

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

#7 Sept. 98

O. C. No. 1683 of 1996

In Re: Trust Estate of HARRY SOBELL, Settlor

**Sur account entitled: First and Interim Accounting of Trustee,
Barton Post, Esquire**

Living Trust Agreement 5/26/92

Before PAWELEC, J.

This account was called for audit October 28, 1998

Counsel appeared as follows:

RICHARD M. GILLIS, JR., ESQ. - for the Accountant

**MARTIN I. KLEINMAN, ESQ. - for Marlyn Kine,
Objectant**

This trust arises under "Living Trust Agreement" of Harry Sobell, executed May 26, 1992, whereby the grantor transferred certain assets in trust. Relevant portions of the Trust Agreement read as follows,

"2.01 PAYMENTS DURING MY LIFETIME

You shall make such payments of income or principal to me as I may from time to time request; in the absence of a request from me, you, at convenient intervals, shall pay over to, or use and apply for comfort, maintenance, support and welfare of me, such part of the principal and income of the trust estate as you shall in your discretion determine. Any income not so paid or used shall be added to the principal.

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4.01 BALANCE OF THE TRUST ESTATE

Upon my death, the balance of the trust estate remaining after any payments made in accordance with Section 3.01 of this Agreement ('the balance of the trust estate') shall be held and disposed of as follows:

A. TO MY ESTATE

I give, devise and bequeath my residue trust estate to my Trustee hereinafter named, IN TRUST, to hold, manage, invest and reinvest, to collect the income therefrom and, after deducting the expenses thereof, to distribute the net income and the principal as thereof as follows:

(1) During the life of my sister, DEANE SOBELL, POST, in my Trustee's sole discretion, to accumulate or apply so much or all of the income therefrom and the principal thereof as my Trustee or his successors may deem advisable for the health, maintenance and comfort of my sister, DEANE SOBELL POST.

(2) During the life of my cousin, MARLYN KINE, I direct my Trustee to set aside a sum of money for the maintenance of MARLYN KINE. I direct that the amount shall be at the sole discretion of my Trustee but, as guidance, I state that I have been giving MARLYN approximately \$600.00 monthly, paying her real estate taxes and some major repairs, and giving her an additional \$400.00 on July 1, and January 1 of each year. There should be a limit of \$1,000.00 per year for the miscellaneous expenses, taxes and repairs. I direct that my Trustee put aside a sum of money for this purpose, that the amount thereof shall be at his sole discretion and that my Trustee shall hold, manage, invest and collect the income after deducting expenses and then

distribute as my Trustee deems advisable. If MARLYN should predecease me or there should be any remaining funds in her trust at the time of her death, then her share or the remainder of her share shall be distributed pursuant to the other provisions of this Will to my sister, DEANE SOBELL POST, if she should survive or to my designated nieces, nephews, great-nieces and great-nephews, as the case may be.

(3) Upon the death of DEANE SOBELL POST or upon my death in the event she should predecease me, my Trustee shall divide the remaining balance of principal and any undistributed income into equal shares for my nephews, MARK SOBELL, LORRY POST and BARTON L. POST and my nieces, MARSHA HARMAN and ETHEL SOBELL KATZ, and the shares of my nieces and nephews should be paid over to them. Likewise, upon the death of MARLYN KINE, if she should survive me, the remaining balance of principal and income shall be distributed equally and paid over to the aforementioned nieces and nephews.”

Harry Sobell, the grantor, died on July 11, 1996, survived by his sister, Deane Sobell Post, by his cousin, Marlyn Kine, and, by his aforementioned nieces and nephews, namely Mark Sobell, Lorry Post, Barton L. Post, Marsha Harman and Ethel Sobell Katz.

By Decree of this Court, dated February 25, 1998, Barton L. Post was ordered to file an account of his administration of the instant trust. On July 29, 1998, Mr. Post filed a “First And Interim Accounting”.

As filed, the Accounting includes principal transactions from May 26, 1992 to May 7, 1998. Principal receipts total \$1,379,258.21. Principal disbursements include: \$20,662.00 in trustee’s commissions paid

to Barton L. Post; \$222,461.65 in payments for nursing care of the grantor; and, \$223,136.69 in other payments for the benefit of the grantor. Principal distributions include: \$28,690.00 in payments to Marlyn Kine, in the period June 30, 1992 to December 4, 1995; transfer of securities, valued at \$325,417.75, to an "Irrevocable Trust" for the benefit of Deane Sobell Post and members of the grantor's family other than Marlyn Kine, on January 17, 1995; and, \$380,379.76 in payments to members of the grantor's family, including Barton L. Post but excluding Deane Sobell Post and Marlyn Kine, in the period June 25, 1992 to November 1, 1995. The Accounting shows a balance of principal, after all disbursements and distributions, of \$101,551.02.

As filed, the Accounting also includes income transactions from May 26, 1992 to November of 1996. Income receipts total \$325,631.63. There are no disbursements or distributions. The Accounting thus shows a balance of income of \$325,631.63.

Marlyn Kine, cousin of the grantor and a beneficiary of the instant trust, has filed an Objection in which she asserts that the payment of \$20,662.00 in trustee's commissions is excessive.

Since the death of his uncle on July 11, 1996, the trustee has not set aside a sum of money for the maintenance of Marlyn Kine, nor has he made any payments to Ms. Kine. In her Objections and briefs, Ms. Kine asserts that the trustee has favored his mother and himself: by failing to set aside a sum of money for the maintenance of Ms. Kine, and, by failing

to make any payments to her. Ms. Kine charges that said failures constitute a violation of the trustee's duty of impartiality, and, an abuse of the discretion which has been conferred upon the trustee. In the alternative, Ms. Kine alleges that the trustee has not made inquiries as to her needs or assets, and, argues that the failure to inquire constitutes a failure to exercise the discretion which is conferred upon the trustee. Ms. Kine asks that the trustee be directed to set up a separate trust fund for her benefit; that the trustee be directed to pay her sums which she is due from the trust, including interest thereon; and, that Barton L. Post be removed as trustee of the trust.

Acting as attorney-in-fact for Harry Sobell, under a power of attorney dated September 15, 1986, Barton L. Post executed an "Irrevocable Trust" on January 11, 1995. Said "Irrevocable Trust" is for the benefit of Deane Sobell Post and members of the family of Harry Sobell other than Marlyn Kine. Acting as trustee of the instant trust, on January 17, 1995, Mr. Post transferred securities valued at \$325,417.75 into said "Irrevocable Trust". In her Objections and briefs, Marlyn Kine notes that the power of attorney of September 15, 1986 contains an express power to make gifts, but, contains no provision authorizing the creation of trusts. Arguing that the attorney-in-fact had no power to create the "Irrevocable Trust", Ms. Kine asks that the trustee be surcharged in the amount of \$325,417.75.

In her Objections, Marlyn Kine asks for “additional information” as to the \$380,379.76 in payments to members of the grantor’s family, excluding Deane Sobell Post and herself, in the period June 25, 1992 to November 1, 1995.

Barton L. Post testified, on October 28, 1998, that the sum of \$20,662.00 in trustee’s commissions represented compensation for a myriad of services which he had provided to his Uncle, Dr. Harry Sobell, from the mid-1980’s until Dr. Sobell’s death on July 11, 1996. Counsel for Mr. Post suggests that the amount of trustee’s commissions must be judged in the context of the lifelong relationship between Mr. Post and his Uncle.

Barton L. Post testified, on October 28, 1998, that he and his brother lived with their grandmother and Uncle, Dr. Sobell, from the time of their parents’ divorce until Mr. Post was thirteen years of age. Mr. Post described his Uncle as the “Father” of this family unit. Mr. Post stated that he was an attorney whose firm, “Post & Schell”, was primarily engaged in the defense of doctors and hospitals against malpractice claims. Mr. Post related how his Uncle retired from the practice of medicine and worked for the firm of “Post & Schell”, on a part-time basis, from the mid-1970’s until the mid-1980’s.

Barton L. Post testified that his Uncle ceased working for the firm of “Post & Schell” in the mid-1980’s, and, resided in a Center City Philadelphia apartment. As his Uncle suffered increasing physical

disabilities from Parkinson's Disease, Mr. Post visited the apartment two or three times a week, and, transported his Uncle to the store, to the bank, and, to doctors' offices. Mr. Post stated that he advised and assisted his Uncle in the management of the Uncle's financial affairs. His Uncle was constantly making gifts, and, Mr. Post was called upon to give advice as to when gifts should be made. Mr. Post related that he checked the entries in his Uncle's bank accounts for accuracy, and, arranged to have his Uncle's income tax returns prepared.

Barton L. Post testified that he became more actively involved in the affairs of his Uncle in the early-1990s, when a bank manager complained that the Uncle had become a problem for the bank's staff, and, Mr. Post observed that his Uncle could no longer fill out bank forms.

Barton L. Post testified that his Uncle lived with Mr. Post, for a time, until the Uncle's falls made this arrangement impossible. Mr. Post then investigated at least six places in an effort to find a residence for his Uncle, and, the Uncle ultimately took up residence in the Philadelphia Geriatric Center (sometimes called "York House"). Mr. Post stated that he spent many hours in arranging twenty-four hour nursing service for his Uncle; in visiting his Uncle two to three times a week to insure that the nurses were performing their duties; in paying his Uncle's bills; and, in caring for his Uncle's assets.

On cross-examination by counsel for the Objectant, on October 28, 1998, Barton L. Post gave the following responses to questions about his compensation,

“Q. By the way, before the trust was in existence, you provided a lot of services for your uncle, I presume? I think you testified to that.

A. Yes.

Q. Did he ever pay you for any of these services?

A. No.

Q. Did you ever discuss payment for those services with him?

A. Oh, yes.

Q. That he would pay you?

A. The conversation in total was that when he worked for me --

Q. Well, I’m not talking about that?

A. Well, it’s all in context.

Q. Well, I’m talking about the services you provided. I’m not talking about him working as a physician for your law firm.

A. When services were to be provided, payment was to be made.

Q. And you had that discussion with him?

A. Oh, yes. He was very specific along those lines.

Q. But he never paid you anything?

A. I didn't ask, and I never took any payment until I was sure that there was going to be enough money to cover the needs of my uncle, and then my mother, which was his wish.

Q. Well, these services that you provided, were they as trustee, or for someone whom you felt was a surrogate father to you? You testified that he was sort of a surrogate father to you; that he had taken you in when your parents died.

THE COURT: 'Divorced,' I think he said.

BY MR. KLEINMAN:

Q. Divorced. I'm sorry.

A. There is no doubt that part of this whole scenario is he was a surrogate father, more than a father, but there was also no doubt there was an understanding between us that when he worked for me, I paid him, and when I worked for him, that he knew I was going to take some sort of fee. He also knew that if there wasn't enough money to cover him and his sister that I wouldn't take a fee. He knew that." NT 10-28-98, Pages 58 to 60

Barton L. Post testified that the Power of Attorney of September 15, 1986 was witnessed by Joseph L. Higgins, Esquire, of the firm of "Post & Schell", and, that said Power was executed in Mr. Higgins' office. Mr. Post stated his belief that said Power authorized him to create trusts and make outright gifts on behalf of his Uncle. Mr. Post recounted that he acted under said Power: in making \$28,690.00 in payments to Marlyn Kine, in the period June 30, 1992 to December 4, 1995; in creating and funding the aforementioned "Irrevocable Trust" of securities valued at

\$325,417.75, in January of 1995; and, in making \$380,379.76 in payments to himself and other members of his Uncle's family, other than his Mother and Marlyn Kine, in the period June 25, 1992 to November 1, 1995. According to Mr. Post, said transactions were intended to avoid payment of federal estate taxes on the death of his Uncle without jeopardizing the comfort of his Uncle and his mother. Mr. Post testified that his Uncle wanted gifts to be made, and, that Mr. Post did not make gifts until he was certain that there would be enough money left to take care of his Uncle and Mother.

Barton L. Post testified that the "Irrevocable Trust" of January 11, 1995 was drafted by Barbara Delvano, Esquire, of the firm of "Post & Schell". Mr. Post stated that Ms. Delvano suggested the creation of a separate trust for the benefit of his Mother; that Mr. Post, not Ms. Delvano, discussed the matter with his Uncle; and, that his Uncle consented to the creation of this trust. The "Irrevocable Trust" was signed by Mr. Post, in his Uncle's room, in the Philadelphia Geriatric Center or in a hospital. It was signed in the presence of his Uncle, a Doctor, a Nurse, and, a Notary Public who was not of the firm of "Post & Schell". Mr. Post admitted that Parkinson's Disease had caused his Uncle to suffer severe physical handicaps, and, that his Uncle was physically capable of doing very little as of 1994. Nevertheless, Mr. Post insisted that his Uncle knew what was transpiring on January 11, 1995, and, that his Uncle was in good mental condition at that time. On cross-examination by counsel for Marlyn Kine, Mr. Post gave the following recount of the events of January 11, 1995,

“Q. January 11th, 1995, specifically the day that he signed the irrevocable trust.

A. At that time, there might have been some words. We had a little computer just for spelling out words. Most of the time, the way we communicated was something like thumbs up, thumbs down, or blinking the eyes, moving feet. It was physical communication.

Q. Are you testifying in this court that you established an irrevocable trust for an individual who communicated to you by thumbs, up, thumbs down, and blinking his eyes? Is that your testimony?

A. I’m testifying in this case that there is no question whatsoever that I and everybody else surrounding Harry Sobell could communicate with him, and could get answers to questions, and could get him to respond. And to satisfy myself, a couple of times I had conversations with the doctors, and the doctors tested him, and they would say the same thing.” NT 10-28-98 at Page 46

When asked how his Uncle acknowledged the execution of the “Irrevocable Trust”, Mr. Post replied,

“A. My recollection is that I asked, ‘Has this been explained to you, and do you understand it?’ And he acknowledged by gestures.” NT 10-28-98 at Page 55

During cross-examination, on October 28, 1998, Barton L. Post identified Exhibit “O-1” as a copy of a letter from an expert in Parkinsonism to his Uncle’s attending physician at Philadelphia Geriatric Center. Exhibit “O-1” reads, in relevant part, as follows,

“Your patient, Dr. Harry Sobell, was seen on March 22, 1993, at the Graduate Hospital Movement Disorders Center. He is a right-handed physician, who was brought by his nephew for a second opinion regarding speech, gait, and cognitive problems. Dr. Sobell was apparently alert and active until four to five years ago when his nephew first noted the his mildly bent posture and mild memory loss. These problems have gradually worsened, so that by 1991, Dr. Sobell had marked difficulty with gait, frequent falls, memory loss, and had developed significant dysarthria. He has been a resident at the Philadelphia Geriatric Center for the past year because of the progressive disability.

*** * * * ***

Mental status exam is remarkable for cognitive slowing, paucity of speech, and marked motor impersistence. He was able to state his name, correctly name his present location, and state the date correctly. However, he is unable to recall his present living address.”

Barton L. Post testified before Administrative Judge Tucker, on March 27, 1997, in support of his Preliminary Objections to a Petition to compel him to file an account of his administration of the instant trust. The transcript of the hearing sur Preliminary Objections was marked as Exhibit “O-2” and received into evidence at the hearing on October 28, 1998.

Mark Menkevich is an employee of the Voter Registration Division of the Philadelphia City Commissioners. In response to a subpoena served by counsel for Marlyn Kine, Mr. Menkevich produced the voting records of Dr. Harry Sobell before Administrative Judge Tucker on March 27, 1997. Mr. Menkevich testified that Dr. Sobell had last voted in the

election of November of 1991, at which time he voted from an Apartment in "Fairmount House" at 2601 Parkway. Mr. Menkevich stated that Dr. Sobell had never missed an election through November of 1991. Mr. Menkevich noted that the Voter Registration Records include a Post Office Change of Address Form. Said form is handwritten and dated May 1, 1992. Said form notes a change of Dr. Sobell's address from an Apartment at 2601 Pennsylvania Avenue to an Apartment at 5325 Old York Road.

On March 27, 1997, Barton L. Post testified that he had continuously resided in Longport, New Jersey, for a period of thirteen years. Mr. Post stated that he was continuously involved in the practice of law from 1955 until 1991. He was semi-retired from the firm of "Post & Schell" in 1985. He fully retired from the firm in 1991. Mr. Post related that his Uncle, Dr. Harry Sobell, had actually been an employee of the firm of "Post & Schell". As an employee of the firm, Dr. Sobell had received a Form "W-2".

On March 27, 1997, Barton L. Post testified that his Uncle and his Mother had lived together, on and off, since 1945. They had lived together in their parents' house in West Philadelphia. They had lived together in the Uncle's Apartment at 2601 Parkway. Mr. Post stated that his Mother had cooked and cleaned for his Uncle, her Brother. Mr. Post related that his Mother had moved into a Retirement Home, in Cape May, New Jersey, by the beginning of 1992. Mr. Post testified that his Mother was ninety-five (95) years of age on her birthday on

March 21, 1997.

Barton L. Post testified that his Uncle was a physician who knew that he had Parkinsonism, and, who knew that he would become disabled. According to Mr. Post, he was asked to undertake the management of his Uncle's financial affairs in the mid-1980's, when the first symptoms of Parkinson's Disease appeared, but, Mr. Post did not do so until the beginning of 1992, when he became convinced that his Uncle could no longer take care of himself. Mr. Post related conversations between himself and his Uncle wherein he promised to continue to take care of his Uncle's affairs after his Uncle became disabled. According to Mr. Post, it was understood that his Uncle would move to New Jersey to be near Mr. Post and his Brother, and, that his Uncle would ultimately enter a Nursing Home when Mr. Post could no longer care for him.

Barton L. Post testified that his Uncle lived with Mr. Post and his late wife, in Longport, New Jersey, for a period of two months at the beginning of 1992. Because his Uncle would fall and hurt himself, Mr. Post and his late wife searched for a facility which could meet his Uncle's needs. Finding no such facility in South Jersey, Mr. Post arranged for his Uncle to take up residence in York House, in Philadelphia, and, for his Uncle to have nursing care on a twenty-four hour basis. Mr. Post stated that his Uncle's physical disability was complete, in that his Uncle could do nothing for himself, by 1994.

On cross-examination by counsel for Marlyn Kine, on March 27, 1997, Barton L. Post gave the following recount of the drafting and execution of the "Living Trust Agreement" which is the subject of these proceedings, to wit,

"Q. By the way, who drafted the Living Trust?"

A. Who drafted it? The honest answer is, he did.

Q. He drafted it?"

A. I know nothing about trust work and whatever. And we have one person in our firm by the name of Joe Higgins and then a Barbara Delvano after Joe Higgins.

He was working there. He got to know these people pretty well. He was preoccupied with setting his affairs in order. And he would read a lot of stuff and he drafted it. I filed it for him.

Q. I notice that the Living Trust which was dated in, I believe, May of '92, certainly was executed by yourself as Trustee, was notarized in Philadelphia, so I assume the document was executed in Philadelphia?"

A. As I recall, as of the time that document was finalized, he was already at the Philadelphia Geriatric Center, which is Philadelphia, obviously. I remember it was prepared. All of the ground work was done before he went in there.

Q. Do you know a Rita Lefer (ph), Notary?"

A. Yes.

Q. Does she work for Post and Schell?"

A. Yes, sir.

Q. To the best of your recollection, was the document executed in the Old York House or was the document executed at Post and Schell?

A. Well, I can't believe he would have gone down to Post and Schell.

Q. I'm not asking you for speculation. I'm asking whether you know or don't know.

A. I'm sorry. I'm trying to remember. I was at the Old York House at the Philadelphia Geriatric Center.

Q. The Notary went there?

A. I doubt that very much.

Q. She notarized the document that she didn't see the participant execute?

A. The answer is obvious.

Q. Obviously?

A. She notarized on my telling her that he had signed it. And she knew his signature very, very well, indeed. She worked with Uncle Harry for over ten years."

NT 3-27-97 at Page 38-39

On March 27, 1997, Marlyn Kine testified that she visited Dr. Harry Sobell while he was in York House, and, that she spoke to him by telephone while he lived there. To rebut said testimony, Barton L. Post gave the following recount of his Uncle's speech problems in response to questioning by his own counsel and counsel for Marilyn Kine, to wit,

"REDIRECT EXAMINATION

BY MR.GILLIS:

Q. Mr. Post, you heard the testimony of Ms. Kine?

A. Yes, I did, sir.

Q. Now, did your uncle have a problem with his speech after the end of '92.

A. He had a problem with his speech before that, but to answer your question, yes.

Q. What was the problem? What were his limitations?

A. His ability to speak was continually decreasing from, oh, I would say, '90 on to the point of the end of '92, he couldn't speak at all. And ...

Q. She mentioned that electronic device. Could you elaborate on that?

A. Yes. The only way I could communicate with him, I got a little computer-type device. When I would ask him a question, he would push the buttons on the computer, and they would answer, basically, yes/no to my questions.

Q. Did he have any vocal ability, then, at that time?

A. Just mumbling." NT, 3-27-97 at Page 48-49

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RECROSS EXAMINATION

BY MR. KLEINMAN:

Q. In the period of time of 1990 through the end of '92, could Dr. Sobell talk on the telephone at that point in time?

A. Certainly in '90 and '91. When you get into '92, it is really a question of what you mean by talking. He could say his name. But, really, he couldn't have a conversation." NT, 3-37-97 at Page 50

Mr. Post insisted that Marlyn Kine did not visit his Uncle, in York House, more than one or two times.

Marlyn Kine testified, on October 28, 1998, that she was born in the year in which Dr. Harry Sobell graduated from Medical School, that is, in 1930. Ms. Kine was a cousin of Harry Sobell. Her father was Harry's uncle and cousin. Ms. Kine stated that her Father was seven years older than Harry, and, that her Father was Harry's dentist until the 1980s. According to Ms. Kine, her parents helped Harry when he was a child, and, helped him through medical school. Ms. Kine related how her parents lived near Harry and his Mother in the vicinity of 46th and Market Streets. Ms. Kine testified that Harry frequently attended family dinners at her parents' house. Ms. Kine stated that she had many telephone conversations with Harry, and, that such conversations continued to take place even after Harry moved into the Philadelphia Geriatric Center in March of 1992.

Marlyn Kine testified that Dr. Harry Sobell lived in three different locations while he was a resident of the Philadelphia Geriatric Center. At first, Harry lived in a small Apartment in the "York House". When he could no longer use the elevator, he moved to Apartment No. 231. Later, when he was sicker, he moved into the "Weiss Building" which was like a hospital unit.

Marlyn Kine testified that she, her sister and her nephew visited Harry Sobell, in the Philadelphia Geriatric Center, in the summer of 1993. On this visit, Harry used a small computer to spell out the words, "I love you". Ms. Kine related that Harry was very sick and residing in the "Weiss Building" when the "Irrevocable Trust" was signed on January 11, 1995. By January of 1995, according to Ms. Kine, Harry could only mumble on the telephone, and, had not been speaking for some time. Ms. Kine believed that his Nurses could communicate with Harry in January of 1995, but, she did not know if he could still use his computer at that time.

Marlyn Kine testified that Dr. Harry Sobell began making gifts to her in the 1970s. Ms. Kine described how Harry would deposit the sum of \$600.00, per month, to her checking or savings account in First Pennsylvania Bank. In addition, Harry gave her \$400.00 in January and June of each year, and, money for certain family needs. According to Ms. Kine, Harry was very methodical in making deposits into her bank accounts. She relied upon his making the monthly deposits, and, she knew that \$600.00 would be deposited each month. In the words of Marlyn Kine,

"He told me they would always continue, and he said, 'Don't worry. I'll always cover you. I will always take care of you.' He told my parents. He told my sister. He told my brother." NT. 10-28-98 at Page 90

Ms. Kine testified that Harry deposited money into her bank accounts in January, February and March of 1992. After Harry entered York House in May of 1992, Ms. Kine would receive checks which had been signed by

Barton L. Post. Ms. Kine stated that Mr. Post did not send her the second \$400.00 which Harry had given her in June of each year, and, that she received no money after December of 1995.

Marlyn Kine testified that Harry Sobell gave her a great deal of money to use in purchasing a house on Bergen Street in 1983. Said house was purchased with the proceeds of sale of her parents' house and Harry's gift. Ms. Kine related that her Father was then injured and could not walk up and down steps, and, that her Mother was then a heart patient with Parkinson's Disease. Ms. Kine described how Harry gave the check to her sister to bring to settlement, and, how an attorney from "Post & Schell" attended both settlements. In describing other gifts over the years, Ms. Kine said,

"A. Yes, he bought me a refrigerator in '83, a washer and a dryer, and about in '87 a dishwasher, and whenever we had any problems, He said, 'Don't worry. I will take care of it.' And he was very straight, extremely reliable, very dependable, a wonderful man." NT. 10-28-98 at Page 96

Marlyn Kine testified before Administrative Judge Tucker, on March 27, 1997, at the hearing sur Mr. Post's Preliminary Objections.

On March 27, 1997, Marlyn Post testified that she and Dr. Harry Sobell were "Double Cousins" because their grandparents had been first cousins. Ms. Kine related that she referred to Dr. Sobell as "Uncle Harry" until she was in her 40s or 50s. She stated that Uncle Harry did not marry

and did not have children. Ms. Kine described a very close relationship between Uncle Harry and the members of her family. In her words,

“He was wonderful to my father. They were great to each other, but he kept my father in a dental office and made him feel that he was important, that he had everything. Everybody loved him. We owe him everything, really. We owe him everything.” NT 3-21-97 at Page 43

On March 27, 1997, Marlyn Kine was asked about her contacts with “Uncle Harry” in the period 1990 to his death on July 11, 1996. Ms. Kine testified that they frequently spoke on the telephone, but, that she did not see Uncle Harry much because she was taking care of her parents. Her father was going on age 94; had lost a leg; and, was in a Nursing Home. Her mother was going on age 91, and, Ms. Kine cared for her at home. According to Ms. Kine, she worried about Uncle Harry and he worried about her parents. Ms. Kine stated that she spoke to Uncle Harry, on the telephone, after he entered York House, and, that she visited him in York House. She related that she broke down and cried on visiting Uncle Harry in York House.

Counsel for Mr. Post engaged in the following cross-examination of Marlyn Kine on October 28, 1998,

“CROSS-EXAMINATION

BY MR.GILLIS:

Q. Ms. Kine, isn't it a fact that Dr. Sobell was physically unable to speak after the end of 1992?

A. He had some slurring of speech. But when he entered the York House, he could still speak. And he had speech therapy and had -- I think we were still speaking with him in '93. He sort of has a computer.

Q. He had an electronic device, did he not, that communicated?

A. Yes.

THE COURT: One at a time.

THE WITNESS: I spoke to him. And then the aid/companion would say he nodded or he smiled. We weren't discussing serious things.

Q. How could you have a telephone conversation with someone who can't speak?

A. Because I told him I loved him, and he didn't lose all sound. He said various things and he motioned. And he had the same companion for a long time; I think, something like, three years. She understood him very well. So did some of the others." NT 3-27-97 at Page 47-48

On October 28, 1998, Ethel Kine testified that she was a sister of Marlyn Kine and a cousin of Dr. Harry Sobell. Ethel stated that she had always consulted Harry about stocks and family matters. Harry was Ethel's doctor until Ethel got married. Ethel related a conversation between her parents and Harry, at a family dinner, wherein her parents asked Harry to provide for Marlyn for her lifetime, and, Harry agreed that he would do so. Ethel testified that Harry told her that he was putting money in Marlyn's

accounts, but, that Harry did not discuss amounts with Ethel. In the words of Ethel,

“And it was well known in my family -- my brother, Ben, who has passed away, and my sister-in-law, Stella, knew about it, and other people. In fact, since Harry passed away, my sister-in-law has asked if Barton was providing any money for Marlyn. I said, ‘Not that I know of.’”

NT 10-28-98 at Page 101

Because the remaining balances of principal and income are more than sufficient to set aside a sum of money for the maintenance of Marlyn Kine, this Court need not discuss her Objection to the trustee’s commissions.

Because the remaining balances of principal and income are more than sufficient to set aside a sum of money for the maintenance of Marlyn Kine, this Court need not discuss the requested surcharge arising out of the creation and funding of the “Irrevocable Trust” in January of 1995, or, the request for “additional information” as to the \$380,379.76 in payments to Barton L. Post and other members of the grantor’s family, excluding Deane Sobell Post and Marlyn Kine, in the period June 25, 1992 to November 1, 1995. However, said transactions will be considered insofar as they relate to the allegations of abuse of discretion or failure to exercise discretion.

While being questioned by his own counsel, in direct and re-direct examination before this Court, Barton L. Post gave no reason for his

failure to make any payments to Marlyn Kine after the death of his Uncle. In his “Answer To Objections” and brief, Mr. Post argues that he was not required to make any payments to Ms. Kine: because he had discretion to use all of the income and principal of the trust for the health, maintenance and comfort of his Mother; and, because the “Living Trust Agreement” does not require that an exact sum of money be paid to Ms. Kine.

A reading of Article 4.01 of the Trust Agreement does not support the argument that the Trustee had discretion to use all of the income and principal for the benefit of the grantor’s sister, Deane Sobell Post, to the exclusion of his cousin, Marlyn Kine. In Section 4.01 A. (2), the grantor expressly directed his Trustee, “... to set aside a sum of money for the maintenance of MARLYN KINE.” In the same Section, the grantor expressly provides that,

“If MARLYN should predecease me or there should be any remaining funds in her trust at the time of her death, then her share or the remainder of her share shall be distributed pursuant to the other provisions of this Will to my sister, DEANE SOBELL POST, if she should survive or to my designated nieces, nephews, great-nieces and great-nephews, as the case may be.” (emphasis, by underlining, supplied)

In Section 4.01 A. (3), the grantor makes express provisions for disposition of the remaining balances of principal and income: on the death of Deane Sobell Post, and, on the death of Marlyn Kine. Read as a whole, Article 4.01 of the Trust Agreement expresses the clear intent of the grantor that a separate fund must be established for the benefit of Marlyn Kine. If the

provisions for the benefit of the grantor's sister and cousin conflict and cannot be construed together, the conflict must be resolved by application of the canon of construction that, "....if two paragraphs are conflicting and cannot be construed together, the latter prevails:" Richley Estate, 394 Pa. 188 (1958). Since the provisions for the cousin follow those for the sister, those for the benefit of the cousin must prevail.

Section 4.01 A. (2) of the Trust Agreement expresses the clear intent of the grantor that his trustee should continue the payments which the grantor had been making to Marlyn Kine. Being a physician, and, knowing that he would eventually become completely disabled by Parkinson's Disease, the grantor became preoccupied with setting his affairs in order, and, personally drafted the Trust Agreement in question. The grantor personally defined the word "maintenance" to mean: monthly payments of \$600.00; additional payments of \$400.00 on January 1 and July 1 of each year; and, an additional sum not in excess of \$1,000.00, per year, for miscellaneous expenses such as real estate taxes and some major repairs. The grantor thus directed his Trustee to pay Marlyn Kine not less than \$8,000.00 and not more than \$9,000.00 in each year after the death of the grantor. Such payments are to be made from a sum of money which is to be set aside by the Trustee for this purpose. The Trustee is only given discretion to determine the amount of money which will be necessary to fund the payments which are mandated by the grantor. In the matter of the Trustee's discretion, it has been held that,

**“ While a court cannot control the discretion conferred upon a trustee it may compel him to exercise it in good faith and within the bounds of a reasonable judgment, and it may also interpose where he fails to use his judgment at all because of a mistaken view, either of fact or law, as to the extent of his powers or duties:”
Brown’s Appeal, 345 Pa. 373 (1942) (citations omitted)**

In the lifetime of the grantor, only he could request that payments be made from the trust. At some point in time, after the execution of the Trust Agreement on May 26, 1992 and before his death on July 11, 1996, the inexorable progress of Parkinson’s Disease rendered the grantor incapable of communicating by intelligible speech. Acting as attorney-in-fact for the grantor, the Trustee paid hundreds of thousand of dollars, outright or in trust, to his mother, himself and other members of the Trustee’s family. And yet, since the death of the grantor, the Trustee has not seen fit to make any payments to Marlyn Kine. Having considered all of the evidence in this matter, this Court holds that the Trustee has abused his discretion by failing to set aside a sum of money for the maintenance of Ms. Kine, and, that the Trustee is required to continue the payments which the grantor was making to Ms. Kine at the time of the execution of the Trust Agreement, to wit: monthly payments of \$600.00; additional payments of \$400.00 on January 1 and July 1 of each year; and, an additional sum not in excess of \$1,000.00, per year, for miscellaneous expenses such as real estate taxes and some major repairs.

The Trustee must now set aside a sum of money sufficient to fund the payments which are mandated by the grantor, and, make such payments pursuant to Section 4.01 A. (2) of the Trust Agreement.

All Objections having been addressed, the “First and Interim Accounting” shows a balance of principal, after distributions in the lifetime of the grantor, of \$ 101,551.02 which, composed as indicated in the account, is awarded to Barton L. Post, Trustee, for the uses and purposes of the continuing trust for the benefit of Marlyn Kine under Section 4.01 A. (2) of the “Living Trust Agreement” of Harry Sobell dated May 26, 1992.

The accounting shows a balance of income, after distributions in the lifetime of the grantor, of \$ 325,631.63 of which a sum sufficient to fund payments to Marlyn Kine under Section 4.01 A. (2) of the Trust Agreement is awarded to Barton L. Post, Trustee, for the uses and purposes of the continuing trust for the benefit of Marlyn Kine under Section 4.01 A. (2) of the “Living Trust Agreement” of Harry Sobell dated May 26, 1992. The then remaining balance of income is awarded as follows: \$24,000.00 to Marlyn Kine, being the minimum distribution mandated by the grantor for the three year period ending July 11, 1999; \$3,600.00 to Marlyn Kine, being the sum of monthly payments due for the months of July through December of 1999; and, the balance to Barton L. Post, Trustee, for the uses and purposes of the continuing trust for the benefit of Deane Sobell Post under Section 4.01 A. (1) of the “Living Trust Agreement” of Harry Sobell dated May 26, 1992.

The above awards of principal and income are made subject to all payments heretofore properly made on account of distribution.

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

Accountant shall file a schedule of distribution within ninety (90) days of absolute confirmation of the account, said schedule to contain all certifications required by Rule 6.11.A.

The certificate of the Official Examiner of the examination of assets awarded in further trust shall be submitted, and when approved by the Auditing Judge, will be annexed.

AND NOW, _____, unless exceptions are filed to this adjudication within twenty (20) days, the “First And Interim Accounting”, as modified by this adjudication, is confirmed absolutely.

J.

