PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Clifton and Mary Byer Intervivos Trust
O.C. No. 180 IV of 2004
Control No. 041909

OPINION

Factual Background

At the time of their marriage in 1991, Clifton Byer was 73 years old and Mary Byer was 55 years old. They both had four children from a prior marriage. [1] On November 24, 1992 Clifton and Mary signed a "Revocable Living Trust Agreement of Clifton A. Byer and Mary E. Byer" (hereinafter "1992 Trust"). This trust document has been the focus of prolonged litigation[2] by the two grantor's children who are divided along family lines with Clifton's children (represented by Linda Hall) against Mary's children (represented by Joseph Martin). Resolution of this dispute requires analysis of the relevant trust language and various transactions involving the assets of the settlors.

One element in this family dispute is that Clifton came into his marriage to Mary with 80% of the assets, which he had accumulated during his previous marriage of 47 years. Both Martin and Hall concede that the grantors were concerned with providing for

[1] 7/21/2006 Hall Brief at 1-2; 7/21/2006 Martin Brief at 6.

[2] The procedural history of this dispute is protracted. According to the docket, the litigation began when Joseph Martin on February 9, 2004 filed a petition for a citation to show cause why Clifton Byer should not file an account. Clifton Byer then filed a Petition for a citation to show cause why real estate located at 2307 Solly Avenue should not be sold. Martin withdrew his petition for an accounting filed at control number 40260, but then on June 22, 2004 filed a petition for a citation to show cause why the co-executors should not be required to file an account. The petition to sell real estate was approved by court decree dated July 26, 2004. On August 19, 2004, Hall filed a petition for contempt and to impose sanctions. On September 17, 2004, Hall filed a petition for a declaratory judgment to which responses were filed. The docket does not indicate that any accounts were filed pursuant to the various petitions. The hearing therefore addressed the issues raised by the parties in the context of the declaratory judgment petition, as those issues evolved during the subsequent period and the hearing. The precise issues addressed in this opinion were framed by the briefs filed after the hearing.

Mary's long-term needs given the seemingly strong likelihood that she would outlive Clifton by many years.[3] Clifton and Mary therefore enlisted the services of a financial adviser, Fran Rambo, who advised them to create a revocable living trust. Ms. Rambo spoke often with Mary and Clifton after Mary had attended a seminar on trusts given by Ms. Rambo's company.[4] Although Ms. Rambo encouraged the Byers to execute a revocable trust document, the actual document was drafted by an attorney, Allen Tucci.[5] Before the Byers signed the trust document, Ms. Rambo testified—without objection at the hearing-- that she had explained to them how the trust would work.[6]

The 1992 Trust document provides that Mary and Clifton were the initial trustees/grantors and each grantor owned 50% of the trust assets.[7] As long as both grantors were alive, each had the absolute right to dispose of his or her share of the assets.[8] The parties fiercely dispute, however, how the trust was to function after the death of the first grantor to die, especially since it was the much younger Mary who died first.

Four years after executing the 1992 Trust, the Byers purchased a home in June 1996 located at 2307 Solly Avenue (the Solly Avenue property). That property was jointly titled to Mary and Clifton as tenants by the entirety.[9] The Byers also opened a

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[3] 7/21/2006 Hall Brief at 2 ("Because of their age difference, Mary and Clifton were concerned that Clifton would predecease Mary, leaving her impoverished…..To ensure Mary had enough money to live following Clifton's resumed death, financial planner Frances Rambo suggested that the Byers create a Revocable Living Trust").; 7/21/2006 Martin Brief at 6 ("In view of the differences in their ages, they both assumed that Mary would survive Clifton, and wanted a trust that would provide for Mary's support after Clifton's death").
[4] 6/19/2006 N.T. at 29 (Rambo).
[5] 6/19/2006 N.T. at 32 (Rambo).
[6] 6/19/2006 N.T. at 35-36 (Rambo).
[7] 1992 Trust, §1.1 & Schedule A.
[8] 1992 Trust, § 2.1.
[9] 7/21/2006 Hall Brief at 2.

brokerage account and maintained a small bank account after executing the 1992 trust, but the parties have stipulated that these assets were not part of that trust.[10]

On February 19, 1997, Mary and Clifton amended the 1992 trust. Less than a year later, Mary died on December 17, 1997. An inventory of the 1992 trust assets at the time of Mary's death was compiled showing a total of $285,048[11] broken down as follows:

First Union Bank Account	$ 9,812.72
Charles Schwab Account	$ 247,038.83
50% Interest in Sicklerville, N.J Property	$ 11,067,00
Time Share: Royal Palms Condominium Orange County, Florida	$ 8,565.00

This inventory was introduced at the hearing as Exhibit 1, and the parties have stipulated that this was the value of the assets in the 1992 Trust at Mary's death.[12] The inventory also indicated that the jointly titled Solly Avenue property had a value of $80,353 and was not a trust asset.[13]

Approximately 2 months after Mary's death, Clifton established an individual family trust entitled the C.A. Family Trust dated February 2, 1998 (the "1998 Trust"). He retitled the Solly Avenue Property so that a ¾ interest went to the family share of the 1992 Trust and a ¼ share went to the 1998 Trust. He also withdrew all of the assets from the 1992 trust. According to Hall, this transfer of assets was intended as a "swap" that was permitted under the terms of the 1992 trust document. She contends that Clifton sought to replace the assets he withdrew from the 1992 trust with the ¾ interest in the

10 7/21/2006 Hall Brief at 2-3.
11 7/21/2006 Hall Brief at 3.
12 7/21/2006 Hall Brief at 3, n.2; 7/21/2006 Martin Brief at 15; 6/19/2006 N.T. at 5 (Savin)("We will show Your Honor that as of Mary's death, there were $285,048 of assets in the trust").
13 Ex. 1

Solly Avenue property of equivalent value.[14] Martin strongly disagrees that this was a permissible "swap" of equivalent assets. According to him, there are at least two issues raised by this "swap:" First, whether Clifton had a right to withdraw half of the 1992 trust assets after Mary's death and second whether the asset swap "can given effect as contended by Linda Hall."[15] Hall agrees that these are key issues in the family dispute, but raises as well whether she, as trustee of the 1998 trust, is entitled to reimbursement of attorney fees and of expenses incurred by the 1998 Trust for the maintenance of the 2307 Solly Avenue property after Mary's death.[16] In resolving these issues, the terms of the 1992 Trust must be the primary focus.

Analysis

A. *Under the 1992 Trust Agreement Clifton Byer Had the Right to Swap Trust Assets after the Death of His Wife Mary*

The revocable living trust agreement of Clifton and Mary Byer ("1992 Trust") provides that Clifton and Mary Byer are the grantors and initial trustees. The property contributed to the 1992 Trust is set forth in Section 1.4, but it raises no issues for resolution because the parties have stipulated to the identity and amount of trust assets at the time of Mary's death as $285,048. What is a key issue in dispute is the right of Clifton, as the surviving grantor/trustee, to dispose of trust assets after Mary's death.

Article 2 of the 1992 Trust document provides for the administration of the trust during the lifetimes of the grantors. It states that "[a]s long as both Grantors are alive and

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[14] 7/21/2006 Hall Brief at 4. According to Hall, the ¾ interest in the Solly Avenue property represented Mary's 50% proportionate share less the expenses of Mary final medical and funeral bills which amounted to $10,650.85. She suggests that these expenses were authorized under Article 5 of the 1992 Trust. Id. at n.3. Martin counters that nothing in the record supports that contention. He asserts Section 5.1 of the 1992 trust merely authorizes but does not require the trustee to pay those final expenses. 7/28/2006 Martin Brief at 1.

[15] 7/21/2006 Martin Brief at 1.

[16] 7/21/2006 Hall Brief at 1.

neither is incapacitated (as defined in § 2.2 below), each Grantor is to have absolute authority as to the disposition of that portion of property in this trust which represents such Grantor's share of ownership in this Trust. Except as provided to the contrary in this Agreement, this authority includes without limitation, the authority to distribute principal and income, to remove or add trust property, and to amend or revoke this Trust."[17] According to Schedule A of the Trust, which identifies the property initially contributed to the 1992 trust, Mary and Clifton "each owns a Fifty Per Cent (50%) of this Trust."[18]

There is no dispute that so long as both Mary and Clifton were alive they had the unfettered right to dispose of their one-half share of trust assets. The parties hotly dispute, however, the right of Clifton, as surviving grantor, to remove assets from the 1992 Trust after Mary's death. Martin argues that upon Mary's death, Clifton's right to withdraw assets from the 1992 Trust terminated.[19] Hall, in contrast, maintains that Clifton retained his right to remove trust assets after Mary's death.[20] An analysis of the trust document and the evidence presented at the hearing supports Hall's conclusion that the grantors intended that the surviving spouse would retain the right to dispose of his one half share of the trust assets.

Article 3 of the 1992 Trust document deals with the division of the trust after the death of the first grantor. Article 3.1, which is critical to this dispute, provides:

> Upon the death of the first of the Grantors to die, the Trustee is to divide that portion of this Trust which represents the share of the first Grantor to die into two separate shares: the "Marital Share" and the "Family Share." Marital Share is defined in Article 4 and Family Share is defined in Article. 7.

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[17] 1992 Trust, Section 2.1.
[18] 1992 Trust, Schedule A.
[19] 7/21/2006 Martin Brief at 1.
[20] 7/21/2006 Hall Brief at 7-8.

The definition of the "Marital share" is extremely complex, but it is not necessary to explore its intricacies since both sides agree that the marital share was zero and not at issue.[21] Moreover, section 3.2 clearly provides that once this share was determined, it was to go to the surviving grantor, in this case Clifton.

The "family share" is defined as "that portion of the Trust that remains at the time of the death of the first of the Grantors after the Trustee makes those distributions pursuant to Articles 4, 5 and 6 of this Agreement."[22] Under the 1992 trust document, Clifton's daughter, Linda Hall, and Mary's son, Joseph Martin, were to serve as the initial trustees of the family share. Section 7.2(b) provides that at least monthly all of the net income of the family share is to be provided to the surviving grantor and that the trustee has the discretion under 7.2(c) to pay the principal of the family share to the surviving grantor as the trustee deems necessary to maintain and support him.[23]

Martin contends that there is an internal contradiction between the first sentence of Section 3.1, which provides that upon the death of the first grantor the deceased grantor's one-half share of the trust is to be divided into a family and marital share, and the definition of the "family share." According to Martin, the definition of the family share in Article 7 requires that the entire trust property—and not just the 50% share of the deceased grantor—should be divided between a marital and family share.[24] As a consequence, Clifton lost his right to withdraw any assets at Mary's death.[25]

[21] 7/21/2006 Martin Brief at 3,n.1; 7/21/2006 Hall Brief at 7.
[22] 1992 Trust, Section 7.1.
[23] 1992 Trust, § 7.2 (b) & (c).
[24] 7/21/2006 Martin Brief at 3.
[25] 7/21/2006 Martin Brief at 1.

This argument thus leads to the proposition that with the death of one grantor, the surviving grantor would be deprived of control over his trust assets. In essence, Martin asks this court to view the trust document from the perspective of the grantors' children's interests. Both parties concede, however, that the purpose of the trust was to provide for the well being of the surviving grantor, which was presumed to be Mary due to her younger age than Clifton.

In construing a trust document, the grantor's intent is the polestar and must prevail. To determine this intent "a court must examine the language of the document, the scheme of distribution, and the facts and circumstances existing at the creation of the trust." Trust of Cyrus Jones, 414 Pa. Super. 361, 367, 607 A.2d 265 (1992). A clause must not be read in isolation, but must be interpreted in the context of the entire trust document. Farmers Trust Co. v. Bashore, 498 Pa. 146, 150, 445 A.2d 492, 494 (1982). Moreover, a "construction will be avoided which would lead to an unnatural, improbable or absurd result, and which, under all the language of the will" or trust " would constitute a highly improbable testamentary intent." Walker Estate, 376 Pa. 16, 22-23, 101 A.2d 652, 655 (1954).

According to Martin, there is an internal contradiction between section 3.1 and section 7.1 of the 1992 Trust document. He concedes that section 3.1 clearly provides that when one of the grantors dies, her half of the trust assets should be divided into two separate shares: the family and marital share. He argues, however, that this clear mandate should be thwarted because of the definition of "marital share" and "family share" in sections 4.1 and 7.1, respectively, which, he asserts, "require that the entire

Trust property, and not just the share of the first Grantor to die, be divided between a marital share and a family share.[26]

While the definition of the marital share as set forth in Article 4 is complicated,[27] its disposition in section 3.2 to the surviving spouse contradicts Martin's argument that the entire trust property should be divided into a family and marital share. Under the express terms of the 1992 Trust document, once the marital share is determined after the death of the grantor that marital share is to be added "to the surviving Grantor's share of this Trust."[28]

The definition of family share in section 7.1 is admittedly ambiguous since it provides: "The Family Share is that portion of the Trust that remains at the time of the death of the first of the Grantors after the Trustee makes those distributions pursuant to Articles 4, 5, and 6 of this Agreement."[29] To clarify this ambiguity, at the hearing Hall offered the testimony of Fran Rambo, the Byers' financial adviser. Martin counters in his brief that this testimony should not be considered, but he offers no precedent to support this claim.

Where the terms of a trust agreement are clear and unambiguous, extrinsic evidence is not admissible to explain the settlor's intent. Factor v. Getz, 442 Pa. 384, 387, 276 A.2d 511, 512 (1971). If, however, a will or trust document is ambiguous on its face, extrinsic evidence may be considered. Estate of Macfarlane, 313 Pa. Super. 397, 403, 459 A.2d 1289, 1292 (1983). In this case, Martin concedes there is an ambiguity when

[26] 7/21/2006 Martin Brief at 3.
[27] According to section 4.1 of the 1992 Trust document, the "marital share is to be the fractional share of the principal of this Trust, the numerator of which and the denominator of which are determined as set forth in §§ 4.2 and 4.3.
[28] 1992 Trust, §3.2.
[29] 1992 Trust, §7.2.

he argues that there is as internal contradiction among the articles of the 1992 Trust document concerning administration of the trust after Mary's death. Nonetheless, he opposes resort to extrinsic evidence. The Pennsylvania Supreme Court has concluded, however, in a case with similar facts that "such evidence is admissible to prove intent where the written instrument is ambiguous." Factor v. Getz, 442 Pa. at 384, 276 A.2d at 512. In Factor, for instance, the decedent's former attorney and scrivener of his will was called to testify as to the testator's intent concerning disposition of real property where a granddaughter brought an action to quiet title.

In the instant case, Fran Rambo testified that she has worked as a financial adviser for 20 years. She first met with Mary Byer after Mary had attended a financial planning seminar conducted by Ms. Rambo's employee, and Ms. Rambo thereafter spoke frequently with both Mary and Clifton concerning financial matters and the Revocable Trust Document the Byers signed on November 24, 1992. The trust document was drafted by an attorney, Allen Tucci.[30] Nonetheless, Ms. Rambo was aware of the trust's purpose:

> Well, they had specific concerns because each had children. They had more specific concerns because Mary was—Mary had such a small amount of money, they were not, kind of, balanced when they got married, and she, the main concern, the main concern that I remember about this case or this trust was that Mary was concerned that she would out live Clifton by a significant amount of years and that his kids would fight her and bad things would happen when he died.[31]

Before the Byers signed the trust document in 1992, Ms. Rambo explained how it would work during their life times:

> The way that this trust worked would be that during your lifetime, both people were grantors. …. Whatever assets were in this trust would be split 50/50 at their

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[30] 6/18/2006 N.T. at 28-32 (Rambo).
[31] 6/19/2002 N.T. at 33(Rambo).

death and 50 percent of it would be held in trust for the first to die's spouse. And whatever—I specifically stressed that people make mistakes with trusts because—and in laws, too, with tax provisions, because they have to title assets properly. So all my clients, including the Byers, understood that the way you title your assets and the way you held them would determine whether, in fact, they even pass through the trust.[32]

She also explained to them how it would work after the death of a spouse:

Whatever was in the trust would be split 50/50, that 50 percent would be set aside but the surviving spouse was the first beneficiary of that.

So that in accordance to the trust document, it did not say just hold it and my surviving spouse starves to death. **Really, the first beneficiary is the surviving spouse, and the primary purpose of separating this was for Federal estate taxes, and not anything else.** It's a federal estate tax move, and not any other move so that people could benefit all along. **They could decide that that surviving spouse could access money, use up the money that they had in their 50 per cent initial share, or they could access in part of the what we call the married and the family share. Because they were the first beneficiaries.[33]**

This extrinsic evidence thus supports the explicit intent set forth in section 3.1 of the 1992 Trust document that upon Mary's death, her 50% share of trust assets was to be divided into a family and marital share. The marital share would then go to Clifton. The family share was irrevocable only insofar as the designated beneficiaries, who could not be changed.[34]

Clifton's "swap" of the 1992 trust assets for a ¾ interest in the Solly Avenue Property was therefore permitted under the terms of trust document. The parties agree that after Mary's death, the Solly Avenue property passed to Clifton as a tenant by the entireties and thus was not an asset of the 1992 Trust.[35] Clifton retitled the property giving a ¾ interest to the 1992 trust in exchange for the $285,048 in assets he withdrew from it. The 1992 trust document gives a grantor

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32 6/19/2006 N.T. at 35-36 (Rambo).
33 6/19/2006 N.T. at 36-37 (Rambo)(emphasis added).
34 6/19/2006 N.T. at 37-38 .
35 6/19/2006 N.T. at 48 (Frank); at 44 (sidebar stipulation).

the right to remove—or swap—assets from the trust.[36] Moreover, Ms. Rambo testified that she had advised Clifton that he had the option under the trust document to make this swap of assets.[37]

Martin complains however that this swap was unfair because the $285,048 in assets Clifton removed from the 1992 trust were far more valuable than the ¾ interest in the Solly Avenue property that he gave to the trust in return. Martin notes that the equity in the Solly Avenue property at the time of Mary's death was $80,353, so that the ¾ interest that was transferred had a value of $60,265. In contrast, one half of the 1992 trust assets had a value of $142,524. Consequently, Clifton only returned assets worth 42% of the assets he withdrew from the trust.[38]

Hall counters that while the swap may not have been an exactly even exchange, Martin's calculations do not take into consideration the payment of Mary's final medical expenses which was authorized under section 5.1 (a) and (b) of the 1992 trust so that the remaining balance of her 50% share was $131,874. Moreover, the value of the Solly Avenue property has appreciated so that the value of the family share is greater than Mary's 50% share of the Trust at the time of her death.[39] Martin attempts to rebut this argument by emphasizing that section 5.1 "authorizes but does not require the Trustee to pay those expenses."[40] Nonetheless, payment of Mary's final expenses would comply with the grantors' intent that the 1992 trust provide for Mary's needs.

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[36] See, e.g., 1992 Trust Document, §§ 2.4, 2.5, 4.7(b), 12.
[37] 6/19/2006 N.T. at 48-49 (Rambo).
[38] 7/21/2006 Martin Brief at 7; Ex. H.
[39] 8/2/2006 Hall Brief at 4.
[40] 7/28/2006 Martin Brief at 1.

B. The Doctrine of Quasi-Estoppel Does Not Apply to Clifton's Swap of Assets

Martin argues that under the doctrine of quasi-estoppel, Clifton's swap of the ¾ interest in the Solly Avenue Property should be considered a gift to the 1992 Trust. The doctrine of quasi-estoppel, according to Martin, "forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid corresponding obligations or effects."[41] He cites to two federal cases from the Fifth Circuit and Philadelphia County v. Sheehan, 263 Pa. 449, 107 A.14 (1919), where the Pennsylvania Supreme Court concluded that the Philadelphia Register of Wills was not equitably estopped from challenging the constitutionality of a statute regulating his compensation when he accepted the salary set by that legislation but placed the disputed commissions in an escrow account until the litigation was resolved.

In the instant case, Martin emphasizes that the deed conveying the Solly Avenue property from Clifton to the 1992 Trust states that the consideration was one dollar. In addition, the transfer tax certification prepared by Clifton's attorney states that the conveyance was exempt from transfer tax as a "transfer to grantor's trust."[42] Martin then invokes 20 P.S.§ 8102-C.3 to argue that the only exemptions for trustees are for transfers for "no or nominal consideration."

Hall persuasively rebuts this argument by demonstrating that Clifton's tax affidavits are not inconsistent with a "swap" or with the requirements of 72 P.S. 8102-C.3.(8). That section provides exemption from realty transfer tax for a "transfer for no or nominal actual consideration to a trustee of an ordinary trust

41 7/21/2006 Martin Brief at 8.
42 7/21/2006 Martin Brief at 9; Ex. M-1.

where the transfer of the same property would be exempt if the transfer was made directly from the grantor to all of the possible beneficiaries that are entitled to receive the property or proceeds from the sale of the property under the trust…" 72 P.S. § 8102-C.3(8). Since Clifton's intent was to swap a ¾ interest in the Solly Avenue property for Mary's 50% interest in the 1992 trust, there was no actual consideration for the transfer. The doctrine of equitable estoppel thus does not apply to render this transfer a gift, rather than a swap.

C. Hall, as Trustee for the 1998 ("C.A. Byer") Trust is Entitled to a ¾ Proportional Reimbursement for Expenses Incurred by the 1998 Trust in Maintaining the Solly Avenue Property Up Until It Was Sold

After Clifton retitled the deed to the Solly Avenue Property, he continued to live in it until September 27, 2003. In her brief, Hall maintains that during this time, the 1998 Trust paid all of the expenses for maintaining the property, including the mortgage, taxes, utilities, insurance and maintenance for a total of $57,583.36.[43] The 1998 Trust continued paying the Solly Avenue property expenses even after Clifton died in March 15, 2004 because-- Hall maintains-- Martin as trustee for the 1992 trust refused to consent to the sale of the Solly Avenue Property. Not until October 18, 2004 was the property sold pursuant to a court order. The property sold for $175,421, which was placed in an escrow

[43] 7/21/2006 Hall Brief at 13. Hall prepared an inventory of these Solly Avenue Property expenses, which was presented as exhibit H-24. In her testimony, Ms. Hall presented a more general estimate of $61,000 for the Solly Avenue property expenses after 1998. See 6/19/2006 N.T. at 127-28 (Hall). Martin, however, does not contest the figures presented in Hall's post-hearing brief; instead, he challenges the general propriety of charging those expenses to the 1992 Trust. See 7/21/2006 Martin brief at 12-14; 7/28/2006 Martin Brief at 1-3.

account. The expenses for that period after Clifton left the property was $7,528.90 for a total claim by Hall for Solly Avenue expenses of $65,112.26.[44]

To support this claim for reimbursement, Hall invokes section 7.2(c) and (d) of the 1992 Trust which provides:

> (c) The Trustee in its sole discretion, is to pay that portion of the principal of the Family Share to the surviving Grantor as such Trustee considers necessary to maintain and support such surviving Grantor in such surviving Grantor's accustomed manner of living.
> (d) The Trustees of the Family Share is to make no distribution under 7.2 (c) until the entire principal of the Marital Share is depleted.

Since there was no marital share, Hall maintains that the family share was responsible for maintaining Clifton in his accustomed manner under the terms of the 1992 Trust.[45] Since the 1992 Trust had a ¾ interest in the property, it should bear its proportionate share of the $57,583.36 in Solly Avenue property expenses during Clifton's residence there. Those expenses would then be deducted from the Martins' 50% interest in the family share of the 1992 Trust. Hall further argues that because Martin delayed the sale of the Solly Avenue property, the Martin family's proportionate family share should bear 100% of those expenses or $7,528.90.[46]

Martin counters that expenses for the Solly Avenue property can not be charged to the principal of the 1992 trust under the Pennsylvania Uniform Principal and Income Act, 20 Pa.C.S. §§ 8101 et seq. On close analysis, however, this argument cannot stand. Martin concedes that any amortization of a mortgage would be properly charged against principal and that under section 8163 the

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[44] 7/21/2006 Hall Brief at 13.
[45] Hall also invokes 20 Pa.C.S. § 7131 but that section was deleted by 2006, July 7, P.L. 625, No. 98, § 4, effective November 6, 2006. Nonetheless, her argument stands on the other grounds she presents.
[46] 7/21/2006 Hall Brief at 14-15.

trustee has the discretion to allocate payments for gas, electricity, water and sewage to either principal or income.[47] Moreover, he fails to cite—or acknowledge-- section 8103(a)(1) which provides that the terms of a trust document control any statutory provisions:

> A fiduciary shall administer a trust or estate in accordance with the governing instrument, even if there is a different provision in this chapter. 20 Pa.C.S. § 8103(a)(1)

Section 7.2(c) of the 1992 Trust document clearly provides for the payment of the expenses necessary to maintain Clifton in his accustomed manner of living. Hall, as trustee of the 1998 trust, is therefore entitled to reimbursement by the Martins for their proportional share of those expenses from the date of Mary's death until the date when the property was sold. They shall not, however, be required as Hall requests to pay 100% of the expenses for the period from the time that Clifton vacated the Solly Avenue property until it was sold because in this long-standing dispute between the children of Mary and Clifton neither side behaved rationally or in accordance with the intent of the trust and their parents that they avoid disputes and litigation costs.

D. Hall is Not Entitled to Reimbursement of the Legal Fees Incurred in the Protracted Litigation Involving the 1992 Trust

Throughout their litigation, the children of Clifton and Mary have incurred significant attorney fees despite their parents' clearly expressed intent that such fees be avoided. Ironically, they have been able to stipulate the amount of those

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[47] 7/21/2006 Martin Brief at 13-14. Section 8163 provides: "Subject to sections 8161 (relating to mandatory disbursement of income) and 8162 (relating to mandatory disbursements from principal), a trustee may, in the trustee's discretion, allocate to income or principal or partly to each ordinary expenses incurred in connection with the administration, management or preservation of trust property and the distribution of income, including, but not limited to, the compensation of the trustee and of any person providing investment advisory, custodian or income tax return preparation services to the trustee."

legal expenses: Joseph Martin, as Co-trustee for the 1992 Trust, incurred $35,000 in attorney fees and costs; Linda Hall, as Co-trustee incurred $60,000.

Linda Hall now seeks reimbursement of these $60,000 in legal fees from Joseph Martin pursuant to section 15.5 of the 1992 Trust document as well as the February 19, 1997 amendment of that document.[48] Martin counters that these provisions are in terrorem clauses which are inapplicable to him as a co-trustee who had probable cause to seek clarification of an ambiguous trust document. For the reasons set forth below, this court concludes that Hall is not entitled to reimbursement of the $60,000 in legal fees.

In section 15.5 of their 1992 trust document, Clifton and Mary Byer sought to discourage litigation regarding the trust with the following provisions:

> No Trustee is required to question any action, omission, accounting or other record of any prior Trustee or of the fiduciary of any other estate or trust from which assets are transferred to any trust created by this Agreement. A beneficiary who requests such an examination must pay all costs with such examination; and all such costs may, in the discretion of the Trustee, be used to offset distributions to such beneficiary under this Agreement.[49]

In addition, the grantors amended their trust agreement on February 19, 1997 to discourage litigation expenses by providing:

> If any beneficiary contests any provision of this Agreement, his or her share shall be reduced by any expenses incurred by the Trustee to defend the same.[50]

Typically, an in terrorem or forfeiture clause in a will or trust conditions a testamentary bequest on whether the terms of the controlling document are challenged by

[48] Hall does not appear to invoke the other grounds for reimbursing a fiduciary for legal fees, which, as a practical matter, would not apply in this case. It is well established, for instance, that a fiduciary subjected to an unsuccessful surcharge action can recover his legal expenses from the estate. Browarsky Estate, 437 Pa. 282, 263 A.2d 365(1970);Wormley Estate, 359 Pa. 295, 59 A.2d 98 (1948). In this case, however, Hall was not subjected to such an action.
[49] 1992 Trust, § 15.5.
[50] 2/19/97 Amendment to 1992 Trust, "Miscellaneous."

a beneficiary. In Friend's Estate, 209 Pa. 442, 443,58 A.853 (1904), for instance, the court considered whether the following provision should be enforced: "If any of my children or grandchildren, or any of the cestuis que trust under this will, shall contest the validity of this my will, or attempt to vacate the same, or alter or change any of the provisions thereof, he or she, or they, shall be thereby deprived of any beneficial interest under this will and of any share of my estate…."

Courts interpreting in terrorem clauses have concluded that such provisions shall not be enforced if the objection to the will or trust was brought in good faith and "not the mere vexatious act of a disappointed child or next of kin." Friend's Estate, 209 Pa. at 444, 58 A. at 854; McMillin Estate, 15 Pa. D. & C. 2d 789 (C.P. Lawrence Cty. 1958). Moreover, courts distinguish between efforts to challenge the terms of a will and efforts to assure its proper administration by requesting, for example, the filing of an account, seeking a surcharge, or filing objections to an account. See, e.g., Mitchell's Estate, 20 Pa. D & C 101 (O.C.Phila. Cty. 1933)(where guardian ad litem sought a surcharge based on an accounting, the in terrorem clause in decedent's will would not apply to the minor beneficiaries); Sands Estate, 66 Pa. D. & C. 551 (O.C. Mont. Cty. 1948)(in terrorem clause precluding the filing of objections to an account is not enforced). Section 2521 of the PEF code similarly provides that a "provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceeding relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings." 20 Pa.C.S. § 2521.

The 1992 trust agreement in section 15.5 and the 1997 amendment is not a pure forfeiture clause because it does not provide that a challenge to its terms will cause a beneficiary to forfeit a bequest; instead, it would impose the costs incident to any challenge on the beneficiary while giving the trustee discretion to offset distributions to that beneficiary based on those costs.[51]

There are several reasons why this remedy cannot be applied to the fees incurred by Linda Hall in response to the litigation by Joseph Martin. First, Joseph Martin, together with Linda Hall, was a co-trustee of the 1992 Trust. Section 15.5 and the February 19, 1997 amendment, however, by their express terms apply to beneficiaries. Second, the 1992 trust document was ambiguous, most specifically as to the interplay of the first sentence of section 3.1 regarding the division of the trust into family and marital shares after the death of the first grantor to die and the definition of family share set forth in section 7.1. As Martin suggests, his efforts to seek a judicial resolution of this ambiguity was premised on probable cause. Moreover, he was not specifically challenging the provisions of the trust document as he was questioning its administration by initially seeking an accounting. Finally, Linda Martin, as co-trustee of both the 1992 trust and the 1998 trust was not a passive victim of the litigation. On the contrary, in her capacity of trustee, she had filed a petition for declaratory judgment as to the scope or res of the 1992 trust. In light of those actions, it is not possible to label one side to this dispute as more litigious than the other.

Sadly, the grantors foresaw and sought to prevent the futility of legal fees with provisions in the 1992 Trust Document and letters to their children.[52] Rather than settle their differences amicably—as their parents hoped—the children of this second marriage

[51] 1992 Trust § 15.5.

[52] See Ex. 17 (3/17/97 letter from Clifton Byer to Linda, Carol, Douglas and Janice stating that "I certainly do not want arguments and bickering that may lead to legal steps to be taken. Mary and I have spent a great deal of time providing for each other and then for our children"); Ex. 18 (3/17/97 letter from Mary Byer to Mary Ann, Joe, Linda and Michele, stating that "We do not want battles that will incur legal fees!).

elected to expend their bequests on litigation expenses. Each side must now bear the costs of this choice.

BY THE COURT:

Date: ___________

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John W. Herron, J.