COURT OF APPEAL FOR ONTARIO

CITATION: The Canada Trust Company v. Browne, 2012 ONCA 862
DATE: 20121207
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Feldman, Simmons and Cronk JJ.A.

In the Matter of the Primo Poloniato Grandchildren's Trust

BETWEEN

The Canada Trust Company
Trustee of the Primo Poloniato Grandchildren's Trust

Applicant
(Respondent)

and

Russell Browne, John Mori Jr., Andrea L. Mori-Mickus, Laura Lee,
Marla L. Ashmore, Teresa O'Neil, Michael Poloniato, Kristen Wiley,
Brandon Ashmore, and The Children's Lawyer on behalf of the minors,
Rachel Browne, Hailey Browne, Michelle Wiley, Jessica Ashmore, Julia Mickus,
Robert Mickus, Olivia Mickus, John Mickus, Marissa Lee, Erica Lee and on
behalf of the unborn and unascertained beneficiaries of the Primo Poloniato
Grandchildren's Trust

Respondents
(Appellant/Respondents)

Earl A. Cherniak, Q.C. and Cynthia B. Kuehl, for the appellant

Archie J. Rabinowitz, David Lobl, and Jeremy C. Millard, for the respondent
Canada Trust Company

Mark Abradjian, Christopher R. Durdan and Brad Wiseman, for the respondents
John Mori Jr., Marla L. Ashmore and Teresa O'Neil

Heard: April 11, 2012

On appeal from the order of Justice Laurence A. Pattillo of the Superior Court of Justice, dated October 5, 2011, with reasons reported at 2011 ONSC 731.

Feldman J.A.:

INTRODUCTION

[1] The Children's Lawyer brings this appeal on behalf of the minor, unborn and unascertained beneficiaries of the Primo Poloniato Grandchildren's Trust (the "Trust"). The Trust was settled in October 1980 by Primo Poloniato, the founder of Primo Foods Ltd., in favour of his grandchildren (the income beneficiaries) and their issue, his great-grandchildren (the capital beneficiaries). The Trust's principal asset is shares in 679312 Alberta Ltd. (the "Holding Company"), a private investment company controlled by the Trust. While the value of the Trust has fluctuated over the years, at its peak it was worth in excess of $130 million.

[2] Since its inception, the Trust has been varied with court approval twice - in December 1988 and again by a deed of arrangement, dated December 1997, which was approved in March 1998. Both variations were made based on the agreement and consent of all parties, including the Children's Lawyer (in 1988, the Official Guardian) on behalf of minor, unborn and unascertained beneficiaries.

[3] The application that gives rise to this appeal was brought by Canada Trust, the Trust's current trustee, for the court's advice and direction to clarify the trustee's obligations under the Trust agreement as varied by the 1997 trust deed (the "Trust Deed as Varied"). That variation changed the nature of the Trust to a

"percentage trust" or a "unitrust". It allowed the trustee to have a freer hand to make investments within the Holding Company in order to maximize the value of the Trust for the benefit of all beneficiaries, without concern as to whether those investments were income-producing or growth-oriented.

[4] The Trust Deed as Varied provides that the income beneficiaries receive a fixed percentage of the net fair market value of a defined percentage of the Trust's assets as their distribution each year. This provides the income beneficiaries with a guaranteed annual income, allowing them to be able to plan their spending priorities and obligations with confidence. As a percentage trust, if the income-producing investments chosen by the trustee do not produce sufficient income to make the distributions, the trustee may sell equities or other capital investments held by the Holding Company in order to generate sufficient funds to make the percentage payments to the income beneficiaries.

[5] For the residuary capital beneficiaries, the benefit of the 1997 variation is that the trustee may invest in equities and other appreciating assets, which will ultimately be available for the capital beneficiaries, rather than being constrained by the obligation to earn income and preserve capital.

[6] The 1997 variation application was based on accounting projections of the future value of the Trust that were prepared by Ernst & Young based on past market performance. Those projections saw the value of the Trust continue to increase over time.

[7] Unfortunately, because economic conditions since 2001 have resulted in lower than expected investment returns, the trustee has had to continue to sell a significant portion of the underlying assets owned by the Holding Company in order to make the annual percentage distributions to the income beneficiaries, resulting in an ongoing depletion of the value of the Trust as a whole.

[8] The application judge interpreted the Trust Deed as Varied to require the trustee to make the percentage distributions to the income beneficiaries in spite of the downturn in the market and its effect on the capital value of the Trust.

[9] The Children's Lawyer appeals from the application judge's decision, arguing that the application judge ignored trust principles and failed to take into account the proper factual matrix in interpreting the terms of the Trust Deed as Varied. Counsel submits that the effect of the decision is to erode the interests of the capital beneficiaries to the point of elimination, which could not have been what was intended when the 1997 variation received court approval.

[10] For the reasons that follow, I would dismiss the appeal. In my view, the application judge interpreted the Trust Deed as Varied in accordance with proper trust principles and in the way it was understood and intended by all the consenting parties and by the approving court at the time.

FACTS

[11] Mr. Poloniato, who died in 1984, had seven grandchildren. All are now of full age and capacity. At the time of the application there were 12 great-grandchildren, six of full age and capacity and six minors.

[12] The Trust was settled as part of an estate freeze. Initially, the Trust held the growth shares of Primo Foods through an Ontario numbered company. Upon Mr. Poloniato's death, the shares were sold and the proceeds were invested in securities and near cash equivalents, which are now held by the Holding Company.

[13] Under the original terms of the Trust, income from the Trust would be accumulated until the earlier of the expiration of 21 years from the settling of the Trust, or the death of the settlor's first grandchild (the latter defined as the "Time of Division"). At the Time of Division, the Trust would be split equally into sub-trusts for each grandchild then living or who had issue living. Subsequent to the Time of Division, the income from each sub-trust would be paid to each grandchild during his or her lifetime and, on the death of the grandchild, the capital of each sub-trust would be payable to one or more of the grandchild's issue as designated by him or her pursuant to a power of appointment. The trustee was given no specific power to encroach on capital.

[14] By the mid-1980s, the value of the Trust had grown significantly. The grandchildren, who were the income beneficiaries, sought earlier access to some of the income from the Trust to assist them in addressing their immediate financial needs and to prepare them for the anticipated receipt of a large sum of money beginning in October 2001 (the expiration of 21 years from the settlement of the Trust).

[15] In December 1988, the court approved a trust variation that accelerated payment of income to the income beneficiaries beginning in 1988 and continuing to 2001. The variation sought by the trustee was consented to by all the adult beneficiaries and the Official Guardian.

[16] The main elements of the 1988 variation (also referred to as the Settlement) were the following:

- The income beneficiaries became entitled to receive 1/7 of the "gross annual income" of the Trust in 1988 and an increasing percentage each year up to 1/3 of the gross annual income for the years 1998, 1999 and 2000; the distributable income was to be paid to those grandchildren alive in each of those years, divided in equal shares *per capita*.
- From January 1, 2001 onwards on an annual basis, all the net income from the Trust fund was to be divided in equal shares *per capita* among the grandchildren.

- The trustee was permitted to encroach on capital to a maximum of $200,000 for each family unit for the benefit of the great-grandchildren.
- The income beneficiaries released their power of appointment in respect of their capital interests under the Trust so that every one of their issue (all the great-grandchildren) would be equal capital beneficiaries.

[17] Some problems arose following the 1988 variation, including uncertainty about the meaning of the term "gross annual income". Also, the grandchildren (the income beneficiaries) wanted to receive a predictable annual amount of money so that they could plan and live knowing what amount would be available each year. Finally, because by 1997 the equity markets were performing very well while interest rates were in decline, it was felt that both classes of beneficiaries were losing out on overall returns because of the investment restrictions on the trustee regarding the need for income-producing assets. The trustee was not able to maximize the value of the Trust at a time when there were significant growth opportunities in the market for those with a more unconstrained investment mandate.

[18] According to an affidavit on the motion to approve the 1997 variation sworn by Mike Ruf, a trust officer of the then trustee, National Trust Company, the second variation in 1997 was meant to resolve the interpretive issue, to give the trustee more discretion as to the management of the investments, and to make distributions to income beneficiaries more predictable.

[19] Among other things, the 1997 variation was designed as a percentage trust or a unitrust, a new type of trust that had been recommended by the Ontario Law Reform Commission's *Report on the Law of Trusts* (Ministry of the Attorney General, 1984). The percentage trust or unitrust would allow the trustee to use a balanced portfolio strategy of investing. Paragraph 26 of the Ruf affidavit explains:

> The principal advantage of the revised method of distribution is that it will enable the Trustee to adopt a balanced portfolio strategy which most likely in the longer term will provide the greatest asset base for the capital beneficiaries, being the minor children and unborn issue of the Grandchildren.

[20] As counsel for the trustee at the time of the 1997 variation, Mr. Martin Rochwerg explained in his evidence on this application that the advantage of a percentage trust is that it allows the trustee to invest for maximum returns, regardless of whether they result in capital gains or income. The total growth is then split between the income and capital beneficiaries on a specified percentage basis. He explained further that the interests of the income and capital beneficiaries would therefore be "in tandem", because they would "either both benefit or they both lose." The effect of the conversion to a percentage trust was that the income beneficiaries were no longer entitled to receive income from the Trust; instead they would receive a fixed amount of money from the Trust each

year, based on a percentage formula that included mandatory minimum and maximum limits.

[21] Prior to the approval of the 1997 variation, a “no-tax” ruling was sought and obtained from Revenue Canada (now the Canada Revenue Agency or “CRA”). By letter of June 1997 addressed to Revenue Canada, Mr. Rochwerg enclosed a memorandum that explained the reasons for the proposed variation and that addressed the issue whether the proposed variation would result in a disposition of a capital interest for tax purposes.

[22] One of the points covered in the memorandum was the legal requirement that the arrangement be for the benefit of minors and unborn and unascertained beneficiaries, who, in this case, were the capital beneficiaries. The memorandum opined that the court would not approve the proposed arrangement on behalf of those beneficiaries if the result was that their interest would be diminished. In this case, the benefit to the capital beneficiaries was said to come “primarily from the Trustee being freed from restrictions on investing so that the Trustee [could] adopt an investment policy which will further enhance the value of the Trust.”

[23] After some back and forth between the CRA and the Trust’s advisors, the CRA granted an advance tax ruling based on the facts as set out in the ruling letter, which included the following paragraph:

> 10. In no event will the annual distribution [to the Income Beneficiaries] be less than the previous year’s

> distribution. Where it is determined that the amount to be distributed based on the formula is less than the previous year’s distribution, the current year's distribution will be adjusted to the amount of the prior year’s distribution. The new system will also provide that the current year’s distribution cannot exceed 115% of the previous year’s distribution. *The Deed of Arrangement will also limit income distributions in any one year to the amount of cash dividends the Trust receives from [the] Holding Company in that year, ensuring there will be no encroachment on capital of the Trust on behalf of the Income Beneficiaries*. These provisions will have the effect of providing the Income Beneficiaries with a stable annual income, and ensuring some growth to the Capital Beneficiaries. In determining the appropriate Distribution Percentage (70%) for the years 2001 and onward, various asset mixes were tested and compared with the results using a rigid asset mix. Rates of return for the last 10 years were used in these projections. Provided these rates of return are a reasonable indication of future rates of return, the new formula will provide an after-tax increase for the Capital Beneficiaries and should also provide a slightly greater after-tax return for the Income Beneficiaries over the longer term. [Emphasis added.]

[24] The basis for selecting 70 per cent in setting the Yearly Income to be distributed to income beneficiaries starting in 2002, which was the amount recommended and accepted as part of the arrangement, was explained in the Ruf affidavit at para. 23. The distribution percentages of 25 per cent for 1997 and 33-1/3 per cent for 1998-2000 were the same as in the Trust deed as varied in 1988, which he refers to as the Settlement. He then states: “In all years thereafter the Distribution Percentage represents a reduction of 30% from that set out in the Settlement.” This was because the Settlement provided that,

beginning in 2001, the trustee was to administer the Trust Fund's annual income by dividing 100 per cent of the net income among the grandchildren on a *per capita* basis. Therefore, a 70 per cent distribution represented a 30 per cent reduction from what they would have received under the Settlement.

[25] The CRA ruling required that income distributions be in the form of cash dividends paid by the Holding Company to the Trust in any year in order to ensure that there would be no encroachment on the capital of the Trust (the shares of the Holding Company). On that basis, the CRA was prepared to give the ruling that "[t]here will not be a disposition of any income or capital interest in the Trust as a result of the proposed transactions". This ruling was needed in order to implement the proposed 1997 variation without adverse tax consequences.

[26] The Children's Lawyer consented to the 1997 variation on behalf of the capital beneficiaries who were unable to consent, namely those who were minor, unborn or unascertained persons.

[27] Ernst & Young had prepared a number of calculations for the purpose of advising on the proposed variation, including a comparison of the projected capital using the then existing portfolio mix of 70 per cent debt and 30 per cent equities, and comparing that to an asset mix of 70 per cent equities and 30 per cent debt. Those calculations, which were provided to the Children's Lawyer,

showed an expected benefit to the capital beneficiaries of approximately $2 million after five years and $12 million after ten years.

[28] In a 1996 letter to the Children's Lawyer explaining the background to the proposal, Mr. Rochwerg summarized five benefits of the proposed variation for the capital beneficiaries. It would: 1) increase growth from better investment performance; 2) reduce costs of administration; 3) address the issue of 21-year planning to reduce imminent tax liability; 4) impose a cap on the income entitlement that would leave more growth for the capital beneficiaries; and 5) accelerate the use of significant tax-free and refundable tax amounts.

[29] This letter also explained the concept of the percentage trust that had been endorsed in 1984 by Ontario's Law Reform Commission in its *Report on the Law of Trusts*. The percentage trust allows the trustee to invest to increase the overall value of the trust and to allocate funds to the income or capital beneficiaries without regard to whether those funds themselves are income or capital of the trust. In that regard, the *Report* recommended that the percentage payment to the income beneficiaries come first from the annual income, and if insufficient, then from capital: p. 303.

[30] Justice Donna Haley, a Superior Court judge with significant expertise in wills and trusts, approved the 1997 variation. In her endorsement, she found that the proposed variation was in the best interests of the great-grandchildren as they would benefit "both directly as capital beneficiaries and by the certainty of

income provided by the variation to their parents who are all grandchildren under the trust".

[31] Commenting on the context in which the 1997 variation application was made, the application judge below observed that at the time, interest rates were declining and capital markets were heating up. "It was anticipated by all parties", he noted, "that the rates of return which had been historically achieved on the assets of the Holding Company would be equalled or exceeded in the future."

[32] However, a few years after the 1997 variation was approved, it transpired that investment returns were not consistently as strong as predicted, which has had a significant effect on the Trust and its value.

[33] The application judge further observed:

> [A] decrease in market performance of the Trust's assets has resulted in the calculation of Yearly Income in each year being less than the Yearly Income which was paid to the income beneficiaries in 2002. Because the definition of "Yearly Income" in clause 0.1(g) of the Trust Deed as Varied provides that the Yearly Income cannot be less than the prior year's Yearly Income, the result has been that the amount the Trust has distributed to the income beneficiaries for each year after 2002 has been the 2002 amount.

In order to be able to pay the Yearly Income to the income beneficiaries as required, the trustee was obliged to cause the Holding Company to sell assets.

[34] In 2003, the trustee commissioned a report on the expected life of the Trust, assuming distributions were maintained at then current levels. The report

indicated that, depending on investment returns, the capital of the Trust would be expended in 18 to 20 years.

[35] The respondent income beneficiaries rely on a more recent report obtained by the trustee in 2007 that estimates that the projected value of the Trust in 2022 could be about $90 million depending on investment returns.

[36] Because of the concerns of the trustee, the Children's Lawyer and other beneficiaries that the minimum annual percentage distributions to the income beneficiaries were depleting the Trust capital, the trustee applied to the court for direction on the extent of the trustee's discretion not to make the minimum percentage distributions to the income beneficiaries in order to preserve the value of the Trust corpus for the capital beneficiaries.

[37] In particular, the trustee wanted to know whether it retained a duty to maintain an even hand between the income and capital beneficiaries in managing Trust distributions, and therefore a discretion to stop making the prescribed percentage payments to the income beneficiaries that were eroding the value of the Trust.

APPLICATION JUDGE'S DECISION AND REASONS

[38] The application judge provided detailed reasons explaining his interpretation of the Trust Deed as Varied. The relevant provisions of the Trust deed are set out in the Appendix to these reasons.

[39] He found the provisions of the Trust Deed as Varied to be clear and unequivocal and thus all that needed to be considered apart from the agreement was the factual matrix. In his view, the Ruf affidavit best summarized the circumstances at the time of the 1997 variation. He concluded that the evidence of the discussions leading up to the agreement and subsequent approval of the 1997 variation, communications with the CRA, the parties' understandings as to what was intended by the 1997 variation or what was communicated to them subsequently, and any legal opinions as to what the 1997 variation means, constituted extrinsic evidence that was inadmissible for the purposes of interpreting the Trust Deed as Varied.

[40] In bringing the application, the trustee set out two questions to be answered by the application judge. The first question was: does the trustee have the discretion to cause the Holding Company that is controlled by the Trust to distribute sufficient income to the Trust to meet the minimum annual distribution requirements to the income beneficiaries? In order to answer that question, the application judge was required to consider the meaning of the following provisions of the Trust Deed as Varied: the definitions of "Yearly Income", "Applicable Percentage", "Net Income", and paras. 1(a), 1(c) and 5(vi).

[41] The application judge first found that clause 1(a) together with the definition of "Yearly Income" in clause 0.1(g)(vi) are clear and unambiguous. He concluded

that the requirement in clause 1(a) to pay the Yearly Income and associated taxes to the income beneficiaries was mandatory. Those provisions read:

> "Yearly Income" for a calendar year shall mean the amount equal to:
>
> …
>
> (vi) in 2002, and in each year thereafter, 70% of the Applicable Percentage for the year of the Net Fair Market Value of the trust's assets valued as of the first business day of the calendar year, provided further that the Yearly Income *shall not be less than the Yearly Income of the previous calendar year, nor greater than 115% of the Yearly Income of the previous calendar year*….
>
> 1. The Trustee shall keep invested the Trust Fund until the date of the death of the first of the grandchildren of Primo Poloniato alive at the date of this agreement (hereinafter collectively referred to as the "Grandchildren" and individually as a "Grandchild") to die (hereinafter referred to as the "time of division") and until the time of division, the Trustee shall deal with the Trust Fund as follows:
>
> (a) *the Trustee shall pay the Yearly Income* to or for the benefit of the Grandchildren in equal shares in each calendar year…. The Trustee shall also from time to time as determined by the Trustee but at least annually pay amounts out of the income of the trust to a Grandchild to compensate him or her for any taxes payable by such Grandchild or withheld by the Trustees from such Grandchild pursuant to the Income Tax Act in respect of the Yearly Income from the trust. The Trustee shall also have the discretion to additionally compensate a Grandchild, who is a non-resident of Canada for purposes of the *Income Tax Act*, for any foreign taxes or similar amounts paid or payable by the Grandchild on account of the receipt by the Grandchild

> of a distribution hereunder … Any income of the trust for a calendar year in excess of the Yearly Income ... shall be added to the capital; [Emphasis added.]

[42] He observed that the mandatory duty created in clause 1(a) is qualified by clause 1(c), which ensures that the mandatory payments are made from the Net Income of the Trust, which means cash dividends paid by the Holding Company (or income from other assets of the trust) and not from a sale or other disposition of the shares of the Holding Company, which would constitute a disposition of the capital of the trust. Paragraph 1(c) provides:

> (c) notwithstanding the foregoing subparagraphs of this paragraph 1, the total of all amounts on account of Yearly Income and any additional payments to a Grandchild paid in a year, shall not exceed the Net Income of the trust*.*

[43] The application judge then turned to clause 5(vi) which reads:

> 5. The Trustee in addition to all other powers available to it by law or otherwise, shall have the following powers, authorities and discretions:
>
> ...
>
> (vi) to determine whether any payments made by the Trustee in the due administration of the Trust Fund shall be charged against the capital of the Trust Fund or against the income therefrom or partly against capital and partly against the income and such determination shall be final and binding upon all persons concerned and *to manage the investments of the trust, including any distributions from any corporations controlled by the Trustee in order that the Net Income, of any trust hereunder shall be no less than the amount required to*

> *be distributed to a Grandchild during a calendar year*;
> [Emphasis added.]

[44] He concluded that this clause grants powers to the trustee, including the power to manage the investments and pay the distributions, in a manner that will achieve the objective of creating sufficient net income to pay the minimum annual amounts to the income beneficiaries. The highlighted portion of clause 5(vi) did not create a duty or obligation on the trustee, but an objective or purpose to guide the trustee.

[45] The application judge found that the power to manage investments in clause 5(vi) carried with it a discretion in the trustee to determine the way in which the investments would be managed. It followed that the power to manage distributions, which by the wording of clause 5(vi) was included in the power to manage investments, must also give rise to discretion in the trustee to determine how distributions were managed.

[46] Moreover, clause 5(vi) made clear that the trustee's discretion to manage investments, including distributions from the Holding Company of cash dividends, was guided by the investment objective to ensure that the Net Income "shall be no less than the amount required to be distributed to a Grandchild during a calendar year".

[47] Based on this analysis, the application judge concluded in answer to the first question that, under the Trust Deed as Varied, the trustee does have a discretion regarding both the investment and distribution of the Trust assets.

[48] The second question put to the application judge was: if the answer to the first question is “yes”, is the trustee still subject to the duty to maintain an even hand between the income beneficiaries and the capital beneficiaries when exercising the discretion to manage distributions?

[49] Citing *Waters’ Law of Trusts in Canada*, the application judge noted that the duty to maintain an even hand could be excluded by the terms of the trust deed. The duty can be ousted either by express words or by implication. In every case it is a matter of construction: Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters’ Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at pp. 966 – 969.

[50] In this case, the application judge considered whether the even hand principle continued to apply in two contexts - the investment of the Trust assets and their distribution to the beneficiaries.

[51] Dealing first with the trustee’s duty with respect to the investment of the Trust assets, the application judge found it was clear that, when read together, the terms of the Trust Deed as Varied ousted the duty on the trustee to maintain an even hand. Because the income beneficiaries were now entitled to receive their percentage share from the total return on investment, whether by income or

capital appreciation, there was no longer any necessity to maintain a distinction between interest and capital for investment purposes. Instead, the trustee could invest in a balanced portfolio for the benefit of all. He noted that this finding was consistent with the intentions of the parties as reflected in the Trust Deed as Varied.

[52] The application judge came to a similar conclusion regarding the trustee's obligation to maintain an even hand in managing distributions. He found that, too, had been ousted by the terms of the Trust Deed as Varied and the way it was designed to operate with a prescribed minimum payment to the income beneficiaries each year.

[53] The power to manage distributions in clause 5(vi) was included in the power to manage investments. He reasoned that if the duty to maintain an even hand did not apply to the power to manage the investments of the Trust, it could not apply to the included power to manage distributions.

[54] The application judge found that the wording of the Trust Deed as Varied clearly required that capital assets held by the Holding Company would be sold, if necessary, to fund the obligations to the income beneficiaries. For the trustee to meet the obligation to pay the Yearly Income to the income beneficiaries, it must require the Holding Company to pay sufficient cash dividends to the Trust and those dividends must be sourced from the Holding Company's returns on its investments, which included both income and capital appreciation. To the extent

that the obligations of the Trust could not be met from the income earned on investments, it was intended that they would be met from the sale of assets in the Holding Company sufficient to generate the required cash dividends.

[55] The application judge also found that to interpret the Trust deed to require the trustee to maintain an even hand between income and capital in respect of the distribution of monies from the Holding Company, so that the trustee could distribute only income from the Holding Company to the Trust to fund the obligations to the income beneficiaries, would render the clear language of clause 1(a) and the definition of “Yearly Income” in clause 0.1(g) completely ineffective.

[56] He further concluded that that interpretation would also fly in the face of the stated objective of the parties to the 1997 variation – to permit the income beneficiaries to share (with the capital beneficiaries) in the overall appreciation of the Trust’s assets on an annual basis, while still providing them with a degree of certainty in respect of the annual amount they would receive.

[57] The application judge rejected the submission that the settlor’s original intent, as discerned from the original Trust deed, was relevant to the interpretation of the Trust Deed as Varied. He also rejected the relevance of the court approval of the 1997 variation by Haley J. He said that it had no bearing on the issue before the court on the application, as the issue before the court was

whether the 1997 variation was in the best interests of the capital beneficiaries and the material before the court at that time "clearly confirmed that it was".

[58] Finally, he did not agree that the 1997 variation would "obliterate" the interests of the capital beneficiaries. There was an indirect benefit to the capital beneficiaries – who were all children of the income beneficiaries – and, as well, a return to previously projected rates of return would "no doubt go a long way to maintaining and perhaps increasing the capital." The negative projections were all based on the assumption that current low rates would continue.

[59] To conclude, in answer to the second question, the application judge found that the duty to maintain an even hand was ousted by the terms and necessary operation of the Trust Deed as Varied.

ISSUE ON APPEAL

[60] The issue on appeal is whether the application judge made a fundamental error in his interpretation of the Trust Deed as Varied by finding that minimum percentage payments to the income beneficiaries were mandatory and that the even hand rule had been ousted with respect to the management of Trust distributions, leaving open the potential for depletion of the capital of the Trust to the detriment of the capital beneficiaries.

[61] The appellant takes the position that the application judge erred in the following specific ways:

> 1) He erred in law by applying only contractual as opposed to trust interpretation principles to the interpretation of the Trust Deed as Varied and in particular:
>
> a) He narrowly construed the factual matrix so as to exclude any consideration of the role of the court and its jurisdiction in approving the 1997 variation.
>
> b) He excluded other evidence relevant to the factual matrix, specifically the CRA ruling.
>
> c) He ignored the intention of the settlor in the interpretive exercise.
>
> d) He made inconsistent interpretive findings concerning the trustee's ability to encroach.
>
> e) He failed to consider the objective of the 1997 variation that there be capital growth.
>
> f) He failed to consider whether his interpretation was consistent with the language of the Trust agreement when read as a whole.
>
> 2) He erred in law by finding, contrary to trust principles and the language of the Trust Deed as Varied, when read as a whole, that the obligation of the trustee to maintain an even hand with respect to the management of Trust distributions was ousted.

[62] Three of the income beneficiaries participated in this appeal. They take the position that the appellant is essentially asking the court to find that the trustee may pay less than the stipulated Yearly Income in the years in which the investment portfolio does not create sufficient returns in the form of income to fund the Yearly Income. They say that there is nothing in the wording of the Trust Deed as Varied or the factual matrix to support this interpretation.

[63] The current trustee says it takes a "neutral" position on this appeal.

ANALYSIS

Principles of Interpretation

[64] The appellant argues that the application judge erred by interpreting the Trust Deed as Varied only as a contract, and that he failed to apply trust principles as part of the interpretive process. When the court is interpreting a trust that has been varied on consent of the beneficiaries, contractual interpretation principles are applied to determine the objective intent of the parties. However, because the agreement is a trust, trust principles must also inform that interpretation.

[65] Before he embarked on the interpretation of the Trust Deed as Varied, the application judge acknowledged that "regard must also be had to the fact that the document under review is a trust deed and not strictly a commercial instrument." The appellant's specific concerns will be addressed individually in the course of the following analysis.

Issue 1- Factual Matrix – General Principles

[66] Before addressing the appellant's specific arguments, it is important to review what is meant by the factual matrix of an agreement.

[67] It is well established that in interpreting a contract, the court may consider the "factual matrix" surrounding the contract, even where there is no ambiguity.

"Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case": *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.), at para. 23.

[68] In *Dumbrell v. The Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616, at para. 53, this court affirmed the relevance of the factual matrix to contractual interpretation:

> [53] The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement …

[69] This court noted in *Dumbrell,* at para. 55, that while there is some debate about the outer limits of the scope of factual matrix, it clearly encompasses "the genesis of the agreement, its purpose, and the commercial context in which the agreement was made".

[70] In *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317, at para. 18, the British Columbia Court of Appeal described the factual matrix as the "background" of the contract:

> The factual matrix is the background of relevant facts, that the parties must clearly have been taken to have known and to have had in mind when they composed the written text of their agreement. It can throw light on

> what the parties must have meant by the words they chose to express their intention….
>
> The factual matrix is the background which may deepen an understanding of what the parties meant by the language they used, but the Court cannot make a new agreement.

[71] While the scope of the factual matrix is broad, it excludes evidence of negotiations, except perhaps in the most general terms, and evidence of a contracting party's subjective intentions: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis, 2012), at p. 27. As the cases above suggest, the factual matrix includes only objective facts known to the parties at or before the date of the agreement, and what is common to both parties: Hall, p. 30. Hall goes on to state that while the factual matrix can "be used to clarify the parties' intentions as expressed in a written agreement, it cannot be used to contradict that intention, create an ambiguity which otherwise does not exist in the written document, or have the effect of making a new agreement": p. 31 (footnotes omitted). Ultimately, the words of the agreement are paramount.

Issue 1(a) - Court Approval of the 1997 Variation

[72] The appellant's position is that if the interpretation of the 1997 variation is not one that could have been approved by the court, then it could not have been what the parties intended or the court understood or approved at that time. The

appellant submits that the application judge erred in finding that the approval of the variation “has no bearing on the issue before the Court in this application”. To the contrary, the basis for the court’s approval must form part of the factual matrix.

[73] Under s. 2 of the *Variation of Trusts Act*, R.S.O. 1990, c. V.1, the court must be assured that any variation approved constitutes a benefit for those whose interests it has a duty to protect. It cannot ever have been intended, argues the appellant, that the interests of the capital beneficiaries would be diminished or defeated entirely. Had that been the intention or considered a reasonable consequence of the proposed variation, it would not have been approved by the court, nor could the Children’s Lawyer have consented to it.

[74] The problem with the appellant’s submission is that the variation application was brought on a record that explained how the variation would be beneficial to the capital beneficiaries, primarily by increasing the value of the capital through investment in equities with growth potential as part of a balanced portfolio. The expert evidence suggested that, based on past performance, such a portfolio would increase in value in the future. The Children’s Lawyer agreed to the variation on that basis and the court approved it on that basis.

[75] The application from which this appeal is brought is not a variation application, nor is it a late appeal from that application. Rather, it is an application to the court to interpret the Trust Deed as Varied.

[76] The appellant's submission is that the approving court would not have found the variation to be for the benefit of the minor, unborn and unascertained capital beneficiaries had it known that markets would fall and not continue to perform as they did through the late 1990's. Therefore this court should interpret the words of the variation in a manner that would allow the trustee to disregard the mandatory provisions of the Trust Deed as Varied. Instead, the court should read the deed as implicitly giving the trustee a discretion to reduce the payments to the income beneficiaries in order to preserve the capital of the Trust for the capital beneficiaries, on the basis that the even hand principle remains in effect under the Trust Deed as Varied.

[77] Stated another way, the appellant submits in para. 47 of its factum that: "if [the application judge's] interpretation of the 1997 Variation is not one that could have been approved by the court, then of necessity, it could not have been what the parties intended or the court understood or approved at that time."

[78] The appellant's first argument to support this submission is that the application judge erred by stating that the variation approval and its basis were irrelevant to his interpretation of the Trust Deed as Varied. The appellant says the factual matrix includes the court approval and the record that formed the basis of the approval application and that the application judge was required to consider those factors as part of the factual matrix.

[79] I agree with the appellant’s submission that the court approval of the 1997 variation and the material that supported it are an important part of the factual matrix that informs the interpretation of the Trust Deed as Varied. And I agree that it would have been an error for the application judge to ignore the court approval of the 1997 variation in his analysis. However, it is clear that that is not what occurred.

[80] As the basis for the factual matrix he considered, the application judge relied on the affidavit of Mr. Ruf that was used to support the court approval variation application. The application judge explicated in detail how the variation had to benefit the capital beneficiaries before it could be approved and that the court found, and the material stated, that it did so.

[81] What the application judge stated near the end of his reasons is that, on the application before him, the court was not performing an approval function but an interpretation function. In other words, on this application – as distinct from the 1997 variation application – the court was not deciding what was in the best interests of the capital beneficiaries.

[82] That said, the application judge also went on to dispute the position of the appellant that the effect of the 1997 variation would necessarily be to “obliterate” the interests of the capital beneficiaries. The value of the Trust did increase for a few years following 1997. Although markets later took a downturn, the appellant’s pessimistic forecasts are based on a continuation of that downturn. The

application judge observed that a return to previously projected rates of return "would go a long way to maintaining and possibly even increasing the capital". Obviously no one knows the future. However, it was open to the application judge to make this observation based on the evidence in the record before him, including the 2007 projection report.

Issue 1(b) - CRA Tax Ruling

[83] The second aspect of the factual matrix that the appellant says the application judge failed to consider was the CRA tax ruling and related correspondence. In the appellant's submission, the CRA ruling made explicit that the definition of "Net Income" was included to ensure that there would be no disposition of the capital assets of the Trust for the benefit of the income beneficiaries. Moreover, the CRA stated that the purpose of the 1997 variation was to ensure growth of the capital assets for the benefit of the capital beneficiaries and trustee's counsel confirmed in correspondence to the CRA that capital assets would not be diminished as a result of the 1997 variation.

[84] Contrary to this submission, it is clear that the application judge considered, as part of the factual matrix, the CRA ruling that was appended to the Ruf affidavit, as important relevant background.

[85] To the extent that the application judge did not consider the correspondence to the CRA and from the tax authorities, I agree with the

appellant that this correspondence is helpful in understanding the full factual context of the 1997 variation and I have included some references to it in the statement of facts in these reasons. However, the appellant has not pointed to anything in the ruling or in that correspondence that contradicts or changes the factual matrix as described by the application judge or the basis on which the court approval was obtained in 1998.

[86] The appellant also argues that the CRA inserted clause 1(c) and the definition of "Net Income" as cash dividends from the Holding Company into the Trust Deed as Varied to ensure that the trustee would not encroach on capital to the detriment of the capital beneficiaries.

[87] I would not accede to this argument. This interpretation is not supported by anything in the correspondence from the CRA. That correspondence was directed to ensuring that cash dividends would be paid from the Holding Company to the Trust. It was the form of those dividends as income to the Trust that would govern their tax treatment, which was the sole concern of the CRA. This is consistent with the "form rule", used in the administration of trusts, which says that for trust accounting purposes, the form of a distribution determines its characterization as income or capital: *Report on the Law of Trusts*, p. 292. In its submission to the CRA dated November 26, 1997, Ernst & Young stated:

> The Deed of Arrangement will also limit income distributions in any one year to the amount of cash

> dividends the Trust receives from Holding Company in that year, ensuring there will be no encroachment on capital of the Trust on behalf of Income Beneficiaries.

[88] The "capital of the Trust" being referred to is the shares of the Holding Company. Their disposal would amount to a capital disposition that would be taxable as such. Clause 1(c) ensures that income distributions will only come from cash dividends paid by the Holding Company, taking the form of income.

Other Correspondence that is Part of the Factual Matrix

[89] In my view, the correspondence by the trustee's lawyer and by the income beneficiaries' lawyer with the Children's Lawyer that explained the purpose of the variation and its intended effect and benefits also forms part of the factual matrix. In that correspondence, reference was made to the fact that the variation was to be a percentage trust, a new financial approach to the investment and disbursement of trust funds by trustees that was approved by the Ontario Law Reform Commission in its 1984 *Report on the Law of Trusts*.

[90] In *Waters' Law of Trusts in Canada*, the authors explain that a percentage trust allows the trustee to maximize the overall value of the trust assets for the benefit of all beneficiaries. It dispenses with the distinction between income and capital, instead guaranteeing the "income beneficiary" "a regular return of a fixed percentage on the value of the trust property": p.1059. If, in a particular year, the traditional income from investments exceeds the percentage to be paid to the

income beneficiaries, the excess “remains part of the trust property”. However, “if the income is less, the percentage is made up out of the trust property”: p. 1059.

Issue 1(c) - Intention of the Settlor

[91] The appellant next submits that the application judge erred in finding the intention of the settlor was irrelevant in interpreting the Trust Deed as Varied. Relying on *Re Irving* (1975), 11 O.R. (3d) 443 (H.C.J.), the appellant argues that before a trust can be varied, one of the issues is whether the variation keeps intact the settlor’s basic intention. Here the basic intention of the settlor was to benefit two generations of the Poloniato family through the creation of income and capital beneficiaries. Yet the interpretation of the 1997 variation by the application judge, the appellant argues, permits unlimited capital encroachment, thus possibly destroying any benefit of the Trust for the second generation.

[92] In my view, there are three responses to this submission. The first is one already referred to - that this was not an application for a variation, but an application to interpret a Trust Deed as Varied. Therefore, if the varying court approved a variation that did not take the settlor’s intent into account, and its meaning is clear, it is not the role of the interpreting court to distort the meaning of the deed as varied.

[93] Second, the case law both in Ontario since *Re Irving*, as well as in other provinces, suggests that the original intention of the settlor need not be

considered when the court approves a variation as long as the necessary criteria are met: See *Russ v. British Columbia (Public Trustee*) (1994), 89 B.C.L.R. (2d) 35 (C.A.); *Teichman v. Teichman Estate* (1996), 134 D.L.R. (4th) 155 (Man. C.A.); *Finnell v. Schumacher Estate* (1990), 74 O.R. (2d) 583 (C.A.). However, because of my first and third responses to the appellant's submission, it is not necessary in this case to finally decide this issue.

[94] The third response is that I do not agree with the appellant's suggestion that the intent and effect of the 1997 variation was to benefit only the income beneficiaries at the expense of the capital beneficiaries. That was clearly not the intent of the approving court, which was obliged to approve the variation only if it was for the benefit of the capital beneficiaries on whose behalf the approval was given. As the application judge was entitled to find, if the economy improves, the value of the trust should also see improvement. Moreover, the capital beneficiaries have had the indirect benefit, referred to by Haley J., of a consistent income flowing to their parents since the date of the variation.

Issue 1(d) - Inconsistent Findings

[95] The appellant contends that the application judge erred in making an inconsistent finding. On the one hand, he found the parties intended that the trustee would have the power to encroach on capital assets of the Trust by selling the assets of the Holding Company. That finding is inconsistent, says the

appellant, with his earlier finding, at para. 50 of his reasons, that the purpose of the definition of “Net Income” was to ensure that there would be no encroachment on the capital of the Trust.

[96] As discussed above, the premise of this submission is incorrect. This submission has been answered in the section dealing with the factual matrix surrounding the CRA ruling.

Issue 1(e) - Objective of 1997 Variation

[97] In the appellant’s view, the application judge erred in failing to take into account an important objective of the 1997 variation: to ensure some growth to the capital beneficiaries. There is no merit in this submission. The application judge did not fail to take this objective into account: see, for example, paras. 37-39 of his reasons. For economic reasons, the trustee has been unable, at least up until the application, to continue to achieve the hoped for growth of the Trust corpus, despite the clear objective of the Trust and of the trustee to do so.

Issue 1(f) - Interpretation of the Trust Deed as Varied, Read as a Whole

[98] In the appellant’s submission, the application judge erred in failing to consider whether his interpretation was consistent with the language of the Trust Deed as Varied, when read as a whole. For instance, counsel points to the fact that the 1988 variation gave the trustee an express power of encroachment on capital to a limited amount for the purpose of benefitting capital beneficiaries. It is

argued that when the parties intended to permit encroachment on the capital of the Trust, they did so in clear and unequivocal terms.

[99] In my view, this submission fails. In his analysis, which is set out in detailed and comprehensive reasons, the application judge takes into account the agreement as a whole. The appellant has provided no suggestion as to how to read the Trust Deed as Varied without giving full effect to the mandatory language to which it objects.

[100] The Trust document is internally consistent in providing the mandatory percentage distribution scheme to the income beneficiaries. As already explained, to the extent that satisfaction of the percentage distribution may require using capital assets, this is a function of the balanced investment strategy employed in a percentage trust to achieve overall growth of the trust corpus. It is not an encroachment on capital in the traditional sense, which is a discretionary exercise by a trustee to benefit a specific beneficiary for specific or general needs, over and above that beneficiary's regular entitlement under the trust.

Issue 2 - Even Hand Rule

[101] The appellant submits that the application judge erred in his interpretation of the Trust Deed as Varied by failing to recognize and give effect to the duty of the trustee to maintain an even hand between the interests of the income and capital beneficiaries. The obligation of a trustee to treat different classes of

beneficiaries fairly and impartially can only be displaced, contends the appellant, by an express intention to the contrary in the trust deed. In the appellant's submission, the 1997 variation did not displace the duty to maintain an even hand in managing distributions.

[102] It is trite law that executors and trustees have a duty to maintain an even hand between the interests of the income and the capital beneficiaries, unless that duty is ousted explicitly or implicitly by the words of the instrument. Justice Middleton described this duty in the following way in *Armstrong (Re),* [1924] O.L.R. 639 (C.A.), at p. 8:

> [I]t must be borne in mind by trustees that they are trustees not for the remaindermen alone in disregard of the rights of the life-tenant, nor for the life-tenant disregarding the interests of the remaindermen. Trustees must preserve an even hand as between these two conflicting interests. The duty towards the capital is to preserve it intact. The duty towards the tenant for life is to obtain as large a yield as is consistent with safety and the observance of the law under the instrument of trust as to the class of investment made; and, furthermore, so to adjust the investments that the life-tenant will receive annually his due proportion.

[103] However, in a percentage trust, the trustee's duty is not to obtain a large income yield while preserving the capital but, instead, to increase the size of the entire trust for the benefit of both classes of beneficiaries. This includes increasing the capital rather than preserving it, and therefore involves an

investment strategy that may include more risk. Because in a percentage trust the trustee is investing to increase the entire value of the trust to benefit all, the issue is not whether the trustee's even hand duty is ousted in respect of the management of the trust's investments. What is disputed is whether the duty has been ousted in respect of the obligation of the trustee to make distributions to the beneficiaries.

[104] The role of the even hand duty in the administration of a percentage trust was addressed in the Law Reform Commission's *Report on the Law of Trusts*. That *Report* recommends that when trustees administer a percentage trust, they continue to maintain an even hand in the periodic valuation of the trust and when making the distributions. Specifically, the *Report* states at p. 303:

> We therefore recommend that the revised [Trustee] Act should contain a provision to the effect that, where trustees are expressly directed by the trust instrument to hold trust assets "on percentage trusts", they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. *In so doing, trustees should be required to maintain an even hand between income and capital beneficiaries*. [Emphasis added.][1]

[105] There is no clear explanation as to what the Commission means when it says that the trustees should maintain an even hand when valuing the assets

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[1] This recommendation has not been incorporated into the *Trustee Act*, R.S.O. 1990, c. T.23.

and making the annual percentage payment to the income beneficiaries. My interpretation is that the Commission contemplates a periodic review and, if necessary, a re-set of the percentage payable to income beneficiaries, based on the value of the trust assets and on the even hand rule.

[106] The problem here is that in the Trust Deed as Varied, the percentage payable to the income beneficiaries is based on a fixed formula for determining the “Applicable Percentage” and the amount to be paid can never go below the highest amount previously paid in a year. That is why the trustee continues to be obliged to cause the Holding Company to sell assets, if necessary, to meet the obligation to the income beneficiaries, despite the effect on the Trust corpus.

[107] To the extent the Trust Deed as Varied sets forth a minimum annual payment to the income beneficiaries, the even hand duty on the trustee has been ousted, implicitly, by the words and intended operation of the Trust Deed as Varied. The application judge made no error in making that finding.

Conclusion

[108] The experience of this Trust has reinforced the need for percentage trusts to be drafted with specific safeguard mechanisms in place that will allow the trustee to review and revise the annual percentage payable to the income beneficiaries based on the changing value of the trust to ensure that one set of beneficiaries is not favoured over the other. Commentators on the percentage

trust concept have recommended including a “force majeure” clause to protect against unforeseen anomalies: see for example, Anne Werker, “The Percentage Trust – Uniting the Objectives of the Life Tenant and Remainderperson in Total Return Investing by Trustees” (Paper delivered at the Law Society of Upper Canada’s 8th Annual Estates and Trusts Summit, November 30, 2005), p. 251.

[109] Two options would be to include a clause providing for a periodic reset by the trustee of the percentage payable to income beneficiaries, or an option for the trustee to apply to the court for advice and directions on such a reset.

[110] It is also clear that the material provided to the court in support of a variation application seeking to convert a trust into a percentage trust must include not only upside projections but also potential downside projections that take into account a possible future market downturn. This will give the approving court the basis to include the appropriate safeguards that will ensure, to the extent possible, that the variation will in fact continue to be for the benefit of the future capital beneficiaries.

[111] However, there are no such provisions in this Trust Deed as Varied. The trustee is obliged to continue to make the minimum percentage distributions provided by its terms.

DISPOSITION OF THE APPEAL

[112] For these reasons, I would dismiss the appeal. In the circumstances of this case, I would award full indemnity costs in accordance with their Bills of Costs to each of the parties, payable out of the estate. To the Children's Lawyer, $116,855.13; to the trustee, $145,061.32; to the respondents on the appeal, $122,473.29 all inclusive of disbursements and H.S.T.

Released: "KF" December 7, 2012

"K. Feldman J.A."

"I agree Janet Simmons J.A."

"I agree E.A. Cronk J.A."

APPENDIX

0.1 In this Trust Deed ... the following terms shall have the following meanings: ...

(a) "**Applicable Percentage**" for a calendar year shall mean the average Rate of Return of the trust over the previous three calendar years.

…

(d) "**Net Fair Market Value**" shall mean the fair market value of the trust's assets at the particular time, provided that where the trust owns shares in a private corporation, the fair market value of such shares shall be deemed to be equal to the fair market value of the assets of the corporation less all the corporation's liabilities, including an amount equal to the current tax liabilities of the corporation with respect to unrealized capital gains on its assets, less:

(i) liabilities of the trust;

(ii) an amount equal to the current tax liabilities of the trust with respect to unrealized capital gains on its assets other than shares in a private corporation; and

(iii) the value of any outstanding interest-free loans to Grandchildren;

(e) "**Net Income**" of the trust for a calendar year shall mean the cash dividends received by the trust in the calendar year from 679312 Alberta Limited ... and any income that is earned on the other assets of the trust, net of expenses incurred and taxes paid by the Trustee in the calendar year on account of the income of the trust;

(f) "**Rate of Return**" for a calendar year shall mean the resulting percentage when [sic] the difference determined when

(A) the Fair Market Value of the trust calculated on the first business day of the next calendar year is added to the Yearly Income Distribution and other permissible distributions to beneficiaries in respect of the calendar year, and is reduced by receipts during the calendar year for life insurance proceeds

is then reduced by

(B) the Fair Market Value if the trust calculated on the first business day of the calendar year,

is then divided by

(C) the Fair Market Value of the trust on the first business day of the calendar year;

(g) "**Yearly Income**" for a calendar year shall mean the amount equal to:

…

(vi) in 2002, and in each year thereafter, 70% of the Applicable Percentage for the year of the Net Fair Market Value of the trust's assets valued as of the first business day of the calendar year, provided further that the Yearly Income shall not be less than the Yearly Income of the previous calendar year, nor greater than 115% of the Yearly Income of the previous calendar year.

1. The Trustee shall keep invested the Trust Fund until the date of the death of the first of the grandchildren of Primo Poloniato alive at the date of this agreement (hereinafter collectively referred to as the "Grandchildren" and individually as a "Grandchild") to die (hereinafter referred to as the "time of division") and until the time of division, the Trustee shall deal with the Trust Fund as follows:

(a) the Trustee shall pay the Yearly Income to or for the benefit of the Grandchildren in equal shares in each calendar year…. The Trustee shall also from time to time as determined by the Trustee but at least annually pay amounts out of the income of the trust to a Grandchild to compensate him or her for any taxes payable by such Grandchild or withheld by the Trustees from such Grandchild pursuant to the *Income Tax Act* in respect of distributions of the Yearly Income from the trust. The Trustee shall also have the discretion to additionally compensate a Grandchild, who is a non-resident of Canada for purposes of the *Income Tax Act*, for any foreign taxes or similar amounts paid or payable by the Grandchild on account of the receipt by the Grandchild of a distribution hereunder … Any income of the trust for a calendar year in excess of the Yearly Income ... shall be added to the capital;

…

(c) notwithstanding the foregoing subparagraphs of this paragraph 1, the total of all amounts on account of Yearly Income and any additional payments to a Grandchild paid in a year, shall not exceed the Net Income of the trust.

5. The Trustee in addition to all other powers available to it by law or otherwise, shall have the following powers, authorities and discretions: ...

(vi) to determine whether any payments made by the Trustee in the due administration of the Trust Fund shall be charged against the capital of the Trust Fund or against the income therefrom or partly against capital and partly against the income and such determination shall be final and binding upon all persons concerned and to manage the investments of the trust, including any distributions from any corporations controlled by the Trustee in order that the Net Income, of any trust hereunder shall be no less than the amount required to be distributed to a Grandchild during a calendar year;