefore, the private income of the beneficiary cannot be considered in determining how much principal should be paid to the beneficiary.'

The Surrogate then went on to hold that the

test for invasion of principal is solely whether the income is sufficient for support, and not whether the beneficiary needs the principal.

In *Matter of Grubel's Will*, 37 Misc.2d 910, 235 N.Y.S.2d 21, the court was faced with a will which also provide, as in the case at bar, that in the event that the trustees shall find that the net income obtainable from a trust set up for the decedent's wife 'will provide insufficient for the needs of my beloved wife' then the trustees were authorized to withdraw from the corpus whatever sums may be necessary to enable the wife to live in a proper manner. The Surrogate held that the trust provisions constituted an absolute gift of support and that the other resources of the beneficiary were not relevant.

In *Matter of Leahy's Estate, Sur.*, 56 N.Y.S.2d 555, the court was faced with a claim for funds by the State Department of Hospitals where the income beneficiary had been confined in a mental hospital. In finding an absolute gift of income and principal, the court held (p. 556): 'Only as to invasion of principal did the testator leave anything to the 'discretion' of the trustees. The will provides liberally that if the income should ever become \*591 insufficient for the comfortable maintenance of the beneficiary in accordance with her accustomed mode of living, then there is given to the trustees the 'power to advance to her, or to pay for her benefit, any additional sum from the principal of said trust fund as they in their discretion deem necessary.' This discretion goes only to the amount of the invasion at any time. There is not any power given to decide whether or not there shall be any payment made at all.' (See, e.g., *Matter of Van Gaalen's Estate*, 38 Misc.2d 853, 239 N.Y.S. 312; *Matter of Connors' Estate*, 34 Misc.2d 1043, 225 N.Y.S.2d 949; *Matter of Vaturi's Estate*, 33 Misc.2d 295, 223 N.Y.S.2d 931; *Matter of Paster's Estate*, 22 Misc.2d 4, 198 N.Y.S.2d 441.)

It would appear from a review of the cases in this area that the language used in the instant will has acquired through judicial decision, a definite and established significance. And, as

the author of the majority opinion herein observed in his dissent in *Matter of Gulbenkian's Will*, 9 N.Y.2d 363, 372-373, 214 N.Y.S.2d 379, 384, 174 N.E.2d 481, 485: 'when a will contains language which has acquired, through judicial decision, a definite and established significance, the testator is taken to have employed the language in that sense and with that meaning in mind. (See *Matter of Krooss*, 302 N.Y. 424, 428, 99 N.E.2d 222 (47 A.L.R.2d 894).'

\*\*\*966 I agree with the courts below that the testator's primary intention was to bequeath the income and principal of the trust for the support and maintenance of \*\*725 his widow without regard to her personal income. While it is obvious that testator was concerned with the welfare of his children and grandchildren, it is equally obvious, especially since testator was aware of his wife's permanent incapacity and of her private resources, that her maintenance and support was his primary consideration. If he had intended the result reached by the majority, he could easily have made provision for his wife based upon need. This, however, he did not do. Having provided that if income would be insufficient to provide for the wife, that the trust be invaded, this court should not now remake the will, even though the result may be the depletion of the contingent estate of the children and of the infant contingent remaindermen.

Accordingly, I would affirm.

BURKE, BERGAN, KEATING and JASEN, JJ., concur with FULD, J.

SCILEPPI, J., dissents and votes to affirm in a separate opinion in which BREITEL, J., concurs.

Order reversed, etc.

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