COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Marital Trust Established Under the Will of Moses Eckstein,
Deceased
No. 3378 ST of 1961
Control No. 022260

Sur Second and Final Account of PNC Bank, National Association, Trustee, for the Marital Trust Established Under the Will of Moses Eckstein, Deceased

The account was called for audit January 6, 2003 **Before: Herron, J.**
Counsel appeared as follows:

James F. Monteith, Esquire
for the Accountant

Robert J. Stern, Esquire
for Remainder Beneficiaries

Paul L. Feldman, Esquire
for Jewish Federation of Greater Philadelpia Corporate Successor to Federation of Jewish Charities & Hebrew Culture Foundation Inc. Corporate Successor to Board of Jewish Education

Pamela S. Fingerhut, Esquire
Deputy Attorney General
for the Commonwealth of Pennsylvania

James P. Golden, Esquire
Michael Sacks, Esquire
for Department of Revenue
Commonwealth of Pennsylvania

John J. Soroko, Esquire
for the Objectors (Carol Ann Brown, Susanne Grundy, Ethel Marcus and Joseph Teller)

ADJUDICATION

Moses Eckstein died on October 31, 1959, leaving a Will dated August 15, 1957 with codicils dated August 15, 1957, October 17, 1957, November 1, 1957 and March 26, 1959. The Will was probated on November 4, 1959. By article Ninth of his Will, Moses Eckstein created a Marital Trust for his wife, Clara Eckstein. The trustee appointed by Article Seventeenth of the Will was Provident Tradesmen Bank and Trust Company. By successive mergers, PNC Bank, National Association is the present trustee and accountant.

On October 30, 2002, PNC filed an account of its administration of the Trust for the

period from June 27, 1984 through September 19, 2002. The reason for filing the account was the death of the life beneficiary, Clara Eckstein (later by remarriage, Halpern), and the necessity of resolving the legal issue of whether she had effectively exercised her power of appointment.

This threshold issue must be resolved because it will determine which, if any, provisions of the Moses Eckstein will (hereinafter "Moses Will") and codicils control the disposition of principal remaining in the marital trust. This determination will also necessarily have significant tax implications.

The marital trust at issue was created by Moses Eckstein by Article NINTH of his will. By Article NINTH, Moses Eckstein gave a "formula fractional" share of his estate to the trustees of the Marital Trust. The trustees were directed to invest the principal and pay the income to his wife Clara in quarter-annual installments for the duration of her life. The Will also provided that the trustees could pay Clara $5,000 from principal upon her written request throughout the existence of the trust. In a provision that is key to the issue for adjudication, the Moses Will gave the following power of appointment to Clara:

> (d) Upon the death of my said wife, to pay over and convey the principal, or balance of principal, as the case may be, to such persons or estates, including the estate of my said wife, in such amounts or upon such trusts as my wife, CLARA ECKSTEIN, may by deed or by last will and testament appoint and in default of said appointment, my trustees shall calculate the additional amount of taxes, whether Federal Estate or State Inheritance or Estate Taxes, imposed upon the estate of my deceased wife by reason of the inclusion of said trust estate as a part of her estate for such tax purposes, and shall pay said sum thus calculated to the personal representatives of my said deceased wife's estate out of the principal of said trust and the balance of said trust fund shall be added to and made a part of my residuary estate and disposed of in the manner hereinafter provided. ARTICLE NINTH, Will of Moses Eckstein

Moses and Clara had one child, a daughter Mary. On October 31, 1959, Moses died as a resident of Pennsylvania. Clara subsequently remarried Benjamin Halpern, who died on March

20, 1976. She never remarried. On November 19, 1993, Clara was a resident of Los Angeles California where she executed a holographic will ("Clara Will") that provided as follows:

Fourth: I give all of my estate as follows:

A. Pursuant to the terms of Paragraph Ninth of the Marital Trust created under the Will of my deceased husband, Moses Eckstein, dated 8-15-57, I have a testamentary power of appointment over the assets being held in said Marital Trust by Provident National Bank, 17th + Chestnut Sts., Phila. Pa. 19101 under Account #64064; I hereby exercise that power by giving the balance of the assets outright + free of said marital trust to my daughter Mary W. Eckstein.

In view of the fact that Alan Zuckerman has affected my health very negatively and that he is now leaving me to live elsewhere, I hereby declare that he is to receive the sum of $1,000.00 (one thousand) and no more.

The balance of my personal estate is to be divided as follows:

One half of my personal estate is to be left to Mary Eckstein. (This is in addition to the marital trust by the Provident.

The remaining half of my personal estate is as follows:

Fifty per cent to sister Ethel Marcus.

Ten per cent to brother, Joseph Teller, of Phila.

And the remainder to be shared equally by Ethel Marcus's children Carole + Suzanne.

Will of Clara Halpern, Ex. A. PNC Petition for Adjudication

Less than a year after this will was executed, Mary Eckstein died on July 29, 1994 without leaving any children. On February 8, 2002, Clara Halpern died as a resident of California. Her holographic November 19, 1993 will was admitted to probate by the Superior Court of Orange County, California, and letters testamentary were issued to Northern Trust Bank of California, N.A. on June 4, 2002.

The unexpected order of the deaths of the testator's only child, and then his widow, the Accountant suggests, poses as a question for adjudication whether Clara's holographic instrument constitutes a valid exercise of her power of appointment under the Moses Will. The accountant takes the position that Clara's holographic will did not exercise the power of appointment, and as a consequence, the principal of the marital trust should be distributed according to Article ELEVENTH (c)(3) of the Moses Will as revised by his second, third and fourth codicils to certain charities and individuals.[1] This position is supported by two charities—the Jewish Federation of Greater Philadelphia and the Board of Jewish Education (hereinafter "Charitable Respondents")-- who have filed memoranda to set forth their arguments. The Office of the Attorney General for the Commonwealth of Pennsylvania, as parens patriae, joined with the Charitable Respondents' memoranda. Objections to this position and memoranda were filed by those beneficiaries named in Clara's Will: Carole Ann Brown, Susanne Grundy, Ethel Marcus and Joseph Teller (Objectors). They argue that Clara effectively exercised the general power of appointment pursuant to 20 Pa.C.S.A. § 2514 (13). For the reasons set forth below, this court concludes that Clara did effectively exercise her power of appointment.

Pennsylvania Law Applies to the Analysis of the Exercise of the Power of Appointment in the Moses Eckstein Will

The Accountant, the Charitable Respondents and the Objectors agree that Pennsylvania law should be applied in analyzing whether Clara Halpern effecitively exercised the power of

1 The Accountant thus proposes distribution to the following: Jewish Theological Seminary of America; Federation of Jewish Charities; Hebrew Culture Foundation, Inc.; Federation of Jewish Charities; Allied Jewish Appeal; Robert Buxbaum; James Buxbaum; Ellen Buxbaum Frank; William H. Simon; Caroline Simon. See PNC Petition for Adjudication, Rider to paragraph 15 at 2-3.

appointment in the Moses Will.[2] Although Clara may have been a resident of California when her will was executed, it is well established that "the exercise and interpretation of a power of appointment created by a donor who was domiciled in Pennsylvania is governed by the law of Pennsylvania." In re O'Reilly's Estate, 371 Pa. 349, 352, 89 A.2d 513, 514 (Pa. 1952). Accord In re Barton, 348 Pa. 279, 282, 35 A.2d 266, 268 (Pa. 1944)("it has been uniformly held that the proper and effective exercise of a power of appointment is, in the case of personality, controlled by the law of the donor's domicile at the time of the creation of the trust").

The parties also agree that because Mary Eckstein was not alive at the time of the death of her mother, Clara, the gift as to Mary in Clara's will lapsed. Moreover, this gift was not saved by Pennsylvania's anti-lapse statute 20 Pa.C.S.A. § 2514(9) because Mary left no issue.[3] The objectors assert, however, that Clara's exercise of the power of appointment did not fail completely because it "was exercised by language in the Clara Will which constitutes a general bequest of her entire estate."[4] In other words, under 20 Pa.C.S.A. § 2514(13) Clara effectively exercised the power of appointment under the Marital Trust of the Moses Will because she made a general bequest of her entire estate, even acknowledging with specific reference the general power of appointment under the Moses Will. Consequently, the objectors contend, the assets of the Marital Trust should be distributed to the beneficiaries of the Clara Will. The Accountant takes the contrary position that Clara failed to exercise the power of appointment, but all parties agree that resolution of their dispute requires analysis of section 2514.

Under 20 Pa.C.S.A. Section 2514(13) and Relevant Precedent Clara Effectively

2 See PNC Petition for Adjudication, Rider to Paragraph 13 at 2-3; Objectors' 3/3/ 2003 Memorandum at 7; Charitable Respondents' 3/3/03 Memorandum at 4-5.
3 PNC Petition for Adjudication, Rider to Paragraph 13 at 3; Objectors' 3/3/03 Memorandum at 7 & n.3.
4 Objectors' 3/3/2003 Memorandum at 7.

Exercised the Power of Appointment

Under Pennsylvania common law, there was a presumption that a power of appointment "had not been exercised unless the intention of the donee to exercise such power appeared in the will, either affirmatively or by necessary implication." Estate of Jaekel, 424 Pa. 433, 436, 227 A.2d 851, 853 (1967). This common law rule was abolished by statute so that the general rule for determining the effectiveness of an exercise of a power of appointment in Pennsylvania is controlled by statute, presently 20 Pa.C. S. A. §2514(13). Estate of Jaekel, 424 Pa. at 437, 227 A.2d at 854 (citing Act of April 24, 1947, P.L. 89 § 14(14) with language identical to 20 Pa.C.S.A. §2514(13)). Section 2514 provides that "*in the absence of a contrary intent appearing therein,* wills shall be construed as to real and personal property in accordance with the following rules:"

> (13) **Power of appointment -** A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator or any bequest of personal property described in a general manner shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an extension of such power.
> 20 Pa.C.S.A. § 2514(13)(emphasis added).

The implications of this statute are crucial. According to the Pennsylvania Supreme Court, if "the donee has a General power of appointment, the effect of the statute is to create a presumption that a general devise of the realty or a bequest of the personalty of the donee operates as an execution of the power of appointment." Estate of Jaekel, 424 Pa. at 438, 227 A.2d at 854. Moreover, the burden of proving that a power of appointment has not been

effectively exercised rests on the party challenging its exercise who must demonstrate "with clarity that the donee-testator has manifested A contrary intent in the will. . . ." Id., 424 Pa. at 438, 227 A.2d at 854. Significantly, this "contrary intent" must appear in the will itself. Id.

A power of appointment is general if it does not restrict the class of persons for whom it may be exercised. Estate of Stewart, 325 Pa. Super. 545, 549, 473 A.2d 572, 574 (1984), aff'd, 506 Pa. 336, 485 A.2d 391 (1984). The parties agree that in Article NINTH of his Will, Moses Eckstein created a general power of appointment when he provided:

> NINTH:
> (d) Upon the death of my said wife, to pay over and convey the principal, or balance of principal, as the case may be, to such persons or estates, including the estate of my said wife, in such amounts or upon such trusts as my wife, CLARA ECKSTEIN, may by deed or by last will and testament appoint . . .
> Article NINTH, Will of Moses Eckstein, Petition for Adjudication, Ex. A.

Under the Estate of Jaekel and section 2514(13), it is therefore necessary to analyze whether the language in Clara's Will expresses a general devise that would serve to exercise the power of appointment. In maintaining that Clara failed to exercise this power, the Accountant has the burden of showing any contrary intent in the will itself to exercise the power. Estate of Jaekel, 424 Pa. at 438, 227 A.2d at 854.

In her will, Clara clearly intended to exercise the power of appointment bestowed on her by Moses as evidenced in Paragraph Fourth. That paragraph begins with words reflecting an intent to bequeath her entire estate: "I give all my estate as follows." She then makes a specific reference to the Power of Appointment under Paragraph Ninth of the Marital Trust created under the Will of "my deceased" husband Moses Eckstein:

Fourth: I give all my estate as follows:

A. Pursuant to the terms of Paragraph Ninth of the Marital Trust created under the Will of my deceased husband, Moses Eckstein, dated 8-15-57, I have a testamentary power of appointment over the assets being held in said Marital Trust by Provident National Bank, 17th + Chestnut Sts., Phila., Pa. 19101 under Account # 64064; I hereby exercise that power by giving the balance of the assets outright + free of said marital trust to my daughter, Mary W. Eckstein.

Next, Clara makes a specific bequest to Alan Zuckerman stating that "[i]n view of the fact that Alan Zuckerman has affected my health very negatively and he is now leaving me to live elsewhere, I hereby declare that he is to receive the sum of $1,000.00 (one thousand) and no more." After this specific bequest, Clara made two more general bequests:

> The **balance** of my personal estate is to be divided up as follows:
> One half of my personal estate is to be left to Mary Eckstein. (This is in addition to the marital trust by the Provident.
>
> The remaining half of my personal estate is as follows:
>
> Fifty per cent to sister Ethel Marcus.
> Ten per cent to brother, Joseph Teller of Phila.
>
> And the remainder to be shared equally by Ethel Marcus's children, Carole, + Suzanne. Paragraph Fourth, Will of Clara Halpern, (emphasis added) PNC Petition for Adjudication, Ex. B.

Consequently, at three different points in her Will, Clara expressed an intent to make a general and total devise of her estate. Such intent would represent an effective exercise of the power of appointment under the "presumption" set forth under section 2514 (13) and the Estate of Jaekel that "a general devise of the realty or a bequest of the personalty of the donee operates as an execution of the general power of appointment." Estate of Jaekel, 424 Pa. at 438, 227 A.2d at 854.

PNC Bank, as the Accountant, and the Charitable Respondents Fail to Meet Their Burden of Showing A Contrary Intent by Clara to the Exercise the Power of Appointment

PNC Bank, as accountant, and the Charitable Respondents have taken the position that Clara did not exercise her power of appointment and "there has been a total default in the exercise of the power and the assets subject thereto in the Marital Trust under the will of Moses Eckstein pass under Article Ninth thereof…"[5] Both PNC and the Charitable Respondents acknowledge that those who challenge the exercise of a power of attorney bear the burden of demonstrating "with clarity that the donee-testator has manifested a contrary intent in the will." Charitable Respondents' 3/3/03 Memorandum at 6 (citing Estate of Jaekel, 424 Pa. 433 (1967)).

To satisfy its burden, PNC argues that "the specifically expressed but failed exercise" of the power of appointment signifies a contrary intent by Clara to exercise the power of appointment.[6] PNC concedes that this issue has been addressed in only two other Pennsylvania opinions: Newlin Estate, 72 Pa. D & C. 446 (Del. O.C. 1950) and Jull's Estate, 370 Pa. 434, 88 A.2d 753 (1952). Of these two cases, PNC relies on the 1950 Delaware County Court of Common Pleas opinion of Newlin Estate. PNC concedes, however, that the subsequent opinion by the Pennsylvania Supreme Court of Jull's Estate may have undermined the rationale of the Delaware County Orphans' Court in Newlin Estate. As PNC acknowledges, "the significance of a specifically intended but failed exercise of a power may have been diminished by the decision of the Pennsylvania Supreme Court in Jull's Estate." PNC Petition for Adjudication, Rider to Paragraph 13, at 4.

PNC 's reliance on Newlin Estate is unpersuasive for a variety of reasons. First, the facts of the Newlin Estate are distinguishable. In Newlin Estate, a husband by will gave a general power of

5 PNC Petition for Adjudication, Rider to Paragraph 13 at 7.
6 PNC Petition for Adjudication, Rider to Paragraph 13 at 3.

appointment to his wife ("donee wife") over one third of the principal of the husband's residuary estate. Newlin Estate, 72 Pa. D &C at 448. In her will, the donee wife created a fractionalized scheme in which she appointed one-fifth of the appointive estate from her husband to his brother. This appointment lapsed, however, because the brother died before the donee wife. The court therefore had to address the issue of whether, by virtue of this lapse, the one fifth share of the appointive estate passed under the will of the donee/wife or, by default, passed through the donor/husband's will. The Newlin court concluded that the appointive estate passed under the donor/husband's will. In so doing, it emphasized the obvious scheme of the donee wife's will which divided the appointive estate into fifths that were appointed among the relatives of her husband. In contrast, she made her brother the residuary beneficiary of her estate. The court concluded that this scheme represented the "contrary intention" required by the statute.

The facts of the instant case differ from those of Newlin because, as PNC acknowledges, Clara' s will did not contain the elaborate fractionalization of the appointive power but she instead treated the appointive estate as a unitary whole that was bequeathed to her daughter.[7] In addition, Clara at three points in paragraph Fourth of her Will expressed the intent to bequeath her entire estate. Moreover, the analysis in Newlin Estate did not specifically apply as a standard the "heavy burden" of showing the contrary intent for exercise of the power of appointment that was subsequently adopted by the Pennsylvania Supreme court in Estate of Jaekel. Finally, the Newlin Court did not explain why the donee wife's intent to bequeath her appointive estate should be construed as an intent not to bequeath the appointive estate merely because that

7 PNC Petition for Adjudication, Rider to Paragraph 13, at 6.

appointment lapsed due to the death of the named beneficiary.[8]

This issue was subsequently confronted directly by the Pennsylvania Supreme Court in In re Jull's Estate, 370 Pa. 434, 88 A.2d 753 (1952). In Jull, the Supreme Court concluded that where a will sought to exercise a power of appointment to charities that failed for the technical reason that it was not attested to by two witnesses, this specific devise was not evidence of a contrary intent to exercise the power. Rather, if the specific appointment failed, it became part of the residuary clause of the will and passed through it. The Pennsylvania Supreme Court dismissed as specious the argument that an ineffective or void exercise of a power of appointment should be evidence of a contrary intention to exercise that power of appointment:

> With respect to this contention that there was no valid exercise by will of the power of appointment, appellants are in the anomalous position of arguing that section 6 makes testator's testamentary appointment to charity void, but that this void appointment shows an intention that the testator did not wish it to pass to the residuary legatee [his wife] since he had already specifically, although ineffectively, said he wanted it to go to charity. In other words, the bequest is absolutely void under section 6 as a bequest, but is valid for the purpose of showing the testator's intention (viz., the contrary intention referred to in section 11, supra). This specious argument is further weakened by the remaining pertinent and very important language of section 6, which appellants ignore (and which we shall hereinafter more fully discuss), as well as by the known fact which has long ago been established as a legal principle, namely, that a residuary gift is intended by a testator as a 'catch-all.' A catch-all residuary clause carries out a testator's dominant intent to dispose of everything which he still owns or has a dispositive interest in or general power over—everything not otherwise specifically or effectually disposed of by the will.
> In re Jull's Estate, 370 Pa. 434, 438, 88 A.2d 753, 755 (1952).

PNC attempts to distinguish Jull's Estate by characterizing its holding as dependent on the operation of the independent savings statute under Section 6 of the Wills Act of 1917. That

8 As the Charitable Respondents note in their 3/3/03 memorandum, the Newlin court relied on Rowland's Estate, 17 Pa. D& C 477 (1918). That court concluded that where a bequest in a donee/wife's will pursuant to a power of appointment lapsed due to the death of the beneficiary, the bequest fell into the residuary clause of the donee wife's will This result supports the conclusion that the assets in the Moses Eckstein marital trust should pass to the beneficiaries named in Clara's will.

statute provided that if a gift to charity in a will was void for lack of proper witnesses, the gift would then go to the residuary beneficiaries.[9] PNC notes that here there is no such savings statute. PNC Petition for Adjudication, Rider to Paragraph 13 at 6. The objectors assert, however, that this ignores the specific holding of the Supreme Court in Jull's Estate as well as the considerable body of precedent that merely because an appointment fails, this does not constitute a "contrary intent." Objectors' 3/3/03 Memorandum at 20 & n. 10.

An analysis of the rationale of Jull's Estate supports the objectors' interpretation. The Supreme Court's analysis in Jull's Estate hinged on both Section 6 and general precedent that a residuary clause in a will is intended as a catch-all of everything not effectively disposed of by the Will. In dismissing as "specious" the argument that failure of a specific appointment should be interpreted as failure of the exercise of the power by Will, the Jull's Estate court gave a dual basis for this conclusion:

> This specious argument is further weakened by the remaining pertinent and very important language of section 6 which appellants ignore (and which we shall hereinunder more fully discuss) as well as by the known fact which has long been established as a legal principle, namely, that a residuary gift is intended by the testator as a "catch-all." A catch-all residuary clause carries out testator's dominant intent to dispose of everything which he still owns or has a dispositive interest in or general power over—everything not otherwise specifically or effectually disposed of. Cf. In re Carother's Estate, 300 Pa. 185, 150 A.585, 69 A.L.R. 1127; In re Bricker's Estate, 335 Pa. 300, 6 A.2d 905; Thompson v. Wanamakers's Trustee, 268 Pa. 203, 110 A. 770; In re Noble's Estate, 344 Pa. 81, 23 A.2d 410; Hunter, Orphans' Court Commonplace Book, Vol. II, section 19(h) at 851. In re Jull's Estate, 370 Pa. at 438, 88 A.2d at 755 (emphasis added).

The Jull's Estate court cited four cases to support its conclusion that a residuary clause

9 According to the Jull's Estate court, Section 6 of the Wills Act of June 7, 1917 provided: "No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will attested by two credible, and at the time, disinterested witnesses at least thirty days before the decease of the testator; and all dispositions of property contrary hereto shall be void and go to the residuary legatee, or devisee, heirs or next of kin, according to law. In re Jull's Estate, 370 Pa. at 437, 88 A.2d at

was a catch-all provision expressing the testator's intent to dispose of everything not specifically devised—including a bequest pursuant to an ineffective power of appointment. Three of these cases did not involve either ineffective charitable bequests or the saving effects of Section 6 on such ineffective bequests.[10] On the contrary, in In re Carother's Estate, the issue was whether an entire will should be deemed invalid where two specific bequests may be void because of undue influence. In resolving this issue, the Supreme Court set forth the general principle that "[w]here legacies or bequests are declared void for any reason, and the will contains a residuary clause disposing of the residue of an estate, the bequests invalidated pass under the residuary clause, unless the scheme of the will or the testator's intention provides otherwise." In re Carother's Estate, 300 Pa. at 188, 150 A. at 586. Likewise, In re Noble's Estate, 344 Pa. 81, 23 A.2d 410 (1942) is not limited to a failed charitable bequest but focuses on the exercise of an appointive power through a general residuary clause. Finally, in Thompson v. Fidelity Trust Co., 268 Pa. 203, 110 A. 770 (1920), the Supreme Court concluded that the power of appointment over real estate in a trust was effectively exercised by a residuary clause in a will even if that clause did not specifically reference the power of appointment. In so doing, the court noted the heavy burden faced by an objector to the exercise of that power. Id., 268 Pa. at 214, 110 A. at 774 ("he, who, in any instance, denies that a general devise executes a general power of appointment must prove, 'by what appears on the face of the will,' that it was testator's 'clearly expressed'

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754 (emphasis added)

10 In re Woods, 209 Pa. 16, 57 A. 1103 (1904), in contrast, dealt with an ineffective charitable bequest. In approving the trial court's conclusion that this lapsed gift passed through the residuary clause, the Supreme Court stated in general terms: "The foundation of this general rule in respect to lapsed legacies, it is said in 2 Williams on Executors, is that the residuary clause is understood to be intended to embrace everything not otherwise effectually given, because the testator is supposed to 'take the particular legacy away from the residuary legatee only for the sake of the particular legatee, so that, upon failure of the particular intent, the court gives effect to the general intent." Id., 209 Pa. at 18-19.

intention the devise in question 'should not do so'").

There is, moreover, another line of precedent that supports the conclusion that Clara effectively exercised her power of appointment. The Pennsylvania Supreme Court has invoked the general principle that when a testator drafts a will, he is presumed to have intended to dispose of his entire estate in the absence of an intent to the contrary. See e.g. Estate of Sykes, 477 Pa. 254, 263-64, 383 A.2d 920, 924-25 (1978)("when a decedent drafts a last will and testament, he is presumed, in the absence of an indication to the contrary, to have intended to dispose of his entire estate and not to die intestate as to any part of it….."). This principle, in essence, complements the principle set forth in section 2514(13). Thus, in analyzing a case where the exercise of a power of appointment was challenged, the Supreme Court emphasized that the statute providing that a general devise shall be construed as exercising a power of appointment creates a "presumption of his (i.e. the testator's) intention to execute it, which is merely another aspect of the accepted rule that a testator is presumed to dispose of everything within his control, irrespective of the verbal form of his intent." Provident Trust Co. v. Scott, 335 Pa. 231, 234-35, 6 A.2d 814, 816 (1939).[11]

Finally, the Charitable Respondents urge this court to consider New York precedent to support their assertion that Clara did not effectively assert her power of appointment.[12] Not only is such precedent not binding, it is more favorable to the Objectors' argument that Clara effectively exercised her power of appointment. In In re Deane's Will, 4 N.Y. 2d 326, 151 N.E.2d 184, 175

11 In Provident Trust, the Supreme Court referenced Section 11 of the Wills Act which it characterized as. . . providing that a general devise of a testator's real estate 'shall be construed to include any real estate which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear in the Will.' Id., 335 Pa. at 234, 6 A.2d at 816. This statute has the same thrust of 20 Pa. C.S.A. § 2514(13). Moreover, the facts of Provident Trust are helpful to the Objectors' position because the court concluded that a power of appointment was exercised by a general residuary clause even where (1) that clause did not specifically reference the power and (2) the will had referenced a different power.

12 See Charitable Respondents' 3/3/03 Memorandum at 9.

N.Y.S.2d 21 (N.Y. Ct. Appeals 1958), for instance, the New York Court of Appeals was asked to consider whether a testatrix had exercised her power of appointment over trust funds in a will that failed to reference this power. The In re Deane's Will court invoked the statutory presumption that a general bequest exercises the power of appointment to conclude that such power was effectively exercised. The second New York case cited by the Charitable Respondents, In re Estate of Hopkins, 46 Misc.2d 273, 259 N.Y.S. 2d 565 (New York Cty. Surrogate's Court 1964), reached a similar conclusion when analyzing whether a limited power of appointment had been exercised. In so doing, the Hopkins court observed that an "attempt by a testator to dispose of all of his property operates as ea execution of a power of appointment and proof of such an intention is not necessary inasmuch as the statute steps in and provides such intention." Id., 46 Misc.2d at 276, 259 N.Y.S. 2d at 567.

For these reasons, this court concludes that Clara Halpern effectively exercised her power of appointment under the Will of her deceased husband Moses Eckstein. Accordingly, the assets in the marital trust should be distributed as follows:

Ethel Marcus	50% (Fifty Per Cent)
Joseph Teller	10% (Ten Per Cent)
Carole Anne Brown	20% (Twenty Per Cent)
Susanne Grundy	20% (Twenty Per Cent)

The accountant states that no Pennsylvania Transfer Inheritance Tax and Estate Tax have been paid during the period covered by the Account. James P. Golden and Michael Sacks made an entry of appearance on behalf of the Commonwealth of Pennsylvania, claiming such Transfer Inheritance Tax as may be due and assessed without prejudice to the right of the Commonwealth

to pass on Debts and Deductions. Any award will be subject to these claims.

The Accountant notes that postponed remainder taxes are due on the principal of the trust but that this amount could not be calculated until the identities of the principal beneficiaries are established by an Adjudication. The Accountant states that if this court determines that Clara Halpern effectively exercised her power of appointment in favor of the beneficiaries named in the residuary clause of her Will, it is relieved of any obligation to determine and remit incremental taxes to the personal representative of her estate. Instead, under Article NINTH of the Moses Will, the Accountant is directed to pay the balance of the Marital Trust to Clara's surviving residuary beneficiaries. The Accountant requests, however, that any distributive order should contain a stay provision until such time as the Accountant has the following assurances that it:

> (a)has no apportionment liability over to persons interested in the decedent's gross estate who are not recipients of the distributed property (such as third persons who receive property included in the gross estate passing outside the will and therefore have contribution rights against the petitioner under California apportionment laws if such rights cannot be effective (sic.) enforced against the residuary beneficiaries) and
> (b) it receives a release of the federal estate tax lien on the trust assets pursuant to the relief provisions of Section 2304(b) of the Internal Revenue Code.
> Petition for Adjudication, Rider 13 at 15-16.

In deference to the request of all parties, this adjudication does not address the tax issues which may be raised by this court's conclusion that Clara Halpern effectively exercised her power of appointment. If the parties so desire, they may submit additional memoranda on the taxation issue for a supplemental adjudication. In addition, this court will issue a stay as to the order of distribution, as requested by the accountant, upon petition by the accountant that provides an opportunity for response by all other interested parties.

According to the Account for the period June 27, 1984 through September 19, 2002, the balance of principal before distribution is $1,256,020.36 and the balance of income before distribution is $435,959.52 for a total of $1,691,979.88. This sum, composed as stated in the account, plus income received since the filing thereof and subject to distributions already properly made or any inheritance tax which may be due, is awarded as set forth in the Will of Clara Halpern as follows:

Ethel Marcus	50% (Fifty Per Cent)
Joseph Teller	10% (Ten Per Cent)
Carole Anne Brown	20% (Twenty Per Cent)
Susanne Grundy	20% (Twenty Per Cent)

Leave is hereby granted to the accountants to make all transfers and assignments necessary to effect distribution in accordance with this adjudication.

AND NOW, this _____ day of December, 2003, the account is confirmed absolutely, with the proposed distribution as set forth in this adjudication.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of the issuance of the Adjudication. An Appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of the Adjudication. See Phila. O.C. Rule 7.1.A and Pa. O.C. Rule 7.1 as amended, and Pa.R.A.P. 902 and 903.

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John W. Herron, J.