

COMMONWEALTH OF MASSACHUSETTS.

Appeals Court.

No. 2023-P-1090.

BARNSTABLE COUNTY.

PETER JUDSON,
PETITIONER-APPELLANT

v.

ROBERT I. FRIEDMAN, ESQUIRE AND DENISE JO LEVY,
AS TRUSTEES OF THE TRUSTS U/W OF HELEN KLINE FOR DENISE JO LEVY,
OBJECTORS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE PROBATE AND FAMILY COURT.

BRIEF FOR THE PETITIONER-APPELLANT, PETER JUDSON.

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STATEMENT OF THE ISSUES

1. Whether the Probate and Family Court erred as a matter of law in allowing a trustee to make distributions from trust principal to the trust's income beneficiary, by relying on the Power to Adjust contained in M.G.L. 203D, the Massachusetts Principal and Income Act, where the terms of the trust give the trustee a discretionary power to distribute portions of the principal of the trust to the income beneficiary as he deems necessary, but **only** if there is an emergency affecting the income beneficiary, taking into account her income and assets from all other sources, and further state that it was the settlor's "intention that principal distributions be made . . . only under the most extraordinary circumstances" and that the settlor did "**not** anticipate the probability that any principal distributions [would] be required".

2. Whether the Probate and Family Court erred as a matter of law in allowing a trustee to make distributions from trust principal to the trust's income beneficiary by relying on the Power to Adjust contained in the Massachusetts Principal and Income

Act, where the statutory prerequisites permitting the trustee to exercise the Power to Adjust have not been met.

3. Whether the Probate and Family Court erred as a matter of law in allowing a trustee to make distributions from trust principal to the trust's income beneficiary by relying on the Power to Adjust contained in the Massachusetts Principal and Income Act, where, even assuming that the Power to Adjust contained in the statute does apply, the trustee failed to prove that he exercised that power impartially, based upon what is fair and reasonable to all of the beneficiaries, in contravention of the requirement of M.G.L. c. 203D, §3(b).

STATEMENT OF THE CASE

This appeal arises under Massachusetts trust law, specifically, the Massachusetts Principal and Income Act, contained at M.G.L. c. 203D ("MPIA"). The issues stem from the Objectors/Appellees, Robert I. Friedman, Esquire ("Friedman") and Denise Jo Levy ("Levy"), Trustees of the Trusts u/w of Helyn Kline for Denise J. Levy ("trusts"), having distributed well in excess of the gross income of the trusts to Levy since 2020,

in violation of the express terms of the trust, which provide that the trustee shall only distribute "all of the net income of her trust in convenient period installments". A. 10, 39.

On September 30, 2022, the Petitioner/Appellant, Peter Judson ("Judson"), filed a General Trust Petition with the Barnstable County Probate and Family Court, asking the Court to order the trustees, Friedman and Levy, to comply with the terms of the trusts by distributing no more than the net income of the trusts to Levy, and ordering Levy to return all funds distributed to her since January 1, 2020 in excess of the net income from the trusts. A. 7, 10-11.

On December 8, 2022, the court issued a Citation with a return date of January 3, 2023. A. 7.

On December 21, 2022, Christine A. Jenness, Esquire filed a Notice of Appearance and Objection on behalf of Friedman. A. 12-14.

On January 3, 2023, Judson filed the Citation, with a Return of Service indicating that it had been served as ordered. A. 16-17.

On February 1, 2023, Friedman filed an Affidavit of Objections in accordance with G.L. c. 190B, §1-401. A. 7, 18-22.

On December 21, 2022, Thomas A. Rockwell, Esquire filed a Notice of Appearance and Objection on behalf of Friedman and Levy. A. 7, 23.

Levy never filed an Affidavit of Objections. A. 6-7.

On May 2, 2023, Friedman and Judson filed cross motions for summary judgment. A. 7-8, 24-122.

The Court heard oral argument on these motion on June 8, 2023. A. 8.

On August 3, 2023, the court issued a Memorandum of Decision in which it found that Friedman "had the authority to exercise the power to adjust for the benefit of the beneficiaries under the trusts", and therefore allowed Friedman and Levy's motion for summary judgment and denied Judson's motion for partial summary judgment. A. 8, 123-128.

The Court reasoned as follows:

1. M.G.L. c. 203D §4(a) allows a trustee to adjust between principal and income if three conditions are met: the trustee invests and manages the trust assets

as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income; and the trustee determines, after applying the rules of Section 3(a) that the trustee is unable to administer the trust impartially. The Court stated that Friedman and Levy had satisfied these three conditions.

2. Friedman's exercise of the power to adjust was permissible under M.G.L. c. 203D §4(b) based upon his unsubstantiated assertions that the trusts had experienced significant growth of principal since they were established, while the income of the trusts had not kept pace, and that he had considered Levy's costs of living, her other sources of income and the relative factors under Section 4(b) in utilizing the power to adjust.

3. None of the conditions listed under Section 4(c) of the statute which prohibited a trustee from exercising the power to adjust existed.

4. The terms of the trust do not specifically deny the trustee the use of the power of adjustment such that the terms of the trust that limit the trustee's use of the power to adjust to emergency situations

only do not affect the application of the power to adjust M.G.L. c. 203D §4(f). The Court then stated that Article Seventh of the Will expressly authorized the trustees "to make or not to make adjustments or appointments among the beneficiaries or as between principal and income" such that even if the Act did not apply, "the trustees were expressly authorized to do so under the plain language of the trusts".

5. M.G.L. c. 203D §3 contains no prohibition against Friedman utilizing the power to adjust and the trusts do not contain a provision manifesting an intention that the fiduciary favor 1 or more of the beneficiaries such that the power to adjust is not barred by M.G.L. c. 203D §3(b).

6. There was no abuse of discretion that would allow a court to change Friedman's decision to exercise or not exercise a discretionary power conferred by the MPIA pursuant to M.G.L. c. 203D §5(a).

A. 123-128.

Consequently, the Court issued a Decree of Dismissal as to Judson's General Trust Petition that same day. A. 135.

On August 18, 2023, Judson filed a Notice of Appeal. A. 8.

STATEMENT OF THE FACTS

On August 3, 1977, Helyn W. Kline executed a Last Will and Testament ("Will") which established Generation Skipping Trusts for each of her two (2) daughters, Denise Jo and Barbara Ann by way of her will. A. 39.

Helyn Kline died in 1988 and her Will was probated in Barnstable County Probate and Family Court (Docket No.: 88P-0794). A. 95.

The trusts for Levy are the subject of this action and are described as follows: Trust u/w of Helyn Kline for Denise Jo Levy (GST Exempt Trust) and Trust u/w of Helyn Kline for Denise Jo Levy (GST Subject Trust). Ibid.

Levy has three (3) adult sons, Stephen Judson, William Judson and Peter Judson, all of whom are equal contingent beneficiaries of the subject trusts pending the death of Levy. A. 39, 95.

The Will states that, "[m]y trustees shall distribute to each daughter all of the Net Income of her trust in convenient period installments." A. 39.

The Will further states, “[m]y Trustees may also distribute to a daughter or apply for her benefit, from time to time, such portion or portions of the principal of her trust as my Trustees, in their absolute discretion, may deem necessary **for any emergency affecting such daughter, taking into account her income and assets from all other sources. It is my intention that principal distributions be made to a daughter only under the most extraordinary circumstances and I do not anticipate the probability that any principal distributions will be required.**”

Ibid. Emphasis added.

Article Seventh of the Will provides that, “**I direct that all inheritance, estate, transfer and succession taxes, federal, state and foreign, of any kind whatsoever, which may be due and payable as a result of my death,** together with all interest and penalties thereon together with all interest and penalties thereon, with respect to all property includable for such tax purposes (except with respect to any property over which I may have a general power of appointment, which property shall bear its proportionate share of such taxes, interest and

penalties), **shall be paid out of the principal of my residuary estate. I authorize my fiduciaries to pay such taxes at such time or times as they, in their absolute discretion, may deem advisable.** My fiduciaries, in their absolute discretion, shall have the authority to claim items of deduction in either the income tax returns or estate tax return, as they may decide, without the consent of the beneficiaries, without liability on their part for so doing, and in their discretion, to make or not to make adjustments or appointments among the beneficiaries or as between principal and income". A. 42-43. Emphasis added.

Article Eighth, Paragraph Eleven of the Will provides the trustees with the power, "To distribute the income and principal which is payable to a beneficiary under any provision of my Will to the beneficiary directly, or to pay and apply the same for the beneficiary's support, education and welfare, as they, in their absolute discretion, may determine, without being required to apply to court for leave to make such payments, and without any liability for so doing." A. 45.

Article Ninth, Paragraph Two of the Will provides, the trust provides that "there shall be **two** Trustees **acting** hereunder at all times." A. 46. Emphasis added.

Article Ninth, Paragraph Five of the Will provides, "**...any fiduciary who is also a beneficiary shall not participate in any decision relating to any discretionary distributions of income or principal.**" A. 47. Emphasis added.

The Will makes it clear that, "[t]he term "fiduciaries" shall be deemed, where appropriate, to mean executors, trustees or guardians." A. 47.

The original trustees named in the Will were Helyn Kline's husband, Hess Kline, Nathan Silverstein ("Silverstein") and David J. Kaufman, Esquire ("Kaufman"). A. 46, 95. All but Kaufman predeceased Helyn Kline. A. 95.

On or about August 16, 1991, Kaufman designated Levy as successor co-trustee to serve with him, in accordance with Article Ninth of the Will. A. 97.

On March 31, 2009, Friedman was appointed successor co-trustee. A. 18, 61.

Kaufman died on May 26, 2020. A. 97.

Levy and Friedman are currently serving as co-trustees of the subject trusts, which require a minimum of two (2) trustees "acting" at all times. Ibid. They have not filed any annual accounts for the subject trusts. Ibid.

Over the four year period from 2015-2019, the trustees distributed \$55,705 in excess of the Net Income of the subjects trusts to Levy. A. 98.

In 2020, after the death of Kaufman, Friedman distributed \$37,226 in excess of the Net Income to Levy. Ibid.

In 2021, Friedman distributed \$20,145 in excess of the Net Income to Levy. Ibid.

In 2022, Friedman distributed \$57,787 in excess of the Net Income to Levy. Ibid.

Friedman refuses to confine distributions to Levy to the Net Income of the subject trusts, stating that he will continue to abide by **Levy's request that invade the principal of the trusts.** Ibid.

Friedman claims that he has reviewed[Levy's] cost of living and her other resources and taken into account all of the other relevant factors required by the law in making excess distributions to Levy, but

has provided no details as to any of Levy's finances, what documentation he reviewed or what "relevant factors" he considered in making excess distributions to Levy. A. 20, 63.

Levy has repeatedly advised Judson that her Morgan Stanley Portfolio, which was funded by Friedman's 2001 dissolution of a similar trust established by Helyn Kline's husband, contains roughly \$1,000,000. Ibid. Levy has also recently advised Judson that she had "earned about \$250,000" and "invested the money which is doing very well" and that she is not "running debt". A. 98-99.

Levy lives alone in a five (5) bedroom, 3,800 square foot apartment on Central Park West. In 2015, Levy advised Judson that her rent for this apartment was almost \$6,000 per month. A. 99.

Neither Levy nor Friedman have produced any evidence of an emergency affecting Levy such that Friedman may distribute portions of the principal to her as he may deem necessary for said emergency under the terms of the trust. A. 61-64.

ARGUMENT

I. THE PROBATE AND FAMILY COURT ERRED IN ALLOWING FRIEDMAN AND LEVY'S MOTION FOR SUMMARY JUDGMENT

BECAUSE THE TERMS OF THE TRUST GIVE FRIEDMAN A DISCRETIONARY POWER TO DISTRIBUTE PORTIONS OF THE PRINCIPAL OF THE TRUST TO LEVY AS HE DEEMS NECESSARY, BUT ONLY IF THERE IS AN EMERGENCY AFFECTING AFFECTING HER, TAKING INTO ACCOUNT HER INCOME AND ASSETS FROM ALL OTHER SOURCES, AND FURTHER STATES THAT IT WAS THE TRUSTOR'S "INTENTION THAT PRINCIPAL DISTRIBUTIONS BE MADE . . . ONLY UNDER THE MOST EXTRAORDINARY CIRCUMSTANCES" AND THAT SHE DID "NOT ANTICIPATE THE PROBABILITY THAT ANY PRINCIPAL DISTRIBUTIONS [WOULD] BE REQUIRED" SUCH THAT THE POWER TO ADJUST CONTAINED IN THE MPIA DOES NOT APPLY.

The Massachusetts Principal and Income Act ("MPIA"), codified at G.L. c. 203D, became effective on January 1, 2006. Addendum 37. It applies to every trust or decedent's estate existing on that day except as otherwise expressly provided in the will, the terms of the trust, or the MPIA. Ibid. There is no legislative history for the MPIA, only a report from the Ad Hoc Principal and Income Act Committee ("Committee"), which drafted it. Understanding and Using Trusts (MCLE, Inc. 5th ed. 2022), §14.1.3. "The MPIA is a default act, taking effect unless the trust's terms contain a different position or does not give a fiduciary a discretionary power of administration. G.L. c. 203D, §3(a)." Ibid.

"When exercising discretion, a trustee must generally act impartially between the income

beneficiaries and the remainder beneficiaries. G.L. 203D, §3(b); see also Lannin v. Buckley, 256 Mass. 78 (1926). The trust agreement and the MPIA may confer broad discretion in determining what is principal and what is income, but trustees cannot use this power to shift beneficial interests. Old Colony Tr. Co. v. Silliman, 352 Mass. 6, 10-11 (1967). If the trust instrument clearly manifests an intention that the trustee shall or may favor one or more beneficiaries, the trustee should carry out that intent. G.L. 203D, §3(b). Otherwise, impartiality is the rule.” Understanding and Using Trusts (MCLE, Inc. 5th ed. 2022), §14.1.4.

The Report of the Ad Hoc Principal and Income Act Committee (“Report”) indicates that the MPIA was enacted after the Committee reviewed the Uniform Principal and Income Act (“Uniform Act”) that was approved at the National Conference of Commissioners on Uniform State Laws on July 31, 1997. A. 100. Section 4 of the MPIA, the Trustee’s Power to Adjust, is identical to its counterpart in the Uniform

Act (Section 104) for the purposes of this action.¹ A.
112.

M.G.L. c. 203D, §3, entitled Fiduciary Duties;
General Principles, provides as follows:

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of this chapter, a fiduciary:

(1) **shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;**

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) shall administer a trust or estate in accordance with this chapter **if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration;** and

(4) shall add a receipt or charge a disbursement to principal if the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

Emphasis added.

¹ The only deviation is a change in subsection (b) (5), eliminating reference to specific types of property the trustee was to consider by simply providing that the trustee consider "the nature and character of the asset held in trust . . ."

This section, which the Probate and Family Court failed to address in its Memorandum and Order, makes it crystal clear that the MPIA is a default act, and that the Power to Adjust contained in the MPIA applies only where the terms of the will or the trust do not contain a different position. In the instant case, the terms of the trusts **do** contain a different position - they expressly provide otherwise in that they give Friedman a discretionary power to adjust but only if there is an emergency affecting Levy, taking into account her income and assets from all other sources. **Moreover, the terms of the trust expressly state that it was the settlor's "intention that principal distributions be made . . . only under the most extraordinary circumstances" and that the settlor did "not anticipate the probability that any principal distributions would be required."** Hence, the terms of the trust itself control by virtue of Section 3(a) of the MPIA and the power to adjust contained in Section 4 of the MPIA cannot be invoked.

3

Despite the trust's clear language as to when and under what circumstances the trustees could distribute principal to the income beneficiary, the

Probate and Family Court inexplicably found that Friedman was expressly authorized to shift principal to income under the "plain language" of the trust. However, in making this finding, the Probate and Court misquoted the Will in stating that, "the Will expressly provides for fiduciaries **'in their absolute discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income.'**" Emphasis added. Here, the Probate and Family Court is apparently attempting to quote Article Seventh of the Will, but it is an edited version inside of quotes, with no ellipses or spaces to indicate the omissions.² The full text of Article Seventh of the Will actually reads as follows: **"I direct that all inheritance, estate, transfer and succession taxes, federal, state and foreign, of any kind whatsoever, which may be due and payable as a result of my death, together with all interest and penalties thereon, with respect to all property includible for such tax purposes (except with respect to any property over which I may have a**

² In fact, the Court mis-paraphrased Article Seventh of the Will earlier in its decision and mis-paraphrased Article Eighth of the Will by deleting key language contained in the provision. A. 124.

general power of appointment, which property shall bear its proportionate share of such taxes, interest and penalties), shall be paid out of the principal of my residuary estate. I authorize my fiduciaries to pay such taxes at such time or times as they, in their absolute discretion, may deem advisable. My fiduciaries, in their absolute discretion, shall have the authority to claim items of deduction in either the income tax returns or estate tax return, as they may decide, without the consent of the beneficiaries, without liability on their part for so doing, and, in their discretion, to make or not to make adjustments or apportionments among the beneficiaries or as between principal and income."

More importantly, Article Seventh applies solely to the payment of inheritance, estate, transfer and succession taxes, which were to be made from the principal of Kline's residuary estate. To read this clause as providing a general power to adjust between principal and income clearly flies in the face of Paragraph 2 of Article Fourth of the Will, which expressly limits the trustees' use of the power to

adjust to "only the most extraordinary circumstances" which Kline did not anticipate would occur.

Since the power to adjust contained in the MPIA does not apply by virtue of Section 3(a), Friedman and Levy must prove the existence of an emergency facing Levy in order to make distributions to her from principal under the discretionary power to adjust conferred by the trust itself, which they failed to do. They produced absolutely no evidence of an emergency affecting Levy, taking into account her income and assets from all other sources. Rather, Levy admitted to Judson that she has no financial problems that would necessitate excess distributions to her. Levy also told Judson that she has invested her earnings very well and is not running any debt. Furthermore, although Friedman claims that he has reviewed "carefully [Levy's] cost of living and her other resources" and taken "into account all of the other relevant factors required by the law" in making excess distributions to Levy, he has provided no evidence as to what documents he has reviewed. Hence, it is abundantly clear that the Probate and Family Court erred in allowing Friedman to utilize either the

Power to Adjust contained in the MPIA or the discretionary power given to him by the terms of the trust to distribute portions of the principal to Levy.

II. THE PROBATE AND FAMILY COURT ERRED IN ALLOWING LEVY AND FRIEDMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATUTORY PREREQUISITES PERMITTING A TRUSTEE TO EXERCISE THE POWER TO ADJUST CONTAINED IN THE MPIA HAVE NOT BEEN MET.

M.G.L. c. 203D, §4, entitled Trustee's Power to Adjust, provides as follows:

(a) A trustee may adjust between principal and income if the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3.

(b) In deciding whether to exercise the power conferred by subsection (a), a trustee **shall consider all factors relevant to the trust and its beneficiaries, including the following factors** to the extent they are relevant:

(1) the nature, purpose and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income and preservation and appreciation of capital;

(5) the nature and character of the assets held in the trust, if an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and if the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If clause (5), (6), (7) or (8) of subsection (c) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment **unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.**

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in clauses (1) to (6), inclusive, of subsection (c) or clause (8) of said

subsection (c) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in said subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

Emphasis added.

The second enumerated factor that a trustee must consider in deciding whether to employ the power to adjust is **the intent of the settlor**. And the intent of the settlor was clearly that the trustee not make distributions from principal to the income beneficiary except under the most extraordinary circumstances where there was a proven emergency. Friedman and Levy cannot exercise the power to adjust where they completely ignored this factor.

The seventh enumerated factor under this section prohibits a trustee from utilizing the power to adjust where the trustee is a beneficiary of the trust. Levy is clearly a beneficiary and the facts are undisputed

that she requested that Friedman make distributions to her from the principal of the trust. It was clearly the settlor's intent that a beneficiary not be involved in in any discretionary distribution of income or principal because the trust expressly states "any fiduciary who is also a beneficiary shall not participate in any discretionary distribution of income or principal." Moreover, the terms of the trust prohibit Friedman alone from exercising the power under Section 4(d) of the MPIA because the trust provides that "there shall be two Trustees **acting** hereunder at all times."

III. THE PROBATE AND FAMILY COURT ERRED IN ALLOWING LEVY AND FRIEDMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE, ASSUMING THAT THE POWER TO ADJUST CONTINUED IN THE MPIA DOES APPLY, THE FACTS ARE UNDISPUTED THAT HAS FRIEDMAN HAS FAILED TO EXERCISE THAT POWER IMPARTIALLY, BASED UPON WHAT IS FAIR AND REASONABLE TO ALL OF THE BENEFICIARIES, IN ACCORDANCE WITH M.G.L. C. 203D, §3(B) .

M.G.L. c. 203D, §3 (b) provides as follows:

(b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the

trust or the will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

The Comment to Section 104 of the Uniform Principal and Income Act ("Comment"), provides numerous examples illustrating the application of the Trustee's Power to Adjust contained in Section 104 which, as stated above, is identical to Section 4 of the MPIA for purposes of this action. A. 116-120.

Example (4) set forth in the Comment provides as follows:

T is the trustee of a trust that is governed by the laws of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise

the power to adjust under Section 104(a) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning 66 Iola L. Rev. 273 (1981).

A.119.

In terms of the requisite showing of impartiality and fairness to all beneficiaries, the facts of the instant case are analogous to those of Example (4) of the Comment to Section 104 of the Uniform Principle and Income Act which, as stated above, is analogous Section 4 of the MPIA. This example illustrates that in order to utilize the Power to Adjust on the grounds of fairness to all beneficiaries, the trustee must clearly document the change in circumstance and his rationale for the specific amount of the adjustment. For instance, he must show that he reallocated the assets of the trust to comply with the Prudent Investor Act and that any adjustment he made in favor of the income beneficiary utilizing the power to

adjust correlated with and did not exceed the capital appreciation resulting from the change in the portfolio's asset allocation.

In the instant case, Friedman has made no such showing. He has not asserted that the income of the trust has declined since its inception or by what percentage it has declined. He simply asserts that the trusts have experienced significant growth of principal since they were established and that the income of the trusts have not kept pace, so he chose an arbitrary amount by which to increase the income paid to Levy. Importantly, Friedman's decision to invade the principal of the trust at the request of Levy belies any claim of impartiality toward the beneficiaries.

CONCLUSION

For the reasons argued herein, this Court should rule that the Probate and Family Court erred as a matter of law in entering judgment against the Petitioner/Appellant, Judson, and reverse the judgment against him insofar as it:

1. Erroneously found that Friedman's exercise of the power to adjust was authorized by M.G.L. c.

203D, §4 and was consistent with the purpose of the trusts at issue; and

2. Erroneously found that that even if the power to adjust conferred by M.G.L. c. 203D, §4 did not apply, Friedman was expressly authorized to so under the plain language of the trusts.

Respectfully submitted,
Peter Judson,
By his Attorney,

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Dated: December 4, 2023

**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF
THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Tracey L. Taylor, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing briefs, including, but not limited to:

Mass. R.A.P. 16(a)(13) (addendum);

Mass. R.A.P. 16(e) (references to the record);

Mass. R.A.P. 18 (appendix to the briefs); and

Mass. R.A.P. 20 (form of briefs, appendices, and other papers). Compliance therewith was ascertained by use of the monospaced font Courier New, 12 pt. with 33 non-excluded pages.

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**ADDENDA TO BRIEF FOR THE PETITIONER-APPELLANT,
PETER JUDSON**

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M.G.L. c. 190B, § 1-401 - Notice; Method and Timing of Giving

(a) If notice on any matter is required by reference to this section and except for specific notice requirements as otherwise provided, the court shall fix a return date and issue a citation. The petitioner shall cause notice of the return day of any matter to be given to any interested person or attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney. Notice shall be given:

(1) by mailing a copy of the citation at least 14 days before the return date by certified, registered or ordinary first class mail addressed to all interested persons who have not assented in writing or their attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney at the person's office or place of residence, if known; or

(2) by delivering a copy of the citation to the person being notified personally at least fourteen days before the return date; or

(3) by publishing a copy of the citation once in a newspaper designated by the register of probate having general circulation in the county where the proceeding is pending or in a newspaper designated by the register of probate in a county identified by the court, the publication of which is to be at least 7 days before the return date.

(b) The court for good cause shown may provide for a different method or time of giving notice for any return date. Notice of proceedings for guardianships of minors in the district court and the juvenile court shall be given in accordance with the rules of those courts.

(c) Proof of the giving of notice shall be made on or before the hearing or return day and filed in the proceeding.

(d) Any party to a formal proceeding who opposes the proceeding for any reason shall before 10:00 A.M. of the return date enter an appearance in writing giving the name of the proceeding, the objecting party's name and the objecting party's address or the name and address of the objecting party's attorney.

(e) The objecting party shall file a written affidavit of objections to the proceeding, stating the specific facts and grounds upon which the objection is based within 30 days after the return date. If the objecting party is a respondent as defined in section 5-101, the respondent or the respondent's appointed counsel shall file a written affidavit of objection to the proceeding, stating the specific facts and grounds upon which the objection is based within 30 days after the return date.

(f) If an affidavit of objections fails to comply with the requirements of the foregoing section (e), such affidavit of objections and the appearance of the party filing such affidavit of objections may be struck on motion after notice at any time after filing of such affidavit of objections.

(g) If a proceeding is unopposed, after the time required for any notice has expired, upon proof of notice, the court or the magistrate may enter appropriate orders on the strength of the pleadings if satisfied that all conditions are met, or the court may conduct a hearing and require proof of the matters necessary to support the order sought.

**Mass. Acts c. 129, §§ 5-6 - An Act Establishing the
Massachusetts Principal and Income Act**

Section 5. This act shall take effect on January 1, 2006.

Section 6. This act shall apply to a trust or decedent's estate existing on the effective date of this act except as otherwise expressly provided in the will or terms of the trust or in this act.

Approved November 10, 2005.

M.G.L. c. 203D, § 3 - Fiduciary Duties; General Principles

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of this chapter, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal if the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

M.G.L. c. 203D, § 4 - Trustee's Power to Adjust

Section 4. (a) A trustee may adjust between principal and income if the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3.

(b) In deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) the nature, purpose and expected duration of the trust;
- (2) the intent of the settlor;
- (3) the identity and circumstances of the beneficiaries;
- (4) the needs for liquidity, regularity of income and preservation and appreciation of capital;
- (5) the nature and character of the assets held in the trust, if an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor;
- (6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and if the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If clause (5), (6), (7) or (8) of subsection (c) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in clauses (1) to (6), inclusive, of subsection (c) or clause (8) of said subsection (c) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in said subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Barnstable Division

Docket No. BA22P1993PO

in re:

TRUSTS U/W OF HELYN KLINE

MEMORANDUM and ORDER

(Respondents' Motion for Summary Judgment filed on May 2, 2023)
(Petitioner's Motion for Partial Summary Judgment filed on May 2, 2023)

The above-captioned matters came before the Court (Tierney, J.) for hearing on June 8, 2023. Attorney Tracey Taylor appeared on behalf of the Petitioner, Peter Judson ("Mr. Judson"). Attorney Thomas Rockwell appeared on behalf of the Respondents, Attorney Robert Friedman ("Attorney Friedman") and Denise Jo Levy ("Ms. Levy"). After hearing, it is ordered as follows:

1. The Respondents' Motion for Summary Judgment is hereby *allowed*.
2. The Petitioner's Motion for Partial Summary Judgment is hereby *denied*.

Memorandum of Decision

Background

In 1977, Helyn Kline ("Ms. Kline") established generation skipping trusts for each of her daughters, including the Respondent, Ms. Levy, by way of her will ("the Will").¹ The trusts established by Ms. Kline for Ms. Levy are the subject of this action. Ms. Levy's three adult sons: the Petitioner, Stephen Judson, and William Judson,² are presently the equal contingent beneficiaries of the subject trusts.³

Attorney Friedman and Ms. Levy are the current trustees of the trusts. In 2009, Attorney Friedman was appointed as trustee of the trusts for the benefit of Ms. Levy. Article Sixth of the Will provides that "any fiduciary who is also a beneficiary shall not participate in any decision relating to any discretionary distributions of income or principal under the times of my will." The purpose of the trusts is to pay all income to Ms. Levy and principal as necessary to address emergency situations.

¹ Ms. Kline subsequently died in 1988.

² Ms. Levy's other two children, Stephen and William Judson, did not join in the underlying action and did not participate in this litigation.

³ Upon Ms. Levy's death, the trusts are to be divided into as many equal shares as there are children of Ms. Levy then living and children of Ms. Levy then deceased who have issue then living.

Paragraph 1 of Section D of Article Fourth of the Will provides that the trustees, “shall distribute to each daughter all of the Net Income of her trust in convenient periodic installments.” Paragraph 2 provides that the trustees may distribute, or apply for Ms. Levy’s benefit, such portion or portions of principal, as the trustees in their absolute discretion may deem necessary for any emergency situation affecting Ms. Levy, while also taking into account her income from all other sources. Paragraph 7 of Article Seventh further provides that the fiduciaries, in their absolute discretion, shall have the authority without the consent of the beneficiaries, without liability on their part for doing so, and in their discretion, to make or not make adjustments or apportionments among beneficiaries or as between principal and income. Paragraph 11 of Article Eighth provides the trustees with the power to distribute income and principal to a beneficiary directly or to pay and apply the same for the beneficiary’s support, as they may in their absolute discretion determine, without being required to apply to the Court for leave to make such payments and without any liability for doing so.

On September 30, 2022, Mr. Judson filed a general trust petition wherein he asserted that, since 2020, the trustees have distributed “well in excess” of the gross income of the trusts to Ms. Levy in violation of the terms of the trust which provide that the trustee shall only distribute all of the net income of her trust in convenient periodic installments. The petition requests that the Court: 1) order the trustees to comply with the terms of the trusts by distributing no more than the net income of the trusts to Ms. Levy; 2) order Ms. Levy to return all funds distributed to her since January 1, 2020 in excess of the net income; and 3) order the trustees to refrain from making any further distributions until the full amount of the excess distributions has been returned.⁴

On May 2, 2023, Attorney Friedman and Ms. Levy filed a Motion for Summary Judgment. On the same date, Mr. Judson filed a Motion for Partial Summary Judgment.

Standard

Summary judgment is permissible when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56. A moving party may be entitled to summary judgment in one of two ways: first, he may submit affirmative evidence negating the nonmoving party’s claim; or second, he may demonstrate that the nonmoving party cannot establish an element of his claim. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715 (1991), citing Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (White, J., concurring). “All evidentiary inferences are to be resolved in favor of the party opposing a motion for summary judgment.” J.F. v. J.F., 71 Mass. App. Ct. 782, 789 (2008). “Doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment.” Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, London, 449 Mass. 621, 628 (2007).

“The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would have no burden on an issue if the case were to go to trial.” Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), citing Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982). If the moving

⁴ On February 1, 2023, Attorney Friedman filed an Affidavit of Objection to the petition.

party is able to demonstrate a lack of genuine issue, “the burden shift[s] to the [nonmoving party] to show with admissible evidence the existence of a dispute as to material facts.” Godbout v. Cousens, 396 Mass. 254, 261 (1985). The nonmoving party must then go beyond the pleadings and demonstrate specific facts to show that there remains a genuine issue of material fact requiring a trial. Slaven v. City of Salem, 386 Mass. 885, 890 (1982), citing Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975).

Cross-Motions for Summary Judgment

This dispute is a disagreement between the parties regarding the applicability and effect of General Laws Chapter 203D (“the Massachusetts Principal and Income Act,” hereinafter “the Act”), specifically Sections 3 and 4, to the trusts executed by Ms. Kline.

Section 3 of the statute, which governs fiduciary duties and general principles, provides, in relevant part, as follows:

“(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of this chapter, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter; . . .

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; . . .

(b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.” G. L. c. 203D, § 3.

Moreover, Section 4 of the statute, which governs a trustee’s “power to adjust,” provides, in relevant part, as follows:

“(a) A trustee may adjust between principal and income if the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3.” G. L. c. 203D, § 4.

After review of the applicable law and the relevant documents executed by Ms. Kline, and after consideration of the arguments advanced by counsel, the Court finds that the trustee,

Attorney Friedman, had the authority to exercise the power to adjust for the benefit of the beneficiaries under the trusts, and therefore, the Respondents' request for summary judgment must be granted, and the Petitioner's request for partial summary judgment must be denied.

Pursuant to General Laws Chapter 203D, Section 4, a trustee may adjust between principal and income if the three conditions outlined in the statute are met: 1) "if the trustee invests and manages the trust assets as a prudent investor"; 2) "the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income"; and 3) the trustee determines, after applying the rules of Section 3 (a) that the trustee is unable to administer the trust impartially. See G. L. c. 203D, § 4 (a).

The Respondents assert that the first condition of the statute is met here because the trust allows the trustee to invest as they see fit and does not dictate a specific investment strategy; that the second condition is met because Article Fourth, 1.D, provides that the trustees shall distribute all of the net income in periodic installments, and that the final condition is met because Attorney Friedman is unable to meet his duty to administer the trusts impartially after abiding by the trust terms and all default rules regarding the allocation of principal and income. The Respondents assert that because the trusts do not direct the trustee to favor one or more of the beneficiaries, the trustee must administer the trusts impartially. The Respondents further contend that the ongoing investment of the trust for growth, for the benefit of the remaindermen, has resulted in a diminished production of income for the income beneficiary. The Respondents assert that given that the three conditions outlined above in Section 4 (a) have been satisfied, the power to adjust applies to the trusts. The Court agrees.

Subsection (b) of Section 4 provides that in deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including, but not limited to, the nature, purpose and expected duration of the trust, the intent of the settlor, the identity and circumstances of the beneficiaries, the need for liquidity, regularity of income, the actual and anticipated effect of economic conditions on principal and income, and the effects of inflation and deflation. See G. L. c. 203D, § 4 (b). The Respondents assert that the trusts have experienced significant growth of principal since they were established, however, the income of the trusts has not kept pace. After considering Ms. Levy's cost of living, her other limited sources of income and the relevant factors under Section 4 (b), Attorney Friedman, as trustee, determined that it was necessary to exercise the power to adjust, shifting principal to income, to pay out income to Ms. Levy. After consideration of the circumstances, and after applying the relevant provisions of the statute to the language of the trusts, the Court finds that the exercise of the power to adjust by Attorney Friedman was permissible.

The Respondents further assert that none of the situations listed under Section 4 (c),⁵ which would prohibit a trustee from exercising the power to adjust, exist with respect to the

⁵ "A trustee may not make an adjustment: (1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment; (2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion; (3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets; (4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside; (5) if possessing or exercising the power to make

trusts at issue and Attorney Friedman's decision to exercise the power of adjustment. The Court agrees.

Moreover, G. L. c. 203D, § 4 (f), provides that "terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the power of adjustment by subsection (a)." Here, the terms of the trusts do not specifically deny the trustee the use of the power of adjustment. Instead, Article Seventh expressly authorizes the trustees "to make or not to make adjustments or apportionments among the beneficiaries or as between principal and income."

The Petitioner asserts that the Act does not apply to the trusts because the trusts specifically state that principal should not be distributed to Ms. Levy; that principal should only be distributed to Ms. Levy in emergency situations, and that no emergency exists. The Petitioner also contends that Section 3 of the Act prohibits Attorney Friedman from exercising the power to adjust under Section 4, however, Section 3 contains no such provision. Instead, Section 3 (b) authorizes the exercise of the power to adjust unless the trust or will "clearly manifests an intention that the fiduciary shall or may favor 1 or more beneficiaries." The trusts executed by Ms. Kline do not contain such a provision. Moreover, this section further provides that a "determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries." G. L. c. 203D, § 3 (b).

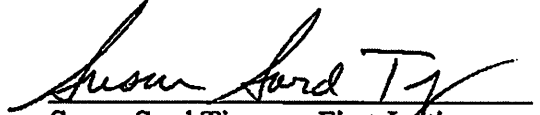
Finally, Section 5 of the statute provides that a "court shall not change a trustee's decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the trustee's discretion. A court shall not determine that a trustee abused his or her discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion." G. L. c. 203D, § 5 (a).

After review of all relevant sections of Chapter 203D, the Court finds that Attorney Friedman's exercise of the power to adjust is authorized by Section 4 and is consistent with the purpose of the trusts at issue. The Will expressly provides for fiduciaries "in their absolute discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income." Therefore, even if the Act did not apply to Attorney Friedman's decision to shift income to principal, the Court finds that he was expressly authorized to do so under the plain language of the trusts.

an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment; (6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment; (7) if the trustee is a beneficiary of the trust; or (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly." G. L. c. 203D, § 4 (c).

In consideration of the foregoing, the Court finds that the Respondents are entitled to summary judgment as a matter of law. Accordingly, the Respondents' Motions for Summary Judgment is *allowed*, and the Petitioner's Motion for Summary Judgment is *denied*. Therefore, a Judgment of Dismissal shall enter with prejudice on the underlying petition.

August 3, 2023


Susan Sard Tierney, First Justice
Barnstable Probate and Family Court

CERTIFICATE OF SERVICE

A copy of the within Brief for the Petitioner-Appellant has this day been sent, via e-filing, to all counsel of record, as follows:

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Signed under the penalties of perjury this 4th day of December, 2023.

/s/ Tracey L. Taylor
Tracey L. Taylor, Esquire

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