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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ESTATE OF CLARENCE OTT, Deceased CHARLOTTE SHEPARD et al., Objectors and Appellants, v. PNC BANK, Petitioner and Respondent.	B230527 (Los Angeles County Super. Ct. No. P337366)

APPEAL from an order of the Superior Court of Los Angeles County. Mitchell L. Beckloff, Judge. Affirmed in part, reversed in part and remanded for further proceedings.

Kerendian & Associates, Shab D. Kerendian, Shawn S. Kerendian, Verlan Y. Kwan, Bryan R. Smith and Marc E. Angelucci, for Objectors and Appellants Charlotte Shepard, C.L. Shepard and Trevor W. Shepard.

Cochran, Davis & Associates, Joan E. Cochran and Jeffrey T. Bolson, for Objectors and Appellants Elizabeth Hawkins Replogle, Laurie Kathleen Pickett Ferrone and Elizabeth Cameron Pickett.

No appearance for Petitioner and Respondent.

INTRODUCTION

PNC Bank, acting as trustee of the Ott Testamentary Trust, filed a petition for instructions seeking confirmation that it should distribute a portion of the trust principal to two of the decedent's great grandchildren, Charles Manteuffel Jr. and Sabrina Manteuffel. Several trust beneficiaries objected to the petition, arguing that the Manteuffel children were not entitled to any portion of the trust. The parties agreed to submit the issue to the court based solely on the text of the trust instrument.

The trial court ruled that although the Manteuffel children had an interest in a portion of the trust's principal, they were not entitled to that portion of the trust until both of the following had occurred: (1) both of the children's great aunts, Elizabeth Replogle and Charlotte Shepard, had died; and (2) at the time of death of the last of the two aunts, at least one of the aunts had surviving issue. The court further ruled, however, that until Elizabeth and Charlotte both died, the Manteuffel children were entitled to receive income from the portion of the trust that they might later inherit. The objectors filed a timely appeal. We affirm in part, reverse in part and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

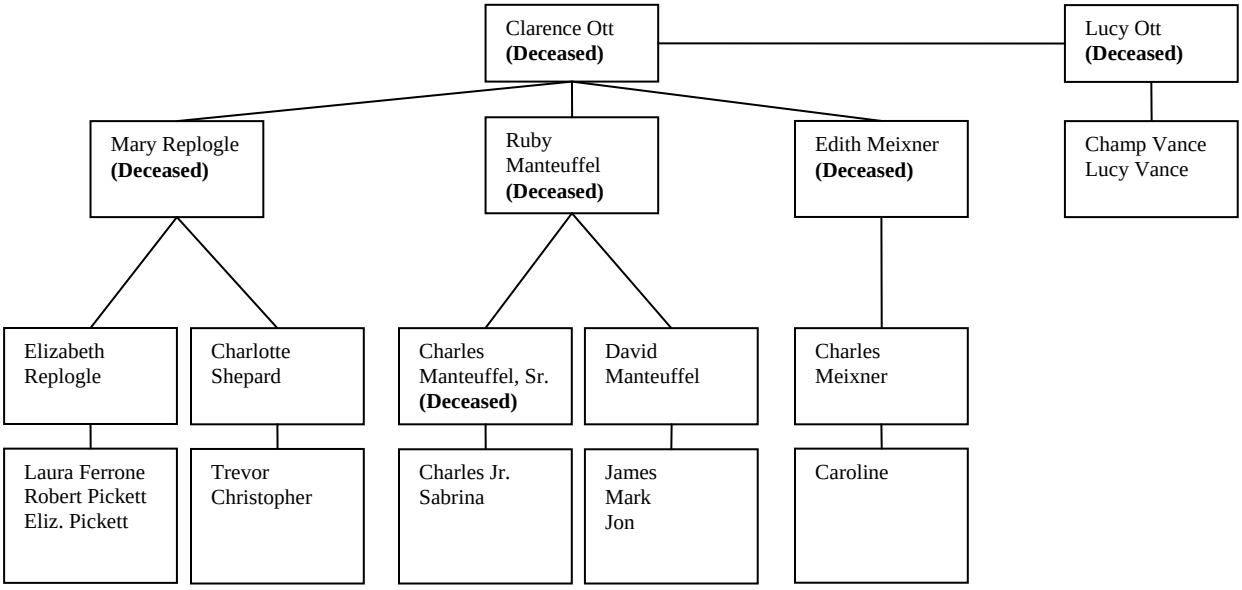
A. The Family of Clarence Ott

Clarence F. Ott (Ott) died on December 20, 1952. As illustrated in the Ott family tree below, Ott was survived by his second wife, Lucy Ott (Lucy), who was the mother of Shepherd Vance and Lucy Jane Vance. Ott was also survived by three daughters, Mary Hawkins (Mary), Ruby Manteuffel (Ruby) and Edith Meixner (Edith). At the time of Ott's death, each of his daughters had children. Mary had two daughters, Elizabeth Replogle (Elizabeth) and Charlotte Shepard (Charlotte); Ruby had two sons, Charles Manteuffel (Charles Sr.) and David Manteuffel (David); and Edith had one son, Charles Meixner.

Since Ott's death in 1952, his wife Lucy and his three daughters, Mary, Ruby and Edith, all died. Mary's daughters, Elizabeth and Charlotte, are still living and have five children between them. Elizabeth's children are Laurie Ferrone, Robert Pickett and Elizabeth Pickett; Charlotte's children are Trevor and Christopher Shepard.

Ruby's son Charles Sr. died in 2000 and is survived by two children, Charles Manteuffel Jr. (Charles Jr.) and Sabrina Manteuffel (Sabrina). Ruby's other son David Manteuffel (David) is alive and has three sons, James Manteuffel, Mark Manteuffel and Jonathan Manteuffel. Edith's son, Charles Meixner, is still living and has one child, Caroline Meixner.

Ott Family Tree:



B. The Ott Testamentary Trust

1. Establishment of The Ott Testamentary Trust

Clarence Ott's will left almost the entire estate to his daughter Mary, Mary's daughters Elizabeth and Charlotte and their issue. The will left Ott's other two daughters, Edith and Ruby, only $500 and provided nothing for their children.

In February of 1953, Edith and Rudy filed a will contest that was settled several months later. The terms of the settlement were memorialized in a 1954 court order that established the Ott Testamentary Trust. The trust provisions, which are contained in the 1954 order, include a detailed explanation regarding the distribution of the trust assets.

2. Summary of trust provisions

a. Initial distribution to Lucy

Under the terms of the trust, Lucy was to receive the "net income" from the trust "during her life."[1] Upon Lucy's death, the trustee was to "apportion the trust estate equitably . . . into four portions" consisting of three portions each consisting of one-fifth of the estate and one portion consisting of two-fifths of the estate.

b. Mary's one-fifth portion of the estate

Sections D(1)-(3) of the trust described Mary's distribution under the trust. Subdivision D(1) provided that, upon Lucy's death, Mary was to receive the income from a one-fifth portion of the estate during her lifetime. Upon Mary's death, the income from that one-fifth portion of the estate was to be distributed equally among any children of Mary who were living at the time of Ott's death, which included Elizabeth and Charlotte, during their lifetimes. Finally, upon the death of Elizabeth or Charlotte, their issue were to "take that portion of the fund from which . . . their parent had theretofore received the income."

Subdivision D(2) provided that if Elizabeth and Charlotte both died without leaving issue, "then the principal of said one-fifth . . . portion of the estate shall be paid in equal parts to Champ . . . and Lucy Vance; and in the event of the death of either, to their issue *per stirpes*."

c. Elizabeth and Charlotte's two-fifths portion of the estate

Section C of the trust described the distribution for Mary's daughters, Elizabeth and Charlotte. Section C(1) provided that, upon Lucy's death, the income from the two-fifths portion of the estate was to be distributed equally to Elizabeth and Charlotte during their respective lives.[2]

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[1] The trust also stated that Lucy's entitlement to income would terminate if she remarried. Lucy died without remarrying.

[2] Section C also contained provisions explaining how the two-fifths portion of the estate should be distributed if Elizabeth or Charlotte – or both Elizabeth and Charlotte –

Subdivision C(3) provided that if Elizabeth and Charlotte died leaving issue, the trustee was to distribute to the issue of the deceased "such proportion of the two-fifths portion of the corpus of the estate from which . . . their mother . . . received the income." If, however, either Elizabeth or Charlotte died without leaving issue, the surviving sister was to receive the income from the full two-fifths portion of the estate during her lifetime and, upon her death, the full two-fifths portion of the estate would be distributed among the issue of the last surviving sister.

Subdivision C(4) provided that if both Elizabeth and Charlotte died without leaving issue, the two-fifths portion of the estate was to be added to the one-fifth portion of the estate set aside for Mary under sections D(1)-(3) and distributed in the same manner as that one-fifth portion. Thus, if Elizabeth and Charlotte both died without leaving issue, the Vances would receive three-fifths of the estate, including: (1) Mary's one-fifth share pursuant to section D(2), and (2) Elizabeth and Charlotte's two-fifths share pursuant to section C(4) and D(2).

d. Ruby's one-fifth portion of the estate

Section D(5) described the distribution for Ott's daughter Ruby and provided that, upon Lucy's death, Ruby was to receive income from a one-fifth portion of the estate during her lifetime. Upon Ruby's death, the income from the one-fifth portion of the estate was to be distributed equally among any children of Ruby who were living at the time of Ott's death, which included Charles Sr. and David, during their lives.

Section D(5) further provided that upon the death of each of Ruby's children, the issue of each child was to "take that portion of the fund from which his or their parent had theretofore received the income." This distribution was, however, "subject . . . to the following limitations, restrictions and provisions:"

"(a) If upon the death of the last to survive of any such child or children of [Ruby], there be no living issue of any such child or children and if [Mary,

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died before Lucy. Because Elizabeth and Charlotte both survived Lucy, those provisions are no longer relevant.

> Elizabeth or Charlotte] be then living, or if said Charlotte or said Elizabeth were survived by issue then the one-fifth portion of the estate . . . . shall be added to the portions of the estate held or theretofore distributable under [sections C and D(1)-(3), which pertained to Elizabeth, Charlotte and Mary's portion of the trust.]
>
> (b) The rights of [Ruby], any child or children of hers and any issue of such child or children to receive income or principal hereunder shall terminate in any and all events . . . if, upon the death of the last surviving of . . . [Lucy, Mary, Elizabeth or Charlotte], there be no issue then surviving of either the said Elizabeth or the said Charlotte, and in such event the principal of the said one-fifth portion of the estate . . . shall be paid in equal parts to [Champ and Lucy] Vance, and in the event of the death of either, to their issue. . ."

e. Edith's one-fifth portion of the estate

Section D(4) described Edith's distribution under the trust and contained language that was identical to section D(5), which described Ruby's distribution. Thus, as with Ruby's distribution, the trust provided that, upon Lucy's death, Edith was to receive income from a one-fifth portion of the estate during her lifetime. Upon Edith's death, any child of Edith who was living at the time of Clarence Ott's death, which included only Charles Meixner, was to receive the income from the one-fifth portion of the estate during his lifetime. Finally, upon Charles Meixner's death, his issue would take "that portion of the fund from which his or their parent had theretofore received the income." These distributions were, however, subject to the same two "limitations, restrictions and provisions" quoted above in relation to Ruby's one fifth-share of the estate.[3]

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[3] Sections D(5) and D(4) also included language indicating that Ruby and Edith could assign any portion of the lifetime income to which they were entitled and that, upon their death, their children were to receive "so much of said net annual income as [Ruby or Edith] shall not have assigned during her lifetime from said one-fifth portion." This language was allegedly added at the behest of the attorneys who represented Ruby and Edith in the 1953 will contest. After the settlement was finalized in 1954, Ruby and

C. Trustee's Petition for Instructions

1. Trustee's petition for instructions

In 2000, Ruby's son Charles Sr. died leaving his two children, Charles Jr. and Sabrina. In 2007, PNC Bank, acting as trustee, filed a petition for instructions seeking confirmation that, as a result of Charles Sr.'s death, it should distribute a portion of the trust principal to Charles Jr. and Sabrina. More specifically, the trustee asserted that, pursuant to section D(5), Charles Jr. and Sabrina were entitled to receive that portion of the trust from which their father, Charles Sr., had received income during his lifetime. Elizabeth, Charlotte and several of their children (who were all current or potential beneficiaries of the trust) filed an objection to the trustee's petition arguing that Charles Jr. and Sabrina were not entitled to any portion of the trust.

To facilitate the interpretation of the trust, the trustee, Elizabeth and her children (the Replogle beneficiaries) and Charlotte and her children (the Shepard beneficiaries) (collectively the beneficiaries) agreed to submit a joint brief listing each of the contested trust provisions and the parties' respective interpretations of each such provision. The parties further agreed that the trial court would determine the meaning of each contested trust provision based solely "on the basis of the 1954 Court order itself, without reference to or reliance on extrinsic evidence, and without the need for any discovery."[4]

Edith each assigned one-quarter of their lifetime income to their attorneys. In 1979, Division 5 of this court concluded that Ruby's assignment terminated with her death and that her surviving children were therefore entitled to all the income generated by the one-fifth portion of the estate. (See *Estate of Ott* (1979) 99 Cal.App.3d 605.) Although the meaning and effect of the assignment provisions were considered in the trial court proceedings below, those provisions are not relevant to this appeal.

[4] The parties' joint case management statement also indicated that, after the trial court ruled on the meaning of the contested trust provisions, the parties would proceed to a second phase of litigation involving allegations of breach of fiduciary trust and other issues. Shortly after issuing its order regarding the proper interpretation of the trust, the trial court stayed the case pending the outcome of this appeal.

2. Summary of contested trust provisions and the trial court's ruling

The primary issue raised in the parties' joint brief involved the proper interpretation of sections D(4) and D(5) of the trust, which described Ruby and Edith's distributions. The parties presented three questions regarding the interpretation of these identically-worded sections. For the purposes of clarity and simplicity, we focus on the arguments made in relation to section D(5), which pertains to Ruby's distribution, noting, however, that the parties made the same arguments in relation to section D(4), which pertains to Edith's distribution of the trust.

a. The meaning of the term "fund"

First, the parties disagreed over the meaning of the term "fund" as used in the following clause of section D(5): "at the death of each child [of Ruby], the issue thereof shall take that portion of the fund from which his or their parent had theretofore received the income . . ." The trustee and the Shepard beneficiaries asserted that the term "fund" referred to "principal" or "corpus" of the trust, meaning that the issue of Ruby's children had been assigned a future interest in the portion of the estate from which their parents received income. The Replogle beneficiaries, however, argued that the term "fund" meant "the accumulation of undistributed income from which each life income beneficiary received income – in other words a bank account." Thus, according to the Replogle beneficiaries, the issue of Ruby's children did not have an interest in any portion of the trust's principal; rather, they had an interest in a portion of whatever undistributed income remained in the bank account into which income was deposited before it was distributed to the life income beneficiaries.

The trial court agreed with the trustee's contention that the term "fund" was intended to refer to trust "principal" or "corpus," rather than undistributed income. The court explained that the use of the term "fund" was the result of "inconsistent drafting in the 1954 Order," which, in the court's view, had used the words "fund," "estate" and "corpus" interchangeably.

b. Interpretation of subdivision (a)

The second issue involved the proper interpretation of section D(5), subdivision (a), which described the circumstances under which the issue of Ruby's children would lose their interest in the portion of the estate from which their parents received income. The subdivision states: "If upon the death of the last to survive of any . . . child or children of [Ruby], there be no living issue of any such child or children and if [Mary, Elizabeth or Charlotte] be then living, or if said Charlotte or said Elizabeth were survived by issue then the one-fifth portion of the estate . . . shall be added to the portion of the estate held or theretofore distributable under [the trust provisions applicable to Elizabeth, Charlotte and Mary]."

The trustee argued that this provision would only become operable if, upon the death of Ruby's last surviving child, two conditions were present: (1) none of Ruby's children had surviving issue, and (2) either Mary, Elizabeth or Charlotte were still alive or Elizabeth or Charlotte had been survived by issue. Thus, according to the trustee, subdivision (a) would not apply if, upon the death of Rudy's last surviving son David (Ruby's other son Charles Sr. died in 2000), any of David or Charles Sr.'s five children or their issue were still alive.

The beneficiaries, however, argued that subdivision (a) applied if, upon the death of Ruby's last surviving child, *either* of two conditions were present: (1) none of Ruby's children had surviving issue and Mary, Elizabeth or Charlotte were still alive, or (2) Elizabeth or Charlotte were survived by issue. Thus, under the beneficiaries' interpretation of subdivision (a), the issue of Ruby's children would lose their interest in the one-fifth portion of the estate from which their parents received income if, at the time of David's death, Elizabeth or Charlotte were survived by issue.

The trial court agreed with the trustee and ruled that subdivision (a) would only become applicable if, at the death of Ruby's last surviving child, no issue from either of her children were still living. Thus, under the trial court's interpretation, subdivision (a) would only apply if: (1) all five of Ruby's grandchildren (and any of their issue) died before David, and (2) at the time of David's death, Mary, Elizabeth or Charlotte were

living or Elizabeth or Charlotte were survived by issue. If both conditions were satisfied, then "the one-fifth portion of the estate that would have otherwise been distributed to David and Charles, Sr.'s living issue [would be] combined with that portion of the estate benefitting Elizabeth and Charlotte."

The court reached an identical conclusion regarding subdivision (a) of section D(4), which applied to Edith's distribution of the trust, meaning that subdivision D(4)(a) would only become operative if : (1) Edith's son Charles Meixner was not survived by his daughter Caroline or Caroline's issue, and (2) at the time of Charles's death, Mary, Elizabeth or Charlotte were living or Elizabeth or Charlotte were survived by issue.

c. Interpretation of subdivision (b)

The third issue involved the proper interpretation of section D(5), subdivision (b), which described the circumstances under which Ruby and her issue would lose all of their rights to the one-fifth portion of the trust. The subdivision states: "The rights of [Ruby], any child or children of hers and any issue of such child or children to receive income or principal hereunder shall terminate in any and all events . . . if, upon the death of the last surviving of [Lucy, Mary, Elizabeth and Charlotte], there be no issue then surviving of either the said Elizabeth or the said Charlotte, and in such event, the principal of the said one-fifth portion of the estate . . . shall be paid in equal parts to [Champ and Lucy] Vance, and in the event of the death of either, to their issue *per stirpes*."

The trustee argued that, under subdivision (b), if either of Ruby's children died leaving issue, "the issue of that child shall receive outright such proportion of the corpus of the [t]rust from which the child received income, unless at that time Elizabeth and her issue and Charlotte and her issue are all no longer living." The trustee further contended that if either of Ruby's children died leaving issue and, at the time of such death, Elizabeth, Charlotte and their issue were no longer living, "the portion of the corpus from which the child received income shall be distributed to [Champ and Lucy] Vance." The trustee asserted that, under this interpretation, Charles Jr. and Sabrina were immediately entitled to the portion of the trust principal from which their deceased father, Charles Sr.,

had been receiving income because Elizabeth, Charlotte and their issue were still living at the time of his death.

The beneficiaries disagreed, arguing that the language in subdivision (b) meant that the one-fifth portion of the trust from which Ruby and her children received income could not be "converted to 'corpus' or distributed until both Elizabeth and Charlotte die . . . . [¶] . . . and if both die without issue . . . then the 1/5 portion of the fund becomes 'corpus' and is distributed immediately upon the death of the last to die between Charlotte and Elizabeth to the Vances or their issue." Thus, according to the beneficiaries, Charles Jr. and Sabrina were not eligible to receive any trust principal unless, upon the death of the last to survive of Elizabeth or Charlotte, neither Elizabeth nor Charlotte had any living issue.

The trial court agreed with the beneficiaries, concluding that subdivision (b) prohibited the issue of Ruby's children from receiving the portion of the estate from which their parents collected income unless and until Elizabeth and Charlotte both died and the last surviving of these two sisters was survived by issue or the issue of her sister. The court explained that if, upon the death of the last surviving of Elizabeth and Charlotte, neither had left issue, the Vances were to receive the portions of the trust described in sections D(4) and D(5). The court stated that "[w]hile it appears highly unlikely this will occur as Elizabeth and Charlotte currently have five issue between them, it is nonetheless possible."

Although the court's ruling prevented Charles Jr. and Sabrina from immediately collecting the portion of the trust from which their father received income, the court further ruled that until Elizabeth and Charlotte died, Charles Jr. and Sabrina were to "receive income from that portion of the one-fifth share from which income was paid to [their father.]"

The beneficiaries filed an appeal of the trial court's order pursuant to Probate Code section 1303.[5] The trustee elected not to participate in the appeal.

DISCUSSION

The beneficiaries appeal three issues regarding the trial court's interpretation of sections D(4) and D(5). First, they contend that the trial court erred in interpreting the term "fund" to mean "principal" or "corpus" of the trust. Second, they argue that the court erred in interpreting subdivision (a), which describes the conditions under which the one-fifth portions of the estate benefitting the issue of Ruby and Edith's children would be re-assigned to Elizabeth, Charlotte and their issue. Third, they argue that the court erred in concluding that the children of Charles Sr. are currently entitled to receive income from a portion of the estate.

A. Standard of Review

"'The interpretation of a written instrument, including a . . . declaration of trust, presents a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein. Accordingly, a reviewing court is not bound by the lower court's interpretation but must independently construe the instrument at issue. [Citations.]' [Citations.]" (*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 168.) "In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it. [Citation.] Ordinary words must be given their normal, popular meaning and legal terms are presumed to be used in their legal sense. [Citation.]" (*Ibid*.)

Generally, "extrinsic evidence as to the circumstances under which a written instrument was made is admissible to interpret the instrument . . . ." (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) In this case, however, the parties agreed that the trial court was to interpret the trust based solely on the text of the trust instrument and we will do the same.

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[5] Probate Code section 1303 states: "With respect to a decedent's estate, the grant or refusal to grant the following orders is appealable: . . [¶] . . . [¶] (f) Determining heirship, succession, entitlement or the persons to whom distribution should be made."

The beneficiaries concede that section D(4), which pertains to Edith and her issue, and section D(5), which pertains to Ruby and her issue, contain identical language and are subject to the same interpretation. Therefore, for the purposes of clarity and simplicity, we review the trial court's interpretation of section D(5), which will also control our interpretation of section D(4).

B. The Trial Court Properly Interpreted the Term "Fund"

The beneficiaries contend that the trial court erred in interpreting the term "fund" as used in the following clause of section D(5): "The net annual income from a one-fifth . . . portion of the estate shall be paid to [Ruby] . . . during her life, and upon her death . . . [the income] shall be paid to any child or distributed equally between any children of said [Ruby] . . . during the life or lives of said child or children; and at the death of each child, the issue thereof shall take that portion of the ***fund*** from which his or their parent had theretofore received the income . . . ." (Emphasis and underlining added.) The trial court concluded that the term "fund" was intended to mean "estate" or "corpus." Thus, under the court's interpretation, the issue of Ruby's children would, upon their parents' death, obtain an interest in the portion of the estate from which their parent had been collecting income.

The beneficiaries, however, assert that the term "fund" was intended to mean the bank account that was used to hold the income from the one-fifth portion of the estate before such income was distributed to Ruby during her lifetime, and then to her children during their lifetimes. Thus, in the beneficiaries' view, the above clause merely gave the issue of Ruby's children an interest in whatever income had not been distributed to their parents prior to their deaths.[6]

In support of their interpretation, the beneficiaries assert that the word "fund" could not have been intended to mean "principal", "corpus" or "estate" because each of

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[6] In the proceedings below, one set of beneficiaries – Charlotte Shepard and her children – agreed with the trustee's position that "fund" meant principal or corpus, rather than undistributed income. On appeal, the Shepard beneficiaries have joined the Replogle beneficiaries in asserting that "fund" means undistributed income, acknowledging, however, that this was not their "position below."

those terms appear in other parts of the trust and are therefore presumed to have a different meaning. (Cf. *Las Virgenes Mun. Wat. Dist. v. Dorgelo* (1984) 154 Cal.App.3d 481, 486 [recognizing "rule of [statutory] construction that when different terms are used it is presumed that different meanings are intended"].) They further contend that a 1959 American Law Reports annotation demonstrates that, at the time the Ott trust was drafted (1954), the term "fund" was commonly used to express less than the whole of the estate. The annotation states: "Summarizing the decisions, the word 'funds' has on occasion been broadly construed to include real estate or the general residuary estate of the testatory when the contents of the will . . . indicated that such was the testator's intention. However, in a majority of the few decisions construing the word, it has been found that the testator used the term in a more restricted sense and intended that only such property as accumulations of money . . . and the like should pass under it."

At most, the arguments and authorities set forth by the beneficiaries suggest that the term "fund" should be presumed to mean something other than "principal," "estate" or "corpus" unless the text of the trust contains a contrary indication. In this case, there are several aspects of the trust suggesting that the term "fund" was intended to mean "principal" or "corpus," rather than undistributed income.

First, subdivision (b) of section D(5), which describes the conditions under which the rights assigned to Ruby and her issue may terminate, contains language showing that the authors intended that Ruby's issue might receive principal, not just income. The subdivision states: "The rights of [Ruby], any child or children of hers and any issue of such child or children to receive *income or principal* hereunder shall terminate . . . if, upon the death of the last surviving of [Elizabeth and Charlotte], there be no issue then surviving of either the said Elizabeth or the said Charlotte, and, in such event, *the principal of the said one-fifth portion* of the estate referred to in this subparagraph (5) shall be paid in equal parts to [Champ and Lucy] Vance; and in the event of the death of either, to their issue . . . ." (Emphasis added)

In describing the rights of Ruby and her issue that are subject to potential termination, the first sentence of subdivision (b) uses the phrase "the rights . . . to receive

income or principal." This language implies that the issue of Ruby's children, who were assigned an interest to "that portion of the fund from which [their] parent received income," were potentially eligible to inherit principal, not only income. If "fund" were intended to mean income, there would be no need to refer to "principal" when describing the rights that Ruby and her issue would lose in the event Elizabeth and Charlotte were not survived by issue.

Furthermore, the second sentence of subdivision (b) explains that, in the event the termination clause becomes operative, the Vances shall receive "the principal of the said one-fifth portion of the estate referred to in this subparagraph (5)." Again, this language implies that, if Elizabeth and Charlotte are not survived by issue, the portion of the estate that Ruby's issue would otherwise inherit under section D(5) will be reassigned to the Vances, which, under the language of subdivision (b), consists of "the principal of the said one-fifth portion of the estate referred to in this subparagraph (5)."

Interpreting the term "fund" to mean "undistributed income," rather than principal or corpus, would also lead to illogical results because a large portion of the trust assets might remain undistributed. Section D(5) assigns the income from a one-fifth portion of the trust to Ruby and, upon her death, to her children for their lives. At the death of each of her children, the "issue thereof" are to receive "the portion of the fund from which his or their parent had theretofore received income," subject to the limitations in subdivisions (a) and (b). If "fund" means "principal" or "corpus," this clause effectively distributes the one-fifth portion of the estate amongst Ruby's living grandchildren once her children have deceased. If, however, fund merely means "undistributed income," and if Ruby's children are survived by issue, the one-fifth portion of the estate would remain undistributed (unless Elizabeth and Charlotte die without issue, in which case the one-fifth portion of the estate would go to the Vances under subdivision (b)).

Under section D(4), which contains the exact same language as section D(5), the same would apply to the one-fifth portion of the estate assigned to Edith and her issue. Under the beneficiaries' interpretation of the term "fund," if Edith's son Charles Meixner is survived by his daughter Caroline Meixner, the one-fifth portion of the estate from

which Charles currently collects income would, upon his death, remain undistributed (unless Elizabeth and Charlotte die without issue, in which case the one-fifth portion of the estate would go to the Vances under subdivision (b)).

The same would also occur under section D(1), which applies to Mary's portion of the estate. As with sections D(5) and D(4), section D(1) assigns the income from a one-fifth portion of the trust to Mary for her lifetime and, upon her death, to her children, Elizabeth and Charlotte for their lives. At the death of each of Mary's children, the "issue thereof shall take that portion of the fund from which his . . . or their parent had theretofore received income." Again, if "fund" means undistributed income, rather than principal, and if Mary's children are survived by issue, the trust would fail to distribute the one-fifth portion of the estate from which Mary and her children drew income during their lives.[7] In sum, under the beneficiaries' interpretation of the term "fund," if Mary, Ruby and Edith's children are survived by issue, the trust would fail to distribute three-fifths of the trust assets (unless Elizabeth and Charlotte die without issue, in which case Ruby and Edith's one-fifth portions of the estate would go to the Vances under subdivision (b)). If, on the other, hand "fund" is interpreted to mean "principal" or corpus," the trust effectively distributes all of the trust assets.

Finally, we agree with the trial court's observation that the trust's consistent use of the word "portion" in conjunction with "fund", "estate" and "corpus" suggests that the author of the trust intended those terms to have the same meaning. The trial court explained that "[w]hile the terms fund, corpus and estate appear to have been used interchangeably, one word – portion – is consistent throughout. The initial instructions to the Trustee were to 'apportion the trust estate equitably . . . . into four portions.' The Trust thereafter consistently modifies or describes its discussion of 'portion' with inconsistent prepositional phrases, i.e., 'portion *of the estate*,' 'portion *of the corpus of*

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[7] In the trial court proceedings, the beneficiaries did not assert that the use of the term "fund" in section D(1) meant something other than principal or corpus. They asserted only that the term "fund" – as used in sections D(4) and D(5) – meant undistributed income.

the estate,' and 'portion *of the fund*.'" The court concluded that this language suggested that the use of the term fund, rather than corpus or estate, was simply the product of "inconsistent drafting."

Based on the text of the trust instrument, we agree with the trial court's conclusion that the term "fund," as used in sections D(5) and D(4), was intended to mean "principal," "corpus" or "estate," and not "undistributed income."

C. The Trial Court Properly Interpreted Subdivision (a)

Section D(5), subdivision (a) contains language describing the circumstances under which the one-fifth portion of the estate assigned to the issue of Ruby's children would be redistributed to Elizabeth, Charlotte and their issue. The subdivision states: "If upon the death of the last to survive of any . . . child or children of [Ruby], there be no living issue of any such child or children and if [Mary, Elizabeth or Charlotte] be then living, or if said Charlotte or said Elizabeth were survived by issue then the one-fifth portion of the estate set aside by this subparagraph (5) shall be added to the portion of the estate held or theretofore distributable [to Mary, Elizabeth and Charlotte under sections C and D(1)-(3) of the trust]."

The trial court ruled that subdivision (a) would only become operative if, upon the death of Ruby's last surviving child, two conditions were present: (1) Ruby's children had no surviving issue, and (2) either Mary, Elizabeth or Charlotte was still alive, or Charlotte or Elizabeth had been survived by issue. The beneficiaries, however, argue that subdivision (a) should be interpreted to apply if, upon the death of Ruby's last surviving child, either of two conditions are present: (1) Ruby's children have no surviving issue and either Mary, Elizabeth or Charlotte are still alive, or (2) Elizabeth or Charlotte have been survived by issue. Thus, according to the beneficiaries, even if Ruby's children are survived by issue, their issue will not receive the one-fifth portion of the trust if either Charlotte or Elizabeth is also survived by issue.

We agree with the trial court's conclusion that subdivision (a) is most logically interpreted as describing two separate conditions that must both be satisfied before Ruby's children's issue will lose their interest in the one-fifth portion of trust principal.

First, the punctuation of the subdivision supports such an interpretation. As explained by the trial court, "[t]he underlined word 'and' divides the two conditions contained in the paragraph and delineates the two separate contingencies."

Second, the beneficiaries' construction of subdivision (a) would essentially render a portion of the trust meaningless. Like all writings, the words of a will or trust "are to receive an interpretation which will give some effect to every expression rather than one which will render any of the expressions inoperative." (*In re Estate of Norrish* (1933) 135 Cal.App. 166, 168.) Here, section D(5) states that the issue of Ruby's children are to receive the one-fifth portion of the trust from which their parents received income during their lifetimes. No party disputes that, under subdivision D(5)(b), this interest will be terminated if, upon the death of the last surviving of Elizabeth and Charlotte, neither Elizabeth nor Charlotte has surviving issue. In that case, the one-fifth portion of the estate would go to the Vances. Under the beneficiaries' reading of subdivision (a), the interest assigned to the issue of Ruby's children would also terminate if Elizabeth or Charlotte are survived by issue, in which case the one-fifth portion of the estate would be distributed to Elizabeth, Charlotte and their issue. Thus, if the beneficiaries' interpretation of subdivision (a) is correct, the trust assigns an interest to the issue of Ruby's children that is effectively inoperative: the interest would terminate under subdivision (a) if Elizabeth and Charlotte leave issue and it would terminate under subdivision (b) if they do not leave issue.

The trial court's interpretation of subdivision (a) avoids this outcome. Under the trial court's construction, if upon the death of Ruby's last surviving child, either of her children have living issue, those issue will receive the one-fifth portion of the trust as long as Elizabeth or Charlotte is also survived by issue. If, upon the death of Ruby's last surviving child, neither of her children have surviving issue, subdivision (a) directs that the one-fifth portion of the trust will be added to the portions of the trust set aside for Mary, Elizabeth and Charlotte if Elizabeth or Charlotte are alive or have been survived by issue. Finally, under subdivision (b), if, upon the death of the last surviving of Elizabeth or Charlotte, neither Elizabeth nor Charlotte has surviving issue, the one-fifth

portion of the estate will go to the Vances regardless of whether Ruby's children are survived by issue. Thus, under the trial court's interpretation, each clause in section D(5) – including both subdivisions (a) and (b) – is given meaning and effect.

D. The Trial Court Erred in Ruling that Charles Jr. and Sabrina are Entitled to Income

The beneficiaries argue that the trial court erred in concluding that Ruby's grandchildren, Charles, Jr. and Sabrina, are currently entitled to receive "income from that portion of the one-fifth share from which income was paid to their father, Charles, Sr.," who died in 2000. The beneficiaries argue there is no provision in the trust that allows for such a distribution.

In the trial court proceedings, the trustee asked the court to determine whether, under section D(5), Charles Sr.'s children (Ruby's grandchildren) were currently entitled to receive the portion of the trust from which their father had received income prior to his death. The court concluded that, under the termination provision in subdivision (b), Charles Sr.'s children, Charles Jr. and Sabrina, would only be entitled to that portion of the trust if, upon the death of the last to survive of Elizabeth or Charlotte, either Elizabeth or Charlotte had living issue. Therefore, according to the court, Charles Jr. and Sabrina were not eligible to take the one-fifth portion of the estate until both Charlotte and Elizabeth had died.

The court further ruled, however, that until Charlotte and Elizabeth died, Charles Jr. and Sabrina were entitled to receive the income that was previously paid to their father. In support of this conclusion, the trial court cited the language of subdivision (b), explaining: "[subdivision (b)] . . . expressly recognize[s] that under some circumstance the issue of . . . Ruby could or would receive 'income or principal.' The [subdivision] . . . also recognize[s] that there are conditions under which the one-fifth principal amount is distributed not to the issue of . . . Ruby but instead to Champ Vance and Lucy Vance or their issue. There is no provision for income payments to the Vances, only the one-fifth portion of the corpus." The court continued: "Therefore, since the Vances have no entitlement to income under the Trust, . . . pending a determination whether . . . Ruby's

grandchildren will be divested of their one-fifth share of the estate, those grandchildren will continue to receive income from that portion of the one fifth-share from which income was paid to . . . Ruby's issue."

The court's conclusion that Charles Jr. and Sabrina are entitled to income payments pending a determination of whether they will inherit a share of the one-fifth portion of the estate is not supported by the language of the trust. Section D(5) plainly states that: (1) Ruby was to receive the income from a one-fifth portion of the estate during her lifetime; (2) upon Ruby's death, her children were to receive equal shares of the income from the one-fifth portion of the estate during their lives; and (3) upon the death of each of Ruby's children, "the issue thereof shall take that portion of the fund from which his or their parent had theretofore received the income," subject to the limitations described in subdivisions (a) and (b). As explained above, the phrase "portion of the fund" was intended to mean portion of the principal or corpus of the estate. Section D(5) therefore assigns Charles Jr. and Sabrina a portion of the trust principal; it contains no provision awarding them interest payments generated by that portion of the principal.

The trial court found a right to income payments based on the termination provision in subdivision (b), which states that "The right of Ruby . . . any child or children of hers and any issue of such child or children to receive income or principal hereunder shall terminate if, [at the death of the last surviving of Elizabeth and Charlotte, Elizabeth and Charlotte have no living issue]." We disagree with the trial court's conclusion that subdivision (b)'s reference to "income or principal" entitles the issue of Ruby's children to income payments. Rather, the language in subdivision (b) simply clarifies that all of the interests described under section D(5) – which includes income from a one-fifth portion of the estate for Ruby and her children during their lives, and the principal from a one-fifth share of the state for the issue of Ruby's children – would be immediately terminated if, at the death of the last surviving of Elizabeth and Charlotte, neither had surviving issue. Nothing in subdivision (b) expands the interests described in D(5).

In the absence of direction to the trustee concerning the income at issue, the Probate Code directs the trustee to allocate that income to principal. (Prob. Code, § 16355, subd. (e).) We therefore conclude that the trial court erred in ruling that the language of the trust assigns Charles Jr. and Sabrina income payments from the share of the one-fifth portion of the estate that they may ultimately inherit.

DISPOSITION

The trial court's order is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. Each party is to bear their own costs.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.