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CARMINE PAUL, EXECUTOR, Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 000307-2016 Approved for Publication In the New Jersey Tax Court Reports

Decided: June 2, 2020

Thomas M. Wolfe for plaintiff (Wolfe Ossa Law, attorneys).

Heather Lynn Anderson for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

NUGENT, J.T.C.

This opinion resolves the motion for summary judgment filed by the Director, Division of Taxation ("Defendant"). Carmine Paul acting as Executor ("Plaintiff") for the estate of Joseph Polastro ("Decedent") challenged Defendant's decision to include in Decedent's estate and levy inheritance tax on the assets of an inter vivos trust. The issue raised is whether the trust qualifies as a taxable transfer "intended to take effect in possession or enjoyment at or after . . . death" under N.J.S.A. 54:34-1(c) or whether the trustees' discretionary authority to distribute principal prevented Decedent's reservation of a life interest in the net income of the trust. The court finds that the transfer falls squarely within the purview of the statute and affirms the assessment.[1]

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[1] As a procedural matter, Defendant filed its motion pursuant to R. 4:46-2. Plaintiff then filed a "Memorandum of Law Submitted in Support of Plaintiff's Motion for Summary Judgment" without a notice of motion or proposed form of order as required under the court rules. R. 1:6-2(a); R. 4:46-2(a). Plaintiff was advised of the deficiency. Because no additional documents were filed with the court, the Memorandum will be treated as opposition to Defendant's motion, only.

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Decedent created an irrevocable trust in June 2007 funded with cash and securities. He relinquished the right to "alter, amend, revoke or terminate any Trust provision or interest . . . ." Under the terms of the Trust Indenture, during Decedent's lifetime the trustees were instructed to pay to him, or for his benefit, the net income of the trust in no less than quarterly payments. The trustees were authorized to make discretionary distributions of trust principal to any children of Decedent and to four named individuals, Carmine Paul, Roxann Paul, Vincent Nuzzi and Sylvia Nuzzi. Any distribution of principal was limited to the maximum gifting amount allowed under the Internal Revenue Code that did not require the filing of a Gift Tax return. Distribution of trust principal to Decedent or to his spouse was disallowed. The trust provided instructions for distribution of funds remaining in the trust on the death of Decedent to any of Decedent's surviving children, or to their issue if no children survived. The trust remainders would next be "distributed equally to the survivors of Carmine Paul and Roxann Paul," and if none survived to Lorraine Pierson or to her issue.

Two provisions addressed the trustees' control over distribution of trust principal. Section III.B reads: "The written approval of two Trustees is required to make a distribution of the principal of the Trust during Grantor's lifetime. If an event shall occur in which there is only one acting Trustee, then no distributions of principal shall be made until a second Trustee is appointed." Under Section IV.A.1., "If either of the Trustees named herein shall be unwilling or unable to serve, then Roxann Paul shall assume the position as co-Trustee" and "if only [one] person remains who is able and willing to serve as Trustee, then such person may alone serve as Trustee, or may under the powers granted to the Trustee herein appoint a co-Trustee or successor Trustee." Trustees were authorized and empowered to "possess, manage, control, grant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, exclusive of any accumulated income therefrom, the trust properties . . . in such Trustee(s)' absolute judgment and discretion . . . ."

The Trust Indenture named both Decedent and Carmine Paul, Decedent's son-in-law, as "Trustees." The trust provision labeled "Alternate or Successor Trustee" instructed that Roxann Paul "shall serve as Successor trustee." However, in supplemental facts provided to the court Plaintiff certified that "[Decedent] created a Trust and named me as an alternate Trustee if he was no longer able to act as Trustee. Before [Decedent] passed he suffered a stroke and was unable to manage his affairs. After his stroke I assumed the role of Trustee for the Trust created by [Decedent]."[2]

Decedent received annual distributions of the trust net income until his death on December 11, 2013. On or about May 5, 2014, Plaintiff filed a New Jersey Resident Decedent Inheritance Tax Return ("return") and reported tax due in the amount of $31,582.15. The return did not include the value of the trust in its calculation of inheritance tax. Defendant audited the return and determined that the trust assets valued at $715,473.35 should be included in the calculation taxable as a transfer "intended to take effect in possession or enjoyment at or after . . . death" under N.J.S.A. 54:34-1(c). Based on the return as filed and on Defendant's corrections and audit adjustments, a notice of assessment issued in the amount of $130,903.15, which included interest and credit for inheritance tax previously paid.

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[2] As noted, under the language of the trust Decedent and Carmine Paul were named as trustees. However, based on Carmine Paul's certification, the role he played under the trust prior to Decedent's stroke is unclear. Whether Carmine Paul served as an alternate or as a co-trustee until the time of the stroke is not dispositive of the ultimate issue presented. What is material to the court's decision is that once Decedent suffered the stroke and was unable act Carmine Paul acted in the role of trustee.

"The New Jersey Transfer Inheritance Tax, N.J.S.A. 54:33-1 et seq. [ ], is a privilege levy upon the right of succession to real and personal property transferred by a decedent in specified cases." Gould v. Dir., Div. of Taxation, 2 N.J. Tax 316, 319 (Tax 1981). The statutory scheme is broad and imposes a tax, "upon the transfer of property, real or personal, of the value of $500.00 or over, or of any interest herein or income therefrom, in trust or otherwise, to or for the use of any transferee, distributee or other beneficiary . . . ." N.J.S.A. 54:34-1. The statute levies inheritance tax on applicable testamentary transfers that occur by will or intestacy. N.J.S.A. 54:34-1(a) to (b). Inheritance tax is likewise levied on certain inter vivos transfers captured by the statute. "Where real or tangible personal property . . . is transferred by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death" the tax applies. N.J.S.A. 54:34-1(c).

"The purpose of the statute is to prevent the avoidance of transfer inheritance tax by a lifetime transfer, which is, in effect, a substitute for or the substantial equivalent of a testate or intestate distribution." Millar v. Baldwin, 9 N.J. Tax 48, 53 (Tax 1987) (citing In re Estate of Lingle, 72 N.J. 87 (1976)); accord Estate of Riper v. Dir., Div. of Taxation, 30 N.J. Tax 1 (Tax 2017), aff'd, 456 N.J. Super. 314 (App. Div. 2018), aff'd, 2020 N.J. LEXIS 120 (Feb. 5, 2020); Estate of Berg v. Dir., Div. of Taxation, 17 N.J. Tax 256, 262 (Tax 1998) (citing Swain v. Neeld, 28 N.J. 60, 68-69 (1958); Central Hanover Bank & Tr. Co. v. Martin, 129 N.J.L. 127, 127-28 (E&A 1942), aff'd, 319 U.S. 94 (1943)); see also Estate of Lingle, 72 N.J. at 93 (noting that "the 'at or after death' provision is a common feature of inheritance tax statutes") (citing In re Estate of Lichtenstein, 52 N.J. 553, 560, 575 (1968)).

The statute nonetheless exempts from its reach those inter vivos transfers where the transferor retains an interest in the trust property, but then timely relinquishes any benefit retained in the property transferred.

> A transfer of property by deed, grant, bargain, sale or gift wherein the transferor is entitled to some income, right, interest or power, either expressly or by operation of law, shall not be deemed a transfer intended to take effect at or after transferor's death if the transferor, more than 3 years prior to death, shall have executed an irrevocable and complete disposition of all reserved income, rights, interests and powers in and over the property transferred.
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> [N.J.S.A. 54:34-1.1.]

Regulations in place to assist in the administration of the tax read, in pertinent part:

> (a) Any transfer of property . . . made by a decedent transferor during [his] lifetime, under which [he] has retained for [his] life or for any period not ascertainable without reference to [his] death, or for any period which does not in fact end before [his] death . . . [t]he possession or enjoyment of the property so that possession or enjoyment of the property can be obtained only by surviving the transferor; . . .
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> (b) The transfer is taxable if . . . the transferor has in form transferred property but has deferred the actual possession, use or enjoyment of the property until a time which can only be measured by reference to the transferor's death.
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> [N.J.A.C. 18:26-5.8.]

The court will consider the motion under well-established standards. Summary judgment shall be granted if "pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). "There is a genuine issue of material fact only if, considering the burden of persuasion at trial, the evidence submitted by the parties, on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529. The parties both contend that there is no material fact at issue and the matter is ripe for summary judgment.

The court finds no need to engage in further fact finding in this matter since the facts are undisputed. The standard set forth in Brill, requiring the trial court "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party" has been met and the matter is ripe for summary judgment. 142 N.J. at 540; see also R. 4:46-2(c).

It is well understood that determinations of the defendant Director are presumed to be correct. Campo Jersey, Inc. v. Dir., Div. of Taxation, 390 N.J. Super. 366, 383 (App. Div. 2007); L&L Oil Serv., Inc., v. Dir., Div. of Taxation, 340 N.J. Super. 173, 183 (App. Div. 2001). The Director's decisions are afforded such treatment because "[c]ourts have recognized the Director's expertise in the highly specialized and technical area of taxation." Aetna Burglar & Fire Alarm Co. v. Dir., Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997) (citation omitted). However, courts are the final authority over the interpretation of statutes. Koch v. Dir., Div. of Taxation, 157 N.J. 1, 8 (1999).

In support of the assessment, Defendant does not rely solely upon the presumption. Defendant contends that Decedent simultaneously reserved a life estate upon transfer of the property and retained control over the trust assets as a trustee, thereby the transfer was intended to take effect in possession or enjoyment at or after Decedent's death and was properly taxed under the "at or after death" prong of the statute. N.J.S.A. 54:34-1(c); N.J.A.C. 18:26-5.8. Moreover, the beneficiaries' possession and enjoyment of the assets did in fact take place at Decedent's death.

In opposition to Defendant's motion, Plaintiff makes the following arguments. Under the structure of the Trust Indenture, Decedent made no reservation to collect net income, having ceded control of the trust to the point that the principal could be dissipated. "[U]pon creation of the Trust the Decedent had given up control of the funds and [the] Trustees could remove all of the money from the Trust with none of the funds passing to the Grantor." The language of the Trust Indenture permitted trustees to distribute trust principal during Decedent's lifetime. Distribution of principal required the signature of two trustees, one of whom was Decedent, however, a successor trustee could fulfill the role should Decedent be unwilling or unable to continue as a trustee. That provision authorized a sole trustee to act alone without the requirement to appoint a co-trustee, and Decedent had no ability to alter the terms of the trust.

"Courts have repeatedly stated that the transferor's retention of income generated by a property is a significant circumstance in determining whether the transfer was intended to take effect at or after death." Estate of Berg, 17 N.J. Tax at 263 (citations omitted). "It is a well-established rule, venerable with age, that a transfer inter vivos by which the donor retains a life estate in the subject matter is a transfer 'intended to take effect in possession or enjoyment at or after . . . death.'" Darr v. Kervick, 31 N.J. 476, 483 (1960) (citations omitted). A transfer "in trust" is taxable "at or after death . . . where . . . the settlor retained income or some benefit for his life with remainder over on his death." Estate of Lichtenstein, 52 N.J. at 576 (citations omitted). In the context of a trust, a life estate has been defined as "[a] legal arrangement whereby the beneficiary (i.e., the life tenant) is entitled to the income from the property for his or her life."

Estate of Franko v. Dir., Div. of Taxation, 23 N.J. Tax 1, 5 (Tax 2006) (quoting Black's Law Dictionary 833 (5th ed. 1979)).

In Estate of Lingle, the Supreme Court developed factors for courts to use as a guide to interpret whether an inter vivos transfer qualifies as taxable under the "at or after death" prong.

> (1) the grantor or settlor must transfer some property, or interest therein, while retaining for his lifetime some or all of the economic benefits therefrom; (2) there must be a consequent postponement of enjoyment on the part of the grantee, promisee or other beneficiary; and (3) both the grantor's retention and the grantee's postponement of enjoyment must be for a period determinable by reference to the grantor's death.
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> Conversely, lifetime transfers will be held not to come within the "at or after death" clause where (1) the retention of benefits by the grantor is not determined by reference to the duration of his life, N.J.A.C. 18:26-5.8 . . . ; (2) the grantor has completely divested himself of his entire interest in the transferred property, [ ]; or (3) there was full and adequate consideration for the property transferred. (Internal citations omitted.)
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> [72 N.J. at 95.]

Here, within the language of the Trust Indenture, Decedent's purpose for the transfer of assets in trust is laid bare. "During Grantor's lifetime, the Trustees shall hold the Trust, in trust, to pay or apply for the benefit of [Decedent] . . . the net income from the Trust." The instruction that trustees "shall" pay the net income to Decedent in "at least quarterly installments" evinces Decedent's intent that the payments to him were non-discretionary in nature. Decedent established a trust to provide net income for him for the duration of his life. He named himself as trustee and acted in that capacity until he was no longer able to act. The trustees were instructed by the trust to collect and distribute "all the rest, residue and remainder of the Trust" for distribution to the individuals named in the order set forth in the Trust Indenture, following the death of Decedent. By the clear terms of the trust, Decedent's death served to trigger the beneficiaries' right to possession and enjoyment of the income from the trust corpus, postponed until that time, while Decedent retained lifetime economic benefits. Moreover, it is undisputed that Decedent did not "execute[ ] an irrevocable and complete disposition" of his "reserved" income interest more than three years prior to his death, as required by N.J.S.A. 54:34-1.1.

In Estate of Lichtenstein, the Supreme Court found that "taxability in this state under the 'at or after death' provision has required that the settlor retain in himself some realistic interest, power or control or some other 'string' during his lifetime . . . ." 52 N.J. at 578 (citations omitted). The Tax Court employed the same analysis in the case Estate of Johnson, 11 N.J. Tax 102 (Tax 1990), where it considered dueling summary judgment motions on stipulated facts on the issue "whether the corpus of [a] trust should be included in the [grantor-decedent's] estate" under N.J.S.A. 54:34-1(c). Id. at 103. The decedent there had two children and created a trust for their benefit. She appointed three trustees: her two children and one "independent trustee." The independent trustee had discretion to "distribute income and principal" of the trust to the children for certain purposes. The children had the "completely discretionary power" to distribute to the decedent a portion of "the income and principal . . . for [her] comfort." Id. at 104. Of note, the paragraph giving the children this power provided that "it shall not be interpreted as creating any right whatsoever in the [decedent] to insist at any time that any portion of the income or principal of the trust be distributed to her." Ibid. The plaintiff in Estate of Johnson argued that "the issue [was] whether the decedent retained an enforceable right to the corpus and income of the trust." Id. at 105. The defendant there "argue[d] that there is a distinction between an interest and an enforceable right" and that "all assets of the trust [were] includable in the decedent's estate because she retained an interest in the trust." Id. at 104-05.

The court held that a realistic interest need not be "an enforceable right," even though it usually is. Id. at 105-06. For example, "it could take the form of an unenforceable interest where there is a prearrangement between the grantor and the trustee which resulted in the grantor retaining a substantial economic benefit in the transferred property." Id. at 106. Although the court adopted the defendant Director's standard, it found the trust assets not taxable under that standard because "prearrangement was not in issue, and no evidence was presented that the grantor retained such an interest." Ibid.

The court supported its decision by distinguishing its facts from those in In re Estate of Brockett, 111 N.J. Eq. 183 (Prerog. Ct. 1932). Estate of Johnson, 11 N.J. Tax at 104-05. The decedent in Brockett created a trust to benefit his two daughters, whom he named as trustees. The Brockett daughters were required to pay the decedent income since the trust "directed the trustees to pay to the [decedent] so much of the income as [they] deemed proper" for maintenance and support. Ibid. Should the trustees deem the income insufficient for the stated purposes the trust authorized use of the corpus. Estate of Brockett held that the decedent's transfer of property to the trust was taxable under the "at or after death" prong of the statute. Id. at 105. The trustees in Brockett "were required to pay the [decedent] something, only the amount was within their discretion" whereas in the case sub judice "there [was] no requirement to pay, payment being 'wholly discretionary.'" Ibid. The present matter is analogous to Estate of Brockett because the Trust Indenture required the trustees to make quarterly distributions to Decedent. The facts here are stronger because in Brockett the amount to be paid to the decedent was discretionary, where under the present facts Decedent was entitled to be paid the entire net income. Thereby, Decedent's entitlement to an economic benefit constitutes a realistic interest in the property transferred.

The Johnson court also adopted the United States Supreme Court's definition of a "string," i.e., "a device employed by a decedent to hold in suspense the ultimate disposition of his property until the moment of his death." Id. at 106 (citing Helvering v. Hallock, 309 U.S. 106, 114 (1939)). Despite adopting the premise, the Johnson court found no string there because the decedent "cannot be said to have retained such a level of control over the final disposition of his property." Ibid. The trustees had discretion to distribute any amount of income and principal they deemed appropriate. Additionally, the trust there was for the benefit of the decedent's two children. So, the trust instrument contemplated that the children would receive trust assets prior to the decedent's death; in fact, that was exactly what happened. Here, by contrast, the income from the trust was reserved entirely for Decedent's benefit during his own life, constituting the string Decedent held until his death. Under the rules articulated in Estate of Lichtenstein and Estate of Johnson, the transfer is therefore taxable.

As a result of the trustees' discretionary power to distribute trust principal, Plaintiff contends that Decedent failed to reserve a life estate. In Estate of Franko, the question was whether to value the interest transferred by the decedent's will to her husband in trust as a contingent interest or a life estate. The court defined a life estate as one where the decedent "is entitled to the income from the property for his or her life." Franko, 23 N.J. Tax at 5. The trustees there were empowered to distribute to the husband the trust income and principal entirely at their discretion. The court found the interest to be contingent rather than a life estate, and defined "the term 'contingent,' as applied to a bequest, as implying 'that no present interest exists, and that whether such interest or right will ever exist depends on a future uncertain event.'" Ibid. (citing Black's Law Dictionary 833, 5th ed. 1979). Due to the trustees' discretionary power of distribution, the husband's interest was found to be contingent. Id. at 7. That is, the future uncertain event was the trustees' decision whether to provide any of the trust, income or principal, to the decedent's husband. Ibid. He could assert no right to the property but was instead subject to the trustees' unfettered discretion to act. Ibid. This court finds that Decedent's transfer falls squarely within the plain language of N.J.S.A. 54:34-1(c) and the facts of well-established case law where courts have found a Grantor to have retained for himself a life interest taxable under the "at or after death" prong of the statute and not any contingent interest.

The plain text of N.J.S.A. 54:34-1.1 likewise supports judgment for Defendant. It applies to transfers by grant "wherein the transferor is entitled to some income . . . either expressly or by operation of law." The statute's use of "is entitled to some income" is telling. It matters not whether Decedent was economically guaranteed any income; what matters is that he was "entitled" to receive some. So, the court must ask whether Decedent was "entitled to some income . . . either expressly or by operation of law." A plain reading of the Trust Indenture indicates express entitlement. Plaintiff argues the opposite, but even if arguendo Plaintiff is correct, Decedent was still entitled to some income by operation of law under the New Jersey Uniform Principal and Income Act ("UPI Act").

The Trust Indenture stated that "[t]he Trustee shall make at least quarterly payments of the net income to" Decedent, which made him an "income beneficiary" under the UPI Act, viz., "a person to whom net income of a trust is or may be payable." N.J.S.A. 3B:19B-2 (emphasis added). An "income interest" under that law is "the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion." Ibid. Defendant argues the Trust Indenture required distributions; Plaintiff argues it made them discretionary since the trustee(s) could have depleted the trust's corpus. Either way, the Trust Indenture clearly created an income interest as that term is used in the UPI Act. Section 3B:19B-7(a) of the UPI Act provides that "[a]n income beneficiary is entitled to net income from the date on which the income interest begins." By default, "[a]n income interest begins on . . . the date an asset . . . is transferred to the trust" in cases involving transfers before death. N.J.S.A. 3B:19B-7(b)(1). Here, Decedent transferred assets to the trust. Thereby, he was entitled to net income under the UPI Act. This establishes that Decedent made "[a] transfer of property by . . . grant . . . wherein [he] [was] entitled to some income . . . either expressly or by operation of law." N.J.S.A. 54:34-1.1.[3]

So far, the transfer meets every element of N.J.S.A. 54:34-1.1 except the "complete disposition" requirement. Plaintiff cannot rely on the exemption because, despite viewing the facts in the light most favorable to Plaintiff, it is undisputed Decedent never made a complete disposition in writing after he transferred the assets to the trust. See, e.g., J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 210 (2019) ("In reviewing a grant of summary judgment, we . . . 'view the evidence in the light most favorable to the non-moving party'") (quoting Qian v. Toll Bros., Inc., 223 N.J. 124, 134-35 (2015)); N.J. Dep't of Environ. Protection/UFT v. Township of Upper Freehold, 31 N.J. Tax 230, 239 (Tax 2019) (citing Brill, 142 N.J. at 541). Moreover, to the contrary, Decedent did in fact receive income distributions until his death. No complete disposition ever transpired. As such, Plaintiff's reliance on this provision is misplaced.

Plaintiff states that the Tax Court held that "if a [g]rantor makes a complete and irrevocable transfer of assets to an [i]rrevocable [t]rust more than [three] years prior to the passing of the [g]rantor, without 'the reservation of income, rights, interest, or power' the funds are not taxable

[3] Alternatively, Defendant argued that Decedent retained some power over the transferred property having appointed himself as a trustee which carries with it the powers of a trustee under New Jersey's Uniform Trust Code. See generally N.J.S.A. 3B:31-61 to 62, 68 to 69. However, because the analysis herein of reserved income and a reserved interest are each dispositive, this court need not analyze such an argument.

under [the] Inheritance Tax." See Gray v. Dir., Div. of Taxation, 28 N.J. Tax 28, 47 (Tax 2014). Plaintiff's argument misstates the law. Gray stands for the proposition that, because of N.J.S.A. 54:34-1.1, determining taxability under the "at or after death" prong "requires inquiry into whether [the] decedent executed a 'complete disposition of all reserved income, rights, interests, and powers.'" Gray, 28 N.J. at 47 (citing N.J.S.A. 54:34-1.1) (emphasis removed). The distinction between a "transfer" and a "complete disposition" is relevant. As this court recently held, "the statutory language, the interpretation of the language by the Director . . ., and the legislative history militate against reading the terms synonymously." Estate of Riper, 30 N.J. Tax at 12.[4]

Under N.J.S.A. 54:34-1.1, if Decedent had reserved some right or interest and later completely disposed of the same more than three years before he died, then the transfer is not taxable. Accordingly, the law surely contemplates that a transfer is not exempt under this section if it is made with such a reservation but is not followed by a complete disposition thereof. Holding otherwise would make the statute a surplusage: if such a transfer were exempt with nothing more, then the complete disposition clause would add nothing to the law. However, New Jersey courts "must presume that every word in a statute has meaning and is not mere surplusage." N.J. Highlands Coal. v. N.J. Dep't of Environ. Protection, 236 N.J. 208, 214 (2018) (citation and internal quotation marks omitted); Township of Galloway v. Duncan, 29 N.J. Tax 520, 529 (Tax 2016) (citation omitted). Therefore, N.J.S.A. 54:34-1.1 lends Plaintiff no support since, when

[4] Plaintiff argued that the tax was likewise unlawful under the "in contemplation of death" prong of N.J.S.A. 54:34-1(c) since the transfer to the trust was made more than three years before Decedent's death. Pursuant to the Final Determination, Inheritance tax was assessed only under the "at or after death" prong of the statute.

Decedent transferred property by grant, he reserved "some income, right, [or] interest" over the same, and he never subsequently executed a complete disposition thereof.[5]

Under the clear terms of the trust Decedent was entitled to income for life. Essentially, Plaintiff argues that because the trust corpus could be diluted to the point that Decedent would lose any entitlement to the income no life estate was created. Plaintiff offers no legal support for the contention and the court's research reveals none. Likewise, the court finds Plaintiff's position to be unsupportable based on the language of the trust, which by its very nature rendered the corpus subject to dilution. The corpus was comprised of cash and securities. There was no guarantee the property would continue to produce income. Moreover, securities are subject to the volatility of the financial markets. By the very terms of the trust the corpus was alienable. The trustees were assigned broad powers in their responsibility to care for the assets, to manage as well as dispose of the trust assets. Trustees had the power to "grant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, exclusive of any accumulated income therefrom . . . ." At any time, the trustees could opt to sell the securities, convert them to cash, to real estate, or to some other form of property, theoretically leaving no net income for distribution to Decedent. That kind of potential outcome should have no bearing on the existence of a life estate.

Moreover, while Plaintiff's theory is not dependent upon the malintent of the trustees, in its argument Plaintiff alludes to the trustees' potential "dissipation" of the corpus. The court finds that the mere possibility of an intervening event, which Decedent did not contemplate, could not destroy the life estate. The possibility of an unusual, indiscriminate event, such as the fiduciary

[5] The parties do not dispute that Decedent made "[a] transfer of property" to the Trust, nor do they dispute that such transfer was by grant. The Trust Indenture itself states "[t]he Grantor [Decedent] has herewith delivered and does hereby irrevocably grant . . . to the Trustee . . . the property described."

breach Plaintiff suggests, does not shield this case from well-established law. See Lingle, 72 N.J. at 96-97 (holding that "where the result is unaffected by unusual or extraneous circumstances, . . . tax consequences . . . should follow the result").

In Estate of Lingle, the decedent's estate settled litigation by providing part of the estate to the decedent's daughters, fulfilling a property settlement agreed to by the decedent when he divorced to leave a portion of his estate to each of his daughters. The issue framed by the Supreme Court was whether "a valid contract to make a particular testamentary disposition is, or may be, a transfer within the meaning of N.J.S.A. 54:34-1, subd. c. . . . impos[ing] a tax upon the transfer of assets where the property . . . is . . . transferred . . . intended to take effect in possession or enjoyment at or after . . . death." 72 N.J. at 93 (internal quotation marks omitted). The Court held, "[g]enerally speaking, where the result is unaffected by unusual or extraneous circumstances, it should not matter whether it comes about because of performance of the contract by the decedent or by way of settlement or adjudication following a breach; tax consequences in such cases should follow the result." Id. at 96-97 (emphasis added). The Court's guidance is applicable to these facts. The inchoate possibility here that a trustee might dissipate the corpus in breach of its fiduciary duty cannot negate Decedent's intention, as clearly manifested in the Trust Indenture, to transfer property at or after his death. Under the Trust Indenture both Carmine Paul and Roxann Paul had the potential to serve as trustees, and likewise were named beneficiaries. While Plaintiff assigned a potential malintent to the trustees to dissipate principal, equally plausible is the possibility that the two individuals would elect to preserve and invest the principal to protect the corpus until the time of their inheritance. Despite Plaintiff's insistence that the trustees could have dissipated the corpus, such an unusual and extraneous breach of fiduciary duty never came to fruition.

To prevail in this case, Plaintiff must establish that the "retention of benefits is not determined by reference to the duration of [Decedent's] life" or that "the [Decedent] has completely divested himself of his entire interest in the transferred property . . . ." Estate of Lingle, 72 N.J. at 95. That burden has not been met. This court finds that Decedent created a life estate taxable under N.J.S.A. 54:34-1(c) as a transfer "intended to take effect in possession or enjoyment at or after . . . death" by retaining an interest in the net income of property transferred in trust notwithstanding the trustees discretionary authority to distribute principal. Thereby, "the tax consequences must follow the result." Estate of Lingle, 72 N.J. at 96-97. Decedent's reservation of an income interest for life, which was never completely disposed of more than three years prior to his death, is included in his estate for purposes of assessing Inheritance Tax. For the court to find otherwise would be contrary to the intent and plain language of the governing statutes and against the weight of the case law.

> The statutory provision seeking to tax transfers to take effect in possession or enjoyment at or after death . . . is not designed to alter the fundamental aim or thrust of the tax. It is rather intended to close avenues of avoidance so obvious that, were they not shut off and controlled, the statutory imposition would certainly fail of its purpose.
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> [Id. at 94.]

Defendant's motion for Summary Judgment is granted. An Order accompanies this opinion.