

**96PR1979 (6/30/97)**

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PROBATE COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 96PR1979

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IN THE MATTER OF

The Separate Trust for the Benefit of Bettina Bancroft Klink under the 1941 Hugh Bancroft, Jr. Trust.

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ORDER

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THIS PROCEEDING relates to an inter vivos trust ("the trust") established in 1941 by Hugh Bancroft, Jr. ("the grantor"). A portion of the trust ("the Bettina portion") was set aside, when grantor died in 1953, for the sole benefit of grantor's daughter Bettina Bancroft Klink ("the income beneficiary"). Following the death of the income beneficiary on May 21, 1996, the principal of the Bettina portion was or will be distributed to the income beneficiary's daughter and sole surviving descendant ("the remainderman").

The trustees petitioned this Court for instructions with respect to the proper apportionment and distribution of certain 1996 trust income which the trustees had accumulated and not yet distributed as of the date of the income beneficiary's death. The co-executors of the estate of the income beneficiary ("the estate"), petitioned the Court seeking an Order (a) that the trustees had improperly allocated all of their fees solely to income during their administration of the trust, (b) allocating those fees between principal and income, and (c) directing the trustees to refund to the estate some of the trustees fees charged during their administration and allocated to the income beneficiary. The two petitions came on for hearing before this Court on May 29 and 30, 1997.

On the first petition, the Court finds that the trustees are required to distribute one-half of the 1996 accumulated income to Ms. Klink's estate. The trustees may, in their discretion, either distribute the other half to Ms. Klink's estate or to the remainderman, in the trustees' discretion. These distributions are subject to any subsequent fee awards (see following paragraph). On the second petition, the Court concludes that the trustees did not act improperly in charging their fees 100% to income and, therefore, DENIES the estate's Petition.

The parties agreed to defer the question of which parties, if any, are entitled to reimbursement of their fees and costs from this proceeding from the principal or income portions of the trust.

I. Facts

The Court adopts and incorporates herein the stipulated facts submitted by the parties. The Court's additional findings of fact are set out in the analysis below.

## II. Applicable law and Analysis

### A. Trustees' Fees

**Applicable Law.** The instrument provides and the parties have stipulated that this Court is required to apply Massachusetts law to the questions presented. Accordingly, the Court has placed substantial weight on the testimony of the several legal experts who were qualified to testify on applicable Massachusetts law. The parties stipulated to the admission of the experts' written reports.

**Standard.** The settlor's intent controls the question of the proper allocation of the trustees' fees, so long as the intent does not violate law or public policy. See, e.g., *Adams v. Peterson*, 625 N.E.2d 575, 577 (Mass. App. Ct.), rev. denied, 631 N.E.2d 58 (1994). The settlor's intent is determined first by examining the language of the trust. See *Clark v. Greenhalge*, 582 N.E.2d 949, 952 (Mass. 1991). Article 1st, paragraph 13 provides:

. . . [T]he trustees shall be entitled to receive as their aggregate annual compensation five percent (5%) of the gross income collected.

While this provision is unquestionably a description of the calculation formula for the trustees fees, the Court concludes, in light of other trust language, that it is unclear whether or not this provision also limits the source from which the fee is to be taken. Consequently the Court concludes that, absent other circumstances, this provision does not require that the trustees allocate their fees to income only.

Before looking to other trust language, the Court has considered the context of Massachusetts law in which the trust was administered. Massachusetts General Laws ("M.G.L.") c. 206, § 16 ("section 16") governs the payment of trustees' fees. The Massachusetts legislature amended section 16 in February 1941, eight months before Mr. Bancroft settled this trust, to read as follows:

A[] . . . trustee shall be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his trust, and shall have such compensation for services as the court may allow. Such compensation, expenses, costs and counsel fees may be apportioned between principal and income as the court may determine.

M.G.L. c. 206, § 16 (1941) (amendment emphasized).

In its analysis of Massachusetts law as applied to these facts, the Court notes that the statutory language provides a trustee with "such compensation for services as the Court may allow." Nevertheless, none of the parties in this case have argued that the amount of the Bancroft trustees' compensation should be set by the Court in the face of the unambiguous language in the trust instrument that the trustees' compensation is to be 5% of the gross trust income. This is because every probate court, whether seated in Massachusetts or in Colorado, will defer to the clearly articulated instruction of a settlor, see *Adams* at 577, even where, but for such instruction, the Court would have both authority and standards for decision.

Here the grantor's instructions are contained in Article 3rd of the trust which provides:

. . . [T]he trustees . . . shall have power from time to time in their discretion and without leave of court: to . . . charge to income or to principal or to apportion between them any expense, disbursement or loss, all as they deem advisable in each case or class of cases, notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the courts . . . .

The Court attributes to Mr. Bancroft, settling this trust with the assistance of counsel eight months after the enactment of the amendment to section 16, knowledge of the new law and its effect. See *Davis v. Hannam*, 336 N.E.2d 858, 861 (Mass. 1975); *Sherburne v. Howland*, 132 N.E. 188, 189 (Mass. 1921). Mr. Bancroft is charged with the knowledge that, absent his language in Article 3rd, a probate court, rather than his trustees, would have the power to set the apportionment. The language in Article 3rd altered that result.

The Court has carefully considered the governing law, the quoted language from the trust, and the testimony and reports of the several legal experts who gave opinions on the significance of section 16 in this circumstance. The Court adopts the conclusion of Mr. Menoya that Massachusetts does not mandate allocation of trustees fees between income and principal when the grantor, through the language of the trust, manifests a preference for allocation pursuant to an exercise of trustees' discretion.

Exercise of discretion. Having decided that the proper apportionment lies within the trustees' discretion, the Court must now determine whether the trustees abused that discretion.

A trustee must, when exercising discretion, "use its best informed judgment in good faith in the light of what the established rules suggest to the trustee is consistent therewith." *Old Colony Trust Co. v. Silliman*, 223 N.E.2d 504, 507 (Mass. 1967). See also *Worcester County Nat'l Bank v. King*, 268 N.E.2d 838, 840 (Mass. 1971).

The Court finds that the trustees' met these tests in their exercise of discretion. First, one of the trustees, Judson Detrick, testified that the trustees frequently met on trust matters and considered a variety of trust administration issues, including fee matters. The trustees administered other trusts for the Bancroft family and had contact with Massachusetts attorneys, including Mr. Hammer who administered still more trusts for the Bancroft family. Both the Colorado and Massachusetts trustees also met and corresponded with family members, some of whom from time to time served as co-trustees of some of the Bancroft family trusts.

The trustees properly considered a variety of relevant factors in their decisions over the years to allocate the fees to income. A variety of considerations were identified by the trustees including some related to the nature of the trust assets and the family history, estate planning objectives, and tax legislation applicable from time to time. Between 1941 and 1995 the applicable transfer tax laws changed, requiring the trustees to revisit their allocation alternatives. The trustees specifically were mindful in the 1980s and 1990s of the trust's generation-skipping exemption status and considered this factor in their determination to allocate their fees 100% to the income beneficiary. The Court adopts the language of attorney Menoya who testified that the circumstances provide a "whole tapestry of reasons" for the allocation. The testimony of the trustee included reference to many of those reasons.

In addition, for 5 years to the settlor and for 40 years to Ms. Klink (those persons most interested in the apportionment of fees) the trustees provided the relatively simple information that the trustees were charging their fees 100% to the trust's income. In response to this notification, the trustees' received either approval or silence. Without determining its legal effect (see below), the past acquiescence of the trust beneficiaries can be considered by the trustees when exercising their discretion about future allocations.

It is not the Court's role to find that the reasons upon which the trustees based their exercise of discretion are the same reasons on which this Court would rely if charged with their duties or even that the reasons irrefutably lead to their conclusion, only that the trustees exercised their discretion properly on those occasions when its application was required. See *State Street Bank and Trust Co. v. Reiser*, 389 N.E.2d 768, 770 (Mass. App. Ct. 1979). Based upon the entire record which the Court has reviewed and considered, the Court concludes that they did. See *Svenson v. First Nat'l Bank of Boston*, 363 N.E.2d 1129, 1137 (Mass. App. Ct. 1977) (applying the Silliman test and approving 100% allocation of fees to income).

Laches and estoppel. Because of the Court's decision that the trustees did not act improperly in allocating the fees to income only, the Court declines to consider whether the estate is barred from its petition by laches or estoppel.

#### B. Undistributed Income

At Ms. Klink's death the trustees were holding approximately one quarter's worth of undistributed trust income. Again, the language of the trust controls. See *Adams*, 625 N.E.2d at 577. Article 1st, paragraph 5(a) provides:

The net income of the child's share shall be paid to the child during his or her lifetime, except that whenever it seems advisable to the trustees for any reason, the trustees may withhold and accumulate not more than one-half of the net income of each or any calendar year.

The parties agree that, pursuant to M.G.L. c. 197, § 27, Ms. Klink's estate is entitled to no more than the interest and dividends earned up to the date of her death, with the remaining interest and dividends passing to Ms. Goth. The co-personal representatives argue that Ms. Klink's estate is entitled to all of that proportionate income, while Ms. Goth would allow only one-half, on the basis that the trustees' power to withhold one-half means that Ms. Klink was only entitled to one-half.

The Court will not determine whether the trustees should withhold a portion of the undistributed income, and thus whether Ms. Klink's estate is entitled to some of the other one-half. That is the trustees' task. A Court should not instruct a trustee how to exercise its discretion. See 3A William F. Fratcher, *Scott on Trusts* § 259, n.7 (1988). The settlor here, again acting on the advice of counsel, could have forecasted Ms. Klink's demise while some income remained undistributed. He saw fit to leave this small decision, as he did many larger ones, to the discretion of his trustees.

June 30, 1997

C. Jean Stewart

Judge, Probate Court