

SURROGATE'S COURT  
COUNTY OF MONROE

STATE OF NEW YORK

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IN THE MATTER OF THE JUDICIAL SETTLEMENT  
OF THE INTERMEDIATE ACCOUNT OF CHASE  
MANHATTAN BANK, N.A., AS TRUSTEE UNDER  
THE WILL OF

FREDERICK G. SILVA f/b/o KATHERINE H. SILVA

Deceased. File No.81 DT 1714

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APPEARANCES:

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**DECISION**

In this accounting proceeding, the Court has before it a motion and two cross motions, all for summary judgment on their respective issues. Chase Manhattan Bank moves for a settlement of its account as trustee. Income beneficiaries under the trust established under the will of Frederick G. Silva for the benefit of Katherine H. Silva and others, on behalf of themselves and on behalf of Karen Ann Deitz, Katherine M. Dietz, Donna Marie Dietz and John W. Dietz, trust remaindermen, (Dietz objectants) move for summary judgment and in opposition to a cross motion for summary judgment by the Trustee. Sandra Harvey, as objectant, and executor

and beneficiary under the will of Katherine Silva also cross moves for summary judgment and is opposed to the relief requested by the Trustee.

At issue is whether Chase, as trustee, acted improperly when it made its decision in August of 1992 to invade principal of the testamentary trust at the request of Katherine Silva, the income beneficiary and whether its denial of invasion of principal for reimbursement in March, 1993 was also improper. With respect to the invasion which was granted, it is alleged that Chase had a conflict of interest because besides being the trustee of that trust, it was also trustee of a revocable trust set up by Katherine Silva and additionally, Chase had been named as co-executor under Katherine Silva's will. Based upon this conflict, the objectants request that the Court set aside the invasion and surcharge Chase for the losses incurred. On the other hand, Sandra Harvey as the sole beneficiary under the will of Katherine Silva submits that as Trustee, Chase abused its discretion when it denied Katherine Silva reimbursement from principal for expenses she incurred for her health care.

#### **SUMMARY JUDGMENT**

Summary judgment is a drastic remedy which should not be granted if there exists a triable issue of fact. (Rotuba Extruders v Creppos, 46 Ny2d 223; Andre v Domeroy, 35 NY2d 361; Sillman v Twentieth Century Fox Film Corp., 2 NY 2d 395) When the motion presented discloses that no fact remains to be resolved at trial the court must grant the summary relief and avoid unnecessary trials and expense to the court system and the litigants.

When the moving party has presented sufficient information to obtain a summary judgment, it is incumbent upon the opposing party to demonstrate evidentiary facts that its claim is real and can be established at trial. (Indigo v Finkelstein, 23 NY2d 728; Spellar v Ryder Truck Rental Inc., 47 Ad2d 608; McGagee v Kennedy, 48 NY2d 832) The party opposing a summary judgment motion must present the proof which will show that the allegations in the pleadings are true and can be established at trial. (Rae v Rosenberg, 67 Misc 2d 881) Allegations both general and conclusory, even though believable,

which contain no factual basis cannot defeat a motion for summary judgment. Responding affidavits must set forth the proofs or the court will conclude that no genuine issue of fact exists. (Banasik v Reed Prentice Div., Package Machine Co., 34 Ad2d 746, aff'd 28 NY2d 770)

The Court is obliged to construe any offer of evidence in a light most favorable to the one moved against. (Weiss v Garfield, 21 Ad2d 156; CPLR §4401)

#### **BACKGROUND**

Frederick Silva in his will dated February 6, 1981 provided for an outright marital bequest to his wife, Katherine H. Silva and a residuary testamentary trust with Mrs. Silva as life income beneficiary. John Dietz and Elizabeth Dietz, niece and nephew in-laws of the testator were named successor income beneficiaries of the trust and grandnieces and grand-nephew of the testator were named as remaindermen. (Elizabeth Dietz was the niece of Katherine Silva, wife of the testator)

Article SECOND, paragraph 2-B of the testamentary trust provides:

If at any time, or from time to time, the income paid to my wife together with such other income as is available to her at the time, shall in the judgment of my Trustee be deemed by it to be insufficient to provide for her maintenance, support or necessary medical care and expense, and for the maintenance, support, welfare and education of each person legally dependent upon her, I authorize and empower my Trustee to pay to my wife or apply for her use and benefit, such sums from the principal of the fund as my Trustee in its exclusive discretion, shall deem necessary or advisable for any such purpose. (emphasis added)

Frederick Silva died on May 31, 1981. On June 4, 1981, Chase was appointed trustee under the will and is presently serving in that capacity.

Subsequently, on May 24, 1982, Katherine Silva set up an inter vivos trust for her benefit with Chase as the trustee. The inter vivos trust in relevant parts reads:

FIRST: The trustee shall hold, manage, invest and reinvest all the property subject to this agreement, and pay the income and principal thereof as follows:.....C. The Grantor reserves the right to withdraw principal from the Trust upon her written request, including the entire principal of the Trust should she desire it." (See paragraph C)

Upon Mrs. Silva's death, the balance in the trust is to be paid to her estate.

It is the fact that there were two requests for invasions of principal of the testamentary trust that are the subject of the objections. First, in July 1992, Katherine E. Silva requested in writing that the principal of the testamentary trust be invaded in order to pay for health care expenses incurred by her during the past year. This request was approved by the Trustee. In March, 1993, Katherine Silva again requested, in writing, for a second invasion of principal of the testamentary trust for reimbursement for health care services provided her from 1988 through 1992. These expenses had already been paid out of Mrs. Silva's inter vivos trust. The amount requested was \$210,000 and the invasion of principal was denied. Sandra Harvey objects to the denial by the Bank of the second request. Objectant(s) Dietz oppose the invasion of principal in 1992 and oppose, too, attorney's fees in connection with the intermediate accounting.

#### D I S C U S S I O N

Those personal considerations aside, the Court's role here is to determine whether or not the trustee abused its discretion in initially granting the invasion for health care and later denying a subsequent invasion for back expenses. The initial grant of the invasion request involved expenses incurred during the year of the request. The later request was for the previous four years of medical care that already been paid out of Mrs. Silva's inter vivos trust.

As a general rule the courts of this state are reluctant to interfere with a trustee's discretion unless it can be shown that the decision constituted an abuse of discretion. That discretion, of course, is to be gleaned from the particular language of the trust establishing the relationship among the grantor, trustee and beneficiaries. (Glenn v Chase Lincoln First Bank, 201 AD2d 908; Matter of Oddo v Blum, 83 AD2d 868 (Second Dept. 1981); Matter of Damon, 71 AD2d 916 (Second Dept. 1979) and Matter of Escher, 52 NY2d 1006(1981)

As always, it is the intention of the testator as reflected in

the instrument creating the trust that is the determining factor for the court seeking to construe the language. (In re Hoeizer v Blum, 93 AD2d 605; see also In re Flyer, 23 NY2d 579)

What is particularly clear in this area of construction is that no two trust provisions are the same. Accordingly each and every construction must be based upon the particular language as well as surrounding circumstances. Here, this testator undoubtedly perceived his wife as the chief recipient of his bounty. His will sets forth a bequest of one-half of his estate to her outright and the balance in a marital trust for her lifetime benefit with liberal language permitting invasion of principal. The language is clear and unambiguous to the extent that "should Katherine lack sufficient income for her maintenance, support or necessary medical care and expense, the trustee is authorized to pay such sums from the principal of the fund . . . . ." The trust language has no time limitations on applications for such invasions. The trustee, in denying the second request for reimbursement of expenses that were paid from the principal of Katherine's own inter-vivos trust, apparently based their denial on the fact that the expenses had already been paid. It did not address the fact that those expenses had been paid out of the principal of the inter vivos trust. It does not appear to be controverted that Katherine did not have sufficient income to pay for her health care and had to invade the principal of her own trust for payment. It is the Court's view that the testamentary trust which referred to Katherine Silva's own income did not, on the other hand, require an invasion of her own living trust principal before an invasion would take place of the testamentary trust. The Court finds that it was an abuse of the trustee's discretion for the bank to deny the second request for invasion to the extent that such an invasion was necessary once the income from the inter vivos trust established by Katherine had been exhausted. The language of the trust clearly allows for the invasion and it was inconsistent on the part of the trustee to reimburse for medical care for one year but not for previous four. In summary, while the income from the inter vivos trust created by Katherine needed to be exhausted by her for those medical expenses,

there existed no prohibition in the testamentary instrument against back payment.

#### CONFLICT OF INTEREST

The Dietz objectants' cross motion for summary judgment expresses the position that Chase as trustee had a decided, and irreconcilable conflict of interest in its performance as trustee vis-a-vis the invasion requests on behalf of Katherine Silva. It is averred that in addition to being trustee of the decedent's testamentary trust, Chase was also trustee of Katherine's revocable trust (the Intervivos trust) as well as being nominated as co-executor under Katherine Silva's will. The suggestion is made that Chase stood to gain financially from the approval of the invasion requests and faced the possibility of losing a business relationship if the invasion was not approved. The claim of conflict is buttressed, according to the Dietz objectants, by the fact that one of the trust employees on the discretionary committee who voted in favor of the invasion one Saul Rasnick, who had an ongoing business relationship with Katherine Silva in his personal capacity.

It is well established that a fiduciary owes an undivided loyalty to benefit the interest of the trust beneficiary. (Meinhard v Salmon, 249 NY 458) Nor may a fiduciary ever act in his or her own self interest in the performance of his or her own obligations to the trust being administered. (Dutton v Willner, 52 NY 312; Munson v Siracuse G & CR Company, 103 NY 58) On the other hand, a potential conflict between a fiduciary and an interested beneficiary alone does not give rise to misconduct sufficient to remove the fiduciary (Will of Marsh, 179 AD2d 578) In this instance unlike the cases cited by the objectants, there is no self-dealing by the bank that is even suggested such as a dual relationship between the bank and a company in using trust funds to purchase stock or mortgages in such a company.

Accordingly, to this court there is no conflict established here to warrant disqualification. Nor can it be said that there is some form of inherent conflict in being trustee of two separate trusts. If that were the case, trust companies as we know them,

would be out of business totally and completely. There is no suggestion that assets have been wasted, that there has been improper investments or other self dealing.

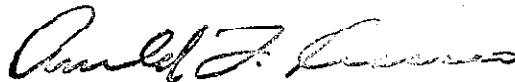
The charge of conflict that deals with the possible dual responsibility by the individual Saul Rasnick, as a tax preparer for Katherine Silva, in his role as a member of the discretionary review committee, presents a bit more of a problem to the Court. The record reveals that while he served on the committee, he was but one of four members and not holding a deciding vote on any decision. On balance, the court is of the mind that the preparation of Katherine Silva's tax return is a service provided by the bank does not equate with a conflict the magnitude envisioned for disqualification. (See Citibank Farmers Trust v Cannon, supra, also Matter of Ridings, 297 NY 417)

The Court accordingly dismisses the objections based on a perceived conflict of interest.

In conclusion the Court grants the motion for summary judgment to the objectant Harvey and grants in part the motion by the bank approving their invasion of principal in 1992. It denies the balance of the bank's application dealing with the 1993 refusal to invade principal. It denies the motion by the objectants Dietz.

Submit order.

Dated: April 22<sup>nd</sup> 1998  
Rochester, New York



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HON. ARNOLD F. CIACCIO  
Monroe County Surrogate

**Document Separator Page**



STATE OF NEW YORK  
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IN THE MATTER OF THE JUDICIAL SETTLEMENT  
OF THE INTERMEDIATE ACCOUNTING OF CHASE  
MANHATTAN BANK, N.A., AS TRUSTEE UNDER  
THE WILL OF

DECISION AND  
ORDER

FREDERICK G. SILVA f/b/o KATHERINE H. SILVA

File No. 81 DT 1714

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**DECISION**

There are two motions before the court. The estate of Katherine Silva, by Sandra Harvey, executor, seeks a determination of the amounts due the Katherine Silva estate from the trust of her late husband, Frederick Silva, pursuant to the April, 1999 decision of

this court. There is a request for interest and attorney's fees on that motion.

In the second motion, objectant Harvey asks the court to rejoin Chase Manhattan Bank, N. A., Trustee of the Frederick Silva Trust, as a party in this proceeding for the purposes of surcharge if there are insufficient funds to cover the ultimate determination by the court including interest and attorney's fees. Both motions are opposed by John and Elizabeth Dietz. Chase opposes being rejoined as a party.

## BACKGROUND

Frederick Silva died on May 31, 1981. Under his will, he left an outright bequest to his wife, Katherine and established a testamentary trust with his wife as the primary income beneficiary and his wife's niece and nephew-in-law, John and Elizabeth M. Dietz, as successor income beneficiaries. The children of John and Elizabeth, Karen Ann Dietz, Katherine M. Dietz, Donna Marie Dietz and John W. Dietz, the grand nieces and grand-nephew, are successor remaindermen of the trust.

In this court's decision dated April 21, 1998, summary judgement was granted to the Estate of Katherine Silva directing Chase Bank as trustee of the Frederick Silva Trust to reimburse the Estate of Katherine Silva for the period from 1987 until her death on September 15, 1993 for any funds expended by Mrs Silva for her maintenance, support or necessary medical care and expense that exceeded her income from the Frederick G. Silva testamentary trust and other income available to her at that time. The decision further dismissed the objection by the Dietzs' to the accounting and denied the motion to remove Chase Bank as Trustee. The subsequent order dated October 21, 1998 included a stipulated release of Chase as a party to the remaining issue; the actual amount that was to be reimbursed to the Estate of Katherine

Silva.

RELEVANT FACTS:

The testamentary trust was established in 1981 and the inter vivos trust in 1982. There were two requests for invasions of principal of the testamentary trust. First, in July 1992, Katherine H. Silva requested in writing that the principal of the testamentary trust be invaded in order to pay for health care expenses incurred by her during the prior year. This request was approved by the Trustee. (An affidavit by a Vice President of the bank dated September 15, 1994 states in reply to objections to the accounting, that the bank as trustee paid from the principal of the Frederick Silva's trust to Katherine Silva \$42,000 on September 2, 1992, to reimburse her for her in-home nursing care from Jan/92 to Aug/92. Exhibit A attached to that affidavit shows a per month invasion of principal of 5,250 to continue until review on 8/1/93). Then in March, 1993, Katherine Silva again requested, in writing, a second invasion of principal of the testamentary trust for reimbursement for health care services provided her from 1988 through 1992. These expenses had already been paid out of Mrs Silva's inter vivos trust.

Katherine died on September 14, 1993. The 1993 request for invasions back to 1988 for expenses already paid which was denied by the trustee bank was overruled by the court's prior decision. Prior to 1992, Katherine had invaded the inter vivos trust principal for \$180,000 (aff. 5(e)) for her in-home care expenses. (See affidavit by a bank officer dated December 5, 1997 indicates (at #11 & 13) that Mrs Silva had withdrawn approximately \$180,000.00 of principal and/or income from her inter vivos trust to pay for in home care. In # 13, the affidavit states the \$180 thousand was from principal and therefore must be reimbursed by the Frederick Silva Trust.)

The reimbursement amount now requested by the Estate is \$318,000

plus interest. Attorneys fees are sought in the amount of \$46,166.17. The beneficiaries of the remainder of the Frederick Silva trust oppose this request and submit to the court the position that Katherine had to exhaust all her income not only from her trust but any other source of income she had including accumulated income received from the trust prior to 1987.

#### DISCUSSION

The court is once again confronted with the need to interpret the language in the Frederick Silva trust; this time to determine the quantum of the appropriate invasion. The court refers to and incorporates herein its decision of April 22, 1998 for the law cited therein on the legal basis and authority of the court to interpret language in a trust instrument. See *Matter of Fabbri*, 2 NY 2d 236 and this court's prior decision dated, April 22, 1998 on the same subject.

Article SECOND, paragraph 2-B of the testamentary trust provides:

*If at any time, or from time to time, the income paid to my wife together with such other income as is available to her at the time, shall in the judgment of my Trustee be deemed by it to be insufficient to provide for her maintenance, support or necessary medical care and expense, and for the maintenance, support, welfare and education of each person legally dependent upon her, I authorize and empower my Trustee to pay to my wife or apply for her use and benefit, such sums from the principal of the fund as my Trustee in its exclusive discretion, shall deem necessary or advisable for any of such purpose. (emphasis added)*

On June 4, 1981, Chase was appointed trustee under the will of Frederick Silva and is presently serving in that capacity.

Subsequently, on May 24, 1982, Katherine Silva set up an inter vivos trust for her own benefit with Chase as the trustee. The inter vivos trust in relevant parts reads:

FIRST: *The trustee shall hold, manage, invest and reinvest all the property subject to this agreement, and pay the income and principal thereof as follows:*

*...C. The Grantor reserves the right to withdraw principal from the Trust upon her written request, including the entire principal of the Trust should she desire it." (See paragraph C)*

Upon Mrs Silva's death, the balance in her trust is to be paid to her estate.

#### MOTION TO REJOIN CHASE AS A PARTY

The motion for reimbursement with interest and attorney's fees on its face exceeds the amounts now held in the Frederick Silva Trust. The Bank has continued to pay to the successor remaindermen income interest from the trust and if the motion were granted, the difference would have to be made up by the remaindermen or the bank. Chase Manhattan, in opposition to the motion to rejoin, has also submitted legal memoranda on interpretation of the trust language and numbers for the amounts to be reimbursed. Their actions as Trustee are an integral and necessary part of this proceeding and in order for the court to consider their position as presented, it is necessary to include them as a party and the motion to rejoin Chase Bank is granted.

#### REIMBURSEMENT

A literal reading of the trust instrument requires an examination of other income at the time of the request. Here requests were made in 1992 and again in 1993 for the period going back to 1988.

This court's decision is controlling in its language as set forth therein when it said, *Here, this testator undoubtedly perceived his wife as the chief recipient of this bounty. His will sets forth a bequest of one-half of his estate to her outright and the balance in a marital trust for her lifetime benefit with liberal language permitting invasion of principal.* This language is consistent with estate planning goals to minimize estate taxes and is generally not intended to limit the benefit to the surviving spouse.

It is well established law that if a document is clear as written, there is no need to look elsewhere for the testator's intent. *In re Hoelzer v. Blum*, 93 AD2d 605; *In re Flyer*, 23 NY2d 579. Here, the language is clear that the trustee *shall, in the judgment of...* Trustee take into consideration other income at the time when the trustee determines that the income is insufficient to meet the needs of the primary beneficiary. The primary intent of the testator is that income and then the principal are to be used to benefit the surviving spouse. *In re Strauss' Estate*, 54 misc2d 243; *Re De Windt's Will*, 180 Misc 646

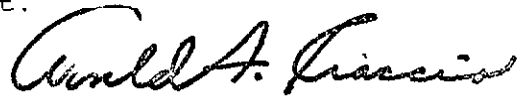
The position asserted by the Bank relying on EPTL 11-2.1 definitions of income and principal is without merit because the reference in the statute is to trust income and principal and when income becomes principal. It has no application to income from another source. No request for invasion of principal was made before 1988 and the uncontroverted fact is that Katherine Silva in 1988 had to invade the principal of her inter vivos trust to meet her medical needs. This negates a review of any financial resources prior to 1988. It is the court's opinion that the only years that may be looked at would be those at the time of the request in 1992 and 1993 which cover the time period from 1988. A prior review of available financial resources before 1988 will not be considered.

After a review of all the documentation, the Bank is directed to

reimburse the estate of Katherine Silva from the Trust of Frederick Silva the amount of \$180,000 as initially requested with interest at the statutory rate of 9% (CPLR 5004) from the date of the request. Attorney's fees to the attorney for the estate are fixed in the amount of \$30,000.00 and disbursements. This takes into full consideration the parameters of fee fixations in such matters. *Matter of Freeman*, 34 NY2d 1; *Matter of Potts*, 213 AD 59; aff'd 241 NY 593. The fees to the attorney for the objectant Harvey are to be paid equally from the Frederick Silva Trust and the estate of Katherine Silva.

This decision is the order of the court.

Dated: December 16, 1999  
Rochester, New York



HON. ARNOLD F. CIACCIO  
Monroe County Surrogate