

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DINO F. KOTSONIS,

Petitioner/Appellant,

v

RONALD J. ZADORA, TRUSTEE,
JOHN KOTSONIS IRREVOCABLE
FAMILY TRUST,

Respondent/Appellee.

Court of Appeals Case No. 273265

Oakland County Probate Court
Case No. 2006-303,574-TV

Hon. Barry M. Grant

Jennifer Sadecki (P61510)
Attorney for Petitioner/Appellant
Jennifer Sadecki PLLC
93 South Main Street
Mount Clemens, Michigan 48043
586.493.9795

Kenneth W. Kingma (P32087)
John J. Bursch (P57679)
WARNER NORCROSS & JUDD LLP
Attorneys for *Amicus Curiae*
Mr. John Kotsonis
2000 Town Center, Suite 2700
Southfield, Michigan 48075-1318
248.784.5036

James H. LoPrete (P16795)
MONAGHAN LoPRETE, McDONALD,
YAKIMA, GRENKE & MCCARTHY
Attorneys for Respondent/Appellee
40700 Woodward Avenue, Suite A
Bloomfield Hills, Michigan 48304-2249
248.642.5770

**MR. JOHN KOTSONIS'S *AMICUS CURIAE* BRIEF IN SUPPORT OF
APPELLEE RONALD J. ZADORA, TRUSTEE**

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BASIS OF JURISDICTION

This Court has appellate jurisdiction in this matter under MCR 5.801(B)(1) and MCR 7.203(A)(2). *Amicus Curiae* Mr. John Kotsonis files this brief pursuant to the Court's Order of November 30, 2006.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. The principal asset of the John Kotsonis Irrevocable Family Trust is a life insurance policy that named the Trust as beneficiary. The trust agreement granted the trustee the power “to change the beneficiary” of that policy, and it also authorized the trustee to distribute some or all of the trust assets in equal or unequal portions, as the trustee believed desirable. The trustee exercised these powers by designating all trust beneficiaries except Appellant as policy beneficiaries, a designation the trustee determined was necessary to preserve the trust asset. Appellant presented no evidence that the trustee’s decision was made in bad faith. Did the probate court clearly err in finding that the trustee’s action was authorized?

Appellant answers: yes.

Appellee answers: no.

Amicus Curiae answers: no.

The probate court answered: no.

2. Appellant concedes that the court “has the authority to order distributions, modifications, reformations or terminations of trust . . . necessary for the preservation of the trust property.” (Dino Kotsonis Appeal Br at 16.) The trustee determined that a modification of the trust agreement to remove Appellant as beneficiary was necessary to preserve the trust asset, and he petitioned the court for such a change with respect to the trust’s “withdrawal right” provision that gives the beneficiaries the right to withdraw trust property to qualify contributions for the annual gift exclusion. Did the probate court clearly err in finding that the change was necessary to preserve the trust asset?

Appellant answers: yes.

Appellee answers: no.

Amicus Curiae answers: no.

The probate court answered: no.

INTRODUCTION

This is a dispute between trustee Ron Zadora and Dino Kotsonis, beneficiary of an irrevocable trust that his father, *amicus curiae* John Kotsonis, created. It arises out of Dino's contention that the trustee acted improperly when he designated a number of trust beneficiaries—but not Dino—as beneficiaries of a life insurance policy that served as the sole trust asset.

The trust agreement specifically authorized the trustee to designate members of John's family as the policy beneficiaries, and it also authorized the trustee to distribute some or all of the trust assets to the beneficiaries in "unequal" amounts, as the trustee determined were desirable. In addition, while Appellant presented no evidence of bad faith or malicious conduct on the part of the trustee, the trustee presented substantial evidence that his action was necessary to preserve the trust asset. Under the terms of the trust agreement, the trustee's decision to exercise his discretion in this manner "shall be conclusive on all persons," and the probate court so held. John Kotsonis respectfully requests that this Court affirm the probate court's decision.

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

MCR 7.212(C)(6) and (7) require that an appellant's factual recitation and argument section be supported with specific page references to the lower court record. Dino Kotsonis's appeal brief does not comply with these requirements; rather, it cites only sporadically to the lower court transcript and opinion, and references no other documents. This deficiency is the direct result of two insurmountable hurdles that Dino Kotsonis is trying to circumvent in his appeal.

First, Dino failed to introduce any testimony or documents in the probate court. Accordingly, he has no evidence to support the unsubstantiated statements he has made in his appeal brief. Second, the evidentiary record that was available to the probate court fully supports

both the trustee's exercise of his discretion and the probate court's approval of the trustee's actions. Once all facts of record are considered in the context of the trust provisions, it is immediately apparent that the probate court did not clearly err. Accordingly, the probate court's decision should be affirmed.

A. The John Kotsonis Irrevocable Family Trust

1. Creation of the Trust

John Kotsonis, the Grantor, is a 76-year-old retiree. (Pet (Ex 1) ¶ 11G, at 10; 6/19/06 Trial Ct Tr (Ex 2) at 7.) He has a son, Dino F. Kotsonis (Pet ¶ 4, at 2), who is the Appellant. John executed the John Kotsonis Irrevocable Family Trust Agreement on April 27, 2000 ("Agreement," attached as Ex A to the Petition (Ex 1¹)), which established the John Kotsonis Irrevocable Family Trust ("Trust"). Ronald J. Zadora is the Trustee (*Id.* Art I at 2). The Agreement designates several beneficiaries, including, but not limited to, Dino Kotsonis (*Id.*, Art III ¶¶ A, B at 3 & Art V at 5).

2. Key Provisions of the Trust

The Trust has only two assets, a Raymond James account that had a balance of \$297 as of April 1, 2006 ("Account," Ex 1-C), and a life insurance policy that (1) insures the life of John Kotsonis, (2) has a death benefit of \$1 million, and (3) designates the Trust as its sole beneficiary ("Policy," Ex 1-B). The Trust's critical provisions are as follows:

First, the Trustee is authorized to exercise all rights with respect to the Policy, "including without limitation the rights to change the beneficiary to a member of the KOTSONIS family." (Trust Art III ¶ A (Ex 1-A) (emphasis added).) This is the "Insurance Power."

¹ Exhibits to the Petition shall hereinafter be referenced as Ex 1-___. For example, the Agreement is Ex 1-A.

Second, the Trustee has the power to make discretionary distributions of part, or all, of the Trust assets in unequal portions to beneficiaries :

During Grantor’s lifetime, the Trustee shall also distribute to any one or more of Grantor’s designated beneficiaries . . . so much or all, if any, of the net income and principal of the trust, in such equal or unequal proportions among them, as the Trustee from time to time believes desirable for the health, support in reasonable comfort, education, best interests, and welfare of Grantor’s designated beneficiaries, considering all circumstances and factors deemed pertinent by the Trustee

(*Id.* Art III ¶ C (emphasis added).) This “Discretionary Distribution Power” grants the Trustee the broadest discretionary power possible, because he can consider anything “deemed pertinent” when exercising the power; he can distribute all of the trust assets as he “believes desirable”; and the power authorizes distributions for the “best interests” and “welfare” of the beneficiaries, standards which are extremely broad.² The Trustee is not restricted to making distributions that are “required,” “necessary,” or “appropriate,” as trust instruments often provide.

Third, when making discretionary distributions, the Trustee is only required to consider “known” assets of a beneficiary: “Among the circumstances are factors to be considered by the Trustee in determining whether to make discretionary distributions of net income or principal to a beneficiary are the other income and assets known to the Trustee to be available to that beneficiary and the advisability of supplementing such income or assets.” (*Id.* Art V ¶ C (emphasis added).)

Fourth, judicial review of the Trustee’s exercise of a discretionary power is limited to how the power is exercised: “The Trustee’s exercise or nonexercise of powers and discretions in good faith shall be conclusive on all persons.” (*Id.* Art VI ¶ D.) Accordingly,

² In carrying out his extremely broad distribution power, the Trustee can even allocate disproportionate shares of property among the beneficiaries. (*Id.* Art VI ¶ A(5).)

when the trustee properly exercises a discretionary power, the exercise is binding on all beneficiaries, regardless of whether anyone disagrees with the decisions made or would have exercised the power differently. *See In re Sykes Estate*, 131 Mich App 49, 53-54; 345 NW2d 642 (1983) (“As to those matters which the settlor has left to the discretion of the trustee, the courts will not interfere with the trustee’s exercise of his discretion unless the trustee has abused his discretion.”).

Finally, the Trustee “shall have no responsibility for payments of premiums or assessments on the policy,” and “may pay premiums or assessments on any such policy using any funds made available to the Trustee by any person.” (*Id.* Art X ¶ A.)

B. The Collateral Litigation

Between the time John Kotsonis executed the Agreement and when the Trustee filed the Petition, John and his son Dino, the Appellant, became embroiled in a contentious eviction/quiet title proceeding in the Macomb County Circuit Court (Case No 05-3965-NZ). In 1998, John had contributed at least \$251,040 of the \$260,000 purchase price for commercial real estate located in Mount Clemens. (D Kotsonis Dep (1-F) at 28; J Kotsonis Dep (Ex 1-G) at 41; Warranty Deed (Ex 1-H).) The initial owners were John, Dino, and Dino’s wife, Diana M. Kotsonis. (D Kotsonis Dep at 14, 29; Warranty Deed.)

On June 18, 2005, Dino and Diana quitclaimed the Mount Clemens property to John (Mt Clemens Quitclaim Deed (Ex 1-I)), in exchange for John quitclaiming his interest in a residential parcel in Algonac, Michigan (Algonac Quitclaim Deed (Ex 1-J)), which is Dino and Diana’s residence. (D Kotsonis Dep (Ex 1-F) at 7, 9, 17, 25-26, 38, 44-45, 49.) John had also contributed \$250,000 toward the purchase of the residence and received a joint tenant interest in return. (*Id.* at 37; J Kotsonis Dep (Ex 1-G) at 41.) The \$250,000 contribution inured to the

benefit of Dino and his wife when John quitclaimed his joint tenant interest in the residence to them in 2005.

Based on the Mt. Clemens Quitclaim Deed, John sought possession of that property so he could sell it. (J Kotsonis Dep (Ex 1-G) at 40.) Dino refused to vacate the property, forcing John to file suit. After 15 months of contentious litigation, the parties stipulated to a dismissal that left the quitclaim deeds undisturbed, awarded no damages, and resulted in John's possession of the Mt. Clemens property. (Release of Lis Pendens and Stip Order of Dismissal with Prejudice (Ex 4³).) There was never any finding that John engaged in wrongful or unlawful conduct in seeking to enforce his rights in the Mt. Clemens Quitclaim Deed.

C. The Premium Payments

John advised the Trustee that, as a result of his estranged relationship with Dino and the \$250,000 contribution toward his son's purchase of a home, he would no longer contribute funds to pay future annual Policy premiums of \$16,921 as long as Dino remained a beneficiary. (Pet (Ex 1) ¶ 11(E).) Under Article IV(B) of the Agreement, Dino would have ordinarily been entitled to a portion of the net life insurance policy proceeds on John's death. But John's refusal to continue paying Policy premiums will cause the Policy to expire or lapse, depriving not only Dino but all Trust beneficiaries of the Policy's benefit.

A John Hancock Life Insurance Company analysis on March 8, 2006, shows that the Policy's cash surrender value was only \$134,520 as of February 26, 2006. (Ex 1-K.) Surrendering the Policy for its cash surrender value was therefore unacceptable to the Trustee, because approximately 86.5% of the beneficiaries' death benefits would be lost. (Pet (Ex 1) ¶ 11(F).) The March 8, 2006 analysis also shows that if the annual rate of return on the Policy is between

³ This Court may take judicial notice of this filing in the parties' parallel litigation. MRE 201(b)(e).

the guaranteed rate of 4.00% and the non-guaranteed rate of 4.425%, John's failure to pay premiums would result in the Policy's expiration in only three to four years (*id.* ¶ 11(G)), again an untenable result. Two March 22, 2006 John Hancock Life Insurance Company analyses of a possible conversion of the Policy to a paid-up policy (without the influx of additional premium payments) was also unacceptable to the Trustee because there would be a reduction of benefits by approximately one-half to two-thirds. (*Id.* ¶ 11(H) & Exs 1-L and 1-M.)

D. The Petition

Faced with the prospect of an expiring Policy and no future distributions to any Trust beneficiaries, the Trustee filed a Petition to Approve Trustee Action Regarding Trust-Owned Life Insurance with the Oakland County Probate Court on April 7, 2006 (Ex 1). In the Petition, the Trustee sought the court's approval to exercise his power to designate certain Trust beneficiaries—but not Dino—as beneficiaries under the Policy, making discretionary distributions in unequal portions “in a manner that will (i) encourage Grantor to continue paying annual Policy premiums, (ii) preserve the Policy's current death benefit of \$1,000,000, and (iii) take into account [Dino's] other resources including a profitable medical practice, a valuable Residence, and the gift from Grantor of \$250,000 that occurred upon Grantor's execution of the quit claim deed” for the Algonac property. (*Id.* ¶ 12.)

Both in the probate court and in this appeal, Dino has erroneously asserted that the Trustee's sole motivation in changing the Policy beneficiaries was the estrangement between John and Dino, exacerbated by the eviction/quiet title litigation. (*See, e.g., D Kotsonis Appeal Br at 2, 5.*) In Dino's words, “it is clear that the Trustee was acting under the influence of the Grantor, and not upon his own accord.” (*Id.* at 6.) But such assertions misinterpret the Petition and are unsupported by the record. The Petition specifically says the Trustee's proposed action

is motivated by his desire to “preserve the Policy’s current death benefit of \$1,000,000.” (Pet (Ex 1) ¶12.) The Trustee also recognizes in the Petition that Dino has substantial assets (including a valuable home and a profitable medical practice) and has already received \$250,000 from John in the form of John’s execution of the quit claim deed for the Algonac residence (*id.*), a transaction that post-dated John’s execution of the Agreement (*see* Ex 1-J, showing deed date of June 2005, more than five years after John executed the Agreement).

After Dino sought and received a two-month adjournment, the probate court conducted a contested hearing on June 19, 2006. The Trustee began by reemphasizing that the Trust gave him authority change the Policy’s beneficiary designation. (6/19/06 Probate Court Tr (Ex 2) at 3-4, 5.) In response, Dino offered no documentary evidence or testimony. Indeed, Dino did not even bother to attend the hearing, a choice the probate court characterized as “not too smart.” (*Id.* at 6.) Rather, Dino simply relied John’s attested Petition and the documents John submitted.

At the hearing’s conclusion, the probate court entered an order (1) approving the Trustee’s change of the Policy’s beneficiary designation; (2) authorizing the Trustee to implement his “exercise of his discretion and authority with respect to the subject life insurance contract”; and (3) removing Dino Kotsonis as a Trust beneficiary. (6/19/06 Order (Ex 3) at 2.) Dino filed a motion for reconsideration that the probate court denied a short time later, stating in its Opinion and Order that Dino “has not demonstrated a palpable error by which this Court has been misled.” (9/7/06 Op & Order at 1.) Dino now appeals.

ARGUMENT

I. THE PROBATE COURT DID NOT CLEARLY ERR IN FINDING THAT THE TRUSTEE EXERCISED HIS DISCRETIONARY POWER IN GOOD FAITH IN SEEKING TO CHANGE THE POLICY BENEFICIARY.

Standard of Review: John Kotsonis agrees that this Court reviews the probate court's findings of fact for clear error. (Dino Kotsonis Appeal Br at 5.)

A. The Trustee Executed the Powers Given Him in Good Faith.

The Trustee sought in the Petition to change the Policy's designation of the Trust as sole beneficiary, so that the Policy's death benefits would instead be paid directly to a number of Trust beneficiaries, but not to John's son, Dino. As explained in the Petition, this was a proper exercise of the Trustee's Insurance Power and Discretionary Distribution Power, which together gave the Trustee both the right and discretion to change Policy beneficiaries, even if the result was an unequal distribution.

The Petition⁴ establishes the pressing need for this change of the Policy's designation of the Trust as sole beneficiary: John refused to pay the Policy premiums as long as Dino continued to be a Trust beneficiary due to (1) the litigation and animosity between John and Dino, (2) Dino's profitable chiropractic and clinical neurology businesses, and (3) John's \$250,000 gift to Dino and his wife. (Pet (Ex 1) ¶ 11.) Lacking premium payments, the Policy would lapse within a short time, leaving the Trust beneficiaries with nothing. (*Id.*)

A trustee is charged by law with the duty of preserving trust property, *In re Estate of Rosati*, 177 Mich App 1, 5; 441 NW2d 30 (1989), and the Petition was responsive to the Trustee's duty to preserve the Trust's principal asset. The relief the Petition requested was

⁴ The Petition functioned like a verified complaint, *see* MCR 2.114(B), as the Trustee attested that the Petition's contents were true to the best of his information, knowledge, and belief. (Pet (Ex 1) at 14.)

necessary to remove the barrier to John's continued payment of the Policy's annual premiums and to preserve the Policy's \$1,000,000 death benefit, all in accord with the Agreement's plain language, including the Insurance Power and the Discretionary Distribution Power.

The probate court necessarily (1) recognized the Trustee's dual powers to change Policy beneficiaries and to distribute Trust assets in unequal amounts (which powers Dino has never challenged); (2) verified the underlying facts that resulted in John's refusal to pay Policy premiums (Dino Kotsonis Appeal Br at 3-4, quoting from the 6/19/06 Hr'g Tr); and (3) "approve[d] the exercise by the Trustee . . . of a change of life insurance beneficiary designation" (6/19/06 Order at 2). In so holding, the probate court expressly found that the Trustee acted in good faith (*id.*); indeed such a conclusion was inescapable, given that Dino failed to introduce any contrary testimony or documents. Having exercised his discretionary power in good faith, the Trustee's action was "conclusive on all persons" (Agreement (Ex 1-A) ¶ 16(D)), including Dino, and there is nothing further over which to argue. The probate court's decision should therefore be affirmed, both in its approval of the change in Policy beneficiary and its authorization of such acts necessary to implement that change.

Dino initially argues that the probate court's decision allowed the Trustee to make an improper "discretionary distribution" because the court-approved beneficiary designation does not constitute a "distribution" within the meaning of the term. (Dino Kotsonis Appeal Br at 7-8.) That argument does not withstand scrutiny. Dino's construction of the term "distribution" does not even satisfy the Black's Law Dictionary definition Dino assigned that word: "cash or other property paid or credited to a trust beneficiary." (*Id.* (emphasis added).) The beneficiary designation the probate court approved does in fact "credit" death benefits payable under the Policy to the designated beneficiaries. Hence, the designation is, by definition, a "distribution."

In addition, the Insurance Power and the Discretionary Distribution Power, in tandem, granted the Trustee authority to so act. The Agreement authorized the Trustee, in his discretion, to change the Policy beneficiary (Agreement (Ex 1-A) Art III ¶ A),⁵ and the Agreement further authorized the Trustee to make distributions in an “unequal” manner, in his sole discretion, to the beneficiaries (*id.* Art III ¶ C; Art VI ¶ A(5)). The Trustee therefore did not abuse his discretionary powers, and the exercise is deemed “conclusive on all persons.” (*Id.* Art VI ¶ D.) The probate court did not clearly err in so finding.

B. The Trustee’s Action Does Not Violate the Grantor’s Original Intent.

Lacking any argument based either on the evidence or the plain language of the Agreement, Dino attempts to invoke John’s intent at the time he created the Trust, claiming that the Trustee’s action somehow violates that intent. (Dino Kotsonis Appeal Br at 8-12.) But the Agreement’s plain language with respect to preservation of Trust assets mirrors the Trustee’s common law duty described above. For example, the Agreement authorizes the Trustee to perform all acts necessary for “the proper management, investment, and distribution of the trust property” (Agreement (Ex 1-A) Art VI ¶ A(16)), acts that cannot be performed if the Trust’s primary asset—a life insurance property—is allowed to expire.

In support of his illogical “original intent” argument, Dino accuses the Trustee of abandoning his fiduciary duties and acting in bad faith: “the Trustee was not acting alone, but was seeking to make discretionary distributions based upon the estrangement of the Appellant and the Grantor, not upon whether or not the distributions were proper or necessary under the

⁵ The Trustee did not “remove” Dino as a beneficiary of the Policy (*contra* Dino Kotsonis Appeal Br at 8); the initial Policy beneficiary was the Trust, not Dino. The semantic difference is important, because the Insurance Power specifically grants the Trustee the power to designate Policy beneficiaries. There is nothing wrong with the Trustee’s decision to designate a group of beneficiaries that excludes Dino, provided that exercise of the Trustee’s discretion is made in good faith.

terms of the trust agreement.” (Dino Kotsonis Appeal Br at 9; *see also id.* at 11 (accusing the Trustee of “bias” against Dino).) But Dino’s attorney did not engage in any discovery nor did she introduce evidence at the hearing that would support a claim of bad faith. Unsupported comments made at the hearing and in Dino’s appeal brief are not evidence, and the probate court rejected such a claim in its Order, which states that the Trustee “demonstrated good faith and proper authority for executing a change of beneficiary designation with respect to the trust owned John Hancock Life Insurance Contract” (6/19/06 Order at 2.) Nothing in the record supports a contrary finding.

Significantly, the Trustee was not seeking to make discretionary distributions based on John and Dino’s estrangement; rather, the Trustee was seeking to change the Policy’s beneficiary designation to preserve the Trust’s only significant asset, the Policy. This fact distinguishes this case from *In re Childress Trust*, 194 Mich App 319; 486 NW2d 141 (1992), in which this Court held that a trustee abuses his or her discretion when acting based on dislike or disapproval of a beneficiary. *Id.* at 324 n 2; 486 NW2d 141. It is critical to understand that the Trustee’s motivation to change the Policy beneficiary was not animosity or bias against Dino, but a desire to preserve the Trust’s principal asset, an asset that was jeopardized in the absence of a change. The probate court did not clearly err in rejecting Dino’s unsupported allegations and finding that the Trustee acted in good faith.

C. The Agreement’s Plain Language Did Not Require Equal Treatment of Beneficiaries.

Having already argued that the Trustee’s action in changing the Policy beneficiary designation “cannot be a ‘distribution’” (Dino Kotsonis Appeal Br at 7), Dino changes course and argues that the Trustee’s modification of the Policy beneficiary violated his fiduciary duties by making discretionary distributions to all Trust beneficiaries save Dino. (*Id.* at 12-15.) Dino

raises two questions: Is the Trustee authorized to make unequal distributions? And if so, could the Trustee make such distributions without taking into account the resources of all beneficiaries? The Agreement's plain language answers both of these questions "yes."

Regarding distributions, the Agreement unequivocally gave the Trustee the discretionary power to make distributions of so much, or all, of the Trust assets "in such equal or unequal proportions among [the beneficiaries] as the Trustee from time to time believes desirable for the health, support in reasonable comfort, education, best interests, and welfare of Grantor's designated beneficiaries." (Agreement (Ex A-1) Art III ¶ C (emphasis added).)⁶ Because the Agreement's plain language is controlling on this point this Court need look no further. *See generally In re Estate of Reisman*, 266 Mich App 522, 527; 702 NW2d 658 (2005) (fundamental role of the judiciary in interpreting trusts is to effect the intent of the grantor as expressed in the plain language of the trust instrument) (citing *In re Allen Estate*, 150 Mich App 413, 416, 417; 388 NW2d 705 (1986); *In re Dodge Trust*, 121 Mich App 527, 542; 330 NW2d 72 (1982); and *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985), among others); *see also Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004) (when a contract is unambiguous, the parties' intent is gleaned from the actual language used, and "an unambiguous contract must be enforced according to its terms") (citation omitted).

⁶ The Trust Agreement's inclusion of the term "welfare" as well as the phrase "best interests" is significant. The word "welfare" includes "happiness." Black's Law Dictionary (6th Ed. 1990). And the phrase "best interests" is synonymous with "welfare." (Pet ¶ 9(B) (citations omitted). Accordingly, the Trust creates extremely broad standards for discretionary distribution, authorizing substantial distributions in excess of those ordinarily made for health, support, maintenance, and education, and suggesting an intention that the Trustee's judgment "be exercised generously and without relatively objective limitation" with respect to a distribution for welfare or happiness. Restatement Trusts, 3d, § 50 cmt d(3) p 268 (2003), Ex 1-E. (For additional authority, *see* Pet at 7-8 & Ex 1-D.)

As for the Trustee's consideration of a beneficiary's resources, the Agreement specifically states that the Trustee need only consider "known" assets of beneficiaries: "Among the circumstances and factors to be considered by the Trustee in determining whether to make discretionary distributions of net income or principal to a beneficiary are the other income and assets known to the Trustee to be available to that beneficiary and the advisability of supplementing such income or assets."⁷ (Agreement (Ex 1-A) Art V ¶ C (emphasis added).) Once John made it known to the Trustee that he had made a gift of at least \$250,000 to Dino and Dino's wife when John deeded his interest in Dino's home, the Trustee was obligated to take that resource into account (which he did in the Petition). The Trustee was not similarly obligated to investigate the unknown assets of beneficiaries, whether belonging to Dino or to someone else.

Dino's reliance on the Restatement (*see* Dino Kotsonis Appeal Br at 14, quoting Restatement Trusts, 3d, § 50, cmt d(7), p 270 (2003)), is misplaced in light of the Agreement's plain language. Dino's argument is also based on a single, out-of-context sentence. (Dino Kotsonis Appeal Br at 14.) The entire Restatement position is as follows:

It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is required to take account of the beneficiary's other resources, (ii) is prohibited from doing so, or (iii) is to consider the other resources but has some discretion in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.

Specifically, . . . the presumption [under the general rule of construction] is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the

⁷ This language is consistent with the extremely broad distribution standards of "best interests" and "welfare." The presence of such standards diminishes the relevance of the beneficiaries' other resources. *See* Restatement Trusts, 3d, § 50 cmt d(3) p 268 (2003).

beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.

* * *

Furthermore, in cases of nonobjective standards (e.g., “benefit” or “happiness”), other resources have less direct relevance than with regard to additional amounts necessary to maintaining an accustomed lifestyle, for example. Those resources, however, may have some bearing on the overall reasonableness of an exercise of the discretionary authority.

* * *

A grant of extended discretion . . . does not relieve the trustee of a duty to take into account, or of a duty to disregard, a beneficiary’s other resources [if a trust provision sets forth the duty], although the extended discretion is a factor to be considered in the process of interpretation [of that trust provision]. If, under the general rule of construction, the trustee has discretion in the matter[,] the trustee has greater latitude in exercising that discretion when the settlor has used language of extended discretion in granting the power of distribution.

Restatement Trusts, 3d, § 50, cmt e, pp 269-271 (emphasis added). In sum, the Restatement flatly contradicts Dino’s position that a trustee must always take into account the other resources of a beneficiary. The Restatement requires the trustee to follow the trust provision addressing the issue. If no such provision exists, the trustee must generally consider the beneficiary’s other resources, except if the trustee determines that “the settlor’s intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.”

In addition, the Restatement provides that a grant of extended discretion (e.g., “best interests” or “welfare”) is a factor to be considered in interpreting a trust provision that addresses the issue whether a beneficiary’s other resources are to be considered when a trustee makes distributions. The Agreement’s directive that the Trustee need only consider resources known to him is consistent with both the Restatement and the extended discretion granted to him under the Agreement’s “best interests” and “welfare” standards.

II. THE PROBATE COURT DID NOT CLEARLY ERR IN FINDING THAT THE TRUSTEE EXERCISED HIS DISCRETIONARY POWER IN GOOD FAITH IN REMOVING DINO KOTSONIS AS A BENEFICIARY OF THE TRUST ITSELF.

Standard of Review: This Court reviews the probate court's findings of fact for clear error. (Dino Kotsonis Appeal Br at 5.) Because it was unnecessary for the probate court to make any rulings of law there is no *de novo* review of any issue in this case. (*Contra id.* at 15.)⁸

Dino concedes that the court “has the authority to order distributions, modifications, reformations or terminations of trust . . . necessary for the preservation of the trust property.” (Dino Kotsonis Appeal Br at 16, citing *Young v Young*, 255 Mich 173; 237 NW 535 (1931), and *Evens v Grossi*, 324 Mich 297; 37 NW2d 111 (1949).) Given the unrebutted evidence that preservation of the Trust's principle asset was a sufficient ground to approve a change of beneficiary that excluded Dino, the probate court did not clearly err in finding that it was necessary to alter the Agreement to remove Dino as a beneficiary.

Dino again argues, incorrectly, that his removal violates John's original intent. (Dino Kotsonis Appeal Br at 17-20.) That complaint is foreclosed by the fact that it is not animosity or estrangement motivating the Trustee's change in the Policy's beneficiary designation, but rather preservation of Trust property. (Pet (Ex 1) ¶ 12.)⁹ It could not have been John's original intent that all Trust beneficiaries be left with nothing.

Dino also erroneously asserts that it was unnecessary to invoke the probate court's equitable power to modify the Trust. But as Paragraph 13 of the Petition explains, it was

⁸ Nowhere in Dino's appeal brief does he contest the construction of the Trust Agreement or the meaning of its terms. Instead, Dino challenges the Trustee's good faith exercise of the discretionary authority granted him.

⁹ When discussing this point, Dino is simply wrong when he claims that John's \$250,000 gift to Dino and Dino's wife was made before John created the Trust. The deed that evidences the gift is dated June 18, 2005. (Ex 1-J.) John executed the Agreement on April 27, 2000. (Ex 1-A at 18.)

necessary to exclude Dino as a beneficiary at least under Paragraph B of Article III of the Trust, because that provision gave Dino a “withdrawal right” with respect to future contributions to the Trust to pay premiums. (The withdrawal right was inserted to qualify those contributions for the annual exclusion for federal gift tax purposes.) The Petition gave two reasons for this requested relief: (1) Dino would have no economic interest in the Policy or the Trust once relief requested in paragraph 12.A was granted, and (2) continuing Dino as a designated beneficiary under Paragraph B of Article III would enable him to defeat the relief granted in paragraph 12.A, because it would allow him to exercise his withdrawal right to obtain his share of a contribution that would otherwise be used to pay the annual policy premiums. If the Trustee had the power to change the Policy beneficiary designation (which he expressly did), then the equitable deviation doctrine would apply the settlor’s probable intent and dictate the modifications to the Agreement that the Trustee requested and the probate court approved.¹⁰ *See* Restatement Trusts, 3d, § 66 & cmt a, pp 492-270 (2003) (“The objective is to give effect to what the settlor’s intent probably would have been had the circumstances in question been anticipated.”).

Dino next asserts that while the Trustee provided several illustrations as to what would happen if John did not pay the annual premiums, the Trustee failed to address whether the beneficiaries would be willing to pay the premiums if they were to become the owners or if it was to be assumed that John would continue paying the annual premiums. Dino raised the same issue on page 9 of his objection to the Petition filed in the probate court. But Dino never stated in either document that he would be willing to pay the premiums. More important, at the probate court hearing, Dino did not call witnesses or introduce any evidence that he or any other

¹⁰ At best, Dino would be entitled only to a narrowing of paragraph (3) of the probate court’s order to exclude Dino as a beneficiary only with respect to Paragraph B of Article III of the Agreement.

beneficiary would be willing to pay the premiums. (6/19/06 Probate Ct Tr (Ex 2) at 2.) No other beneficiary has approached the Trustee about paying the premiums, nor did any testify at the hearing that they wanted to pay the premiums. Accordingly, the Trustee did not abuse his discretion or act in bad faith by focusing on the danger presented in John's refusal to pay premiums as long as Dino remained a Trust beneficiary.

Dino's remaining arguments are unsupported by and inconsistent with the lower court record:

- There is no evidence that the Trust was ever terminated (*contra* Dino Kotsonis Appeal Br at 23);
- There is no evidence that the Trustee's action defeated John's original intent to create an irrevocable trust that would distribute at his death (*contra id.*). As already discussed, John's original intent also included the desire to preserve Trust property, and Dino's assertion disregards the lifetime Discretionary Distribution Power John granted to the Trustee.
- There is no evidence that John directed the Trustee on the disposition of Trust assets (*contra id.* at 24). At the hearing, the probate court asked Dino's attorney twice if she wanted to ask questions, and she declined. (6/19/06 Trial Ct Tr at 9.) Moreover, the Trustee explained in the Petition why the relief requested was better than simply surrendering the policy or switching to a paid-up contract; either option would substantially reduce the benefit available to the beneficiaries for distribution. (Pet (Ex 1) ¶ 11(D)-(H).)
- The Trustee must take into account John's voluntary contributions (or lack thereof) in administering the Trust. (*Contra* Dino Kotsonis Appeal Br at 26.) Ignoring that payment stream (or lack thereof) would violate the Trustee's duty to preserve the Trust assets.
- The probate court order does not create, directly or indirectly, "an incident of ownership within the Grantor in the trust property." (*Contra id.*) To the contrary, the order vindicates the Trustee's attempt to preserve Trust assets while acting in conformance with the Agreement's plain language.

In sum, the Trustee properly exercised the discretionary powers the Agreement granted to him (the Insurance Power and the Discretionary Distribution Power), and he did so while considering the "known" assets of beneficiaries, precisely as the Agreement directed.

Because the Trustee acted in good faith and in no way abused his discretion the probate court did not clearly err in its findings.

CONCLUSION

Despite having already received a \$250,000 gift from his father, Dino seeks to thwart the Trustee's attempt to preserve the \$1,000,000 life insurance policy benefit that serves as the Trust's principle asset. If successful, Dino's actions would assuredly destroy that asset, leaving no benefit for Dino or any other beneficiary. Such an absurd result is flatly inconsistent with both the Trustee's duty of preservation and the plain language of the Agreement, which fully authorized the Trustee's action. The probate court did not clearly err in its findings of good faith, and this Court should affirm.

Even if Dino had introduced some evidence that the Trustee abused his discretion in designating Policy beneficiaries, the probate court's decision should still be affirmed based on the independent and alternative ground noted in Paragraph 12(B) of the Petition. Wholly aside from the Trustee's authority to designate Policy beneficiaries, he was granted discretionary authority to distribute some or all Trust assets in unequal amounts to beneficiaries. The Trustee could properly exercise that authority either by naming the Trust beneficiaries (excluding Dino) as Policy beneficiaries, or by assigning the Policy to the beneficiaries (excluding Dino), and letting them name themselves as beneficiaries. Either way, the Trustee has made a "distribution" to the beneficiaries, which was done in conformance with the broad standards granted him in making such decisions. The end result is the same, and the Trustee's exercise of this authority in good faith is again "conclusive" on all persons, including Dino. There is no set of circumstances that counsels in favor of reversal of the probate court's sound decision.

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Respectfully submitted,

WARNER NORCROSS & JUDD LLP

By _____
Kenneth W. Kingma (P32087)
John J. Bursch (P57679)
2000 Town Center, Suite 2700
Southfield, Michigan 48075-1318
248.784.5036

Attorneys for *Amicus Curiae*
Mr. John Kotsonis

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