

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

In Re 2008 Trust for the Benefit of
Marina Stefanidis-Perez

:
: SUPERIOR COURT OF NEW JERSEY
: CHANCERY DIVISION, PROBATE PART
: ESSEX COUNTY
: DOCKET NO.: ESX-CP-248-2014
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In Re 1997 Trust for the Benefit of
Marina Stefanidis-Perez

: SUPERIOR COURT OF NEW JERSEY
: CHANCERY DIVISION, PROBATE PART
: ESSEX COUNTY
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OPINION

Decided: March 22, 2016

By: Walter Koprowski, Jr., P.J.Ch.

Oral argument was held before this Court on February 16, 2016. The following attorneys appeared:

Joel Kreizman, Esq., for Plaintiff Marina Stefanidis-Perez
Wendy Klein, Esq., for Defendant Araceli Perez, in her capacity as Trustee of the 1997 and 2008 Trusts for the benefit of Marina Stefanidis-Perez

The issues before the court are as follows:

Plaintiff's motion for partial summary judgment on: 1) whether the trustee of the 1997 and 2008 trusts should be removed; and 2) whether Plaintiff is entitled to an updated accounting through May 30, 2015. Defendant's cross-motion for partial summary judgment on Count IV: 1) seeking advice and direction on whether Defendant may withhold distributions pursuant to the terms of the 1997 Trust.

FACTS & PROCEDURAL HISTORY

Marina Stefanidis-Perez ("Plaintiff" or "Marina") was born on August 14, 1991 and is the daughter of Araceli Perez ("Defendant" or "Trustee") and Athanasios Stefanidis. She currently resides in Holland with her fiancé. Myrna Perez ("Myrna") and

Alfonso Perez (“Alfonso”) are Araceli’s parents and Marina’s maternal grandparents. At issue here are two trusts, created in 1997 and 2008, for which Myrna is the grantor, Marina is the sole beneficiary, and Araceli serves as the trustee. Both parties agree that Araceli, a successful businesswoman, initiated the formation of both trusts.

On March 4, 1997, Myrna created a trust entitled “Trust for the Benefit of Marina Stefanidis,” or the “1997 trust.” On January 1, 2008, Myrna created a second trust entitled “Trust for the Benefit of Marina Stefanidis Perez,” or the “2008 trust.”

From 1997 to 1999, the 1997 Trust was funded with cash gifts from Araceli, Myrna and Alfonso. The 1997 trust currently owns 7.5% ownership interest in America Supermarket, Inc. and Pueblo Meat Market, Inc.; 10% interest in Twin City Warehousing Co., LLC.; 30% interest in Twin City of Bridgewater, LLC; and 25% interest in Twin City of Jersey City, LLC.

The 2008 Trust owns a 49% interest in Perez Farms LLC (with real property) and 15% interest in Twin City of Bayonne, LLC.

The main difference between the trusts is the age limit on distributions of income and principal. The 1997 Trust allows for income distributions at age 22, and principal distributions at ages 30, 35, and 40. The 2008 Trust, however, distributes income only as required by law, and principal only when Marina reaches age 65; the Trustee can, however, make discretionary distributions of income and principal before age 65.

In 2005, Araceli bought 154 acres of real property in Washington Township, New Jersey for \$1.6M. Araceli created a limited liability company, Perez Farms, LLC (the “Farm”) in 2008 to construct and operate a horse farm on the land, and transferred the real property to Perez Farms, LLC. The 2008 trust is a 49% non-voting member of the Farm, with another Trust (daughter Victoria’s) owning the other 49%, and Araceli owning the remaining 2%.

Approximately \$1.8M was transferred from the 1997 Trust to the 2008 Trust for the purchase of the Trust’s interest in the Farm, and its share of capital construction costs.

Plaintiff filed a motion for partial summary judgment seeking to remove Araceli as trustee of both trusts, and Defendant filed a cross-motion for summary judgment seeking advice and direction from this Court with respect to the 1997 Trust. All discovery has been completed, except for the deposition of Rosa Perez, the successor trustee of both trusts.

Summary Judgment Standard

Under Rule 4:46-2(c) a court should only grant a motion for summary judgment where there are no genuine issues of material fact requiring trial, and where the movant is entitled to judgment as a matter of law. See Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Summary judgment is a businesslike and efficient means of disposing of a dispute

without a trial when there are no material issues of fact. Id. at 530. Moreover, “an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.” R. 4:46-2(c).

On a motion for summary judgment, the court must consider “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.” Id. Additionally, the “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249).

If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a “genuine” issue of material fact for purposes of summary judgment. Id. Summary judgment is appropriate when the evidence “is so one-sided that one party must prevail as a matter of law.” Id.

LAW & ANALYSIS

Plaintiff’s Motion for Partial Summary Judgment to Remove Trustee & Compel an Updated Accounting

I. Removal of Fiduciary

N.J.S.A. § 3B:14-21 governs removal of fiduciaries for cause. The court may remove a fiduciary when the fiduciary:

- a. After due notice of an order or judgment of the court so directing, neglects or refuses, within the time fixed by the court, to file an inventory, render an account, or give security or additional security;
- b. After due notice of any other order or judgment of the court made under its proper authority, neglects or refuses to perform or obey the order or judgment within the time fixed by the court;
- c. **Embezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary;**
- d. No longer resides nor has an office in the State and neglects or refuses to proceed with the administration of the estate and perform the duties required;

- e. Is incapacitated for the transaction of business; or
- f. Neglects or refuses, as one of two or more fiduciaries, to perform the required duties or to join with the other fiduciary or fiduciaries in the administration of the estate for which they are responsible whereby the proper administration and settlement of the estate is or may be hindered or prevented.

Removal of a trustee should be granted only sparingly. Braman v. Central Hanover Bank & Trust, 138 N.J. Eq. 165 (Ch. Div. 1946). The removal of a trustee requires a broad inquiry into whether the circumstances are such that a continuance of the trustee in office would be detrimental to the trust. Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 360 (App. Div. 1985).

Plaintiff argues that the Trustee should be removed because she breached her fiduciary duties by self-dealing, decanting the 1997 Trust into the 2008 Trust, or alternatively due to hostility towards the Plaintiff beneficiary. Trustee initially opposed this motion on the grounds that discovery had not been completed. Since then, all depositions have been completed, with the exception of Rose Perez, who is the successor trustee under both trusts. It is unclear how Rose's deposition is required in order for the Trustee to oppose motions.

i. Self-Dealing

Plaintiff argues that Trustee engaged in self-dealing by selling real property she owned personally to the Trust. Self-dealing is prohibited and a fiduciary cannot purchase from himself. Donnelly v. Ritzendollar, 14 N.J. 96 (1953). Plaintiff argues that Trustee sold 49% of the Farm to each of Marina's and Victoria's trusts, effectively eliminating the use of her own money for developing the farm, but still maintaining complete control over the Farm. Trustee refutes these arguments, stating that she gifted the entire real property with a pre-mortgage value of \$1.39M (net value \$244,069) to Perez Farms LLC in return for 51% interest in the Farm, and the 2008 Trust acquired the remaining 49% in the Farm for \$234,497.74. By the time the 2008 Trust acquired any interest in the property, it was no longer owned by the Trustee. Thus, there are issues of fact as to ownership of the property, Trustee's involvement therein and 2008 Trust's subsequent acquisition.

ii. Imprudent Investment

Plaintiff argues that the Trustee committed waste through her decision to invest in Perez Farms and such investment was imprudent and violated the New Jersey Prudent Investor Act. Article Fifth of the 2008 Trust expressly states, in pertinent part:

The Trustee is authorized and empowered, but are not required, in the Trustee's sole and absolute discretion, which shall be exercised in a fiduciary capacity primarily in the interest of the beneficiary (and the

judgment of the trustee shall be conclusive and binding upon all persons now or hereafter interested herein), without judgment, decree, order, direction, approval, or other action of any court:

. . .

(B) To hold, sell, exchange, invest, reinvest, acquire buy purchase or otherwise, and retained, temporarily or permanently, any kind of property, real or personal, tangible or intangible, as the trustee may deem advisable including . . . properties which produce much, little, or no income, including real property or any interest therein, wholly without regard to where such property is located or situated, and holy without regard to whether the same shall be investments authorized for Trustee and the laws are was of any state. . . .

The New Jersey Prudent Investor Act, codified in N.J.S.A. 3B:20-11.3, provides, in part, that:

a. A fiduciary shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill, and caution.

b. A fiduciary's investment and management decisions respecting individual assets shall not be evaluated in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

c. Subject to the standards established in this act, a fiduciary may invest in any kind of property or type of investment. No specific investment or course of action is inherently imprudent.

The 2008 Trust terms allow the Trustee to buy any type of investment, including property that produces little or no income. Plaintiff argues that the Farm produces no income and that Trustee admitted she has no plans to develop the property in the near future to begin producing income. However, Trustee asserts that she purchased the Farm property in 2005 for Marina, who has had a life-long interest in horses and riding. In fact, Marina began training in Holland in horseback riding shortly after Araceli purchased the property in 2005. Both parties agree that there was at least one discussion of a plan to convert the property into an equestrian facility. Since 2008, the Farm has been sporadically under construction, for which the Trustee hired and paid for architects and contractors. Trustee also cites a Rutgers University Equine Science Center report from 2007 just before construction began on the property, noting that the equine industry in New Jersey generated over \$1.1B annually and was "alive and well".

Trustee clarifies that any statements made in her deposition with regards to developing the property or selling it to produce income for the trust are accurate for two reasons. First, development of the equestrian facility has stalled because of this lawsuit

and the fact that Plaintiff may no longer be interested in the Farm. Second, a court order prevents Trustee from selling or transferring any trust assets, and therefore she accurately stated that she has no current plans to sell the property, but she is willing to consider the same.

Furthermore, the Trustee claims she has always had Plaintiff's best interests in mind, beginning with the fact that the creation of these trusts were her idea in 1997, and not the grantor's (Myrna) idea. Trustee avers that she wanted to secure her children's futures by putting funds in trust for their benefit, and that any gifts the grandparents made were made at Araceli's request or direction.

New Jersey Prudent Investor Act is "a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on those express provisions." N.J.S.A. 3B:20-11.2. Here, Trustee was following the 2008 Trust's terms when she acquired the interest in the Farm. Her actions complied both with the trust terms and the Act because she was diversifying the Trusts' portfolio by acquiring interest in an LLC with real property. Prior to this interest, the 1997 Trust contained only minority non-voting interests in the family supermarkets and an investment account.

Trustee states that the \$1.8M funds used to develop the Farm were a sound investment performed in good faith, and made in accordance to each trust's proportionate interest in the Farm. Trustee claims that the investment was sound because a 2013 appraisal from JM & Associates values the property at \$4.244M, up from its original value of \$1.3M when it was transferred to the Farm. Plaintiff disputes this opinion with a letter from Gagliano & Company, which appears to be an appraisal review rather than a separate or updated appraisal.

To summarize, the Trustee appears to be empowered by the Trusts and the New Jersey Prudent Investor Act to make investment decisions, including the purchase of interests in real property. Summary judgment is not appropriate on these grounds as there are genuine issues of material fact as to the suitability of the investment in Perez Farms and whether it is in the interest of the beneficiary.

iii. Decanting 1997 Trust

Plaintiff argues that the Trustee breached her fiduciary duties by decanting funds from the 1997 Trust into the 2008 Trust. In a trust context, decanting is the term generally used to describe the distribution of trust property to another trust pursuant to the trustee's discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries. W. Culp & B. Mellen, Trust Decanting: An Overview and Introduction to Creative Planning Opportunities, 45 Real Prop. Tr. & Est. L.J. 1 (2010). A trustee may decant all or a portion of the principal of a trust subject to the trustee's power of invasion. See, e.g., 12 Del. C. § 3528(a) (a trustee has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries,

to exercise such authority by appointing all or a portion of the principal subject to the power of invasion in favor of a trustee under a separate instrument (a second trust)).

Decanting may be authorized by the common law, a state statute, or the terms of the instrument may expressly allow a trustee to decant trust property to another trust. Id. Under the common law in New Jersey and other jurisdictions, a trustee who has the ability to distribute principal outright from a trust to or for a beneficiary may instead exercise such authority by distributing the assets in further trust for the beneficiary. See Wiedenmayer v. Johnson, 106 N.J. Super. 161 (App. Div. 1969); Phipps v. Palm Beach Trust Company, 142 Fla. 782 (1940); In re: Estate of Spencer, 232 N.W.2d 491 (Iowa 1975). The Second and Third Restatements of Property also recognize a trustee's power to appoint trust property in further trust pursuant to the trustee's discretionary power. See Restatement (Second) of Property: Donative Transfers § 11.1 cmt.(d) (1986); Restatement (Third) of Property: Wills & Other Donative Transfers § 19.14 (Tentative Draft No. 5, 2006).

New Jersey does not have a decanting statute, unlike other states such as New York and Delaware. See 12 Del. C. § 3528; N.Y. C.L.S. E.P.T.L. § 10-6.6. In these jurisdictions, the statutes vary in details but all operate on the same fundamental premise: if a trustee has the ability to invade principal for a beneficiary under the terms of a trust agreement, the trustee may, in the exercise of this invasion power, appoint the principal to a new trust for the benefit of some or all of the beneficiaries of the first trust. Some statutes prohibit the decanting from eliminating certain rights a beneficiary may have over the trust. For example, under Delaware law, the decanting power may not be used to eliminate a fixed income right with respect to a trust that qualifies for the marital deduction. 12 Del. C. § 3528(a)(5). Many decanting statutes provide that the authority to decant is in the sole and absolute discretion of the trustee and that it is not necessary to obtain beneficiary consent in order for a trustee to exercise its decanting power. Some states such as New York permit a trustee to seek judicial approval for a decanting.

In Wiedenmayer v. Johnson, contingent beneficiaries challenged a court-approved transfer from one trust to another, where the original trust empowered the trustees to make income and principal distributions to the primary beneficiary at their sole discretion, even terminating the trust. Id., 106 N.J. Super. at 164-65. The trustees set up a substituted trust they deemed to be in the beneficiary's best interest, but this new trust changed the terms of the original trust, eliminating any contingent remainder interests. Id. at 165. The court considered whether trustees could distribute trust property to another trust created for the beneficiary's benefit. The court held that, because the terms of the original trust provided that the corpus could be completely distributed to the beneficiary, then the trustees had a right to change the terms of the trust by creating a new trust and transferring funds from the original trust therein. Id.

Here, Plaintiff argues that Trustee decanted by transferring \$1.8M from the 1997 Trust it into the 2008 Trust. From the 1997 Trust, Plaintiff is entitled to net income payments beginning at age 22, and principal distributions at ages 30, 35, and 40. The terms of the 2008 Trust drastically change these terms so that Plaintiff no longer has

access to any income or principal distributions, unless discretionary, until age 65. Although the 1997 Trust does not expressly permit the Trustee to alter the trust's terms through decanting, the Trustee has absolute discretion to invade the principal under Section D of Article Second of the 1997 Trust. Even though New Jersey does not have a decanting statute, Wiedenmayer clearly permits decanting of trust assets where a trustee has absolute and sole discretion. As in Wiedenmayer, the Trustee has sole discretion to make these distributions to Plaintiff, and her actions here were authorized. The fact that Plaintiff never approved this decanting is not required because the Trustee has sole discretion to make principal distributions.

Although Plaintiff alleges that Trustee is benefitting from these trusts, Trustee maintains that Plaintiff is the beneficiary of both trusts and still has access to income and principal from the 2008 Trust, albeit at the Trustee's sole discretion until age 65. Further, the 1997 Trust is not completely defunded because it still contains interests in the various family supermarkets, of which Plaintiff is entitled to income payments at the very least. Thus, under the common law in New Jersey, the Trustee permissibly decanted from the 1997 Trust here. The only genuine issues of material fact that remain pertain to the subsequent investment of the decanted funds in Perez Farms via the 2008 Trust.

iv. Hostility

The general rule is that mere friction or hostility between a beneficiary and a trustee is not necessarily a sufficient ground for removal. For friction or hostility to form the basis for removal, the relationship must be shown to materially interfere with the trust, especially if the hostility arises out of the misconduct of the trustee. Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 361 (App. Div. 1985). The mere fact that a beneficiary disagrees with a fiduciary's proper exercise of discretionary powers or is resentful of the fiduciary's authority or is antagonized by his personality is not sufficient to cause his removal. In re Koretzky, 8 N.J. 506, 530 (1951). The court must determine not only the existence of hostility, animosity, friction or malice, but whether such a relationship has either resulted in actual acts of misconduct or has created a conflict of interest which appears likely to endanger the trust or the welfare of the beneficiary. Wolosoff, 205 N.J. Super. at 362.

The most fundamental duty owed by a trustee to the beneficiary of a trust is the duty of loyalty. In re Koretzky, 8 N.J. at 528. "[T]he general rule [is] that the nature and extent of the duties and powers of the trustee are determined by the terms of the trust. Those powers are not enlarged by the fact that the trustee is also the parent and natural guardian of the minor beneficiary. . . . In his capacity as trustee [the parent-settlor] was bound by the trust provisions." Coffey v. Coffey, 286 N.J. Super. 42, 56 (App. Div. 1995) (citing La Fortune v. Commissioner of Internal Revenue, 263 F.2d 186, 192 (10th Cir. 1958)). Where the interests of a trustee conflict with those of the beneficiaries, the trustee is obliged to resign, or otherwise the conflict is grounds for removal. Coffey, 286 N.J. Super. at 57 (citing Koretzky, 8 N.J. at 528)). In Coffey, the appellate division affirmed the lower court's decision to appoint a substitute trustee where a father trustee functioned as such with a dual purpose to control his adult children and manage the trust according

to its terms. The court found that the father trustee's goal of controlling or punishing his children "for what he perceive[d] to be derelictions in their relationships with him, is . . . clearly a conflict with [his] . . . duties as trustee." Id. at 57.

The exercise of a court's discretion to remove a trustee on the basis of friction or hostility must be based on the consideration of all the circumstances that have led to such disharmony, ill feelings and hostility. Wolosoff, 205 N.J. Super. at 363. The court should consider: the nature of the trust and objectives thereof, the powers and duties of the trustee, the necessity or desirability of collaboration between the parties, origin or responsibility for the hostility and the extent to which discretion has been entrusted to the trustee which might adversely affect the rights or benefits of the beneficiary seeking his removal. Id. Further, a plenary hearing should be held to determine hostility. Id. at 366.

In this case, the Plaintiff initially raises hostility as a reason to remove Trustee in her reply brief to the Trustee's opposition for this motion. Consequently, the Trustee urges the Court not to consider this improper argument. However, the Trustee had an opportunity to address Plaintiff's hostility argument, so this Court will consider this issue.

There appears to be longstanding bitterness and hostility among the parties here stemming from 2010, if not earlier. Trustee kicked Plaintiff out of her home in July 2010, a month shy of her eighteenth birthday. Trustee claims that Plaintiff was being disrespectful to her, but in a text message exchange where Plaintiff inquired why she was being kicked out, Trustee did not give a reason for the eviction. Plaintiff also states that Trustee called her "stupid" since age 13 on a weekly basis, and taught Marina how to make "jack and cokes" for Trustee by age 14; Trustee denies any such wrongdoing. Plaintiff also notes that she tried unsuccessfully to reconcile with Trustee in 2013, and text messages from Trustee show that she "need[s] some time apart" from Plaintiff.

Trustee acknowledges that her sister Rose and her parents informed Plaintiff about the trusts when Trustee did not want Plaintiff to know about them. Trustee also admits that she has not given Plaintiff any money since she left home in 2010, and has not made any trust distributions either, but she is not required to because Plaintiff is under the age of 40.

This appears to be a situation where a young adult is clashing with her mother, who happens to also be the trustee of the 1997 and 2008 Trusts created for her benefit. There are issues of fact here pertaining to this mother-daughter relationship that may be mere hostility. It is arguable that any ill-will between the parties here is interfering with the Trustee's administration of the trust because she is making determinations about funds for Plaintiff based on her maturity, but she also has sole discretion in the trust to do so, and she may reasonably consider Plaintiff's other sources of income such as money from her grandparents.

Trustee has noted that she is upset with her own parents (Myrna and Alfonso) for funding Plaintiff's lifestyle by providing her and her fiancé in Holland with 7,000EU per month. Trustee did not want to create a "trust fund baby," but rather wanted to

provide for Plaintiff's health, support, maintenance, and education, and states she has always provided for her expenses. Plaintiff points out that if she were receiving any distributions from the trusts, then she would have no need for funding from her grandparents. Trustee admits that she refused to pay for a medical procedure despite acknowledging Plaintiff's long-standing medical needs for breast reduction surgery, but she has the authority to do so in her sole discretion as Trustee. Trustee did not contribute funds towards Plaintiff's rhinoplasty for a deviated septum, but it does not appear that Plaintiff even requested any trust funds for this procedure. Further, Trustee states that Plaintiff is not living a life that she feels is giving Plaintiff "the maturity or life skills to manage money moving forward. . . .," and as a result, has withheld any mandatory income distributions since age 22 because of this alleged "incapacity." Plaintiff's Ex. F, p. 50-51. But in 2008, Plaintiff was 16 years old, had not yet been to Holland, and was not involved with her fiancé, and therefore could not be living this lifestyle that the Trustee claims the 2008 trust was created to avoid supporting until age 65. There are obvious fact issues as to the nature of this relationship and therefore, summary judgment is **DENIED**.

II. Accounting

N.J.S.A. 3B:17-2 provides that "[a] personal representative may settle his account or be required to settle his account in the Superior Court. Unless for special cause shown, he shall not be required to account until after the expiration of one year after his appointment." An action may be commenced by an interested person to compel a fiduciary. R. 4:87-1.

ARTICLE THIRTEENTH of the 1997 Trust includes the following language regarding accountings:

(B) Nothing contained in this ARTICLE THIRTEENTH shall preclude the TRUSTEE from seeking a judicial settlement of his or her accounts, but such an accounting is not required. Formal accountings shall, in the discretion of the TRUSTEE, be limited and confined to those necessary and required under prevailing law thereto applicable.

(C) The TRUSTEE shall submit to the GRANTOR an annual statement of transactions and year end position.

Here, Trustee does not oppose the Plaintiff's request to update the accountings that were submitted through December 31, 2013. Plaintiff states she does not know the current status of the trusts and how much funds were spent on the Farm. Plaintiff requests that the accountings for both 1997 and 2008 trusts be updated through May 31, 2015 when this motion was filed. Thus, summary judgment on this ground should be **GRANTED**, and Trustee is ordered to update the accounting through May 30, 2015.

**Defendant's Motion for Partial Summary Judgment on Count I of the 1997
Counterclaim for Advice & Direction**

A trustee may seek the court's advice and direction with respect to language in a trust instrument pursuant to Rule 4:95-2, which provides that, "a summary action pursuant to R. 4:83 may be brought by executors, administrators, guardians or trustees for instructions as to the exercise of any of their statutory powers as well for advice and directions in making distributions from the estate." N.J.S.A. 2A:16-55(c) further allows a fiduciary to seek a "declaration of rights," to "determine any question arising in the administration of the estate, trust, or guardianship, including the construction of wills and other writings."

Here, Araceli Perez is the trustee of the 1997 Trust seeks relief under N.J.S.A. 2A:16-55(c) and R. 4:95-2. Trustee is seeking the Court's advice and direction with respect to the 1997 trust, specifically Articles Second and Fourteenth, and whether she is required to make mandatory distributions to Marina because she is over age 22. Article Second of the 1997 trust provides that in section (C):

(C) Upon Beneficiary **attaining the age of twenty-two (22) years, the Trustee shall pay to the Beneficiary all the net income of the Trust quarter-annually.** Any net income of the Trust wherein the Beneficiary is under the age of twenty-two (22) years shall be accumulated and added to the corpus.

(D) The Trustee is hereby empowered to pay over to the beneficiary such some or sums from principal of the trust as, in the trustee's sole discretion, our from time to time deemed advisable for any reason.

(E) the principal of the trust shall be paid over to the beneficiary as follows:

- (1) one-third (1/3) thereof on the 30th birthday of the beneficiary;
- (2) one-half (1/2) of the balance thereof on the 35th birthday of the beneficiary;
- (3) the entire remaining balance thereof on the 40th birthday of the beneficiary, at which time the trust shall terminate.

Article Fourteenth entitled "Minors / Incompetents Provision," provides:

(A) If, pursuant to any of the Provisions of this Trust, any money or other property (hereinafter sometimes referred to as "said property") **shall become payable to either a person who is under the age of forty (40) years, or to a person who is either legally adjudicated incompetent or who** (by reason of either illness or mental or physical disability or incompetence) **lack, in the opinion of the Trustee then**

servicing, the capacity to properly administer said property, the Trustee shall do the following:

(1) Postpone distribution of said property to such a person and hold the same in Trust until such person shall have attained the age of forty (40) years or until the termination of such incapacity, whichever shall later occur. Until such time, the Trustee shall hold, manage, administer, and invest and reinvest both the principal and previously undistributed income of said property and **pay over and/or apply the same for the health, support, maintenance, and/or education of such person, in such manner** and to such extent as the **Trustee shall deem to be in such beneficiary's interest.**

Pursuant to the terms of Article Fourteenth of the 1997 Trust, the Trustee has withheld mandatory income under Article Second and principal distributions because Marina is not age 40 yet. Article Fourteenth then allows the Trustee to make any discretionary distributions before age 40 for “health, support, maintenance, and/or education.” Mr. Robert Sochor, Esq., the drafting attorney of the 1997 Trust, has testified that the 1997 Trust was written this way to give the Trustee flexibility to postpone distributions.

New Jersey courts have adopted several sections of the Restatement (Second) of Trusts (2012). See Tannen v. Tannen, 416 N.J. Super. 248, 267 (App. Div. 2010), aff'd, 208 N.J. 409 (2011). With respect to discretionary trusts,

. . . if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.

Section 128, although not specifically adopted by New Jersey, provides that the beneficiary's interest depends “upon the manifestation of intention of the settlor. . . .” Restatement (Second) of Trusts § 128 (2012). However, the terms of the trust may provide that the trustee “shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary.” In such a case, the beneficiary cannot compel the trustee to pay to him or to apply for his benefit more than the trustee in the exercise of a sound discretion deems necessary for his education or support. Id., at comment e. Whether the beneficiary is entitled to support out of the trust fund even though he has other resources is a matter of interpretation. Id.

Restatement (Third) of Trusts § 50 (2012) significantly changes the rights of beneficiary in a support or discretionary trust, as follows:

- (1) A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.
- (2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust.

A court will “not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust.” Restatement (Third) of Trusts, § 50, comment b (2012). Accordingly, judicial intervention is not warranted merely because the court would have differently exercised the discretion. Id. Abuse of such discretion is not permitted either, but what constitutes abuse depends on the terms of the trust, in addition to basic fiduciary duties such as “the general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (§ 79), and [] the duty to provide beneficiaries with information concerning the trust and its administration (§ 82).” Id. The terms “support” and “maintenance” are the most common guides used in granting discretion to trustees, and are sometimes accompanied by a reference to the beneficiary’s accustomed standard of living. Id., at comment d(2). However, that level of support is implied from the terms themselves, even without an express reference to the beneficiary’s lifestyle. The accustomed standard of living is measured by that enjoyed by the beneficiary at the time an irrevocable trust was created. Id.

A court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a beneficiary, the “court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.” Id., at comment b. Under a support standard, “it would not be reasonable . . . for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle.” Id., at comment d(2). New Jersey courts, however, have declined to adopt the Restatement (Third) of Trusts with respect to these provisions. See Tannen, 416 N.J. Super. at 267 (discussing the preceding Restatement (Third) provisions, but declining to adopt them or apply the standards to the facts in the case).

Plaintiff does not dispute the Trustee’s ability to withhold distributions from the 1997 Trust at her discretion but argues that the Article Fourteenth language is not clear and she has never received any such payments for her “health, support, maintenance, or education.” Neither party addresses this support standard, nor how the Trustee has employed this standard when considering distributions to Marina. Plaintiff argues that the Trustee arbitrarily denies Plaintiff access to any trust funds, particularly when she requested funds for surgery in one instance. Plaintiff claims that the Trustee must exercise some type of discretion, and that an arbitrary refusal to make any payments at all

constitutes abuse of discretion. However, there is nothing in the record to indicate that Plaintiff requested any funds from the Trustee for any later medical procedures or any other needs. There is no indication that Plaintiff has ever submitted any budget to the Trustee for consideration either. Trustee cannot adequately exercise her discretion pursuant to Article Fourteenth if she was not asked to make any payments for Marina's "health, support, maintenance, and/or education," especially in light of the undisputed fact that Marina is receiving monthly funding, including a credit card, from her grandparents to support herself and her fiancé.

Trustee opines at length that Marina does not have the capacity to administer the trust property because she is 24 years old and has not been employed or enrolled in school. Marina is also a beneficiary of another trust and therefore, the Trustee feels she does not need income from the 1997 Trust. However, Plaintiff is under age 40, and discerning this fact alone, the Trustee has the right to withhold mandatory distributions from the 1997 trust, and make distributions for Marina's "health, support, maintenance, and/or education." Moreover, this specific application does not involve claims of breach of fiduciary duty, and there is insufficient information on this record to allow the Court to make any determination as to same. As discussed in the prior section, at best, there are material issues of fact with respect to Plaintiff's motion for summary judgment with respect to the Trustee's breach of fiduciary duty.

Therefore, there are no issues of fact here with respect to the Trustee's authority to withhold mandatory income distributions to Plaintiff who is under age 40, as described in Article Fourteenth and subject to making appropriate payments of health, support, maintenance and/or education. Defendant's motion for summary judgment on Count 1 of the 1997 counterclaim seeking advice and direction from the court that mandatory distributions can be withheld pursuant to the conditions set forth in Article Fourteenth is **GRANTED**.