

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Living Trust Established under Deed of Trust of Sidney H. Evans and
Marcia Evans dated November 5, 1996 as Amended December 24, 2004

No. 638 IV of 2009
Control No. 092113

Sur First and Final Account of Gail Evans Glassman, Surviving Co-Trustee under
Amendment dated December 24, 2004

The account was called for audit September 14, 2009
Counsel appeared as follows:

Before: Herron, J.

Ryan R. Gager, Esquire – (appearance withdrawn) for the accountant
Jeffrey L. Abrams, Esquire – for the accountant
Michael L. Galbraith, Esquire – for objectors
A. James Millar, Esquire - for the Commonwealth

ADJUDICATION

By a trust agreement dated November 5, 1996, Sidney and Marcia Evans established a joint revocable living trust (“1996 Evans Trust Agreement”) and named themselves as the initial co-trustees. Marcia died on December 11, 1998, and Sidney continued on as sole trustee. After Sidney suffered a fall and hospitalization in 2004, he executed an amendment to the trust agreement dated December 24, 2004 that named his daughter Gail Evans Glassman as co-trustee. Nonetheless, the amendment stated that “[i]t is my express desire that my daughters share equally in any beneficial interests that are created under this Trust and any other beneficial interests created during my lifetime or upon my death.” This amendment was signed and dated by both Sidney Evans and Gail Evans Glassman (“Ms. Glassman”). It was also notarized. Sidney Evans died on March 31, 2008. One of the beneficiaries of the trust, Linda Shecter, thereafter filed a petition seeking an accounting from Ms. Glassman as trustee. On August 12,

2009, Ms. Glassman filed an account of her administration of the trust covering the period December 24, 2004 to March 31, 2008. Three beneficiaries, who were daughters of Sidney Evans, filed objections to the Account, challenging, inter alia, various sums of money that were paid directly to Gail Evans Glassman, as trustee, as well as excessive attorney fees.¹ In particular, after narrowing their initial objections, they objected that the following “monies paid directly to the trustee” were not authorized by the controlling trust agreement:

- (1) \$174,643.80 “for care of Sidney Evans and administration of his affairs” from April 2005 until the date of his death on March 31, 2008;
- (2) \$25,070.00 as “reimbursement paid to Gail Evans for expenses incurred on behalf of Sidney Evans;”
- (3) \$20,428.00 in cash withdrawals and checks made payable to the trustee, and which she had allegedly given to the decedent as cash;
- (4) \$3,694.95 in expenses after the death of Sidney Evans, and;
- (5) \$35,000 in counsel fees paid to the co-trustee’s prior attorneys, Saul Ewing, for the preparation of the Account.²

A hearing was held on January 11, 2010 to consider these objections.

Legal Analysis

- I. The \$174,643.80 Paid to Gail Glassman “for the care of Sidney Evans and administration of his affairs” Constituted Compensation Not Permitted by the Trust Agreement

Under Pennsylvania law, those who object to an account bear the burden of proof:

“[t]here can be no doubt that the person attempting to prove an account incorrect must sustain the burden of establishing his position.” Dunn Estate, 54 Pa.D. & C 2d 760, 761 (Mercer Cty. 1972). Moreover, “those who seek to surcharge a fiduciary for breach of trust must bear the

1 See 9/14/09 Objections. Initially, the objectors, Linda Shecter, Iris Borek and Barbra Lefkoe, filed 48 objections to the account. Prior to the hearing, the objectors narrowed down their objections by not pursuing objections 8-28 and 31-48. See 1/11/10 N.T. at 3-4 (Galbraith).

2 See 1/11/10 Objections to be Presented at the Hearing. The objectors claimed these expenditures violated Article 16, §7 of the 1996 Evans Trust Agreement.

burden of proving the particulars of his wrongful conduct.” Maurice Estate, 433 Pa. 103, 107, 249 A.2d 334, 336 (1969). In objecting to the \$174,643.80 that Gail Glassman was paid “for care of Sidney Evans and administration of his affairs,” the objectors seek to surcharge her in that amount; they therefore bear the burden of proof. In essence, they assert the legal argument that such payments were not permitted under the terms of the trust agreement, and by paying the \$174,643.80 to herself Ms. Glassman breached that document.

The polestar for determining whether the various sums claimed by the trustee in her account are permitted is the settlors’ intent as expressed in the terms of their trust agreement. The precise wording of the trust agreement must be the focus of any analysis. In re Estate of Tashjian, 375 Pa. Super. 221, 227, 544 A.2d 67, 70 (1988). The PEF code likewise provides that the ‘trust instrument controls.’ 20 Pa.C.S. §7705(a). In construing the language of the trust document, the provisions as a whole should be considered. Farmers Trust Co. v. Bashore, 498 Pa. 146, 150, 445 A.2d 492, 494 (1982)(“in the ascertainment of a settlor’s intent, it is fundamental that a clause must be read not in isolation but in the context in which it appears”).

The living trust agreement signed by Sidney and Marcia Evans was revocable and for the benefit of themselves and their descendants. The trust agreement gave the Trustees broad discretion in making distributions to themselves or their descendants:

Our Trustee may also distribute to or for the benefit of the surviving Trustmaker and our descendants as much of the principal of the Family Trust as our Trustee, in its sole and absolute discretion, shall consider necessary or advisable for their education, health, maintenance and support.

Our Trustee shall, at all times, give primary consideration to the surviving Trustmaker’s education, health, maintenance, and support, and only thereafter to our descendants.
1996 Evans Trust Agreement, Article 10, Section 3.

Under the 1996 Evans Trust Agreement, the Trustee also had authority to make unequal

distributions among the settlor's children:

Our Trustee may make distributions to or for the benefit of one or more of the beneficiaries of the Family Trust to the complete exclusion of the other beneficiaries. These distributions may be made to a beneficiary or beneficiaries in equal or unequal amounts according to the respective needs of our beneficiaries.
1996 Evans Trust Agreement, Article 10, section 4 (b).

Finally, the trust agreement contains specific provisions for the "Trustee's Fee" in Article 16, Section 7, which provides:

Our Trustee shall be entitled to fair and reasonable compensation for the services it renders as a fiduciary. The amount of compensation shall be an amount equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale.

Notwithstanding the above, we direct that no child of ours receive compensation for the services such child renders as a fiduciary under this agreement.

Our Trustee shall be reimbursed for the reasonable costs and expenses incurred in connection with its fiduciary duties under this agreement.
1996 Evans Trust Agreement, Article 16, § 7 (emphasis added).

By its terms, the Trust terminated upon Sidney's death on March 31, 2008. At that time, the trust was to be divided into equal shares for each of Sidney's then living daughters: Gail Glassman, Linda Schecter, Barbra Leflore, Iris Bore and Andrea de Botten.

The objections to the account focus on payments to Ms. Glassman as trustee while her father was alive as well as a few payments after his death. Under the terms of the 1996 Evans Trust Agreement, the co-trustees were granted broad discretion in making distributions among the settlor's children. They also were entitled to payments for reimbursement for reasonable costs and expenses incurred in the exercise of their fiduciary duties. But the trust document is clear in directing that "no child of ours receive compensation for the services such child renders as fiduciary under the agreement."

Ms. Glassman forthrightly agrees that "[t]here is no question that Article 16, Section 7 of

the Sidney H. and Marcia Evans Living Trust prohibits Gail, as a daughter, from receiving trustee compensation.”³ She argues, however, that the \$174,643.80 in payments that she paid to herself for “care of Sidney Evans and administration of his affairs” were actually distributions or reimbursements that were permitted under the Trust Agreement. In support of this broad argument, Ms. Glassman also relies on documents that allegedly express her father’s intent that this \$174,643.80 be distributed or reimbursed to her.⁴ Ultimately, however, these arguments are unpersuasive based in large part on the inconsistencies in Ms. Glassman’s testimony, her lack of credibility and by the categorizations in her formally filed account that carefully distinguish between distributions and reimbursements, on one hand, and payments totaling \$174,643 “for care of Sidney Evans and administration of his Affairs,” on the other.⁵

Glassman testified that she had become co-trustee of her father’s trust after he amended his trust agreement in December 2004. This decision came as a surprise, but she believed that her father elected to name her as co-trustee after he became ill in 2004 when he had been hospitalized for several weeks after suffering a fall.⁶ The amendment was formally prepared by her father’s attorney and accountant; both she and her father signed and dated it. The attorney was present when the amendment was signed.⁷

In the formal account that Glassman as surviving co-trustee filed with the assistance of counsel, Glassman testified that she had withdrawn by ATM withdrawals or check a total of \$174,643 “for care of Sidney Evans and Administration of his Affairs” throughout the period

3 3/8/10 Glassman Brief at 1.

4 See generally 3/8/10 Glassman Brief at 3 (citing Ex. F and Ex. R-2).

5 The Account separately lists distributions to beneficiaries at pages 87-98, reimbursements to Gail Evans at pages 46-58, and “Gail Evans for care of Sidney Evans and administration of his affairs” at pages 20-39.

6 1/11/10 N.T. at 10 (Glassman).

7 1/11/10 N.T. at 49 (Glassman) and 12/24/04 Amendment to 1996 Evans Trust Agreement.

April 2005 through March 31, 2008.⁸ She conceded that she either withdrew the money from the ATM herself or wrote the checks to herself and then used the money for her own purposes.⁹ According to her account, Ms. Glassman received this \$174,643.80 for her “care of Sidney Evans and administration of his affairs.” This “care of Sidney Evans,” she explained, referred to “the services that I performed for my father” such as running his household, taking him out, doing his grocery shopping, taking him to the doctor, or acting as a companion.¹⁰ Ms. Glassman conceded, however, that she had not been solely responsible for her father’s care. She testified that her father at all times had live-in aids and “there was someone there all the time.”¹¹ The aids prepared his dinner; they bathed and cared for his hygiene. Glassman never moved in with her father, though she did buy his food and provide companionship,¹² but credible testimony also established that other daughters, and not just Glassman, provided companionship and assistance to their father on a frequent and regular basis.¹³

Under the explicit language of Article 16, §7 of the Trust Agreement Ms. Glassman’s payment of \$174,643 to herself for caring for her father would appear to violate the settlors’ edict that “we direct that no child of ours receive compensation for the services such child renders as fiduciary under this agreement.” Glassman seeks to avoid this conclusion with various arguments. After conceding that “[t]here is no question that Article 16, Section 7 of the Sidney H. and Marcia Evans Living Trust prohibits Gail, as a daughter, from receiving trustee

8 See, Account at 20-38; 1/11/10 N.T. at 27-28 (Glassman). Counsel for Glassman stipulated that the ATM withdrawals totaled \$125,043.80 while the checks totaled \$49,600. 1/11/10 N.T. at 16 & 21 (Counsel to Glassman).

9 1/11/10 N.T. at 20-22; 27 (Glassman).

10 1/11/10 N.T. at 22 (Glassman).

11 1/11/10 N.T. at 23 (Glassman).

12 1/11/10 N.T. at 23-24 (Glassman).

13 1/11/10 N.T. at 99-100 (Schechter)(describing services she performed for her father such as grocery shopping and taking him to his doctors).

compensation,”¹⁴ she then attempts to characterize these payments for Sidney’s “care” as distributions that were permitted to beneficiaries under Article 10, sections 3 and 4 of the trust agreement.¹⁵ The problem with this argument, however, is that Glassman’s formally filed account sets forth a distinct listing for “distributions to beneficiaries” at pages 87 through 98 which state that \$48,000 was distributed to Gail Evans as a beneficiary. These distributions of \$48,000 to Gail as a beneficiary were undoubtedly permitted under the terms of the trust. But the account does not include the challenged \$174,643 to Gail for “care of Sidney” among these distributions. Instead, the \$174,643 is listed separately at pages 20 through 39 of the Account as compensation for “care of Sidney and administration of his affairs” and as such clearly flies in the face of the trust language explicitly forbidding such payments. See 1996 Evans Trust Agreement, Article 16, §7.

The separate listings in the formally filed account of Ms. Glassman’s compensation for “care of Sidney” and the distributions to her as beneficiary constitute a formal admission of this critical distinction between compensation for services as trustee and distributions to a beneficiary. In fact, Gail acknowledges as much *sub silentio* in her brief where she requests that she “should be directed to file an amended account that properly classifies the funds in question as principal distributions.”¹⁶ There is no need for an amended account. The account Ms. Glassman filed with the assistance of highly skilled counsel documents the distinctions between the distributions of \$48,000 and compensation of \$174,634 she received as trustee.

Ms. Glassman, however, seeks to avoid the clear implications of her account by raising another argument against the characterization of the \$174,634 in payments to her as

14 3/8/10 Gail Glassman Brief at 1.

compensation. She invokes two documents—Ex. F and Ex. R-2-- to support her claim her father intended that the \$174,643 at issue constituted either support distributions or reimbursements permitted under various provisions of the Trust document.¹⁷ Ms. Glassman argues that in December 2004, when Sidney presented her with the amendment naming her as co-trustee of the trust, she was surprised. Although she did not discuss the implications of this new role and believed she would merely continue to take care of Sidney, her father “knew that the demands on Gail’s time were clearly going to be different, and they discussed how her increased responsibilities would prevent her from pursuing her career.”¹⁸ According to Ms. Glassman, Sidney insisted that he would support her, and this is documented by Exhibit F which she characterizes as a written outline of Ms. Glassman’s support needs signed by Sidney.¹⁹ The first handwritten page states: “I authorize the dispersal of funds to Gail Evans to reimburse her time and counsel” and is signed Sidney Evans. The second page that is stapled to this statement lists various expenses for “condo mtg,” “health,” “car” “cable” totaling \$3942. Ex. F. There are, however, numerous problems with this proffered document. Ms. Glassman conceded that the agreement was in her handwriting. It is not dated. It is not witnessed nor notarized. Moreover, Ms. Glassman testified that this handwritten document was executed on the same date as the formally drafted December 24,2004 trust amendment that was witnessed and notarized by Sidney’s attorney.²⁰ It strains credulity that after going to so much trouble to have a trust

15 3/8/10 Gail Glassman Brief at 1.

16 3/8/10 Gail Glassman Brief at 9.

17 See, e.g., 3/8/10 Gail Glassman Brief at 1. This court agrees that the Trust Agreement, Article 10, sections 3 and 4, permit such distributions in unequal amounts to the beneficiaries. The \$174,643 at issue, however, did not constitute either distributions or reimbursements; those amounts were separately set forth in the Account.

18 3/8/10 Gail Glassman Brief at 2-3.

19 3/8/10 Gail Glassman Brief at 3.

20 1/11/10 N.T. at 47-50 (Glassman).

amendment drafted by an attorney to add a co-trustee, Sidney would have relied on a hand scribbled undated paper to assure his co-trustee adequate reimbursement.

This writing quite simply is too vague and inadequate to support the claim for \$174,643. In essence, Ms. Glassman is suggesting that it is an additional amendment to the trust agreement, yet it fails to meet the requirement for modifying a revocable trust agreement set forth in 20 Pa.C.S. § 7752(c), which provides:

(c) HOW TO REVOKE OR AMEND. – The settlor may revoke or amend a revocable trust only:

- (1) by substantial compliance with a method provided in the trust instrument; or
- (2) if the trust document does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by a later writing, other than a will or codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust instrument. 20 Pa.C.S. § 7752(c).

The procedure for amending the Sidney and Marcia Evans Trust Document is set forth in Article 4, section 1 (d) as follows:

d. Amend or Revoke the Trust

We shall have the absolute right to amend or revoke our trust, in whole or in part, at any time. Any amendment or revocation must be in writing, signed by both of us, and delivered to our Trustee.

This right to amend or revoke is personal to us and may not be exercised by a legal representative of either of us. **After the death of one of us, this agreement shall not be subject to amendment or revocation.**

1996 Evans Trust Agreement, Article 4, section 1 (d)(emphasis added).

By its express terms, therefore, the 1996 Evans Trust Agreement provides no means for amendment after the death of one of the settlors, in this case Marcia. In such a case, 20 Pa.C.S. § 7752(c)(2) would therefore apply: “if the trust instrument does not provide a method.” Under this provision, the trust agreement may be amended “by a later writing, other than a will or

codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust agreement.” 20 Pa.C.S. §7752(c)(2)(emphasis added). The note proffered as Ex. F makes no reference whatsoever to either the trust document or the trust assets. This contrasts to the formally executed, dated, and witnessed December 24, 2004 trust amendment that specifically references the November 5, 1996 trust document in naming Gail Evans Glassman co-trustee.

Likewise, the other document Ms. Glassman relies on to support her claim for the \$174,643.80—Exhibit R-2—cannot support this claim. According to Ms. Glassman, after “a year of support payments” authorized by Ex. F, “Sidney again approved the arrangement in writing” with Ex. R-2.²¹ Ex. R-2 consists of various names and numbers scribbled on a piece of paper with a circle around “ok Sidney H. Evans.” Ms. Glassman testified that this sheet “reaffirmed” the gifts that her father gave to her and his other relatives. More specifically, she stated that among the various numbers she had written “[s]ixty per year and plus last year expenses, car, cell” in response to which her father wrote “OK Sidney Evans.”²² If anything, this document is even more vague than the Ex. F Ms. Glassman proffered to support her \$174,643.80 claim. It also fails to make any specific reference to the trust agreement or any claims pursuant to it. Ms. Glassman, therefore, will be required to return the \$174,643.80 to the trust.

II. The Objectors Fail to Meet Their Burden of Proof in Challenging the \$25,070 Ms. Glassman Claimed as Reimbursement for Expenses Incurred on Behalf of Stanley Evans or for the \$20,428 Claimed as a Cash Distribution to Sidney Evans during the Period December 2004 to November 2007

Under the specific terms of the 1996 Evans Trust Agreement, the trustee “shall be

²¹ 3/8/10 Gail Glassman Brief at 3.

²² 1/11/10 N.T. at 70-71 (Glassman).

reimbursed for the reasonable costs and expenses incurred in connection with its fiduciary duties under this agreement.”²³ The account claims that \$25,070 was paid to Gail Glassman as reimbursement for expenses incurred on behalf of Sidney Evans for the period December 31, 2004 through February 21, 2008.²⁴ In addition, according to the account, Gail Glassman was paid \$20,428 as reimbursement for cash she distributed to her father from December 31, 2004 through November 2007.²⁵ When questioned about these expenditures, Ms. Glassman offered credible testimony to support her claim for \$25,070 as reimbursements for such expenses as house repairs, carpet cleaning, haircuts and family celebrations on her father’s behalf.²⁶ She also testified convincingly that she had distributed \$20,428 to her father as cash, because he liked having cash on him and he used it to take his girlfriend out for an evening.²⁷ Although the amended objections challenged these particular payments to Ms. Glassman, the objectors do not address them in their post-hearing brief. Instead, they direct their challenge clearly on the \$174,643.80.²⁸ Similarly, the objectors raised no arguments and cited no evidence concerning the allegedly excessive attorney fees incurred, inter alia, in preparing the account.²⁹ These claims, therefore, will be deemed waived.

The objectors also challenged expenditures by Ms. Glassman following the death of her father on March 31, 2008 for withdrawals of \$3500 in cash from April 1 to April 8, 2008 and also for a \$194.95 purchase at Costco on April 8, 2008. When specifically questioned about

23 1996 Evans Trust Agreement, Article 16, section 7.

24 See Account at 65-69; 1/11/10 N.T. at 31 (Glassman).

25 See Account at 71-75; 1/11/10 N.T. at 36 (Glassman).

26 1/11/10 N.T. at 32-33 (Glassman).

27 1/11/10 N.T. at 36-37.

28 See, e.g., 2/5/10 Objectors’ Brief at 7; 3/17/10 Objectors’ Brief at 1-2.

29 1/11/10 N.T. at 40-41 (Glassman).

these expenditures during the hearing, Ms. Glassman could offer no explanation.³⁰ She will therefore be required to return this \$3,694.95 to the trust.

According to the accountant \$30,000 in Pennsylvania Transfer Inheritance Tax and Pennsylvania Estate tax was paid on March 5, 2009. A. James Millar, Esquire, 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 shall be subject to this claim.

The account shows a balance of principal before distribution of \$ 746,383.77 and a balance of income before distribution of \$ 85,893.24 for a total of \$ 832,277.01. This sum, composed as stated in the account, plus the surcharge of \$174,643.80 and \$3694.95 directed against the accountant, and any income received since the filing thereof, subject to distributions already properly made, and subject to any additional transfer inheritance tax as may be due and assessed, is awarded as set forth in the Proposed Statement of Distribution as follows:

Income

Proposed Distributees

Amount/Proportion

Linda Schecter	One-fifth
Gail Evans	One-fifth
Barbra Lefkoe	One-fifth
Iris Borek	One-fifth
Andrea de Botten	One-fifth

Principal

Linda Schecter	One-fifth
Gail Evans	One-fifth
Barbara Lefkoe	One-fifth
Iris Borek	One-fifth

³⁰ 1/11/10 N.T. at 38-39; Ex. B (PNC Bank Statement).

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

A schedule of distribution, containing all certifications required by Phila. O.C. Div. Rule 6.11.A(2) and, in conformity with this adjudication, shall be filed with the Clerk within ninety (90) days of absolute confirmation of the account.

AND NOW, this _____ day of MAY 2010, the account is confirmed absolutely.

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 7.1A and Pa. O.C. Rule 7.1 as amended, and Pa.R.A.P. 902 and 903.

John W. Herron, J.