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Substitution of Attorney.

In Chancery of New Jersey

148-130.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

On Bill, &c.
Substitution
of Solicitor.

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It appearing to the court that Edwin P. Longstreet, solicitor of the defendants, Gilbert L. Marcellus and Julia L. Osborne, individually and as Executors and Trustees of the last will and testament of W. Irving Pearce, in the above entitled cause, consents hereto;

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It is on this 19th day of September, nineteen hundred and forty-five, ORDERED that Arthur T. Vanderbilt and he is hereby substituted as solicitor for said defendants, Gilbert L. Marcellus and Julia L. Osborne, individually and as Executors and Trustees of the last will and testament of W. Irving Pearce, deceased, in the place and stead of the said Edwin P. Longstreet.

30

MAJA LEON BERRY,
V.-C.

I hereby consent to the entry of the foregoing order.

Edwin P. Longstreet.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

148-130.

10	Between <p style="text-align: center;">FLORENCE L. PEARCE, Complainant-Appellee,</p> <p style="text-align: center;"><i>and</i></p> <p>GILBERT L. MARCELLUS, JULIA L. OSBORNE, Individually and as Executors and Trustees of the Last Will and Testament of W. IRVING PEARCE, deceased, and AGNES COLEMAN,</p>	On Bill, etc. Notice of Appeal.
20	<p style="text-align: center;">Defendants-Appellants.</p>	

The defendants Gilbert L. Marcellus and Julia L. Osborne, individually and as executors and trustees of the last will and testament of W. Irving Pearce, deceased, hereby appeal from so much of the final decree of the Chancellor in the above-entitled action made on June 29, 1945, on the advice of the Honorable Maja Leon Berry, as orders: that the defendant executors and trustees pay to complainant, in addition to the income of said estate, so much of the principal as shall be necessary for the complete comfort and support of complainant; that the executors and trustees pay to complainant the sum of \$4,093.89 from principal, as the amount by which expenditures from the date of testator's death until April 30, 1945, exceeded the income received or to be received by her from the estate; that the executors and trustees pay hereafter from the principal of

Notice of Appeal.

the estate such sums in addition to the income as shall be necessary for the complete comfort and support of the complainant including the cost for one practical nurse at an expense of \$35.00 per week who together with a housekeeper now employed, is sufficient to care for and minister to the complainant, or in the alternative the complainant may at her election employ graduate nurses to care for her in which event there shall be no liability on the part of the executors to pay the excess of wages above those customarily received by practical nurses; that either of the parties hereto may apply to this court on five days' notice to the other party or their solicitor, for an order modifying any terms or orders in this decree in the event of change of circumstances of the complainant. 10

Dated: 18 day of September, 1945. 20

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel with
Defendants Gilbert L. Marcellus
and Julia L. Osborne.

I conceive there is good cause for appeal in the above entitled cause. 30

ARTHUR T. VANDERBILT,
Of Counsel with Defendants Gilbert
L. Marcellus and Julia L. Osborne.

Due and legal service of the within Notice of Appeal is hereby acknowledged this 19 day of September, 1945.

PARSONS, LABRECQUE AND BORDEN,
Solicitors for Complainant. 40

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

148-130.

10	Between <p style="text-align: center;">FLORENCE L. PEARCE, Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">GILBERT L. MARCELLUS, JULIA L. OSBORNE, Individually and as Executors and Trustees of the Last Will and Testament of W. IRVING PEARCE, deceased, and AGNES COLEMAN,</p>	On Bill, etc. Notice of Appeal.
20	<p style="text-align: right;">Defendants.</p>	

30 The defendant, Agnes Coleman, hereby appeals from the final decree made in the above entitled cause by the Honorable Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of the Honorable Maja L. Berry, one of the Vice-Chancellors, on the twenty-ninth day of June, 1945, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

SAMUEL D. HOFFMAN,
Samuel D. Hoffman,
Solicitor for and of Counsel with
Defendant, Agnes Coleman.

I conceive there is good cause for appeal in the above entitled cause.

40 SAMUEL D. HOFFMAN,
Samuel D. Hoffman,
Of Counsel with Defendant
Agnes Coleman.

**Petition of Appeal of Gilbert L. Marcellus,
and Julia L. Osborne, Individually and as
Executors and Trustees of the Last Will and
Testament of W. Irving Pearce, Deceased.**

NEW JERSEY COURT OF ERRORS.
AND APPEALS.

10

Between

FLORENCE L. PEARCE,
Complainant-Appellee,

and

GILBERT L. MARCELLUS, JULIA L.
OSBORNE, Individually and as
Executors and Trustees of the
Last Will and Testament of
W. IRVING PEARCE, deceased,
Defendants-Appellants.

On Appeal from the
Court of Chancery.

Petition of Appeal of
Gilbert L. Marcellus, and
Julia L. Osborne,
individually and as
Executors and Trustees
of the Last Will and
Testament of
W. Irving Pearce,
deceased.

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*To the Honorable Court of Errors and Appeals
in the Last Resort in All Causes:*

The petitioners find themselves aggrieved by a final decree made in the Court of Chancery on the 29th day of June, 1945, made by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, and advised by the Honorable Maja Leon Berry, one of the Vice-Chancellors of said Court, in a certain cause in the Court of Chancery wherein Florence L. Pearce was complainant and Gilbert L. Marcellus, Julia L. Osborne, individually and as Executors and Trustees of the Last Will and Testament of W. Irving Pearce, deceased, and Agnes Coleman were defendants, in the following respects.

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*Petition of Appeal of Gilbert L. Marcellus
and Julia L. Osborne.*

10 1. That the executor, Gilbert L. Marcellus and Julia L. Osborne are required to pay to the complainant the income received from said estate and so much of the principal as shall be necessary for the complete comfort and support of the complainant Florence L. Pearce.

2. That the Executor Gilbert L. Marcellus and Julia L. Osborne pay to Florence L. Pearce from the principal of the estate the sum of \$4,093.89, which is the amount by which her expenditures from the date of death of W. Irving Pearce to and including April 30, 1945, exceeded the income received or to be received by the complainant from the said estate.

20 3. That the said Executors pay from the principal hereafter sums from the principal of said estate in addition to the income as shall be necessary for the complete comfort and support of the complainant, including the cost for one practical nurse at an expense of \$35.00 per week, who together with a housekeeper now employed, is sufficient to care for and minister to the complainant, or in the alternative the complainant may at
30 her election employ graduate nurses to care for her in which event there shall be no liability on the part of the executors to pay the excess of wages above those customarily received by practical nurses and,

4. That either of the parties hereto may apply to the Chancellor on five days' notice to the other party or their solicitor, for an order modifying any terms or orders in this decree in the event of
40 change in the circumstances of the complainant.

*Petition of Appeal of Gilbert L. Marcellus
and Julia L. Osborne.*

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that:

(1) The Chancellor should have dismissed complainant's bill of complaint because, since the executors had not acted in bad faith, the amount of principal which the said executors should pay to complainant over and above the income from said estate was discretionary with the executor and not with the Chancellor, and

(2) The Chancellor failed to take into consideration the fact that complainant had, independent of said trust funds, sufficient means to support her.

Petitioners, therefore, pray that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this court shall seem proper.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel with
Defendants Gilbert L. Marcellus
Julia L. Osborne.

Petition of Appeal of Agnes Coleman.

**NEW JERSEY COURT OF ERRORS.
AND APPEALS.**

10	Between	FLORENCE L. PEARCE, Complainant-Appellee,	}	On Appeal from the Court of Chancery.
	<i>and</i>			
20		GILBERT L. MARCELLUS, JULIA L. OSBORNE, Individually and as Executors and Trustees of the Last Will and Testament of W. IRVING PEARCE, deceased, and AGNES COLEMAN, Defendants-Appellants.	}	Petition of Appeal of Agnes Coleman.

*To the Honorable the Court of Errors and
Appeal in the Last Resort in all Causes:*

The petition of Agnes Coleman, the appellant in the above entitled cause, respectfully shows that:

- 30 1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, bearing date June 29th, 1945, in a certain cause in said Court of Chancery wherein the said Florence L. Pearce was complainant and the said Gilbert L. Marcellus, Julia L. Osborne, individually and as Executors and Trustees of the Last Will and Testament of W. Irving Pearce, deceased, and Agnes Coleman were defendants, in this respect, to wit, that the said decree adjudges (1) that the executor, Gilbert L.
- 40 Marcellus and Julia L. Osborne are required to

Petition of Appeal of Agnes Coleman.

pay to the complainant the income received from said estate and so much of the principal as shall be necessary for the complete comfort and support of the complainant Florence L. Pearce, (2) that the Executors Gilbert L. Marcellus and Julia L. Osborne pay to Florence L. Pearce from the principal of the estate the sum of \$4,093.89, which is the amount by which her expenditures from the date of death of W. Irving Pearce to and including April 30, 1945 exceeded the income received or to be received by the complainant from the said estate, (3) that the said Executors pay from the principal hereafter sums from the principal of said estate in addition to the income as shall be necessary for the complete comfort and support of the complainant, including the cost for one practical nurse at an expense of \$35.00 per week, who together with a housekeeper now employed, is sufficient to care for and minister to the complainant, or in the alternative the complainant may at her election employ graduate nurses to care for her in which event there shall be no liability on the part of the executors to pay the excess of wages above those customarily received by practical nurses and (4) that either of the parties hereto may apply to the Chancellor on five days' notice to the other party or their solicitor, for an order modifying any terms or orders in this decree in the event of change in the circumstances of the complainant.

And petitioner appeals from the decree of the Chancellor which decreed as aforesaid upon the ground that the same is erroneous in that the said Chancellor should have dismissed complainant's bill of complaint because, since the executors had not acted in bad faith, the amount of principal which the said executors should pay to complain-

Petition of Appeal of Agnes Coleman.

ant over and above the income from said estate was discretionary with the executors and not with the Chancellor, and because the Chancellor failed to take into consideration the fact that complainant had, independent of the said trust funds, sufficient means to support her.

10 Petitioner, therefore, prays that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

SAMUEL D. HOFFMAN,
Solicitor for and of Counsel with
Appellant, Agnes Coleman.

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Bill of Complaint

IN CHANCERY OF NEW JERSEY.

*To His Honor, Luther A Campbell, Chancellor of
the State of New Jersey:*

The complainant Florence L. Pearce, residing
in the Borough of Manasquan, County of Mon- 10
mouth and State of New Jersey, respectfully
shows that:

1. W. Irving Pearce of the Borough of Manas-
quan died on June 16, 1942, leaving a last Will
and Testament, a true copy of which is annexed
hereto and marked Schedule "A".

2. By the second paragraph of said last Will 20
and Testament, said W. Irving Pearce provided
as follows:

"SECOND: I give, devise and bequeath all
the rest, residue and remainder of my estate,
of whatsoever kind and nature and whereso-
ever situate, real, personal and mixed, to
GILBERT L. MARCELLUS and JULIA L. OSBORNE,
my Executors and Trustees hereinafter
named, in trust upon the trust that they shall
hold and invest the same and pay the net in- 30
come therefrom semi-annually, to my beloved
wife, FLORENCE L. PEARCE, if she shall survive
me, for her sole use and benefit so long as she
may live, and if the net income from my said
estate is not sufficient in the opinion of my
Executors and Trustees to properly support
and maintain my said wife in complete com-
fort, I hereby authorize and direct my said
Executors and Trustees to use so much of the
principal of my said estate for that purpose 40

Bill of Complaint.

as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE."

10 3. Gilbert L. Marcellus and Julia L. Osborne qualified as Executors and Trustees have taken upon themselves the administration of the Estate of W. Irving Pearce.

4. Since the death of W. Irving Pearce, said Gilbert L. Marcellus and Julia L. Osborne have paid to Florence L. Pearce the net income of the estate, which has approximated the amount of Two Hundred and Fifty (\$250.00) Dollars a month.

20 5. Said Julia L. Osborne after the death of W. Irving Pearce, employed a trained nurse to take care of Florence L. Pearce, but has declined and refused to pay her wages and the said Florence L. Pearce has been forced out of her own funds to pay the wages thereof.

30 6. During the lifetime of her husband, W. Irving Pearce, Florence L. Pearce was supported in comfort by her husband who paid for the upkeep and operation of the automobile, for the maintenance of the home, and for the taxes and insurance thereon, for household help and housekeeper, for medical and dental bills, for clothing, food and all incidentals of the home. The cost of the maintenance of the home with all the incidental expenses approximated the sum of Four Thousand Five Hundred (\$4,500.00) Dollars a year.

40 7. Since the death of W. Irving Pearce, Florence L. Pearce has been afflicted with arthritis and has been compelled to retain the services of

Bill of Complaint.

trained nurses, and in the course of the past year has expended for trained nurses, Doctors and medicines a sum of approximately Seven Thousand (\$7,000.00) Dollars.

8. Florence L. Pearce has requested and notified Gilbert L. Marcellus and Julia L. Osborne as Executors and Trustees of the last Will and Testament of W. Irving Pearce that, under the second paragraph of his will which provided that she was to be maintained in complete comfort and support, if necessary at the expense of the consumption of the principal of the estate, the said Executors should pay to her out of the principal of the estate the sums expended by the said Florence L. Pearce in excess of the income received by her and should in the future use so much of the principal as will be necessary to pay the excess of such expenditures over the income of the estate.

9. The complainant has lived frugally and carefully and has only expended such funds as are absolutely necessary for her maintenance and well-being, and has not attempted to expend monies for her complete comfort, but has confined her expenditures to absolute necessities, which is contrary to the plain directions and intent of her husband, the testator, W. Irving Pearce, as expressed in his said last Will and Testament.

10. As by reference to said last Will and Testament will appear, those interested in the said estate of W. Irving Pearce are Gilbert L. Marcellus, one of the Executors who is given a twenty-five per cent (25%) of the residue remaining after the death of Florence L. Pearce, Julia L. Osborne, the other Executor of the estate, who is

Bill of Complaint.

given twenty-five per cent (25%) of the residue remaining after the death of Florence L. Pearce, Agnes Coleman, who is given twenty per cent (20%) of the residue remaining after the death of Florence L. Pearce. The remaining three-tenths of the estate are likewise given equally to Gilbert L. Marcellus and Julia L. Osborne, by reason of the death of Cohen Pearce, who predeceased the complainant, Florence L. Pearce.

11. The complainant charges that the discretion and opinion of the Executors, Gilbert L. Marcellus and Julia L. Osborne are not free and unbiased, but are influenced and controlled because Gilbert L. Marcellus and Julia L. Osborne receive each one-fourth of the residue and each one-half of the three-tenths of the residue, upon the death of Florence L. Pearce, and with the knowledge that all advancements from the principal are to their financial detriment, they, in abuse of discretion, have refused to provide sufficient funds from the principal for the complete comfort and support of the complainant, Florence L. Pearce.

12. Complainant believes that a true and proper construction of the last Will and Testament of W. Irving Pearce requires the Executors and Trustees, Gilbert L. Marcellus and Julia L. Osborne to pay to the complainant sufficient funds from the principal to meet the deficiency which exists after the use of the income to maintain herself in complete comfort.

13. Complainant needs and asks the instructions of this court with respect to the following:

(a) Did the testator, W. Irving Pearce, by his last Will and Testament, intend that the

Bill of Complaint.

complainant should use her personal funds for her support and comfort?

(b) Does the last Will and Testament of W. Irving Pearce give absolute and uncontrolled discretion to the Executors and Trustees to determine what sum is necessary to support and maintain the complainant in complete comfort? 10

(c) Are the Executors and Trustees obliged to consider the illness and physical condition of the complainant, and to pay to her such sum from the principal as will, in conjunction with the income, properly support and maintain her in complete comfort?

Complainant is without adequate remedy in the courts of law, and therefore prays: 20

1. That Gilbert L. Marcellus, Julia L. Osborne and Agnes Coleman, who are the defendants to this suit, may answer this bill of complaint and each statement herein made.

2. That this court construe the last Will and Testament of W. Irving Pearce, and decree what the duties of Gilbert L. Marcellus and Julia L. Osborne, the Executors and Trustees thereof are, with respect to payments from the principal to properly support and maintain Florence L. Pearce in complete comfort. 30

3. That this court may determine, adjudge and decree what monies should be paid from the principal of the estate of W. Irving Pearce to Florence L. Pearce to reimburse her for monies expended by her personally for her support and maintenance since the death of the testator, her husband W. Irving Pearce. 40

Schedule "A".

4. That this court may retain jurisdiction of this cause and of the parties to this cause, for the purpose of instructing the Executors and Trustees or any other party to this suit with respect to any other questions which may hereafter arise involving the construction of the last Will and Testament of W. Irving Pearce, or with respect to the accounting by the Executors and Trustees of their administration of the trust.

5. That a writ of subpoena may issue commanding the said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

PARSONS, LABRECQUE & BORDEN,
Solicitors for Complainant.

20

THEODORE D. PARSONS,
Of Counsel.

Schedule "A".

IN THE NAME OF GOD, AMEN.

I, W. IRVING PEARCE, of the Borough of Manasquan, in the County of Monmouth and State of New Jersey, being of sound and disposing mind, memory and understanding, and mindful of the uncertainty of life, do hereby revoke all wills and codicils, as well as all other instruments of a testamentary nature, heretofore made by me, and do hereby make, publish and declare the following to be my last Will and Testament:

FIRST:—It is my will and I do order that all my just debts and funeral expenses be duly paid as soon as conveniently may be after my decease.

40

Schedule "A".

SECOND:—I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatsoever kind and nature and wheresoever situate, real, personal and mixed, to GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees hereinafter named, in trust upon the trust that they shall hold and invest the same and pay the net income therefrom, semi-annually, to my beloved wife, FLORENCE L. PEARCE, if she shall survive me, for her sole use and benefit so long as she may live, and if the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE.

10

20

I DIRECT that the provisions made for my said wife in this paragraph of my last Will and Testament shall be in lieu of her dower or right of dower in my estate.

THIRD:—Upon the death of my said wife should she survive me, or upon my death should my said wife predecease me, I give, devise and bequeath all of the rest, residue and remainder of my estate as follows:—

30

(a) One-fourth or twenty-five per cent. thereof, I give, devise and bequeath to my nephew, GILBERT L. MARCELLUS of Manasquan, New Jersey, absolutely and in fee simple.

(b) One-fourth or twenty-five per cent. thereof, I give, devise and bequeath to JULIA L. OSBORNE, of Manasquan, New Jersey, and

40

Schedule "A".

West Chester, Pennsylvania, daughter of Julia L. Osborne, deceased sister of my wife, absolutely and in fee simple.

10 (e) One-fifth or twenty per cent. thereof, I give, devise and bequeath to my niece, AGNES COLEMAN, absolutely and in fee simple.

20 (d) Three-tenths or thirty per cent. thereof, I give, devise and bequeath to the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees hereinafter named, in trust nevertheless, for the uses and purposes following, to wit; to pay the net income therefrom to my brother, COHEN PEARCE, of Manasquan, New Jersey, if he be living, for his comfort, support and maintenance for and during the remainder of his natural life, and at his decease, I give, devise and bequeath said three-tenths or thirty per cent. of my said residuary estate unto the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, Individually, equally, share and share alike, absolutely and in fee simple.

30 If my said brother, COHEN PEARCE, predeceases me, or if the said COHEN PEARCE predeceases my said wife, then and in that event, upon the death of my said wife, should she survive me, or upon my death should my said wife predecease me, I give, devise and bequeath said three-tenths or thirty per cent. of my said residuary estate unto the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, Individually, equally, share and share alike, absolutely and in fee simple.

40 FOURTH:—In the administration of the trusts hereinbefore mentioned, my Executors and Trustees shall have full and complete power and au-

Schedule "A".

thority to lease any properties of my estate; to execute such agreements as my said Executors and Trustees may deem necessary in administering said trusts; also full power to compound, compromise, settle and adjust all claims in favor of or against my estate upon such terms as they may deem best; to compromise any mortgages I may hold at my death for the face value or less, as they may deem best; to retain by way of investment any securities, property or mortgages coming to them from my estate without being accountable for losses resulting from depreciation in the value of the same so long as they act in good faith; to invest and reinvest any part of my trust estate in United States, State or Municipal Bonds, or first mortgages upon improved real estate. 10

Upon the death of either of my Executors and Trustees before the purpose of any trust under this Will is executed, I direct that the survivor of them may act as Executor and Trustee with all of the powers discretionary or otherwise which are conferred upon said two trustees and executors by this Will subject to all of the duties and restrictions to which said Executors and Trustees were subject originally. 20

LASTLY:—I nominate, constitute and appoint the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, Executors and Trustees of this my last Will and Testament, and I direct that they be not required to give bond for the faithful performance of their duties as such Executors and Trustees. 30

(a) I give and grant unto my said Executors and Trustees, or the survivor of them, full and complete power and authority to grant, bargain, sell and convey any or all of the real and personal estate of which I may die seized or possessed, at public or private 40

Schedule "A".

sale, at such times and upon such terms as they or the survivor of them may deem best, and I authorize them or the survivor of them to execute such conveyances as they or the survivor of them may deem necessary in pursuance of this power of sale.

10 (b) I hereby direct my executors, above named, or the survivor of them, to pay and satisfy all taxes, Federal, State, Inheritance, Succession, or otherwise, out of my residuary estate.

20 (c) I hereby empower my said executors, or the survivor of them, with full authority to settle, adjust or compromise as they or the survivor of them may deem best for my estate, any taxes as above outlined, without the consent or approval of any of the beneficiaries and without liability to any one who may have an interest in my said estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Twelfth day of December, Nineteen Hundred and Forty.

W. Irving Pearce (L. S.)

30 SIGNED, SEALED, PUBLISHED AND DECLARED by the said W. IRVING PEARCE, Testator, to be his last Will and Testament, in the presence of us, who were all present at the same time, and who have, at his request and in his presence and in the presence of each other, hereunto subscribed our names as witnesses.

40 Forman T. Bailey Asbury Park, N. J.
Irving E. Katz Asbury Park, N. J.
Florence Tannenbaum Bradley Beach, N. J.

Filed July 28th, 1942.

Demand for Bill of Particulars by Gilbert L. Marcellus and Julia L. Osborne, Defendants.

IN CHANCERY OF NEW JERSEY.

148-130.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

On Bill, &c.
Demand for Bill
of Particulars
by Gilbert L.
Marcellus and
Julia L. Osborne,
Defendants.

10

To Florence L. Pearce or Parsons Labrecque & Borden, Solicitors for the complainant, Florence L. Pearce:

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PLEASE TAKE NOTICE that the defendants, Gilbert L. Marcellus and Julia L. Osborne, demand that the complainant answer the following particulars within ten days from the date of service of this demand:

1. State in detail, the payments and expenditures made by W. Irving Pearce for the upkeep and operation of the automobile, for the maintenance of the home, the taxes and insurance thereon, for household help and housekeeper, for medical and dental bills and for clothing, good and incidentals of the home as alleged in the 6th paragraph of the bill of complaint, during the period from June 16, 1941 to June 16, 1942 and give the names and addresses of the household help and housekeepers engaged during that period.

30

40

Demand for Bill of Particulars by Gilbert L. Marcellus and Julia L. Osborne, Defendants.

10 2. State in detail, the payments and expenditures made by W. Irving Pearce for the upkeep and operation of the automobile, for the maintenance of the home, the taxes and insurance thereon, for household help and housekeeper, for medical and dental bills and for clothing, food and incidentals of the home as alleged in the 6th paragraph of the bill of complaint, during the period from June 16, 1940 to June 16, 1941 and give the names and addresses of the household help and housekeepers engaged during that period.

20 3. State in detail, the payment and expenditures made by W. Irving Pearce for the upkeep and operation of the automobile, for the maintenance of the home, the taxes and insurance thereon, for household help and housekeeper, for medical and dental bills and for clothing, food and incidentals of the home as alleged in the 6th paragraph of the bill of complaint, during the period from June 16, 1939 and June 16, 1940 and give the names and addresses of the household help and housekeepers engaged during that period.

30 4. State the date when complainant was first afflicted with arthritis as alleged in the 7th paragraph of the bill of complaint.

5. Itemize the expenditures for trained nurses, doctors and medicines during the past year amounting to approximately \$7,000.00 and give the names and addresses of the nurses and doctors to whom payments were made.

40

Demand for Bill of Particulars by Gilbert L. Marcellus and Julia L. Osborne, Defendants.

6. Give an itemized list of all income and the source or sources thereof, which complainant has received since June 16, 1942.

7. State in detail, all real estate owned by the complainant, showing the address of the property, types of buildings erected thereon, the book and page in the County Clerk's Office in which said deeds are recorded, whether there are any mortgages a lien on said premises, the monthly rental received for each property, if rented by the month and the summer rental for which the premises were leased for the year 1944, if rented for summer occupancy. 10

8. Give an itemized list of all repairs made to all real estate owned by the complainant and the amount of money expended on each during the past year, and give the names and addresses of the persons or companies to whom said expenditures for repairs were made. 20

9. State in detail all bonds and mortgages owned by the complainant, giving the date of each bond and mortgage, the address of the property covered by each bond and mortgage, the book and page of record of each mortgage and the amount of principal sum for which said mortgages remain a lien, the rate of interest and the names and addresses of the present owners of the mortgaged premises. 30

10. State in detail, all stocks, bonds and other securities owned by the complainant, giving the names of the companies, the number of shares and bonds in each and the present fair value of each. 40

Demand for Bill of Particulars by Gilbert L. Marcellus and Julia L. Osborne, Defendants.

11. State in detail all banks in which the complainant has funds on deposit, both savings and checking accounts, giving the names of the banks, type of account and amount of funds on deposit in each.
- 10 12. State in detail all other cash owned by the complainant and the place where it is placed for safe keeping.
13. State the total amount of assets of the complainant at this time, including all property, real, personal and mixed and all other assets of every kind and description.
- 20 14. Give an itemized list of all debts owed by the complainant to any person.
15. State in detail, all real property sold by the complainant since June 16, 1942, giving the address and name of the person to whom same were sold and the consideration received for each property sold.
- 30 16. State in detail, all sums of money received by the complainant since June 16, 1942 on account of the principal sums of all bonds and mortgages owned by her on June 16, 1942.
17. State in detail, all stocks, bonds, mortgages and other securities or assets which the complainant has sold since June 16, 1942, giving the names and addresses of the stocks, bonds, mortgages, securities or assets sold and the amount received for each.
- 40

Demand for Bill of Particulars by Gilbert L. Marcellus and Julia L. Osborne, Defendants.

18. Give a detailed list of all real property acquired or purchased by the complainant since June 16, 1942 and the amount of the purchase price.

19. Give a detailed list of all mortgages acquired or purchased by the complainant since June 16, 1942 and the amount of each mortgage, name and address of the mortgagors and the address of the property covered by each mortgage. 10

20. Give a detailed list of all stocks, bonds and other securities acquired by the complainant since June 16, 1942, giving the name of each, number of shares, number of bonds and the amount of the purchase price of each. 20

EDWIN P. LONGSTREET,
Solicitor and of Counsel with
Defendants Gilbert L. Marcellus and Julia L. Osborne.

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Bill of Particulars.

Mrs. Naden was the housekeeper and Mr. Ray Loveland took care of the grounds.

2. Complainant is totally unable to answer in detail the payments made by W. Irving Pearce except to state that all monies for various items mentioned in the second demand were paid by Captain Pearce from his personal estate. 10

3. Complainant is unable to state in detail the expenditures made by Captain Pearce for the items therein.

4. Complainant was first troubled with arthritis after the death of her husband.

5. Sara Vanderhoven, Mrs. Perryman, Manasquan, \$4 daily between July 3, 1943 and November 1, 1943. Mrs. Bogue, Manasquan, Miss Moore, Belmar, November 1, 1943 to date, \$135. per week. Doctor Albright, \$33, Point Pleasant Hospital \$5, Health Center, \$5. 20

6 to 20 inclusive by stipulation by letter of solicitor of defendants dated September 8, 1944 are answered as follows: That the complainant, Florence L. Pearce has sufficient funds and property in her own right to adequately maintain and support herself and that Florene L. Pearce has a very substantial estate of her own, the income from which is more than sufficient to support her and pay for the services of trained nurses, doctors, and medicines which are required while she is suffering from arthritis and that since the death of W. Irving Pearce on June 16, 1942, the income received from her own estate has been far more than necessary to support herself and it has not been necessary at any time to invade the corpus 30
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*Demand for Bill of Particulars by
Agnes Coleman, Defendant.*

of her own personal estate for her support and
that her own personal estate is so large that it
will not be necessary to invade the corpus of same
for her support and maintenance even while she
is suffering from arthritis as alleged in the bill
10 of complaint.

PARSONS, LABRECQUE & BORDEN,
Solicitors for Complainant.

**Demand for Bill of Particulars by Agnes
Coleman, Defendant.**

IN CHANCERY OF NEW JERSEY.

20 148-130.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

On Bill, etc.
Demand for Bill
Coleman,
of Particulars
by Agnes
Defendant.

30

*To Florence L. Pearce or Parsons, Labrecque and
Borden, Esquires, her solicitors:*

PLEASE TAKE NOTICE that the defendant, Agnes
Coleman, demands that the complainant answer
the following particulars within ten days from
the date of service of this demand:

40 1. What is the name and address of the
trained nurse which complainant states was hired

*Demand for Bill of Particulars by
Agnes Coleman, Defendant.*

by the defendant, Julia L. Osborne, the date of said hiring and the wages of said trained nurse?

2. What did complainant's husband pay for (1) the upkeep and operation of the automobile; (2) for the maintenance of the home; (3) for the taxes and insurance thereon; (4) for household help; (5) for the housekeeper; (6) for medical bills; (7) for dental bills; (8) for clothing; (9) for food; (10) for incidentals of the home. 10

3. State the different items which complainant contends constituted the upkeep and operation of the automobile and the amounts which complainant contends her husband expended for each.

4. State the different items which complainant contends constituted the maintenance of the home and the amounts which complainant contends her husband expended for each. 20

5. State the different items which complainant contends constituted the taxes and insurance of the home and the amounts which complainant contends her husband expended for each.

6. State the items which complainant contends her husband expended for (1) household help and (2) for housekeeper, with names and addresses of said persons. 30

7. State the items which complainant contends her husband expended for (1) medical bill; (2) dental bills; (3) clothing and (4) other incidentals with the names and addresses of said persons and the amounts paid to each.

8. Itemize with names, addresses and dates of all persons, the various amounts paid to trained nurses, doctors and medicines since the death of 40

*Demand for Bill of Particulars by
Agnes Coleman, Defendant.*

W. Irving Pearce, which complainant charges approximate \$7,000.

10 9. Was the request and notification mentioned in paragraph 8 of the Bill of Complaint made in writing or orally, giving date of same; and copy of same if in writing.

10 10. State any and all income which complainant has received since the death of said W. Irving Pearce in addition to that received from the estate of her husband, the source of same, giving dates and amounts of said income.

20 11. State in detail all property, real and personal owned by complainant, including mortgages, stocks, bonds and other securities, and the present fair value of the same together with a statement of all debts, liabilities and other obligations owing from complainant to others.

12. State whether complainant has since the death of W. Irving Pearce sold, conveyed, transferred or assigned any property, real or personal, owned by her and if so, itemize such property giving the amount of consideration received by the complainant.

30 Respectfully yours,

SAMUEL D. HOFFMAN,
Solicitor and of Counsel with
Defendant, Agnes Coleman.

40

Bill of Particulars.

IN CHANCERY OF NEW JERSEY.

148-130.

Between

FLORENCE L. PEARCE,
Complainant,
and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

On Bill, &c.
Bill of
Particulars.

10

To: *Samuel D. Hoffman, Esq., Solicitor of De-
fendant, Agnes Coleman.*

20

Sir:

HEREINBELOW please find bill of particulars de-
manded by you in the above entitled cause.

1. Dorothy Tillotson, Fitkin Hospital. Hired
by Julia Osborne, June 16, 1942, \$40 per week.

2. Complainant does not know of her own per-
sonal knowledge what her husband paid for the
upkeep and operation of the automobile, but upon
statements made by her husband during his life-
time believes that the cost of operation and main-
tenance approximated \$300 a year. Complainant
likewise has no personal knowledge as to the re-
maining items in the demand. The home was
maintained and all repairs made. Taxes were paid
and insurance bills were paid but complainant has
no knowledge of the amount of these. The house-
keeper during her husband's lifetime was Mrs.
Naden who received \$80 a month. Medical bills

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Bill of Particulars.

were unknown. Upon inquiry complainant is informed by her dentist that in 1942 her husband paid \$96 for a dental bill. Clothing amounted to approximately \$200 a year. The food was paid for by Captain Pearce and complainant has no record of the amount but believes that approximately \$100 a month was spent for food. Various incidentals in the home included curtains, rugs, linens, etc., amounted to approximately \$20 a month.

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3. Complainant has no actual knowledge of the items except that her husband paid the gasoline, tires, repair bills, license fees and all expenses.

20

4. Complainant has no personal knowledge of the amount expended by her husband. The housekeeper, Mrs. Naden, was paid by her husband's fund. The caretaker of the grounds, Ray Loveland, received \$4 a week. The cost of minor repairs for plumbing and electricity varied from month to month. Telephone bills approximated \$6 monthly. Electric light bills approximately \$21 monthly. Medical bills average \$15 monthly.

30

5. Taxes to the Borough of Manasquan, 1942 amounted to \$304. Insurance for 1942 amounted to \$16.50.

6. Mrs. Naden, housekeeper, received \$80 a month.

7. (1) Doctor Albright, Spring Lake, New Jersey, medical bills averages \$20 a month.

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(2) W. H. Errickson, Freehold, N. J., \$96 per year.

Bill of Particulars.

(3) Have no records of where clothes were purchased. Believes amount expended was at least \$200 a year.

(4) Incidentals included the payment of all necessary items of running the home. Complainant has no record of these items.

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8. Dorothy Tillitson, trained nurse, \$88; Sara Vanderhoven, Manasquan, New Jersey, Mrs. Perryman, Manasquan, New Jersey, \$4 daily between July 3, 1942 and November 1, 1943; Mrs. Bogue, Manasquan, New Jersey, Miss Moore, Belmar, New Jersey, November 1, 1943 to date \$135 per week; Doctor Albright, \$33; Point Pleasant Hospital, \$5; Health Center, \$5.

9. In writing, June 15, 1944.

20

“In the Matter of the Estate of W. Irving Pearce, Deceased.

To: Gilbert L. Marcellus and Julia L. Osborne, Executors and Trustees:

PLEASE TAKE NOTICE, that I, Florence L. Pearce, the widow of W. Irving Pearce, deceased, do hereby demand of you as Executors and Trustees, that you pay to me from the corpus of said estate, the sum of Sixteen Thousand (\$16,000.00) Dollars, being the amount of monies expended by me since the death of my husband in excess of the income received by me from the estate, which monies were necessary for my support and maintenance, and that you further advance from the corpus of said estate, an annual sum of not less than Eight Thousand (\$8,000.00) Dollars

30

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*Answer of the Defendants, Gilbert L. Marcellus
and Julia L. Osborne.*

in addition to the income for my support and
maintenance.

Florence L. Pearce.

Dated: June 15th, 1944."

- 10 10 to 12. Pursuant to agreement, these de-
mands are answered with the statement that the
complainant is possessed of sufficient property to
adequately support and maintain herself.

PARSONS, LABRECQUE & BORDEN,
Solicitors of Complainant.

20 **Answer of the Defendants, Gilbert L.
Marcellus and Julia L. Osborne.**

IN CHANCERY OF NEW JERSEY.

30	Between FLORENCE L. PEARCE, Complainant, <i>and</i> GILBERT L. MARCELLUS, <i>et als.</i> , Defendants.	} On Bill, &c. Answer of the Defendants, Gilbert L. Marcellus and Julia L. Osborne.
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- 40 The defendants, Gilbert L. Marcellus and Julia
L. Osborne, of the Borough of Manasquan, in the
County of Monmouth and State of New Jersey,
Executors and Trustees under the last will and
testament of W. Irving Pearce, deceased, an-
swering the bill of complaint filed herein, say that:

*Answer of the Defendants, Gilbert L. Marcellus
and Julia L. Osborne.*

1. These defendants admit the allegations of paragraphs 1, 2 and 3 thereof.

2. These defendants admit that Florence L. Pearce has received net income from the estate, which they have paid to her in the following amounts, namely:

10

August 16, 1943.....\$4,463.81

May 22, 1944..... 1,639.75

August, 1944 1,887.41

3. These defendants deny the allegations of paragraph 5.

4. These defendants deny the allegations of paragraph 6.

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5. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7, but leave the complainant to proof thereof.

6. These defendants admit that a notice, as mentioned in paragraph 8, was served upon them, as Executors and Trustees, by Florence L. Pearce, dated June 15, 1944 and they refer specifically to a copy of the notice as to the contents and form thereof.

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7. These defendants deny the allegations of paragraph 9 thereof.

8. These defendants admit the allegations of paragraph 10, but specifically refer to the will of W. Irving Pearce to show the disposition of his estate.

9. These defendants deny the allegations of paragraph 11 thereof.

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10. These defendants deny the allegations of paragraph 12 thereof.

*Answer of the Defendants, Gilbert L. Marcellus
and Julia L. Osborne.*

11. These defendants deny the allegations of paragraph 13 thereof.

Further answering the bill of complaint, these defendants say:

10 1. That the bill prays that Gilbert L. Marcellus and Julia L. Osborne answer the bill of complaint and does not name them therein as executors and trustees of the Estate of W. Irving Pearce, and the bill in its present form should be dismissed.

20 2. That the 2nd paragraph of the last will and testament of W. Irving Pearce, deceased, according to the true and lawful construction of the same required these defendants, as Executors and Trustees, to pay the net income from the estate of the decedent to Florence L. Pearce, his widow, which they have paid and gave them discretionary power under the will to invade the corpus for her support, if in their discretion it was necessary.

30 3. That it was the intention of W. Irving Pearce, the decedent, that the executors and trustees should have the sole and absolute discretion of determining whether it was necessary to invade the corpus for her support and maintenance, which he deemed very remote, because his wife had a very substantial estate of her own and said will should be so construed.

These defendants, therefore, pray that complainant's bill of complaint may be dismissed, with costs.

40 EDWIN P. LONGSTREET,
Solicitor for and of Counsel with
Defendants, Gilbert L. Marcellus
and Julia L. Osborne, Executors
and Trustees of the last Will and
Testament of W. Irving Pearce,
deceased.

Answer of Agnes Coleman.

IN CHANCERY OF NEW JERSEY.

148-130.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

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On Bill, etc.
Answer of
Agnes Coleman.

The answer of defendant, Agnes Coleman.

20

This defendant, answering the bill of complaint, says that:

1. Paragraph 1 to 3, inclusive, are admitted.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 4.

3. Paragraphs 5 and 6 are denied.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 7 and 8, but says that complainant has been guilty of laches in failing to request and notify the executors of her demands before expending the moneys claimed by her and before her rights were determined in the premises.

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5. Paragraph 9 is denied.

6. Paragraph 10 is admitted.

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Answer of Agnes Coleman.

7. Paragraph 11 is denied and this defendant says that the last will and testament of the said W. Irving Pearce gave to the said executors and trustees the discretion of determining whether the net income from his said estate was sufficient to properly support and maintain the complainant in complete comfort, and did also give to the said
 10 executors and trustees the discretion of determining how much, if any, of the principal of the said estate the executors and trustees may deem necessary for the complete comfort and support of the complainant, and that the determination by the said executors and trustees did not in any event constitute an abuse of discretion.

8. Complainant has ample means, independent
 20 of any moneys which she may receive under the last will and testament of her said husband, to properly support and maintain herself in complete comfort and that the executors are not required to pay to the complainant any funds from the principal to meet any deficiency which may exist between what complainant receives from the income of her husband's estate and what she expends.

This defendant, therefore, prays that complainant's bill of complaint may be dismissed, with
 30 costs.

SAMUEL D. HOFFMAN,
 Solicitor for and of Counsel with
 Defendant, Agnes Coleman.

Conclusions.

what he did say. We cannot make a new will for a decedent.

Now, the language of this will, which is pertinent to this inquiry, is as follows:

10 "I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatsoever kind and nature and wheresoever, situate, real, personal and mixed, to Gilbert L. Marcellus and Julia L. Osborne, my Executors and Trustees hereinafter named, in trust upon the trust that they shall hold and invest the same and pay the net income therefrom, semi-annually, to my beloved wife, Florence L. Pearce, if she shall survive me, for her sole use and benefit so long as she may live * * *."

20

Now, up to that point there certainly can be no question as to the intention of the testator. From that language it is quite plain that he intended her to have all the net income which his estate produced; it did not make any difference whether it was small or great, all of the net income was to go to her, and the Executors and Trustees had no discretion whatever in the matter.

30 Now we come to the controversial part of that clause of the will:

40 " * * * and if the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, Florence L. Pearce."

Conclusions.

Now, to my mind that language is plain and is subject to only one construction: "If the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort" then a portion of the corpus may be used.

10

The reason I asked the Executor, when he was on the stand, if in his opinion the income from this estate was sufficient to maintain the widow in complete comfort, I think is now quite obvious. I think we may assume that from the language of this will that it was the intention of the testator to provide for his wife out of his own estate the same comforts, so far as was possible, as he provided for her in his lifetime and that she was to continue her existence or mode of living on the same plane, on the same scale as that which he established himself during his lifetime.

20

The Executor who took the stand says that she is living on the same plane now as she did during the lifetime of Captain Pearce, and also said that assuming that the expense, the cost of that living to be \$5200 a year, it was quite obvious that the income from the estate was not sufficient for that purpose. Therefore, we may say that the Executors are of the opinion that the income of this estate is insufficient to properly support and maintain the wife in complete comfort. That is the only inference that can be drawn from that testimony.

30

The condition which exists today, the condition of Mrs. Pearce's health, apparently is somewhat aggravated over the condition which existed during Captain Pearce's lifetime, but even at that period, when she was ill, according to the testimony of the Executor, he provided her with trained nurses.

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Conclusions.

Now, there is not only shown here, according to the testimony, the necessity for the expenditure of \$5200 for the ordinary living expenses of Mrs. Pearce, but there is this additional expense which, so far as the evidence shows, is necessary, which amounts to \$9 a day for one nurse or \$18 a day for two nurses, and that amounts to a considerable sum of money over the course of the year. I have not figured it up, but I should say that it amounts to around \$7000, and there is nothing to indicate now that that expenditure is not an entirely proper one, and the only question is, should she be required to pay it herself or should the Executors be required to dip into the corpus of the estate for the payment of that expense and such deficiency as there may be in the income to provide for the ordinary living expenses.

Now, the will says if, in that event, the event which I think is plainly shown to have occurred, "I hereby authorize and direct—" and note the word "direct"—"my Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary—as they may deem necessary—for the complete comfort and support of my said wife, Florence L. Pearce."

Now, that is the only point, passing the other question as to opinion which I have already disposed of—that is the only point where discretion is vested in the Executors as to the amount of money which shall be used or whether or not they shall use any of the principal. The question is whether they deem it necessary that moneys over and above the amount of income are required for the complete comfort—and I think the use of this word "complete" in two different places in this

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Conclusions.

paragraph is significant—"for the complete comfort and support" of the widow.

Now, the discretion which they are authorized to exercise in determining that question is an honest discretion, a discretion which is not in any way influenced by any personal interest which they may have in the maintenance of the fund intact—the corpus of the fund intact. These Executors are residuary legatees under this will to the extent of fifty per cent of the trust fund or fifty per cent of the fund which may remain after the death of the wife. So it is quite natural, I think, for us to assume that their judgment might possibly be influenced to some extent by that interest. Their discretion might very possibly be warped. I do not say that it is, but I say the fact that they have refused, and that refusal is not denied, to use any of this corpus for the comfortable maintenance of the widow is strongly evidential of an abuse of the discretion which is vested in them by the will. My conclusion is—my interpretation of this will, which leads to that conclusion, is that the widow is entitled to complete support and maintenance out of either income or corpus, if it is necessary to use the corpus, without regard to the fact that she may have a substantial estate of her own. It is in evidence that she had a substantial estate of her own prior to the execution of this will and that that fact was known to the testator at the time he made his will. I think if it had been his intention that his widow should be compelled to rely upon her own estate instead of his he would have said so. Knowing the fact, there would have been no occasion for him to have provided so explicitly for the use of both income and principal or for his widow's complete comfort if he had intended that she should use her own estate for that purpose.

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Conclusions.

There are not many cases in this State which are pertinent on this point. Mr. Parsons, in his brief, mentioned a number of cases, and Mr. Hoffman and Mr. Longstreet have also mentioned a number of cases, some of which are, and some of which are not, pertinent; but there are two cases cited by Mr. Parsons: one is *New Jersey Title Guaranty and Trust Company vs. Dailey*, 123 N. J. E., 205, and the other *Camden Safe Deposit and Trust Company vs. Read*, 124 N. J. E., 599, which I think cite other cases. These and the cited cases are pertinent and I think they justify the conclusions at which I have arrived.

The case of *Smith vs. Field*, 98 N. J. E., 532, is not in my judgment at all applicable; I think what was said there is entirely dictum, and the issue which was presented here was not there involved. And while my attention has not been directed to any case in New Jersey which is exactly in point, there are cases outside of New Jersey that have been cited by Mr. Parsons which I think completely establish the principle that where the life beneficiary has a separate estate, that life beneficiary is not obliged to use her own separate estate to reduce the charges upon the estate in which she has a life interest. One case is *Rezzemini vs. Brooks*, a New York case, 140 N. E., 239, in which Justice Pound and Justice Cardozo participated, and I think this excerpt from the decision in that case is quite pertinent here:

“Our decision in the case of *Holden vs. Strong*, supra, involved the construction of a will wherein the testator gave to a Trustee ‘full power and authority to use so much of the trust fund, either interest or principal,

Conclusions.

as shall, in his judgment and discretion, be necessary for the proper care, comfort and maintenance' of the plaintiff so long as he should live. We held that the plaintiff there was entitled to support and maintenance even though he was able to support himself and had accumulated a fund which he had on deposit in a bank. The reasoning and principle laid down in that case we regard as controlling the case under consideration." 10

A similar problem is presented here.

Then the decision of the Supreme Court of Vermont *In Re Robinson's Will*, 144 Atlantic, 457, may have some bearing here. I do not think it necessary for me to quote from it. I think those two cases are sufficiently in point here to support the conclusion to which I have arrived. 20

Now, with respect to the compliance by the Executors with this clause of the will as I have interpreted it, what I said a few moments ago with respect to the access to the home by the Executors and the cooperation between the Executors and the life beneficiary, has very strong application now. There ought to be no dispute about this, about the requirement. Whatever the requirements are must, under my interpretation of the will, be satisfied out of the income or principal. The question which the Executors must decide is, what is right and proper under the circumstances? The life tenant will not be permitted to expend money lavishly which would unnecessarily reduce the remainder of this estate at the time of her death. The only thing that I can say further with respect to that is that the Executors must exercise an honest judgment and 30 40

Conclusions.

10 if there is any dispute as to what is proper I see
 no reason why the circumstances should not be
 submitted to the Court for its advice. It may
 be that trained nurses are not necessary. Dr.
 Albright suggests that practical nurses might be
 able to do the same amount of work for less
 money, might perform the same kind of services.
 If that is so and practical nurses are available,
 then I think it is the duty of the Executors to
 provide them, and if the life beneficiary under
 those circumstances insisted upon having trained
 nurses, then I think it would be up to her to pay
 the extra cost of them.

I will advise a decree accordingly.

20 May 17, 1945.

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Decree Construing Will.

of said estate to the complainant Florence L. Pearce during her life, and if the net income from the estate of W. Irving Pearce was not sufficient to support and maintain the complainant in complete comfort, the Executors were directed to pay so much of the principal of the estate as might be necessary for the complete comfort and support of the complainant; and it appearing that the complainant has received or will receive from the income from the Estate the sum of \$10,296.77 up to and including April 30, 1945 and has expended since the death of W. Irving Pearce on June 16, 1942, up to and including April 30, 1945, the sum of \$14,390.66, and that said expenditures exceed the income received by the complainant of \$10,296.77 by \$4,093.89 and it further appearing that the complainant has and is now suffering from chronic arthritis, and that the income from said estate is insufficient to provide for the complete comfort and support of the complainant, and that the will clearly intends that in such event the Executors use so much as may be necessary of the principal for the complete comfort and support of the complainant.

It is thereupon, on this 29th day of June, nineteen hundred and forty-five, ORDERED, ADJUDGED and DECREED under the provisions of the second paragraph of the will of the said W. Irving Pearce, deceased, the Executors, Gilbert L. Marcellus and Julia L. Osborne are required to pay to the complainant the income received from said estate and so much of the principal as shall be necessary for the complete comfort and support of the complainant Florence L. Pearce.

It is further ORDERED that the Executors Gilbert L. Marcellus and Julia L. Osborne pay to

Decree Construing Will.

Florence L. Pearce from the principal of the estate the sum of \$4,093.89 which is the amount by which her expenditures from the date of death of W. Irving Pearce to and including April 30, 1945 exceed the income received or to be received by the complainant from the said estate.

AND it is further ORDERED that the said Executors pay from the principal hereafter sums from the principal of said estate in addition to the income as shall be necessary for the complete comfort and support of the complainant, including the cost of one practical nurse at an expense of \$35.00 per week, who together with a housekeeper now employed, is sufficient to care for and minister to the complainant, or in the alternative the complainant may at her election employ graduate nurses to care for her in which event there shall be no liability on the part of the Executors to pay the excess of wages above those customarily received by practical nurses.

It is further ORDERED that the complainant submit to the defendant Executors and Trustees, itemized statement to July 31st, 1945 and every three months thereafter of the nature and amount of her disbursements for her support and maintenance during said period.

It is further ORDERED, ADJUDGED and DECREED that the complainant shall upon reasonable notice from the Executors submit to physical examinations by a physician selected by the Executors and that the complainant shall have the right and privilege of having the examinations made in the presence of her own physician.

And it is further ORDERED, ADJUDGED and DECREED that the Executors may on reasonable no-

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Decree Construing Will.

tice visit the complainant in her home to determine the manner, standard and plane of living of the complainant.

10 And it is further ORDERED, ADJUDGED and DECREED that either of the parties hereto may apply to this court on five days' notice to the other party or their solicitor, for an order modifying any terms or orders in this decree in the event of change in the circumstances of the complainant.

20 And it is further ORDERED that a counsel fee of Five Hundred dollars be allowed to Parsons, Labrecque & Borden, solicitors of complainant Florence L. Pearce, and a counsel fee of Five Hundred dollars be allowed to Edwin P. Longstreet, solicitor for defendants, Gilbert L. Marcellus and Julia L. Osborne, together with the costs of this suit to be paid by the defendants, Gilbert L. Marcellus and Julia L. Osborne, Executors and Trustees of the last will and testament of W. Irving Pearce, deceased, out of the estate in their hands.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

LUTHER A. CAMPBELL,
C.

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Testimony.

IN CHANCERY OF NEW JERSEY.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, JULIA L.
OSBORNE, Individually and as
Executors and Trustees of the
Last Will and Testament of
W. IRVING PEARCE, and AGNES
COLEMAN,
Defendants.

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On Bill, &c.

Testimony.

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Transcript of stenographer's notes of testimony in the above entitled cause, taken before HON. MAJIA LEON BERRY, Vice-Chancellor, at Chancery Chambers, Long Branch, New Jersey, on May 17, 1945, at ten o'clock in the forenoon.

Appearances:

MESSRS. PARSONS, LABRECQUE & BORDEN,
THEODORE D. PARSONS, Esq., (present), 30
Solicitors for the Complainant.

EDWIN P. LONGSTREET, Esq.,
Solicitor for the Executors and Trustees.

SAMUEL D. HOFFMAN, Esq.,
Solicitor for the Defendant Agnes Coleman.

40

Colloquy.

Mr. Parsons: I assume your Honor wishes no opening?

The Court: No. I know what it is all about. It is a question of construction of Captain Pearce's will.

Mr. Longstreet: Here is a memorandum.

10 The Court: I have a memorandum from Mr. Parsons.

You may present your proofs.

Mr. Parsons: If your Honor please, I desire first to offer in evidence a certified copy of the will of Captain Pearce.

(Certified copy of Last will and Testament of W. Irving Pearce, above referred to, received in evidence and marked Exhibit C-1.)

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Mr. Parsons: And then we have agreed that the payments received from the estate for the year 1943 are \$4463.81; for the year 1944, two payments of \$1639.75 and \$1887.41; and for 1945, \$1536.25.

Mr. Longstreet: The \$1500 applies on the 1944 income.

Mr. Parsons: Well, that may be so; but I mean, we received it on February 10th.

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Mr. Longstreet: From the account. The income received for the year 1943 and the income for the year 1944.

Mr. Parsons: All right, whatever it is. I am just reciting the amounts that we have received.

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Florence L. Pearce, Complainant—Direct.

FLORENCE L. PEARCE, the complainant, being duly sworn according to law, on her oath testified as follows:

Direct examination by Mr. Parsons:

Q. Mrs. Pearce, how old are you? A. About seventy-five. 10

Q. And Captain Pearce died when? A. June 16, 1942.

Q. 1942? A. Yes.

Q. And, Mrs Pearce, Captain Pearce in his lifetime was engaged in what kind of occupation? A. A seaman; and then after the last war, the old war, he stayed home with me because I needed him.

Q. The Captain's estate, the money that he obtained was by following the sea, is that right? 20
A. Some of it.

Q. Now, prior to the Captain's death, Mrs. Pearce, did you have your own separate funds? A. I had what was left me by my father.

Q. You had what was left you by your father? A. Yes.

Q. And can you tell us approximately when your father died? A. Yes. He died in August, 1899.

Q. Now, during the time after the last war 30
where did you and the Captain reside? A. In Manasquan.

Q. Is it in the same house in which you reside at the present time? A. Yes.

Q. And will you tell us how many rooms are in the house? A. Well, downstairs there is three and a kitchen and an out kitchen and a lavatory and a hall and a parlor and a library and a dining room. 40

Florence L. Pearce, Complainant—Direct.

Q. And how many rooms upstairs? A. A kitchen, I should say, a lavatory and an out kitchen.

Q. Now, upstairs how many are there? A. Well, there are three large bedrooms and one rather small—a hall bedroom, and there is a bath-
10 room.

Q. Now, during your husband's lifetime, Mrs. Pearce, who paid the expenses of running the house? A. My husband.

Q. And during that time while he was living did you have a housekeeper? A. Oh, yes, there was always help when you could get it.

Q. Who paid the housekeeper? A. Captain Pearce.

Q. Did you have anybody working on the place?
20 A. A man, a yard man.

Q. Who paid for the yard man? A. Captain Pearce.

Q. Now, in connection with the expenses of the house, food for the table, telephone, electric light, coal, oil, and so on, who paid for that? A. Cap-
tain Pearce.

Q. Who paid the medical and dental bills? A. Captain Pearce. He paid for everything.

Q. Now, since your husband's death, Mrs.
30 Pearce, have you retained and kept the checks which you have used for running the home? A. Not all. My housekeeper has to pick up things now and then. We have a running account with the meat man, the butcher, and the grocery man.

Q. Does your housekeeper, in addition to the checks that you have here, spend cash money? A. Oh, yes, surely.

Q. And can you tell us approximately what that averages a week? A. Well, sometimes it is
40 more, sometimes less; about \$6 I should say.

Florence L. Pearce, Complainant—Direct.

Q. About \$6 a week? A. It depends on the account at the end of the week.

Q. Mrs. Pearce, during the year 1945 you have been and are now suffering from arthritis, are you? A. Yes.

Q. And may I ask you, during 1944 and during the current year have you had in attendance any nurses caring for you? A. Oh, yes. 10

Q. And what are their names? A. Mrs. Moore and Mrs. Florence Bogue.

Q. And these nurses have been in attendance upon you from 1944 to the present time? A. Yes.

Q. Now, you have placed your checks together, Mrs. Pearce, by years, from 1942, from the date of the Captain's death? A. Yes.

Q. And for the year 1943? A. Yes.

Q. And the year 1945? A. 1944. 20

Q. I mean 1944. You are correct. A. Yes.

Q. And 1945 down to and including the 1st of May? A. Yes.

Q. And in doing that did you separate the checks so that you have the checks in each month of the year? A. Yes.

Q. And have you made a tabulation of the checks likewise? A. As near as I could.

Q. And these checks are for the expenses around the home, for the nurses and keeping the home going, is that right? A. Yes. 30

Mr. Parsons: I would like to offer these. They have been tabulated, if the Court please by the years and also by the months. Mrs. Pearce in her own handwriting has made up a schedule of the checks. I would like to offer the checks and the schedule.

(Checks and schedule, above referred to, received in evidence and marked Exhibit 40 - C-2).

Florence L. Pearce, Complainant—Direct.

Mr. Parsons: And for the purposes of the record, so it will appear in the record, the tabulation of the checks for the year 1942 amounts to \$2029.46.

The Court: These are expenditures?

10 Mr. Parsons: Yes, sir. For the year 1943, \$4466.60; for the year 1944 \$11,289.89; and for the first four months of this year, that is, until May 1st, \$3514.46.

Mr. Longstreet: May we look at those tabulations? It may save time.

Mr. Parsons: They are done by adding machine, and the checks are all right here.

The Court: Did you have a copy of the will marked, Mr. Parsons?

20 Mr. Parsons: I did, sir.

The Court: Let me look at it. And the file is not here. If I might see a copy of the bill and answers I would appreciate it.

Mr. Parsons: I had intended to hand that up to your Honor—I had a copy right out here—here it is.

(Discussion off the record.)

30 Q. Mrs. Pearce, your physician, the doctor who takes care of you is Dr. Albright? A. Yes.

Mr. Parsons: And by agreement—I am sorry, Mr. Hoffman, I did not speak to you about it but I assume that the statements by Dr. Albright—

Mr. Hoffman: Mr. Longstreet has told me about it.

Mr. Parsons: In lieu of Dr. Albright appearing personally—he is so tremendously busy—Mr. Longstreet and I agreed he could make a statement out and we would

Florence L. Pearce, Complainant—Cross.

agree it could go in evidence if it is satisfactory to the Court.

The Court: All right.

Mr. Parsons: We offer in evidence two statements of Dr. Albright.

(Two statements by Dr. Louis F. Albright, above referred to, received in evidence and marked Exhibits C-3 and C-4, respectively.) 10

Q. Mrs. Pearce, to take care of your expenses over and above what comes from the estate, has it been necessary for you to use your own funds?

A. Yes.

Mr. Parsons: I think that is all. 20

Cross examination by Mr. Hoffman:

Q. Now, Mrs. Pearce, can you hear me from here? A. Yes.

Q. Mrs. Pearce, isn't it a fact that you have sort of determined, in so far as you were able, to prevent these defendants from getting the corpus of this estate? A. Oh, no.

Q. And isn't it a further fact that since this will was opened you have placed in the way of the trustees many obstacles to a proper administration of this estate with the hope that they would not be able to get the corpus of this estate? A. No. 30

Mr. Parsons: I object to that, if your Honor please.

The Court: I do not think that has anything to do with it, whether she desires to prevent the ultimate beneficiaries from receiving anything or not. That is not the 40

Florence L. Pearce, Complainant—Cross.

question. The question here is whether the trustees are obliged to pay out of the corpus of the estate such moneys as are necessary for her complete comfort, using the terms of the will. Now, that is the only question there is here.

10 Mr. Hoffman: If your Honor please,

The Court: The motives which may prompt her to bring this action are immaterial.

Mr. Hoffman: Well, I have a line of questions, if your Honor please, that goes to the motives of this witness, and I assume that your Honor's ruling in each case would be to refuse to permit me to ask the question.

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The Court: Yes.

Q. Mrs. Pearce, isn't it a fact and don't you know it to be a fact that it was your husband's intention that you should use the income from your own independent estate before you could ask the trustees to use part of the principal?

Mr. Parsons: I object to that question, if the Court please.

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The Court: Objection sustained. She is not permitted to tell us what the testator's intention was. That is to be taken from the four corners of the will.

Q. You were familiar with the terms of the will, Mrs. Pearce? A. Oh, I have read them.

Q. And are you familiar with the provision which gives to the trustees the right to determine the need for the use of principal as well as the

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Florence L. Pearce, Complainant—Cross.

right to determine how much principal is to be used? A. I don't see it that way.

Q. Are you familiar with the language of that provision of the will? A. Yes.

Q. Yet you waited for two years, did you not, before you notified the trustees that you would expect reimbursement of this money that you had spent; isn't that so? A. I don't remember. 10

Q. Well, when did you first make demand upon the trustees to make payment? A. I don't remember.

Mr. Parsons: It was in June, 1944. I think there was a letter before then.

Q. Now, Mrs. Pearce, why did you wait for two years, before making a demand upon the trustees. A. I don't remember how long I waited. I hoped they would do what was right by me. They knew that my husband from his life—they knew as I knew and everybody that knew him, that I was his first, always in his mind, and nobody ever came first, and that he would want me to have, and I supposed they were kind enough to do as I honestly knew he would want them to do. They couldn't help but know it. 20

Mr. Parsons: Now, Mrs. Pearce, I think you have answered it. 30

The Court: I do not know what the object of that question is.

Mr. Hoffman: If your Honor please, the object of the question is, as we construe the language of the will the discretion is given to the trustees to determine what principal, if any, is to be paid.

The Court: I understand that. But what has that got to do with her request or failure to request? 40

Florence L. Pearce, Complainant—Cross.

10 Mr. Hoffman: I think it was her duty to notify and give the trustees the opportunity to determine how much principal, if any, was to be used in connection with her needs under the terms of the will before she made the disbursements herself for a period of two years. Of course, it goes back to the other argument; it goes to her conduct.

The Court: To the effect that her failure to request the executors to advance moneys during any particular year is a waiver of her rights?

20 Mr. Hoffman: No, I am not urging that; but I do say this, that if she had made the request promptly and if the executors had determined that she was entitled to principal that the amount that might have been used in connection with what she conceived to be her needs might be an entirely different and a much smaller amount than the amount of the total of these checks.

30 The Court: Well, it is unnecessary for us to examine into that because the checks are here, the disbursements represented by the checks are shown to the Court by the checks themselves. If they are improper disbursements, of course, the Court could limit the amount of corpus which was to be used by the executors and trustees. But there is no question that I can see that can be raised as to the propriety of her refraining from demanding payments out of the corpus.

40 Q. Mrs. Pearce, when did you first develop this condition of arthritis? A. Well, I don't remem-

Florence L. Pearce, Complainant—Cross.

ber having it until about the time Captain Pearce died. It was a great shock to me when he died; and, of course,—it was a terrible shock, and of course, before that I was not so strong, but I don't remember having arthritis.

Q. Didn't Dr. Albright treat you for arthritis as far back as 1937? A. I don't remember. He was trying to build me up because I was very much rundown, and that was what gave my eyes conjunctivitis, which comes from a very rundown condition, and I was. And I never saw a doctor—the first time I ever saw a doctor was because I had a terrible cold. I had an appointment for the doctor—

The Court: All this information you are asking is in this doctor's certificate. He gives in detail—and I understand this certificate of the doctor is offered in evidence and received in evidence by consent of all counsel—and there is a detailed statement here of all of his treatments since January 6, 1937 right down to May 15, 1945.

Mr. Hoffman: May I see that, your Honor?

Q. You say Dr. Albright didn't treat you for arthritis back in 1937? A. I didn't know that he was treating me; I thought I was just rundown then to be built up.

Q. Isn't it a fact, Mrs. Pearce, that your husband knew of your condition of arthritis at the time that he made the will? A. I don't think so.

Q. Now, these checks that were presented here this morning, do they include all your expenses of every kind? A. No; at times I buy things I want and I just take the little purse—for instance,

Florence L. Pearce, Complainant—Cross.

if I want a pair of stockings I buy a pair of stockings.

Q. Exclusive of the checks that were put in evidence this morning, how much of your own independent income have you used since Captain Pearce's death? A. Well,—

10 The Court: Used for what purpose?

Mr. Hoffman: For any purpose.

The Court: What difference does it make. If she is entitled, as she claims she is, to the use of the corpus of this estate for her living expenses, such expenses as are necessary to keep her in comfort, then it does not make any difference what she did with her own income.

20 Mr. Hoffman: Excepting a phase of our case, if your Honor please, goes to the contention that she should have used her own independent income before resorting to the principal of the testator's estate.

The Court: Well, that is a question for the Court to decide; and the question whether she did or did not use any of her income for her personal support is beside the point. I am assuming, and I think we all have a right to assume on this applica-
30 tion, that she does not deem it necessary for her to dip into her own estate at all for her support.

Mr. Hoffman: Yes; that is the complainant's contention and it is, incidentally, admitted that she has sufficient income of her own to adequately pay for all of her needs.

The Court: Well, it seems to me that a lot
40 of the facts here might well be stipulated: First, as to the value of the testator's es-

Florence L. Pearce, Complainant—Cross.

tate and the income, the annual income from it, that might well be stipulated, I should think. I suppose the executors will testify to that.

Then you might very well agree on the amount of the separate estate she has and what the income from that is. It may have a bearing from that standpoint, what she has. 10

Mr. Hoffman: Well, I just have one question or two and I will be through with this witness.

Q. Now, Mrs. Pearce, how many nurses have you kept and employed during the past year? A. Two.

Q. Two? A. Yes: One night and one day. 20

Q. On twelve-hour shifts? A. Well, yes, I have to have one night and I have to have one during the day.

Q. Are they graduate nurses, trained nurses? A. Yes, I understand so.

Q. And just how much of their time is used in connection with ministering to your needs as to the arthritis condition? A. Well, all that is necessary, all that I require. I try to do what little I can to keep my hands in order so that I can still write. You see, my hands are crippled. 30

Q. Do they give you massages? A. Yes, they give me massages and see to my food, they prepare my food.

Q. Haven't you got a housekeeper there now? A. Yes; but they know the kind of food I ought not to have; they are trained as dieticians; and my housekeeper is perfectly willing to do everything for me, and all, but they are trained to know more about the dietician part of it and they 40

Florence L. Pearce, Complainant—Cross.

prepare my food and bring it to me. I am not able to go up and downstairs without help.

10 Q. Outside of preparing your food and bringing it to you, how many massages do you get a day? A. Well, I suppose every night; and they help me take my bath. I can't take a bath myself; it is impossible. I can do a little, and I do all that I can so that I won't be entirely helpless, and I do all that I can do, but I can't do any more than I do.

Mr. Hoffman: That is all I have.

Further cross examination by Mr. Longstreet:

20 Q. Mrs. Pearce, I have a stipulation made by your counsel as to the bill of particulars, and this states "That the complainant, Florence L. Pearce, has sufficient funds and property in her own right to adequately maintain and support herself and that Florence L. Pearce has a very substantial estate of her own, the income from which is more than sufficient to support her and pay for the services of trained nurses, doctors and medicines which are required while she is suffering from arthritis, and that since the death of W. Irving Pearce on June 16, 1942, the income

30 received from her own estate has been far more than necessary to support herself and it has not been necessary, at any time, to invade the corpus of her own personal estate for her support and that her own personal estate is so large that it will not be necessary to invade the corpus of same for her support and maintenance even while she is suffering from arthritis as alleged in the bill of complaint." Now, that is correct, isn't it?

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Florence L. Pearce, Complainant—Cross.

Mr. Parsons: We stipulated that, if your Honor please, and I object to the question.

The Court: Well, it is a fact that has been stipulated.

Q. The estate of you and the Captain were kept separate: The Captain had his private personal estate and you had yours separate, isn't that true? A. Well, I don't understand what you mean. 10

Q. Well, there weren't joint bank balances at any time, there wasn't joint property; you each maintained your separate estate under your separate estate? A. Yes, to a certain extent.

Mr. Longstreet: That is the only question.

Mr. Parsons: Can we, in accordance with the Court's suggestion, stipulate on the record the amount of the estate of Captain Pearce? 20

Mr. Longstreet: Yes, that can be stipulated.

(Discussion off the record.)

Mr. Longstreet: There is a report from Rudolf, Cinnamon & Calafato showing the stocks, bonds and mortgages which were in the estate on the date of death, June 16, 1942, the changes in the list as of May 1, 1945, showing an estate as of the date of death of \$116,093.16, and an estate as of the present date of \$96,494. The amount has decreased \$20,000 after disbursements as shown on this statement of some \$30,000 30 40

Mrs. Margaret Naden, for Complainant—Direct.

10 to cover Federal estate taxes, New Jersey estate taxes, counsel fees, and so forth. It also shows an income as of the date of death of \$4,022.50 per year based on a gross estate of \$116,093.16, while the estimated income for 1945 based on the securities on hand, an estate of \$96,000, will show an income of \$4509. We will permit that whole account to be used because it is a complete statement.

The Court: Let it be marked in evidence.

(Statement by Rudolf, Cinnamon & Calafato, above referred to, received in evidence and marked Exhibit DE-1.)

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MRS. MARGARET NADEN, produced as a witness on behalf of the complainant, being duly sworn according to law, on her oath testified as follows:

Direct examination by Mr. Parsons:

Q. Mrs. Naden, you are the housekeeper of Mrs. Pearce, are you? A. Yes.

30 Q. And have been for how long? A. Five years last December.

Q. And directing your attention, Mrs. Naden, to moneys handled by you personally for household expenses, the table and so on, do you handle weekly any money for the table and household supplies? A. We have the running account, but I have to buy all things at other stores.

Q. And what do you average weekly in addition to these checks for the supplies for the home? A. Well, it averages about \$6.

40 Q. May I ask you, Mrs. Naden, in addition to that, just briefly—Mrs. Pearce for the past year

Mrs. Margaret Naden, for Complainant—Cross.

Mrs. Rae S. Moore, for Complainant—Direct.

and a half has had nurses there at the home? A. Yes.

Q. And do you know that they have been steadily there? A. Oh, yes.

Q. Both a day nurse and a night nurse? A. Yes. 10

Q. And do you know that they minister to her and are in attendance upon her? A. Yes.

Mr. Parsons: I think that is all.

Cross examination by Mr. Longstreet:

Q. When did you first start to have two nurses, Mrs. Naden, about a year and a half ago? A. About a year and a half ago, I guess.

Q. That is in the latter part of 1943? A. I think so. 20

Mr. Longstreet: That is all.

Mr. Hoffman: No questions.

MRS. RAE S. MOORE, produced as a witness on behalf of the complainant, being duly sworn according to law, on her oath testified as follows: 30

Direct examination by Mr. Parsons:

Q. Mrs. Moore, briefly, you have been in attendance upon Mrs. Pearce how long. A. Since the 1st of November, 1943.

Q. And your profession is what? A. Registered nurse.

Q. As a graduate trained nurse? A. Yes.

Q. And has there been any other nurse in attendance upon her besides yourself? A. Yes; Miss Bogue. 40

Mrs. Rae S. Moore, for Complainant—Direct.

Q. Yes. Do you alternate the times in which you are in attendance upon her? A. We do.

Q. In other words, one week you will be on in the daytime and then another week on in the night time? A. Not exactly like that.

Q. Well, it generally works out? A. Yes.

10 Q. In other words, you do know the services you have to render in the evening and you likewise know the services that are rendered during the daytime? A. I do.

Q. Then, from your own personal knowledge will you detail very briefly for the Court the services of what you have to do for Mrs. Pearce? A. In November, 1943 Mrs. Pearce was almost an invalid when I went there, she was able to sit up no longer than two hours at a time; her appetite was
20 poor, her body was all crippled up.

We forced her out of bed many times, and she didn't want to—we still do, occasionally, when she is tired due to weather conditions.

1944, the Spring, there was quite a bit of improvement so that we were able to get her downstairs and get her over in Point Pleasant. She was out during the Summer twice.

30 During that time the morning care consists of getting her out of bed according to what time we have been able to get her in bed at night, maybe from nine to ten. When we went there she wasn't even able to wash her face. Now she can wash everything but her legs and back most of the time. She has always washed the upper part of her body, I would say, since last Spring.

Q. I am rather interested. May I interrupt?
A. Yes.

40 Q. It is my understanding that it is a necessary thing in the treatment of arthritis to keep the patient moving. A. Absolutely; you cannot let them

Mrs. Rae S. Moore, for Complainant—Cross.

stop as long as they are organically able to move at all.

Q. And that has been one of your functions?

A. Yes.

Q. To force her to do things. A. To force them to do things for themselves and guide them to a certain extent so that they do not get a cardiac reaction from overdoing, but still have a guidance to that degree so that they are kept as humanly comfortable as possible. 10

Q. Will you describe briefly what duties—what is done at night? A. At night Mrs. Pearce has a complete bath, massage at the present time of the upper extremities. Before that it was epsom salts on her whole entire body besides her back and hands. She goes to bed then. She has to sleep on her back with a pillow elevating her buttocks due to pressure on the lower coccyx area. There are five pillows that have to be adjusted in that bed. 20

As long as I have been there, although I have tried several times to turn her on her side, due to the arthritic condition of her shoulders I cannot keep her on her side; in fact, she has never been able to stay; it has only been tried a few times because it was so unsatisfactory.

She gets up anywhere in the morning—when we first went there she slept no longer than two hours, that was last Spring, 1944, at a time. Now it varies; it may go three hours, four hours; occasionally there may be a good night, according to the weather or her nervous condition. 30

Mr. Parsons: I think that is all. Cross examine.

Cross examination by Mr. Hoffman:

Q. Mrs. Moore, did you function under instructions from a doctor? A. I did, yes. 40

Mrs. Rae S. Moore, for Complainant—Cross.

- Q. Which doctor? A. Dr. Albright.
- Q. Did Mrs. Pearce have any other physician excepting Dr. Albright, so far as you know? A. Not since I have been there.
- Q. She didn't require the services of a physician for the past year or so, did she? A. The last
10 doctor has been to see her was in 1944—I think it was the first part of 1944—I am not just sure.
- Q. Just about a year ago? A. Yes, just about a year ago.
- Q. As far as you know she has not been to see Dr. Albright since then excepting for this last visit a few days ago? A. Yes.
- Q. Dr. Albright has not visited her at her home all during that period? A. We have kept in contact with him by telephone when necessary. This
20 is what we call a chronic case.
- Q. Have you had occasion to call him any time. A. Yes, I have.
- Q. But he has not actually made any visits? A. No.
- Q. And she has not made any visits over to him? A. No.
- Q. If I gather what you say correctly, the condition of Mrs Pearce has greatly improved since you got there. A. Since I first went there,
30 definitely .
- Q. How much do you receive? A. We receive \$9 a day.
- Q. Now, isn't it a fact that the services that you render could be rendered by a practical nurse as well? A. I believe that was tried before we came there; there were four or five girls in there previous to that and we were called due to the fact that they were getting nowhere.
- Q. How many massages do you give Mrs.
40 Pearce? A. Always, up until just recently she

Mrs. Rae S. Moore, for Complainant—Cross.

always got two a day, and sometimes during the day when her hands were so bad we would massage them during the day.

Q. And how long would that take? A. Oh, maybe half an hour during the day, an hour in the morning, an hour at night—close to an hour. Of course, now that she is so much better she is able to do more for herself and massaging is not so necessary. 10

Q. That requires less work on your part? A. Yes.

Q. Between times what do you do, act as sort of a companion? A. Companion, and helping her to do the things she can't do, and guiding her.

Q. The cooking was done by Mrs. Naden? A. I would advise the meal and occasionally fix something. 20

Q. But you don't actually do the cooking? A. No, I don't do the cooking.

Q. And you don't actually prepare the food? A. No.

Q. You are sort of a consultant, is that it? A. Yes, that is it.

Mr. Hoffman: That is all.

The Court: Are you the day nurse or the night nurse? 30

The witness: I am the day nurse at the moment.

The Court: Do you alternate?

The Witness: Yes, we do.

The Court: Does the other nurse get the same pay you get?

The Witness: Yes, she does.

The Court: You do twelve-hour duty?

The Witness: That is right.

The Court: All right. 40

Mrs. Rae S. Moore, for Complainant—Cross.

Further cross examination by Mr. Longstreet:

Q. At the present time working for Mrs. Pearce are both you and the other nurse? A. Yes.

Q. Both of you are registered nurses? A. Yes.

10 Q. You are on twenty-four-hour a day duty?
A. Yes.

Q. There is a housekeeper there besides, is there not? A. Yes.

Q. There is a Margaret McCorken. Was that another nurse? A. Maturka. She was in 1943 when I first went on.

Q. That was January 4, 1944. A. 1944—wasn't that 1943? And she was only there about four or five months, I don't remember exactly how long.

20 Q. You started November 1, 1943? A. In the first part of November. Exactly when I don't remember.

Q. And a Rae Moore was there at that time? A. In November, right.

Q. I call your attention to her statement of services for 1944 in which a Margaret Maturka was a nurse paid \$63 on January 4, 1944, and Rae Moore paid \$54; is that correct? A. May I explain that?

30 The Court: This is Rae Moore, isn't it?
The Witness: Yes.

40 Q. And the other was Maturka? A. May I explain? Mrs. Pearce was not able to handle some of her accounts at that time and Mrs. Jones had to come over. Sometimes it wasn't convenient for her to come on the day we were to be paid so she handled that, and it was overtime when she would miss. Sometimes it would be under, sometimes over.

Mrs. Rae S. Moore, for Complainant—Cross.

The Court: It wasn't paid until long after?

The Witness: Yes; it was still \$9 a day we got.

The Court: What Mr. Longstreet is trying to find out is whether there was a duplication of services of nurses after you came there. Did these nurses you mention leave when you came? 10

The Witness: That is right.

Q. And how long has Mrs. Bogue been there, as long as you? A. No. Miss Maturka was there first. About the 1st of April, 1944.

Q. Well, I am referring now to the February statement of 1944 in which there is a charge on February 1st for Margaret Maturka, a nurse, of \$63, and Rae Moore, a nurse, \$63, and Florence Bogue, a nurse, \$27. A. Miss Bogue at that time relieved Miss Maturka. 20

Q. Well, in that two weeks from February 1st to February 16th, I call your attention to the following charges: February 1st, Rae Moore, \$63; February 1st, Margaret Maturka, nurse, \$63; February 8th, Rae Moore, \$63; February 8th, Margaret Maturka, \$38; Florence Bogue, \$27. And then she relieved her during that time? A. That is right. 30

Mr. Longstreet: That is all.

Mr. Parsons: That is all.

That is our case, if your Honor please.
Complainant Rests.

Forman T. Bailey, for Defendants—Direct.

THE CASE FOR THE DEFENDANTS.

FORMAN T. BAILEY, produced as a witness on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

10 *Direct examination by Mr. Longstreet:*

Q. Mr. Bailey, you drew the will of Captain Irving Pearce, did you not? A. That is right.

Q. You drew it on December 12, 1940? A. I think it was signed on that date, but it was dictated previously.

Q. The will is dated December 12, 1940. A. I think it is.

20 Q. And on the day the Captain signed the will did you have some discussion with him relative to it? A. Yes.

Q. And at the time the will was drawn did he make the statement which I will read to you—

Mr. Parsons: Now, I object to that, if your Honor please.

The Court: Wait a minute. Was this statement prepared at the time?

30 Mr. Longstreet: This statement is testimony in the will contest case made by Mr. Bailey.

The Court: The will has been probated, hasn't it?

Mr. Longstreet: The will has been probated.

The Court: There is no question about the validity of the will?

Mr. Longstreet: No question.

40 The Court: All right. Now, you can show the circumstances which existed at the time the will was made but you cannot

Forman T. Bailey, for Defendants—Direct.

prove by testimony the testator's intention. You cannot prove what he intended to do by anything *dehors* the will. You can prove the surrounding circumstances at the time the will was executed in order to get the picture, but—what I am trying to say is this: you cannot prove what he intended to say but we must draw his intention from what he did say. 10

For instance, I will take an extreme case. Suppose Mr. Bailey should testify that at the time Mr. Pearce made this will he said to him: "My wife has more money than I have and I am going to give her the income on my estate for her life, but if she has any extraordinary expenses I expect her to use her own estate to pay for it." Do you think that would be admissible? 20

Mr. Longstreet: Yes, I think it would.

The Court: You do? Well, I don't. Because if he had intended to make any such provision by his will he should have done so by the language of the will. I can only interpret the language which has been used in the will.

Mr. Longstreet: And the circumstances attending it where the fact that he expressed the fact that his wife had a substantial estate of her own and would never need any more than income. 30

The Court: Well, I cannot help that if he did say so. What I am interested in is what he said in his will, not what he said before he signed his will or before his will was drawn. I am called upon to interpret what he said in his will. That I know he said because he signed it. 40

Gilbert L. Marcellus, Defendant—Direct.

Mr. Longstreet: Allow me an exception.

The Court: You don't need it.

Mr. Longstreet: All right.

That is all, Mr. Bailey. We brought you out here uselessly.

10

GILBERT L. MARCELLUS, one of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Longstreet:

20 Q. Mr. Marcellus, I show you the accounting prepared by the accountant in this estate and ask you what income was derived from that at the time of Mr. Pearce's death. A. As reported in the income tax, it was \$3837.24.

Q. And was that income increased by the action of the executors? A. It was.

Q. Did you during the administration of the estate dispose of the real estate? A. We disposed of all the bad parcels except one.

Q. What have you left now? A. One lot in Shark River Hills; it is not salable as yet.

30 Q. And in what did you invest those funds?

Mr. Parsons: I object to that; the account speaks for itself.

Mr. Longstreet: For the good faith of these executors—

The Court: There is no attack on their investments, is there?

40 Mr. Longstreet: I want to show the good faith of the Executors in making every effort to bring the best income possible from this estate.

Gilbert L. Marcellus, Defendant—Direct.

The Court: I think we can assume that is so. There has no attack been made on it, has there?

Mr. Parsons: Absolutely no, sir.

The Court: Their action has not been challenged. There is only one act that has been challenged here and that is the refusal to use part of the corpus for the widow's support. That is the only act which is challenged. And you do not have to go into the question of investments. We assume that the Executors are performing their duties in that respect, they are getting out of it all they can. 10

Mr. Longstreet: That is all.

The Court: Let me ask you a question, Mr. Marcellus, you know Mrs. Pearce, of course, very well. 20

The Witness: Yes.

The Court: You live in Manasquan?

The Witness: Yes.

The Court: How close to her do you live?

The Witness: Four blocks away.

The Court: How often do you see her?

The Witness: I am not allowed in the house. 30

The Court: You are not allowed in the house? Who keeps you out?

The Witness: I attempted to communicate with my aunt on various occasions and she refused to talk to us on the phone.

The Court: Well, I can readily understand why she might refuse to talk to you on the phone after hearing her on the witness stand this morning; she has a defect in speech which would probably prompt her to 40

Gilbert L. Marcellus, Defendant—Direct.

refuse to talk to anybody on the telephone. But have you been there to see her? Have you called at the house to see her?

10 The Witness: No, sir. We have written her letters which she refused to answer. We tried to call her on the phone and she hangs up.

The Court: Have you discussed her condition with Dr. Albright?

The Witness: With Dr Albright? No, Sir.

The Court: Did you know Dr. Albright had been treating her for arthritis?

The Witness: Yes, Sir.

The Court: And yet you have not discussed her condition with him?

20 The Witness: We got his report.

The Court: When?

The Witness: Miss Osborne has inquired, the other executor, her niece.

The Court: How frequently have you gotten reports from him?

The Witness: We both have the same doctor.

30 The Court: Well, that doesn't answer the question. How frequently have you gotten reports from him?

The Witness: Well, I think every time she has been there. She goes there every month or two.

The Court: You mean your co-executor goes to Dr. Albright's office every month or two?

The Witness: Yes, Sir.

40 The Court: Do you know anything about the living conditions of Mrs. Pearce prior to her husband's death?

Gilbert L. Marcellus, Defendant—Direct.

The Witness: Yes.

The Court: What were they?

The Witness: They had a housekeeper and the Captain did most of the work around the place and on the various parcels of real estate, both his own and hers. That is the way he kept himself busy. 10

The Court: Well, is there any change in her method of living since he died from what it was before he died, with the exception of these nurses?

The Witness: There is no particular change that I know of, Sir, except the addition of the trained nurses. Of course when she was sick he would have nurses there.

The Court: He had nurses for her when she was ill? 20

The Witness: Yes.

The Court: Trained nurses?

The Witness: I know two practical nurses that were there and one trained nurse.

The Court: The income from this estate last year was what?

The Witness: May I look at this?

The Court: Yes.

The Witness: Last year, Sir? 30

The Court: Yes, 1944.

The Witness: \$3935.56. It has since gone up.

The Court: I do not recall, Mr. Parsons, what the amount of the living expenses, exclusive of the nurses, were for 1944. Can you tell me?

Mr. Parsons: I have not tabulated that, if your Honor please; and tabulating it 40

Gilbert L. Marcellus, Defendant—Direct.

very roughly and quickly I would say that the living expenses were \$5200.

10 The Court: Assuming that \$5200 was required for the actual living expenses exclusive of the wages of the nurses, is it your opinion that the income from this estate was sufficient to pay those charges in the past year?

The Witness: If it was \$5200 it was not sufficient to pay, no, Sir.

The Court: Well, you say that she is living on the same scale now that she was prior to Captain Pearce's death except for the fact she has trained nurses in attendance.

20 The Witness: I have no means of knowing what he spent himself.

The Court: Well, of course, we cannot very well gauge the amount of money which was spent for living expenses three years ago with what was spent today; the amounts may differ widely and yet the result may be the same. In other words, the cost of living, I think we all know, is considerably different today than it was three years ago.

30 What I am interested in knowing is whether the scale of living has been higher since the Captain's death than it was before, and you answered that question a few minutes ago and said she was living about the same except for the nurses.

The Witness: I didn't mean as to expense, I meant as to conditions under which she lives.

40 The Court: That is exactly what I wanted to know.

Gilbert L. Marcellus, Defendant—Direct.

Now, assuming that \$5200 is a proper expenditure for maintaining her living on that scale, then in your opinion is the income from the estate sufficient to pay that expense?

The Witness: If it is entirely to be paid from the estate, Sir? 10

The Court: I am asking you if the income is sufficient, in your opinion, to pay the expenses of her living?

The Witness: Not if it is \$5200?

The Court: Well, I am assuming that \$5200 is the correct amount; there is no proof to the contrary.

Now, if the income is insufficient to pay that charge for her living it follows that it is insufficient to pay for the nurses, that is so, isn't it? 20

The Witness: Yes, Sir.

The Court: And it would be the addition of somewhere in the neighborhood of between five and six thousand dollars a year in addition to that to pay for the nurses, wouldn't it?

The Witness: Yes.

The Court: At \$9 a day.

The Witness: Yes, Sir. 30

The Court: Assuming that they are necessary.

The Court: We have no testimony on that or no evidence on that except the word of the physician, and the physician says "She undoubtedly requires the attention and assistance of some capable person at all times. At least, even at night, there should always be someone in the house with

Gilbert L. Marcellus, Defendant—Direct.

her who could be called and be promptly available for her aid."

10 And then later in his statement he says the services required could "very competently be carried out by trained nurses but could equally well be performed by less technically trained persons. Massage is about the only attention which she requires which calls for any special training on the part of her attendant. Otherwise such attention as she requires could be well administered by any person equipped with a reasonable amount of good common sense. Adequate medical care is a term which allows much latitude in its interpretation and it may vary from the minimum requirements of the patient's condition to the point where 'adequate medical care' verges on luxury."

20

Well, that is perhaps a correct statement.

Do you now whether practical nurses are available to take care of Mrs. Pearce?

The Witness: I don't know that, sir. We have one living at our home who works around the community. She also works in the hospital at various times.

30

The Court: I have no more questions.

Mr. Longstreet: As long as you brought out the question of why he had not called on Mrs. Pearce, I think that needs some explanation as to the difficulty that has been going on ever since this will was first read. And as long as your Honor has opened up the question I think it ought to be brought out further.

40

Gilbert L. Marcellus, Defendant—Direct.

This man has done everything for that estate. He has not been allowed to call there. He has written to her. They have even been compelled to call upon the Court to submit to them mortgages. They have been required to make complete searches and have not been given the mortgages. 10
Mr. Parsons was in that suit.

He has written her letters and got no reply. He has called her on the phone and the receiver has been hung up. He has called on Mr. Birdsall.

They had to, in administering this estate, get a search, grantee and grantor and mortgagee and mortgagor search, and write to each one of the individuals to find out how much money they owned, how interest was paid. They called on each tax officer to find out the taxes due. They have been compelled to do all this. He has not been allowed near there. 20

The Court: Well, my only purpose in asking that question was to find out how much he knew respecting the needs of the widow, and whether he was in a position to form an opinion, that is all.

Mr. Longstreet: That is why I wanted to call your Honor's attention to why he couldn't do it, why the executors are not allowed there. There is ill feeling. There has been a will contest in which they have attempted to show the non-competency of the Captain. There wasn't a bit of testimony adduced on it other than the question of Mr. Bailey on the question of the will. There has been expense and constant litigation on this since it has been there, and 40
it has been luxury litigation. I want to

Gilbert L. Marcellus, Defendant—Direct.

explain the executor's position and show your Honor so your Honor would understand that because we have not gone into that phase of it.

10 The Court: I haven't any objection to your explaining the circumstances if you want to. I may say this, that irrespective of what my decision may be as to the proper construction of this will, it is the duty of both the executors and the beneficiaries under this will, and particularly of the life beneficiary, to cooperate and not deal at arm's length and not deal in opposition to one another. If there is no cooperation, if the executors are excluded from the home of the life beneficiary, how can they be in a position to form an intelligent opinion as to her needs? I would not hesitate to direct that they be accorded every facility to inspect the home or to obtain whatever information is necessary in order to put them in a position to exercise some reasonable judgment.

20

30 Mr. Parsons: That is right, sir. I do not know why Mr. Longstreet wanted to put that statement on the record, because Mr. Longstreet came into the case later, and Mr. Carton represented these executors, if your Honor please, and there was a grave doubt in Mrs. Pearce's mind as to the propriety of the execution of the will; and just as soon as it came out and the two men from Mr. Carton's office, I think Mr. Bailey and Mr. Keith—I believe after their testimony I advised Mrs. Pearce, and she complied, there wasn't any long will contest.

40 There was a one-day hearing and then we

Gilbert L. Marcellus, Defendant—Direct.

voluntarily withdrew after we were satisfied. We complied with every request so far as I know, sir, in cooperating and getting his estate wound up. We turned over to Mr. Carton everything we had in the estate. Now, anything that is wanted we will give. If they desire to come into the house and see Mrs. Pearce, certainly they have that right, sir. 10

The Court: They can even go further if it is necessary. If they have any question as to the propriety of these nurses they may have physicians examine her.

Mr. Parsons: We are perfectly willing to have that, sir, perfectly willing, at any time.

The Court: I only say that now because the question has been raised by Mr. Longstreet. And while it is not an issue in this case under the pleadings as I see it, I make the statement so you may be governed in your future actions accordingly. 20

I am called upon to determine what Captain Pearce meant by the language which he used in his will and I have no doubt about what he meant. I am through with this witness. If you want to ask him any more questions you may do so. 30

Mr. Longstreet: No.

The Court: Is that all?

Mr. Longstreet: That is all.

Exhibit C-1.

IN THE NAME OF GOD, AMEN.

10 I, W. IRVING PEARCE, of the Borough of Manasquan, in the County of Monmouth and State of New Jersey, being of sound and disposing mind, memory and understanding, and mindful of the uncertainty of life, do hereby revoke all wills and codicils, as well as all other instruments of a testamentary nature, heretofore made by me, and do hereby make, publish and declare the following to be my last Will and Testament:

FIRST:—It is my will and I do order that all my just debts and funeral expenses be duly paid as soon as conveniently may be after my decease.

20 SECOND:—I give, devise and bequeath all of the rest residue and remainder of my estate, of whatsoever kind and nature and wheresoever situate, real, personal and mixed, to GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees hereinafter named, in trust upon the trust that they shall hold and invest the same and pay the net income therefrom, semi-annually, to my beloved wife, FLORENCE L. PEARCE, if she shall survive me, for her sole use and benefit so long as she may live, and if the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE.

30

40 I DIRECT that the provision made for my said wife in this paragraph of my last Will and Testa-

Exhibit C-1.

ment shall be in lieu of her dower or right of dower in my estate.

THIRD:—Upon the death of my said wife should she survive me, or upon my death should my said wife predecease me, I give, devise and bequeath all of the rest, residue and remainder of my estate as follows:— 10

(a.) One-fourth or twenty-five per cent. thereof, I give, devise and bequeath to my nephew, GILBERT L. MARCELLUS of Manasquan, New Jersey, absolutely and in fee simple.

(b.) One-fourth or twenty-five per cent. thereof, I give, devise and bequeath to JULIA L. OSBORNE of Manasquan, New Jersey, and West Chester, Pennsylvania, daughter of Julia L. Osborne, deceased sister of my wife, absolutely and in fee simple. 20

(c.) One-fifth or twenty per cent. thereof, I give, devise and bequeath to my niece, AGNES COLEMAN, absolutely and in fee simple.

(d.) Three-tenths or thirty per cent. thereof, I give, devise and bequeath to the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees herein-after named, in trust nevertheless, for the uses and purposes following, to wit; to pay the net income therefrom to my brother, COHEN PEARCE, of Manasquan, New Jersey, if he be living, for his comfort, support and maintenance for and during the remainder of his natural life, and at his decease, I give, devise and bequeath said three-tenths or thirty per cent. of my said residuary estate unto the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, Individually, equally, share and share alike, absolutely and in fee simple. 30 40

Exhibit C-1.

10 If my said brother, COHEN PEARCE, predeceases me, or if the said COHEN PEARCE predeceases my said wife, then and in that event, upon the death of my said wife, should she survive me, or upon my death should my said wife predecease me, I give, devise and bequeath said three-tenths or
 10 thirty per cent. of my said residuary estate unto the said GILBERT L. MARCELLUS and JULIA L. OSBORNE, Individually, equally, share and share alike, absolutely and in fee simple.

20 FOURTH:—In the administration of the trusts hereinbefore mentioned, my Executors and Trustees shall have full and complete power and authority to lease any properties of my estate; to execute such agreements as my said Executors and Trustees may deem necessary in administering said trusts; also full power to compound, compromise, settle and adjust all claims in favor of
 20 or against my estate upon such terms as they may deem best; to compromise any mortgages I may hold at my death for the face value or less, as they may deem best; to retain by way of investment any securities, property or mortgages coming to them from my estate without being accountable for losses resulting from depreciation
 30 in the value of the same so long as they act in good faith; to invest and reinvest any part of my trust estate in United States, State or Municipal Bonds, or first mortgages upon improved real estate.

40 Upon the death of either of my Executors and Trustees before the purpose of any trust under this will is executed, I direct that the survivor of them may act as Executor and Trustee with all of the powers discretionary or otherwise which are conferred upon said two trustees and executors by this Will subject to all of the duties and restrictions to which said Executors and Trustees were subject originally.

Exhibit C-1.

LASTLY:—I nominate, constitute and appoint the said GILBERT L. MARCELLUS and JULIA L. OSBORNE Executors and Trustees of this my last Will and Testament, and I direct that they be not required to give bond for the faithful performance of their duties as such Executors and Trustees.

(a.) I give and grant unto my said Executors and Trustees, or the survivor of them, full and complete power and authority to grant, bargain, sell and convey any or all of the real and personal estate of which I may die seized or possessed, at public or private sale, at such times and upon such terms as they or the survivor of them may deem best, and I authorize them or the survivor of them to execute such conveyances as they or the survivor of them may deem necessary in pursuance of this power of sale.

(b.) I hereby direct my executors, above named, or the survivor of them, to pay and satisfy all taxes, Federal, State, Inheritance, Succession, or otherwise, out of my residuary estate.

(c.) I hereby empower my said executors, or the survivor of them, with full authority to settle, adjust or compromise as they or the survivor of them may deem best for my estate, any taxes as above outlined, without the consent or approval of any of the beneficiaries, and without liability to any one who may have an interest in my said estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Twelfth day of December, Nineteen Hundred and Forty.

W. Irving Pearce (L. S.)

Exhibit C-1.

SIGNED, SEALED, PUBLISHED AND DECLARED by the said W. IRVING PEARCE, Testator, to be his last Will and Testament, in the presence of us, who were all present at the same time, and who have, at his request and in his presence and in the presence of each other, hereunto subscribed our names
 10 as witnesses.

Forman T. Bailey, Asbury Park, N. J.
 Irving E. Katz, Asbury Park, N. J.
 Florence Tannenbaum, Bradley Beach, N. J.

MONMOUTH COUNTY SURROGATE'S
 OFFICE.

20 LETTERS TESTAMENTARY.

STATE OF NEW JERSEY, }
 COUNTY OF MONMOUTH. } ss.:

I, JOSEPH L. DONAHAY, Surrogate of the County of Monmouth do certify the annexed to be a true copy of the LAST WILL AND TESTAMENT OF W. IRVING PEARCE, late of the County of Monmouth, deceased, and that Gilbert L. Marcellus and Julia L. Osborne, of the County of Monmouth, the Executors therein named, proved the same before me
 30 and are duly authorized to take upon themselves the Administration of the Estate of the Testator agreeably to said Will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, at Freehold, the Twenty-eighth day of July in the year of our Lord one thousand nine hundred and forty-two.
 (Seal)

40

JOSEPH L. DONAHAY,
 Surrogate.

Exhibit C-1.

MONMOUTH COUNTY SURROGATE'S
OFFICE.

LETTERS OF TRUSTEESHIP.

To ALL TO WHOM THESE PRESENTS SHALL COME,
GREETING:

10

WHEREAS W. Irving Pearce late of the County of
Monmouth and State of New Jersey, in and by his
Last Will and Testament duly proved before the
Surrogate of the County of Monmouth, did ap-
point Gilbert L. Marcellus and Julia L. Osborne
as trustees and,

WHEREAS the said Gilbert L. Marcellus and
Julia L. Osborne, have accepted the duties of
trustees as therein provided, therefore:

20

I, JOSEPH L. DONAHAY, Surrogate of the County
of Monmouth, do hereby certify that the said Gil-
bert L. Marcellus and Julia L. Osborne, are duly
authorized to execute the said trust according to
law and the terms of the said Last Will and Testa-
ment.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my seal of office,
at Freehold, the Twenty-eighth
(Seal) day of July in the year of our Lord
one thousand nine hundred and
forty-two.

30

JOSEPH L. DONAHAY,
Surrogate.

40

Exhibit C-2.

1942

	June	16	N. J. Bell Telephone Co.....\$	5.10
	"	29	Dr. Frederick K. Stamm.....	5.00
	"	27	Margaret Naden, housekeeper	10.00
	"	29	Dorothy Tillotson	78.00
10	"	30	Manasquan Bayhead Daries.....	5.10
	"	30	F. B. James groceries.....	30.00
	"	30	Laundry	5.00
	July	1	Dorothy Tillotson	10.00
	"	6	Chas Oakley Repairs to home house....	3.00
	"	6	Howard Height work on car.....	7.49
	"	8	Sarah Vanderhoven nurse.....	40.00
	"	8	Raymond Loveland handyman.....	2.75
	"	14	Elsie Rayne Miller, dress.....	19.75
20	"	6	Geo. Gregory flowers for cemetery plot	41.50
	"	14	Wm. Weir drg goods.....	7.04
	"	21	Bush Agency insurance.....	5.00
	"	21	" " "	11.50
	"	26	Sarah N. Vanderhoven nurse.....	40.00
	"	29	Telephone	7.10
	"	29	Electric & Gas.....	8.19
	"		Margaret Naden housekeeper.....	48.00
			Groceries	75.00
			Milk	5.10
			Laundry	8.00
30	August	1	Manasquan & Bayhead Daries.....	5.27
	"	1	Louis Albright Md. services.....	18.00
	"	3	Boro of Manasquan.....	76.16
	"	6	Street, Linder & Prophet, eyeglass....	3.00
	"	6	Sears Roebuck & Co., kitchen.....	2.00
	"	10	Jersey Cent. Power & Light Co.	21.63
	"	12	N. J. Bell Telephone Co.....	7.10
	"	15	F. B. James, groceries.....	12.22
	"	25	Bird Electrical Co.....	1.95
40	"	28	Jersey Cent. Power & Light Co.....	2.05

Exhibit C-2.

87.00	"		Milk, Manasq'n Bayh'd Daries.....	5.27	
08.00	"		Laundry	8.00	
17.00	"		Nurse, Perryman	60.00	
00.00	"	27	Dry goods, R. H. Macey & Co. N. Y....	5.50	
80.00	"		Drugs	5.00	
80.00	"		Mrs. Naden, Housekeeper.....	48.00	
September		1	Christian Herald	2.50	10
00.00	"	1	Wm. P. Weir, drugs.....	6.56	
07.00	"	1	Manasquan Bayhead Daries.....	5.27	
80.00	"	2	Dr. J. B. Lansing.....	5.00	
04.00	"	2	F. B. James, groceries.....	12.66	
80.00	"	4	Fred H. Allen.....	1.50	
81.00	"	7	P. P. Hardware Co.....	1.25	
90.00	"	8	Chas. O. Oakley, carpenter work.....	6.79	
80.00	"	15	F. B. James groceries.....	12.83	
00.00	"		Electric & Gas	17.63	
87.00	"		Housekeeper, (Naden)	48.00	20
80.00	"		Nurse	30.00	
87.00	"		Yard man	9.00	
00.80	"		Laundry	10.00	
October		2	Abrams store, dress	18.95	
00.00	"	3	Jersey Central Power & Light Co.....	2.20	
00.00	"	3	H. Leroy Schafer, fuel oil.....	3.48	
00.00	"	3	Manasq'n Bayhd Daries, milk.....	5.27	
10.00	"	5	New Jersey Bell Tel. Co.....	9.71	
07.00	"	15	Manasq'n Bayhd Daries.....	2.55	
87.00	"		" Milk	5.27	30
"	"	19	Louis F. Albright, Md.....	9.00	
00.00	"	19	Wm. D. Bowen, cemetery plot care....	4.00	
80.00	"	19	F. B. James groceries.....	13.25	
00.00	"	20	Thomas Manson, cemetery work.....	100.00	
40.00	"	24	New Jersey Bell Telephone.....	6.68	
00.00	"	26	Marie Weindell, lampshade.....	4.50	
80.00	"	27	Jersey Cent. Power & Light Co.....	17.63	
80.00	"		Laundry	10.00	
00.00	"		Handy man (Raymond)	6.00	40
	"		Nurse	30.00	

Exhibit C-2.

		3	F. B. James groceries.....	14.72
	November	3	Sears Roebuck, washer repair.....	1.80
		3	Manasq'n Bayh'd Daries.....	2.72
		4	Chas. O. Oakley, carpenter.....	2.50
		4	F. B. James, groceries.....	14.62
		5	N. Jersey Power & Light Co.....	11.26
10		5	Howard Height, car service.....	1.50
		6	Scotts, Oil Burner work.....	30.00
		7	J. Goldberg, clothing.....	37.50
		16	Manasq'n. Bay'd Daries.....	2.55
		17	F. B. James, Groceries.....	10.90
		17	Wm. P. Weir drugs.....	4.08
		19	Manasquan Groceries.....	16.75
		17	F. B. James groceries.....	10.90
		21	N. J. Bell Tel. Co.....	6.32
		27	Mrs. Stanley Curtis, sewing.....	6.00
20		30	Jersey Cent. Power & Light Co.....	9.75
		30	Manasqn Bayh'd Daries.....	2.55
			Milk " " ".....	2.72
			Housekeeper, Margaret Naden.....	48.00
			Groceries and meats, fish etc.....	70.00
			Laundry.....	10.00
			Tuberculosis preventorium.....	5.00
	December		Housekeeper, Mrs. Naden.....	48.00
		1	Leroy Schafer, fuel oil.....	11.31
		5	" " " ".....	8.70
30		2	F. B. James, groceries.....	12.74
		7	Reader's Digest Asso. 1 yrs. subscrip- tion ren.	3.00
		11	B. Altman & Co.....	20.85
		16	F. B. James, groceries.....	14.29
		29	Jersey Cent. Power & Light Co.....	10.34
		18	Scott's, Oil Burner care.....	5.00
		18	H. Leroy Schafer, fuel Oil.....	16.53
		22	N. J. Bell Telephone.....	4.46
40		30	Jack A. Groz, coal.....	20.00

Exhibit C-2.

	30	H. Leroy Schafer, oil.....	12.18	
	31	Fred H. Allen, Plumber.....	1.02	
		Red Cross seals	5.00	
		Nurse	60.00	
		Total for 1942		
		½ June & July.....\$	472.62	
		Aug. & Sept.....	450.14	10
		Oct. & November.....	378.56	
		Nov. continued & December.	445.49	
			<hr/>	
			\$1,746.81	
		1943.		
January	7	F. B. James, groceries.....	15.92	
"	8	Steinback-Kresge, drugs.....	5.38	
"	11	H. Leroy Schafer, oils.....	12.15	20
"	16	F. B. James, groceries.....	15.19	
"	20	Lees' Cut-rate-shop	17.29	
"	22	N. J. Bell Tele. Co.....	4.66	
"	27	Borough of Manasqn, tax.....	100.78	
"	29	Jersey Cent. Power & Light.....	11.06	
"	29	Boro. of Point Pleasant, tax.....	254.05	
"	29	Housekeeper	48.00	
"	29	Nurse	30.00	
"	29	Laundry	10.00	
"	31	Mansasquan Bayh'd Daries.....	10.54	30
"	30	Louis F. Albright, md.....	3.00	
February	2	Dr. Wm. C. Errickson, Dental work....	132.00	
"	2	Thomas Manson & Sons, cemetary plot	195.00	
"	3	F. B. James, groceries.....	17.56	
"	4	Chas. O. Oakley, carpenter.....	20.49	
"	8	H. Leroy Schafer, fuel oil.....	13.14	
"	16	F. B. James, groceries.....	13.41	
"	18	H. Leroy Schafer, fuel oil.....	11.52	
"	23	N. J. Bell Telephone Co.....	4.02	
				40

Exhibit C-2.

	25	Jersey Cent. Power & Light Co.....	10.21
		Laundry	10.00
		Nurse	60.00
		Housekeeper (Naden)	48.00
		Dairy	10.00
March	2	Point Pleasant Hardware.....	3.98
10	"	5 H. Leys Schafer.....	8.10
	"	5 Manasqn Bayh'd Daries.....	4.76
	"	8 Scotts oil burner.....	23.00
	"	15 Abrams Dress Shop.....	48.80
	"	16 F. B. James grocery.....	15.28
	"	24 N. J. Bell Tel. Co.....	5.84
	"	26 Jersey Cent. Power & Light Co.....	10.50
	"	29 H. Leroy Schafer	17.55
		Laundry	10.00
		Milk	10.00
20		Housekeeper	48.00

1943 (continued)

	April	2	Manasquan Bayhd Daries.....	5.44
	"	2	Red Cross	5.00
	"	3	Wm. P. Weir drugs.....	3.50
	"	3	F. B. James, groceries.....	16.05
	"	7	Fred H. Allen, plumber.....	49.48
	"	16	Point Pleasant Hardware Store.....	14.50
30	"		U. S. O.	5.00
	"	19	F. B. James, groceries.....	15.41
	"	21	Vannote Lumber Co.....	18.76
	"	23	N. Y. Herald-Tribune.....	6.00
	"	26	Jersey Cent. Power & Light Co.....	9.98
	"	30	Vannote Lumber Co.....	20.88
			Cement & wire.....	4.00
			To Extrs for W. T. P's 1/2 of automobile also tag \$18. and tax \$5.00.....	506.25
			Nurse	60.00
40	May	3	Health Center	5.00
	"	4	Manasquan Bayhead Daries.....	5.10

Exhibit C-2.

"	10	Victory van (carier)	4.25	
"	18	F. B. James, groceries.....	17.47	
"	21	Geo. Gregory & Son cemetery plot.....	20.40	
"	21	N. J. Bell Telephone Co.....	5.90	
"	28	Jersey Cent. Power & Light Co.....	9.98	
"	31	James P. Holsart, cemetery plot work..	16.00	
"		Housekeeper, Naden	48.00	10
"		Handy man	12.00	
"		Nurse	60.00	
"		Laundry	10.00	
June	2	F. B. James, groceries.....	13.92	
"	3	Manasquan Bayh'd Daries.....	5.10	
"	9	Vannote Lumber Co., cem't. comp., & lime	1.25	
"	16	F. B. James, groceries.....	22.47	
"	22	Gregory & Son, flowers for cemetery plot	5.00	20
"	24	N. J. Bell Telephone Co.....	4.53	
"	29	Howard Height, car service.....	6.25	
"	28	Jersey Cent. Power & Light.....	10.08	
"		Housekeeper, Naden	48.00	
"		Nurse	60.00	
"		Car tax	5.00	

1943 (continued)

July	3	Manasquan Bayh'd Daries.....	5.10	30
"	12	Jack A. Groz, coal.....	24.00	
"	15	Point Pleasant Hardware.....	4.65	
"	16	F. B. James, groceries.....	20.81	
"	24	N. Jersey Bell Tel. Co.....	4.75	
"	24	Alfred L. Debow, electrician.....	4.00	
"	28	N. J. Bell Tel. Co.....	12.30	
"	29	H. Leroy Schafer, fuel oil.....	18.00	
"		Laundry	10.00	
"		Nurse	60.00	

Exhibit C-2.

	August	14	Jack Groz, coal.....	10.50
	"	18	F. B. James.....	18.76
	"	18	Abrams, dress	37.85
	"	22	"	14.00
	"	23	Fed. Council of Churches of America..	10.00
	"	21	Point Pleasant Hospital	5.00
10	"	26	N. J. Bell Telephone.....	4.35
	"	27	Dr. Errickson, Dentist.....	6.00
	"	30	Jersey Cent. Power & Light.....	10.95
	"		Laundry	10.00
	"		Nurse	60.00
	September	8	Sunway Vitamin Co.	3.00
	"	2	Manasq'n Bayhead Daries.....	5.10
	"	14	Scotts' oil burner service.....	8.50
	"	21	F. B. James, groceries.....	16.97
	"	20	Jersey Bell Telephone Co.....	6.18
20	"	23	Alfred L. Debow	2.75
	"	30	Jersey Cent. Power & Light.....	11.25
	"		Housekeeper	48.00
	"		Nurse	60.00
	"		Handyman	12.00
	"		Drugs	15.00
	"		Dairy	5.44

1943 (continued)

30	October	6	F. B. James, groceries.....	21.61
	"	9	Manasq'n Bayh'd Daries.....	5.10
	"	13	Steinback-Kresge, material	10.00
	"	16	Nurse	7.00
	"	18	N. J. Bell Telephone Co.....	.17
	"	18	Scotts', heater service & repair.....	35.80
	"	22	F. B. James, groceries.....	14.71
	"	23	Nurse	28.00
	"		Handyman	7.50
	"		Laundry	10.00

40

Exhibit C-2.

November	4	Marie Bassett, nurse	8.00	
"	4	Annie Perryman	86.35	
"	4	Manasquan Bayh'd Daries	5.44	
"	4	F. B. James, groceries.....	21.57	
"	4	N. J. Bell Telephone.....	6.62	
"	6	Margaret Naden housekeeper.....	20.00	
"	9	Bertha Storey, nurse.....	32.00	10
"	9	A. L. DeBow, electric.....	6.75	
"	13	Wm. C. Errickson, D.D.S.....	10.00	
"	13	Maturka (Margave) nurse	32.00	
"	16	F. G. James, groceries.....	23.70	
"	13	Margaret Naden, housekeeper.....	20.00	
"	20	Margaret Maturka, nurse.....	48.00	
"	20	Margaret Naden, housekeeper.....	20.00	
"	27	" " "	20.00	
"	24	Margaret Maturka, nurse.....	32.00	
"	27	" " "	24.00	20
"	24	Rae Moore, nurse	68.00	
"	16	" " "	54.00	
"	30	" " "	64.00	
"		Laundry	10.00	

1943 (continued)

December	1	Reader's Digest	3.00	
"	1	Dodge Publishing Co.....	5.00	
"	3	Manasquan Bayhead Daries.....	5.10	
"	3	F. B. James, groceries.....	26.00	30
"	3	H. Leroy Schafer	18.00	
"	4	Wm. P. Weir, drugs.....	5.95	
"	4	Margaret Naden	23.80	
"	4	Annie Perryman	19.20	
"	4	Margaret Materka	36.00	
"	7	Rae Moore	63.00	
"	11	Margaret Naden	20.00	
"	11	Materka	36.00	
"	15	"	45.00	40

Exhibit C-2.

	“	18	F. B. James	32.16
	“	18	Margaret Naden	20.00
	“	18	Margaret Materka	36.00
	“	20	Annie Perryman	5.00
	“	23	N. J. Bell Telephone	10.91
	“	29	Margaret Materka	27.00
10	“		Margaret Naden	20.00
	“	29	Rae Moore	99.00
	“	23	Margaret Materka	63.00
	“	20	Rae Moore	72.00
	“	30	Jersey Cent Power & Light Co.....	15.00
			Laundry	10.00
			Total 1943	
			January - February	\$1147.37
			March - April	973.88
			May - June	395.60
20			July - August	351.02
			September - October	334.08
			November	612.43
			December	717.12
				<hr/>
				\$4531.50
			Amended to correct total for the year of	\$4466.60
			1944	
30	January	4	Margaret Naden, housekeeper.....\$	27.14
	“	4	F. B. James, groceries.....	28.84
	“	4	Margaret Maturka, nurse.....	63.00
	“	4	Rae Moore, nurse	54.00
	“	5	H. Leroy Schafer, fuel oil.....	49.00
	“	10	Manasquan Bayhead Daries.....	5.00
	“	10	C. A. Pons.....	2.00
	“	10	Wm. P. Weir, drugs.....	9.38
	“	10	Margaret Naden, housekeeper.....	20.00
40	“	10	Margaret Materka, nurse.....	63.00
	“	10	Rae Moore, nurse.....	63.00

Exhibit C-2.

	15	Margaret Naden, housekeeper.....	26.00	
	15	Fred H. Allen.....	46.81	
	18	Margaret Materka, nurse.....	63.00	
	18	Rae Moore.....	63.00	
	20	Louis F. Albright, Md.....	21.50	
	23	F. B. James, groceries.....	29.62	
	25	Margaret Naden, housekeeper.....	20.00	10
	25	Rae Moore, nurse.....	63.00	
	25	Maturka, nurse.....	63.00	
	29	Eva McElmoyl, dress.....	21.72	
	29	Margaret Naden.....	20.00	
	31	Jersey Cent. Power & Light.....	15.03	
	31	N. J. Bell Telephone Co.....	11.78	
		Laundry.....	8.00	
February	1	Rae Moore, nurse.....	63.00	
	3	Margaret Maturka, nurse.....	63.00	
	3	H. Leroy Schafer, fuel oil.....	40.50	20
	5	F. B. James, groceries.....	32.55	
	8	Rae Moore, nurse.....	63.00	
	8	Margaret Maturka, nurse.....	38.00	
	12	Margaret Naden, housekeeper.....	20.00	
	14	Florence Bogue, nurse.....	27.00	
	15	Rae Moore, nurse.....	63.00	
	16	Margaret Maturka, nurse.....	36.00	
	19	F. B. James, groceries.....	38.98	
	19	Margaret Naden, houskeeper.....	20.00	30
	21	N. J. Bell Telephone Co.....	12.47	
	23	Margaret Maturka, nurse.....	72.00	
	23	Rae Moore, nurse.....	54.00	
	26	Jersey Cent. Power & Light Co.....	15.93	
	26	Margaret Naden.....	20.00	
	26	Margaret Maturka, nurse.....	54.00	
	29	Rae Moore, nurse.....	63.00	
		Handyman.....	6.30	
		Laundry.....	8.00	
March	3	Mrs. Florence Bogue, nurse.....	20.00	40

Exhibit C-2.

	“	4	Wm. P. Weir, drugs.....	8.83
	“	4	H. Leroy Schafer, fuel oil.....	39.15
	“	4	Margaret Naden, housekeeper.....	20.00
	“	7	Margaret Maturka, nurse.....	45.00
	“	7	Rae Moore, nurse.....	75.00
	“	7	F. B. James, groceries.....	29.01
10	“	7	Fred Allen, plumber.....	20.93
	“	7	Red Cross	5.00
	“	11	Margaret Naden, housekeeper.....	20.00
	“	14	Rae Moore, nurse.....	63.00
	“	14	Margaret Materka, nurse.....	63.00
	“	15	F. B. James, groceries.....	32.89
	“	18	Margaret Naden, housekeeper.....	20.00
	“	21	Florence Bogue, nurse.....	54.00
	“	21	Margaret Maturka, nurse.....	63.00
20	“	25	Margaret Naden, housekeeper.....	20.00
	“	28	Florence Bogue, nurse.....	63.00
	“	28	Margaret Materka, nurse.....	63.00
			Laundry	8.00
	April	1	Margaret Naden, housekeeper.....	20.00
	“	1	F. B. James, groceries.....	35.64
	“	1	Jersey Cent. Power & Light Co.....	18.48
	“	4	Florence Bogue, nurse.....	63.00
	“	4	Rae Moore, nurse.....	72.00
	“	4	Wm. P. Weir, drugs.....	3.17
30	“	4	Manasquan Bayhead Daries.....	15.64
	“	4	H. Leroy Schafer, fuel oil.....	9.00
	“	6	N. J. Bell Telephone Co.....	13.04
	“	8	Louis F. Albright, Md.....	5.00
	“	10	Margaret Naden, housekeeper.....	20.00
	“	11	Rae Moore	63.00
	“	11	Florence Bogue, nurse.....	63.00
	“	15	Margaret Naden	20.00
	“	18	Florence Bogue	63.00
	“	18	Rae Moore	63.00
40	“	19	F. B. James, groceries.....	31.48

Exhibit C-2.

"	22	Margaret Naden	20.00	
"	22	N. Jersey Bell Telephone Co.....	8.06	
"	25	Rae Moore	63.00	
"	25	Florence Bogue	63.00	
"	29	Jersey Cent. Power & Light.....	15.48	
"	29	Alfred L. Debow.....	41.74	
"	29	Margaret Naden	20.00	10
"	4	Manasquan Bayh'd Daries.....	15.64	
"		Laundry	8.00	
May	2	Rae Moore, nurse.....	63.00	
"	2	Florence Bogue	63.00	
"	2	H. Leroy Schafer	22.50	
"	4	F. B. James.....	33.90	
"	4	Manasquan Bayhead Daries.....	5.10	
"	6	Margaret Naden	20.00	
"	11	Wm. P. Weir, drugs.....	8.45	20
"	11	George H. Gregory & Son, flowers for cem.	14.00	
"	9	Florence Bogue	63.00	
"	9	Rae Moore	63.00	
"	13	Margaret Naden	20.00	
"	15	Rae Moore	63.00	
"	15	Florence Bogue	63.00	
"	19	F. B. James, groceries.....	39.52	
"	20	Margaret Naden	20.00	
"	23	N. Jersey Bell Telephone Co.....	7.69	30
"	23	Rae Moore	54.00	
"	23	Florence Bogue	63.00	
"	27	Margaret Naden	20.00	
"	29	Jersey Cent. Power & Light Co.....	14.93	
"	31	Florence Bogue	63.00	
"	31	Lulu Davis	72.00	
"		Handyman	8.00	
"		Laundry	8.00	
June	3	Weirs Pharmacy	11.92	
"	6	Lulu Davis, nurse.....	45.00	40

Exhibit C-2.

	“	6	Florence Bogue, nurse	63.00
	“	6	F. B. James, groceries	34.34
	“	9	Margaret Naden, housekeeper	20.00
	“	10	“ “ “	20.00
	“	13	Florence Bogue, nurse	63.00
	“	13	Rae Moore, nurse	72.00
10	“	17	F. B. James	35.53
	“	19	Elsie Rayne Miller, dress	55.00
	“	23	N. J. Bell Telephone Co.	5.93
	“	20	Rae Moore	72.00
	“	20	Florence Bogue	63.00
	“	21	Margaret Naden	20.00
	“	24	“ “	20.00
	“	27	Rae Moore	63.00
	“	27	Florence Bogue	63.00
	“	30	Raymond Loveland	6.25
20	“		Laundry	4.00
	“	30	Weir's Pharmacy by ch'k of July 2nd. .	3.45
	“	3	Collector of Internal Rev. Collector. . .	503.36
July		1	Margaret Naden	20.00
	“	1	Jersey Cent. Power & Light Co.	12.90
	“	2	Weir's Pharmacy, drugs	3.45
	“	4	F. B. James	40.83
	“	4	Rae Moore	63.00
	“	4	Florence Bogue	63.00
	“	4	Margaret Lewis, Laundry	3.00
30	“	5	Scotts, oil burner service	6.00
	“	6	Harry Carroll, yardman	4.00
	“	8	Margaret Naden	20.00
	“	8	Manasquan Bayh'd Daries	10.70
	“	10	Harry Carroll	3.75
	“	11	Florence Bogue	63.00
	“	11	Rae Moore	63.00
	“	11	N. Jersey Bell Telephone	6.99
	“	15	Margaret Naden	20.00
	“	18	F. B. James	29.84
40	“	18	Florence Bogue	63.00

Exhibit C-2.

"	18	Rae Moore	63.00	
"	19	Harry Carroll, yard man.....	4.00	
"	20	Jersey Cent. Power & Light Co.....	9.46	
"	22	Margaret Naden	20.00	
"	25	Florence Bogue	63.00	
"	25	Rae Moore	63.00	
"	29	Margaret Naden	20.00	10
"	31	Manasquan Bayh'd Daries.....	4.08	
"		Laundry	8.50	
"	31	Weir's Pharmacy	
August	1	Rae Moore	63.00	
"	1	Florence Bogue	63.00	
"	2	Manasquan Bayh'd Daries.....	4.08	
"	3	Weirs Pharmacy	12.21	
"	3	H. Leschafer, fuel oil.....	10.80	
"	3	Harper Sibley	5.00	
"	4	Harvey Carroll	4.00	20
"	5	Margaret Naden	20.00	
"	5	Hankins & Reid, plumbers.....	15.55	
"	5	F. B. James, groceries.....	31.85	
"	8	Rae Moore	63.00	
"	8	Florence Bogue	63.00	
"	10	N. Jersey Bell Telephone Co.....	6.38	
"	12	Margaret Naden	20.00	
"	15	Howard Height, car service.....	3.00	
"	15	Florence Bogue	63.00	
"	15	Rae Moore	63.00	30
"	16	Harry Carroll	4.50	
"	16	F. B. James.....	28.24	

1944 (continued)

August	19	Margaret Naden	20.00	
"	19	Jersey Cent. Power & Light Co.....	13.60	
"	22	Florence Bogue	63.00	
"	22	Rae Moore	63.00	
"	26	Margaret Naden	20.00	
"	28	Raymond Loveland	3.25	40

Exhibit C-2.

	“	22	Harry Carroll	3.50
	“	29	Florence Bogue	63.00
	“	29	Rae Moore	63.00
	“	31	Weir's Pharmacy, p'd by ch'k Sept. 4th	
				855.96
10	September	1	Raymond Loveland	6.50
	“	2	A. C. Thompson, meat.....	23.45
	“	2	Margaret Naden	20.00
	“	3	Florence Bogue, nurse.....	63.00
	“	5	Rae Moore	63.00
	“	5	Raymond Loveland	6.66
	“	5	Florence Bogue	63.00
	“	6	John Falkenburg	13.50
	“	9	Margaret Naden	20.00
20	“	12	Florence Bogue	63.00
	“	12	F. B. James, groceries.....	36.24
	“	12	Rae Moore	63.00
	“	12	N. Jersey Bell Telephone Co.....	6.21
	“	12	H. Leroy Schafer, fuel oil.....	22.50
	“	14	Manasquan Bayhead Daries	6.08
	“	16	Margaret Naden	20.00
	“	19	Rae Moore	63.00
	“	19	Florence Bogue	63.00
	“	19	Jersey Cent. Power & Light Co.....	12.82
30	“	22	F. B. James, groceries.....	16.64
	“	23	Margaret Naden	20.00
	“	26	Florence Bogue	63.00
	“	26	Rae Moore	63.00
	“	26	Raymond Loveland	18.50
	“	30	Margaret Naden	20.00
	“		Laundry	10.00
	“	4	Internal Revenue Coll. of Camden.....	505.36
40				

Exhibit C-2.

1944 (continued)

October	2	Health Center	3.00	
"	3	Rae Moore	63.00	
"	3	H. Leroy Schafer.....	13.50	
"	7	Margaret Naden	20.00	
"	9	F. B. James, groceries.....	29.28	
"	10	Florence Bogue	63.00	10
"	10	Rae Moore	63.00	
"	10	Weirs Pharmacy	3.02	
"	11	N. J. Telephone Co.....	9.08	
"	12	R. H. Lechard	270.00	
"	14	Dr. William C. Errickson	12.00	
"	"	Margaret	20.00	
"	16	Fred H. Allen.....	516.89	
"	17	Florence Bogue	63.00	
"	17	Rae Moore	63.00	
"	17	Alfred L. Debow, electric repair.....	4.00	20
"	21	Margaret Naden	20.00	
"	24	Mrs. Rae Moore	63.00	
"	24	A. E. Thompson	29.80	
"	24	Florence Bogue	63.00	
"	25	F. B. James	26.52	
"	25	Jersey Cent. Power & Light Co.....	14.83	
"	28	Margaret Naden	20.00	
"	31	Florence Bogue	63.00	
"	31	Manasquan Bayhead Daries.....	11.59	
"	31	Rae Moore	63.00	30
November	1	H. Leroy Schafer, fuel oil.....	18.00	
"	4	F. B. James	19.53	
"	4	Margaret Naden	20.00	
"	6	Florence Bogue	63.00	
"	6	Rae Moore	63.00	
"	6	Dr. Louis F. Albright.....	5.00	
"	6	Point Pleasant Hardware Co.....	1.93	
"	6	Weirs pharmacy	9.05	
"	9	Raymond Loveland, painting.....	49.69	40

Exhibit C-2.

	“	10	N. J. Bell Telephone Co.....	5.25
	“	11	F. B. James, groceries.....	22.37
	“	11	Margaret Naden	20.00
	“	11	Howard Height, Inc.	9.10
	“	14	Florence Bogue	63.00
	“	14	Rae Moore	63.00
10	“	18	Margaret Naden	20.00
	“	18	Geo. H. Gregory & Sons, flowers for cem. plot	11.00
	“	18	Jersey Cent. Power & Light Co.....	14.63
	“	20	Dodge Publishing Co.	3.10
	“	21	Rae Moore	63.00
	“	21	Florence Bogue	63.00
	“	24	N. J. Bell Telephone Co.....	5.37
	November	25	Margaret Naden	20.00
	“	28	Rae Moore	63.00
20	“	28	Florence Bogue	63.00
			Laundry	8.00
	“	6	Hankins & Reid.....	4.80
	December	1	Thompson's meat market.....	24.96
	“	2	Margaret Naden	20.00
	“	2	H. Leroy Schafer.....	22.50
	“	3	Jersey Cent. Power & Light Co.....	20.50
	“	4	Fred H. Allen.....	5.00
	“	4	B. Altman & Co.....	22.95
	“	4	A. E. Thompson, meat.....	16.95
30	“	5	Florence Bogue	63.00
	“	5	Rae Moore	63.00
	“	5	Raymond Loveland	7.40
	“	5	F. B. James, groceries.....	28.05
	“	9	Margaret Naden	20.00
	“	12	Rae Moore	63.00
	“	12	Florence Bogue	63.00
	“	15	F. B. James.....	26.36
	“	16	Manasquan Bayhead Daries.....	5.70
	“	16	Margaret Naden	20.00
40	“	18	Jersey Cent. Electric & Gas.....	2.32

Exhibit C-2.

“	19	Rae Moore	63.00	
“	19	Florence Bogue	63.00	
“	19	Margaret Naden, meat.....	13.14	
“	23	Margaret Naden	20.00	
“	23	N. J. Telephone Co.....	6.37	
“	26	Florence Bogue	63.00	
“	26	“ “	9.36	10
“	26	Rae Moore	63.00	
“	30	Margaret Naden	20.00	
“		Laundry	10.00	
“	31	Manasquan Bayh'd Daries.....	5.70	
“	16	Coll. of Internal Revenue 4th quarter..	501.37	
		1945		
January	2	H. Leroy Schafer by chk of Jan. 4th...	47.25	
“	2	Ray Moore, nurse.....	63.00	20
“	2	Florence Bogue, nurse.....	63.00	
“	5	Howard Height, auto service.....	2.50	
“	6	Margaret Naden, housekeeper.....	20.00	
“	8	Boro of Manasquan, tax for water....	25.30	
“	8	Boro “ “ tax for home 44		
		Broad	75.84	
“	9	Rae Moore	63.00	
“	9	Florence Bogue	63.00	
“	13	Margaret Naden	20.00	
“	13	Dora Curtis clothing repair.....	18.00	30
“	16	Florence Bogue	63.00	
“	16	Rae Moore	63.00	
“	18	Raymond Loveland	5.34	
“	18	Jersey Cent. P. & Light Co.....	16.93	
“	19	F. B. James.....	28.81	
“	20	Margaret Naden	20.00	
“	20	Jersey Cent. Power & Light Co.....	16.93	
“	20	Wm. P. Weir Pharmacy.....	11.71	
“	21	Geo. Gregory & Sons, flowers for cem.		
		plot	9.00	40

Exhibit C-2.

		23	N. J. Telephone Co.....	5.81
		23	Rae Moore	63.00
		23	Florence Bogue	63.00
		24	Eva McElmoyl dress.....	12.75
		27	Margaret Naden	20.00
		29	Jersey Cent. Power & Light Co.....	21.13
10		30	Rae Moore	63.00
		30	Florence Bogue	63.00
		17	Bush agency, renewal of insurance dwelling at 44 Broad.....	37.75
			Laundry	8.00
			H. E. Thompson, Jan.-Feb.....	25.06
	February	2	H. Leroy Schafer, fuel oil.....	29.70
	"	3	J. B. James	31.61
	"	3	Margaret Naden	20.00
	"	6	Rae Moore	63.00
20	"	6	Florence Bogue	63.00
	"	9	Dora Curtis, sewing.....	5.00
	"	10	Margaret Naden	20.00
	"	13	Rae Moore	63.00
	"	13	Florence Bogue	63.00
	"	13	" " for turkey.....	11.06
	"	17	Margaret Naden	20.00
	"	19	F. B. James, groceries.....	43.73
	"	20	Rae Moore	63.00
	"	20	Florence Bogue	63.00
30	"	23	N. J. Bell Telephone Co.....	7.91
	"	23	Margaret Naden	20.00
	"	27	Rae Moore	63.00
	"	27	Florence Bogue	63.00
	"		Laundry	8.00
	March	2	Jersey Cent. Power & Light Co.....	18.78
	"	2	Manasq'n Bayh'd Daries	5.32
	"	3	Margaret Naden	20.00
	"	3	H. Leroy Schafer fuel oil.....	47.25
	"	3	F. B. James, can goods etc.....	22.06
40	"	6	Rae Moore, nurse.....	63.00

Exhibit C-2.

06"	6	Florence Bogue, nurse.....	63.00	
08"	6	Dr. Wm. C. Errickson, dental work....	12.00	
28"	9	A. E. Thompson, for meat.....	29.08	
20"	10	Margaret Naden	20.00	
00"	12	Weir's Pharmacy, drugs.....	6.34	
00"	16	Arthur Birdsall, for assisting in tax rep't.	25.00	10
07"	16	J. B. James, groceries etc.....	29.92	
07"	17	Margaret Naden	20.00	
00"	20	Florence Bogue	63.00	
"	20	Rae Moore	63.00	
"	20	Fed. Council of Churches of Christ in America	10.00	
"	22	N. J. Bell Telephone.....	5.43	
"	24	Margaret Naden	20.00	
"	27	Florence Bogue	63.00	
"	27	Rae Moore	63.00	20
"	29	Jersey Cent. Power & Light Co.....	17.43	
"	31	Weir's Pharmacy	5.94	
"	31	H. Leroy Schafer, fuel oil.....	13.50	
"	31	Margaret Naden	20.00	
"	31	Laundry	8.00	
"	15	Coll. of Internal Revenue.....	300.00	
April	3	F. B. James, paid by Miller ch'k. 27.00 and mine	29.21	
"	3	Manasquan Bayhead Daries.....	5.70	
"	3	Florence Bogue	63.00	30
"	3	Rae Moore	63.00	
"	7	Margaret Naden	20.00	
"	10	LeParisien Cleaners	1.10	
"	10	" " "	1.10	
"	10	" " "	1.38	
"	10	" " "	1.38	
"	10	Rae Moore	63.00	
"	10	Florence Bogue	63.00	
"	14	Margaret Naden	20.00	
"	17	Rae Moore	63.00	40

Exhibit C-3.

	“	17	Florence Bogue	63.00
	“	18	A. E. Thompson, meat.....	27.20
	“	18	F. B. James, groceries.....	26.62
	“	24	N. J. Bell Telephone.....	4.95
	“	24	Rae Moore	63.00
	“	24	Florence Bogue	63.00
10	“	20	Dora Curtis, dress alterations.....	3.50
	“	30	Manasquan Bayhead Daries	5.70
	“	30	Weir's Pharmacy	7.76
May		1	H. Leroy Schafer fuel oil.....	21.60

Exhibit C-3.

IN CHANCERY OF NEW JERSEY.

20

148-130.

Between

FLORENCE L. PEARCE,
Complainant,

and

GILBERT L. MARCELLUS, *et als.*,
Defendants.

On Bill, &c.
Certificate.

30

I, LOUIS F. ALBRIGHT, hereby certify that I attended and prescribed for Mrs. Florence L. Pearce as her physician during the following periods.

On January 6, 1937, I attended her. She was suffering from joint pains and chronic arthritis. I attended her every three or four days and then once a week until April 1937.

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From April, 1937, I attended her every two weeks until August 1937.

Exhibit C-3.

I informed Captain Irving Pearce on many of these visits and I advised them both that she was suffering from chronic arthritis. In August, 1937, she had a bad cold and I saw her every two or three days for a month. In September, 1937, I attended her at least once a week until January 1938. During this period she was convalescing from a cold. In January, 1938, I saw her every two weeks, also during 1938 and 1939 and in the summer of 1939, I saw her once about every three weeks. 10

On November 1, 1939, she was suffering from inflammation of the eye and I saw her every day until December, 1939. From December, 1939, until April, 1940, I visited her about once a week. In August, 1940, I saw her every two weeks up until November of 1940. 20

On November 20, 1940, she was suffering from pneumonia and I visited her nearly every day until January 1941. In January 1941 I attended her once a week until the end of March and every two weeks thereafter until July 12, 1941.

I did not see her from July 12, 1941 until June 18, 1942. I attended her every day for the month of June and then every one or two weeks until September, 1942.

November 21, 1942 was the last visit I had with her in the year 1942. 30

On October 1, 1943, I saw her every two or three weeks until December 11, 1943, which was my last visit with her.

During all this period she was suffering from arthritis and I attended her and prescribed medicines for her various illnesses.

.....
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Exhibit C-4.

LOUIS F. ALBRIGHT
Spring Lake, N. J.

May 16th 1945

To WHOM IT MAY CONCERN :

- 10 Mrs. Florence L. Pearce was last seen by me on
May 15th 1945. She has for many years been suf-
fering with a chronic arthritis and was so still
afflicted when I saw her on the above date. She
has improved considerably but was still consider-
ably disabled by her joint disease. At the age of
75 years and with such a chronic disease she un-
doubtedly requires the attention and assistance of
some capable person at all times. At least, even
20 at night, there should always be someone in the
house with her who could be called and be
promptly available for her aid. During the day
she would require a bit more personal attention
for such duties as bathing, dressing, etc. The per-
formance of the above duties call for the employ-
ment of some type of attendant. They can very
competently be carried out by trained nurses but
could equally well be performed by less techni-
cally trained persons. Massage is about the only
attention which she requires which calls for any
30 special training on the part of her attendant.
Otherwise such attention as she requires could be
well administered by any person equipped with a
reasonable amount of good common sense. Ade-
quate medical care is a term which allows much
latitude in its interpretation and it may vary from
the minimum requirements of the patient's condi-
tion to the point where "adequate medical care"
verges on luxury. In the above few statements I
have tried to outline the needs of the patient and
40 I will finish by saying that these needs may be
satisfied in a number of ways some of which would
be more satisfactory than others.

Louis F. Albright, M. D.

Exhibit DE-1.**COMPARATIVE STATEMENT OF ASSETS
ESTATE OF W. IRVING PEARCE**AS OF JUNE 16, 1942 (DATE OF DEATH) AND
MAY 1, 1945

RUDOLF, CINNAMON & CALAFATO
ACCOUNTANTS AND TAX CONSULTANTS
550 Cookman Avenue
Asbury Park, N. J.

Telephone 6463

P. RUDOLF
M. CINNAMON, C. P. A.
G. T. CALAFATO

New York Office
42 BROADWAY
Whitehall 3-5553

May 2, 1945

Mr. Gilbert Marcellus and Miss Julia Osborne
Executors of the Estate of W. Irving Pearce
Manasquan, New Jersey

Dear Sir and Madam:

Attached herewith is a Comparative Statement of Assets of the Estate of W. Irving Pearce as of June 16, 1942 (date of death) and May 1, 1945. This statement also shows the estimated annual income based on the assets as of June 16, 1942 and the estimated annual income based on the assets as of May 1, 1945.

You will notice that the total assets as of June 16, 1942 were \$116,093.16 as against total assets as of May 1, 1945 of \$96,494.00. This decrease of approximately \$20,000.00 is accounted for by disbursements chargeable to corpus such as Federal Estate Tax, New Jersey Inheritance Tax, Executors' Commissions, Legal Expenses, Funeral and Administration Expenses, amounting to about \$30,000.00, as against an increase in corpus of

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Exhibit DE-1.

approximately \$10,000.00 resulting from the sales of Real Estate at a profit, or a net decrease as mentioned above of \$20,000.00.

10 Despite this decrease in the net Estate, you will notice that the anticipated annual income based on the assets of \$96,494.00 as of May 1, 1945 is \$4,509.00 as against anticipated annual income based on the assets of \$116,093.16 of June 16, 1942 which was only \$4,022.50. This is due to the fact that the real estate taken over by the Executors as of the date of death, most of which was operating at a loss, has been sold and the proceeds invested in 5% first mortgages. In addition thereto, the money on deposit with the Abraham Lincoln Federal Savings & Loan Association and the Benjamin Franklin Savings & Loan Association
20 amounting to \$7,000.00 was also invested at a higher rate. For your further information, I submit below the amount of interest and dividend income received during the past four years:

1941 (W. Irving Pearce)	\$3,837.24
1942 (W. Irving Pearce and Estate of W. Irving Pearce)	3,969.94
1943 (Estate of W. Irving Pearce)	4,366.18
1944 (Estate of W. Irving Pearce)	3,935.56

30 I believe the remaining figures in the attached schedule are self-explanatory.

Respectfully submitted,

M. CINNAMON.

ESTATE OF W. IRVING PEARCE

COMPARATIVE STATEMENT OF ASSETS

AS OF JUNE 16, 1942 (DATE OF DEATH) AND MAY 1, 1945

	<u>AS OF JUNE 16, 1942</u>			<u>AS OF MAY 1, 1945</u>			<u>REMARKS</u>
	<u>ASSET</u>	<u>RATE OF RETURN</u>	<u>ESTIMATED ANNUAL INCOME</u>	<u>ASSET</u>	<u>RATE OF RETURN</u>	<u>ESTIMATED ANNUAL INCOME</u>	
<u>STOCKS AND BONDS</u>							
10 shares capital stock of The First National Bank of Bradley Beach	\$ 250 00	6%	\$ 15 00	\$ 250 00	8%	\$ 20 00	
60 shares, paid up or income shares Manasquan B&L Association	12 000 00	3 1/2%	420 00	12 000 00	3%	360 00	
\$4,000 U. S. of America Defense Bonds Series G	3 952 00	2 1/2%	100 00				
Full paid share certificate of Mutual Home and Savings Association of Newport News (10 shares)	1 000 00	5%	50 00	1 000 00	4%	40 00	
\$1,000 General Mortgage Income Bond, 4 1/2%, of 870 Seventh Ave. Corp. and 20 shares common stock, 870 Seventh Ave. Corp.	200 00	various	45 00	200 00	various	87 50	
\$3,000 U. S. Government 2% Treasury Bonds				3 000 00	2%	60 00	
\$1,000 U. S. Government 2 1/2% Treasury Bond				1 000 00	2 1/2%	25 00	
\$2,000 U. S. Government 2 1/2% Series G Bonds				2 000 00	2 1/2%	50 00	
Total Stocks and Bonds	<u>\$17 402 00</u>		<u>\$ 630 00</u>	<u>\$19 450 00</u>		<u>\$ 642 50</u>	
<u>FIRST MORTGAGES</u>							
Emma Dutcher - Ocean and Benedict Avenues, Pt. Pleasant, N.J.	3 000 00	5%	150 00				
Raymond Johnson - 410 Third Ave., Bradley Beach, N. J.	3 000 00	5%	150 00	2 700 00	5%	135 00	
Lyle K. Elmer - Broad St., Manasquan, N. J.	3 400 00	5%	170 00	2 900 00	5%	145 00	
Philomene Classens - 404 Third Ave., Bradley Beach, N. J.	2 500 00	6%	150 00				
Leo M. Cooper - 114 McCabe Ave., Bradley Beach, N. J.	3 000 00	5%	150 00	2 800 00	5%	140 00	
Bert H. Stowell - 43 Ocean Ave., Manasquan, N. J.	3 200 00	5%	160 00	2 900 00	5%	145 00	
Rush B. Van Sickel - Lake Avenue, Manasquan							
\$1,300. mortgage subject to tax lien of \$650.	no value	5%			5%	65 00	Has been making payments of interest
Frederick B. Williamson - 828 East Ave., Bay Head, N.J.	7 500 00	5%	375 00				
Anna Gibson - 404 Fifth Ave., Bradley Beach, N. J.	2 700 00	5%	135 00				
Point Pleasant-Bay Head Ice & Coal Co., Hawthorne Ave., Pt. Pleasant Beach, N. J.	4 000 00	6%	240 00	3 000 00	6%	180 00	
Jacob Musler - 207 LaReine Ave., Bradley Beach, N. J.	2 500 00	in default		2 550 00	5%	127 50	A deed was taken to this property 6/9/43 and later sold for \$5,000
June Wright - 504 Fourth Avenue, Bradley Beach, N. J.	2 000 00	in default		1 800 00	5%	90 00	A deed was taken to this property 9/10/43 and later sold for \$5,000
\$6,000 mortgage valued at							
Max Solomon - Arnold Ave., Point Pleasant Beach, N. J.	6 500 00	5%	325 00	2 350 00	5%	117 50	
Theophila H. Doane - 501 Lake Ave., Bay Head, N. J.	3 500 00	6%	210 00				
Philip M. Somers - 213 Fourth Ave., Bradley Beach, N. J.	3 000 00	5%	150 00	3 000 00	5%	150 00	
Robert E. Rankin - Barnegat Lane, Mantoloking	5 000 00	5%	250 00				
Anna H. Cunningham - 503-5th Ave., Bradley Beach, N. J.	3 000 00	5%	150 00	1 500 00	5%	75 00	
Sadie Friedland - 501 Fifth Ave., Bradley Beach, N. J.	2 500 00	5%	125 00				
Charles P. Young - 409 Evergreen Ave., Bradley Beach, N. J.				3 500 00	5%	175 00	
Erwin Gemalt - 306 Seventh Ave., Bradley Beach, N. J.				2 500 00	5%	125 00	
Joseph Maltese - 219 Ocean Park Avenue, Bradley Beach, N. J.				300 00	5%	15 00	
Forward	<u>\$60 300 00</u>		<u>\$ 2 890 00</u>	<u>\$31 800 00</u>		<u>\$ 1 685 00</u>	

ESTATE OF W. IRVING PEARCE

COMPARATIVE STATEMENT OF ASSETS

AS OF JUNE 16, 1942 (DATE OF DEATH) AND MAY 1, 1945

	AS OF JUNE 16, 1942			AS OF MAY 1, 1945			REMARKS
	ASSET	RATE OF RETURN	ESTIMATED ANNUAL INCOME	ASSET	RATE OF RETURN	ESTIMATED ANNUAL INCOME	
Forward	\$60 300 00		\$ 2 890 00	\$31 800 00		\$ 1 685 00	
Alexander Lorincz - Pershing Ave., Manasquan, N. J.				2 800 00	5%	140 00	
Main St. Furniture Exchange - 206 Brinley Ave., Bradley Beach, N. J.				1 850 00	5%	92 50	
Cora Rhoads - Osborn Avenue, Point Pleasant, N. J.				2 900 00	6%	174 00	
Rebecca and Abe Lipetz - 309 Fourth Ave., Bradley Beach, N.J.				4 000 00	5%	200 00	
Joseph C. and Mary Murphy - 305 Atlantic Avenue Point Pleasant, N. J.				3 000 00	5%	150 00	
Edwin C. Hewitt - 646 East Ave., Bay Head, N. J.				5 000 00	5%	250 00	
Anne and Sol Mandel - 404 Second Ave., Bradley Beach, N. J.				7 000 00	5%	350 00	
Viola R. Rogers - River Road, Point Pleasant, N. J.				12 000 00	5%	600 00	
Abe and Naomi Kevoe - 707 Central Ave., Bradley Beach, N.J.				1 500 00	5%	75 00	
Total First Mortgages	<u>60 300 00</u>		<u>2 890 00</u>	<u>71 850 00</u>		<u>3 716 50</u>	
REAL ESTATE							
337 River Road - Point Pleasant Beach, N. J.	4 000 00	none	none				Sold 7/6/43 for \$4,700.00
829 Main Avenue - Bay Head, N. J.	4 500 00	none	none				Sold 5/11/44 for \$6,100.00
830 East Avenue - Bay Head, N. J.	5 000 00	none	none				Sold 5/13/44 for \$9,000.00
409 Evergreen Avenue - Bradley Beach, N. J.	4 000 00	none	none				Sold 7/20/43 for \$5,750.00
206 Brinley Avenue - Bradley Beach, N. J.	3 500 00	none	none				Sold 6/14/43 for \$4,000.00
707 Central Avenue - Bradley Beach, Contract of Sale	2 550 00	5%	127 50				
Total Real Estate	<u>23 550 00</u>		<u>127 50</u>	<u>none</u>		<u>none</u>	
OTHER ASSETS							
Note Receivable - Mandells Perfume Shop	3 000 00	5%	150 00	3 000 00	5%	150 00	
Deposit in Abraham Lincoln Federal Savings & Loan Ass'n	2 000 00	3-3/4%	75 00				
Deposit in Benjamin Franklin Savings & Loan Ass'n.	5 000 00	3%	150 00				
Cash in Banks	4 841 16	none		2 194 00	none		
Total Other Assets	<u>14 841 16</u>		<u>375 00</u>	<u>5 194 00</u>		<u>150 00</u>	
TOTAL ASSETS AND ESTIMATED ANNUAL INCOME	<u>\$116 093 16</u>		<u>\$ 4 022 50</u>	<u>\$96 494 00</u>		<u>\$ 4 509 00</u>	

REPUBLIC OF PHILIPPINES
OFFICE OF THE COMPTROLLER GENERAL OF ACCOUNTS
GENERAL INVESTIGATION OF REVENUE

DATE	PARTICULARS	AMOUNT	
		IN P.S.	IN C.P.
1950-01-01
1950-01-31
1950-02-28
1950-03-31
1950-04-30
1950-05-31
1950-06-30
1950-07-31
1950-08-31
1950-09-30
1950-10-31
1950-11-30
1950-12-31

WYDEINAGY
BONDE
HAWWABAYTE

1950-01-01 to 1950-01-31
1950-02-01 to 1950-02-28
1950-03-01 to 1950-03-31
1950-04-01 to 1950-04-30
1950-05-01 to 1950-05-31
1950-06-01 to 1950-06-30
1950-07-01 to 1950-07-31
1950-08-01 to 1950-08-31
1950-09-01 to 1950-09-30
1950-10-01 to 1950-10-31
1950-11-01 to 1950-11-30
1950-12-01 to 1950-12-31

DATE	AMOUNT	DATE	AMOUNT
1950-01-01	...	1950-01-01	...
1950-01-31	...	1950-01-31	...
1950-02-28	...	1950-02-28	...
1950-03-31	...	1950-03-31	...
1950-04-30	...	1950-04-30	...
1950-05-31	...	1950-05-31	...
1950-06-30	...	1950-06-30	...
1950-07-31	...	1950-07-31	...
1950-08-31	...	1950-08-31	...
1950-09-30	...	1950-09-30	...
1950-10-31	...	1950-10-31	...
1950-11-30	...	1950-11-30	...
1950-12-31	...	1950-12-31	...

...

...

New Jersey Court of Errors and Appeals

Between

Flannery L. Pearce,
Complainant Appellee,

and

Grant L. Stinson, Jr., James L. Stinson, and
Oscar, individually and as Executors,
Executors and Trustees of the
Last Will and Testament of W.
Irving Pearce, deceased, and
Avery Casper,
Defendants Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

Facts

The bill was brought for the substitution of the
Will of W. Irving Pearce, deceased, of Newark,
New Jersey, who was the husband of the
complainant. Captain Pearce is alleged to have
executed his will on December 29, 1939, and died
on June 16, 1942. This couple had no children.

The contest arises over the construction to be
placed on the second paragraph of Captain
Pearce's will, which reads as follows:

I give, devise and bequeath all
of the real residue and remainder of my
estate, of whatsoever kind and nature, and
wheresoever situate, that I possess or own
at the date of my death, to Grant L. Stinson, Jr. and
James L. Stinson, my Executors and Trustees, for
matter named, to hold upon the trust that
they shall hold and convey for some and for

New Jersey Court of Errors and Appeals

Between

FLORENCE L. PEARCE,
Complainant-Appellee,

and

GILBERT L. MARCELLUS, JULIA L.
OSBORNE, individually and as
Executors and Trustees of the
Last Will and Testament of W.
Irving Pearce, deceased, and
AGNES COLEMAN,
Defendants-Appellants.

On Appeal from
Chancery.

BRIEF FOR DEFENDANTS-APPELLANTS.

Facts.

The bill was brought for the construction of the Will of W. Irving Pearce, deceased, of Manasquan, New Jersey, who was the husband of complainant. Captain Pearce (a retired seaman) executed his will on December 17, 1940, and died on June 16, 1942. The couple had no children.

The contest arises over the construction to be placed on the second paragraph of Captain Pearce's will, which reads as follows:

SECOND: I give, devise and bequeath all of the rest residue and remainder of my estate, of whatsoever kind and nature and wheresoever situate, real, personal and mixed, to GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees hereinafter named, in trust upon the trust that they shall hold and invest the same and pay

the net income therefrom, semiannually, to my beloved wife, FLORENCE L. PEARCE, if she shall survive me, for her sole use and benefit so long as she may live, and if the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE.

I DIRECT that the provisions made for my said wife in this paragraph of my last Will and Testament shall be in lieu of her dower or right of dower in my estate.

The testator nominated as his executors and trustees the defendants GILBERT L. MARCELLUS and JULIA L. OSBORNE, his nephew and niece. These two people, and defendant AGNES COLEMAN take vested remainders in the estate mentioned in paragraph 2 of the will in the amounts of 25% outright plus 15% by virtue of a contingency which has become vested, making a total of 40% each to Mr. Marcellus and Miss Osborne, and 20% outright to Agnes Coleman.

From June 16, 1942, the date of death of Captain Pearce, down to January 1, 1945, the estate earned a net income of \$9527.22 which has been paid by the trustees to Mrs. Pearce, pursuant to the terms of the trust. In addition to this, there was due to her the earned income for the first 4 months of 1945 in the sum of \$769.55, making a total paid income of \$10,296.77 down to April 30, 1945. During this same period the testimony shows Mrs. Pearce spent the sum of \$21,300.41, as she maintains, for her support and maintenance (S. C., p. 56; ll. 10-12).

Mrs. Pearce was able to spend that amount of money because she has for many years had an estate of her own which is more than adequate to provide for her comfortable support and maintenance and for the expensive medical aid which she has provided for herself (S. C., p. 27; l. 26).

Mrs. Pearce, who is 75 years old, has been suffering from arthritis and has been treated for it by Dr. Louis F. Albright from 1937 to date. Dr. Albright had treated her, after the death of the testator from late June, 1942 to September of that year, and another visit in November, 1942. He did not see her again until October 1, 1943, the beginning of a series of visits at 2 to 3 week intervals continuing until December 11, 1943. This was the doctor's last visit prior to one he made in May, 1945, in connection with these court proceedings. He was kept informed of her condition after December 11, 1943, by telephone conversation. She had not been treated by any other physicians (S. C., pp. 112-113).

In November, 1943, Mrs. Pearce hired two registered nurses at an expense of \$9 a day for each, and continued the hiring of these nurses down to the date of the hearing, at a total expense to April 30, 1945, of \$9,758.91.

Dr. Albright's statement in the record (Exhibit C-4) is that she needed the assistance of some capable person at all times, and that apart from massage, the attention she requires could be administered by a person of good common sense, and that it would not be necessary to get a registered nurse in order to have a qualified person (S. C., p. 114).

The trustees had attempted many times, from the date of Captain Pearce's death, to determine

the needs of Mrs. Pearce, with respect to her comfortable support and maintenance, but she refused to see them, and would not answer their letters, or telephone calls, nor were they permitted to enter her home (S. C., p. 77, ll. 28-40; p. 78, ll. 1-10). The only information they got from her was a written demand on June 15, 1944, that they recompense her from corpus in the amount of \$16,000, and thereafter pay her, in addition to income, the sum of \$8,000 annually for her support and maintenance (S. C., p. 33, l. 20). They were kept informed of her physical condition through conversations with Dr. Albright.

The trustees have paid over to Mrs. Pearce all of the income as aforesaid, but in their discretion have not paid to her any of the principal.

The complainant sought a money decree of more than \$12,000 to be paid from principal, covering the difference between the total amount she claimed to have spent for her support and maintenance, and the amount of income paid to her, but the Vice-Chancellor advised in his decree the sum of \$4,093.89 for past expenditures, and further decreed that the trustees should pay to her in the future, in addition to the income, the sum of \$35 a week for a practical nurse. He ordered also that the trustees pay over in addition to the income so much of the principal as should be necessary for the complete comfort and support of the complainant, without acknowledging discretion in the trustees (S. C., p. 47).

The questions raised by these facts are:

1. Should the Court of Chancery have dismissed the bill of complaint?
2. Did the Court of Chancery err (a) in invading the discretion of the trustees in the circum-

stances by fixing a sum to be paid out of principal for the beneficiary's past support and maintenance; by fixing the amount to be paid in the future for a practical nurse, which sum is ordered to be paid from principal regardless of the sufficiency of the income; by ordering payments from principal as well as income for her comfortable support and maintenance without acknowledging discretion in the trustees; and (b) in its definition of the word "complete comfort and support"?

ARGUMENT.

POINT I.

The Court of Chancery should have dismissed the bill of complaint.

It is thoroughly established in New Jersey that the courts will not interfere with the exercise of the discretionary powers granted to a trustee in the absence of proof of action in bad faith, an abuse of discretion, or a betrayal of trust. The bill should have been dismissed for lack of evidence of such shortcoming in the trustees.

In *Read v. Patterson*, 44 N. J. Eq. 211, (E. and A. 1888) the testator provided for the payment of so much of the income of his estate as should in the judgment of his executor be necessary for the support and maintenance of his grandchildren. The court in refusing to interfere with the administration of the trust said at page 219:

“ * * * Where the power is coupled with a trust or duty, the court will enforce a proper and timely exercise of the power; but if it be given upon a trust to be exercised in the discretion or upon the judgment of the trustee,

the court will not interfere with the trustee's discretion in executing the trust, unless he has exercised his discretion *mala fide*."

In *Latorraca v. Latorraca*, 132 N. J. Eq. 40, (Ch. 1942); affirmed in 133 N. J. Eq. 298 (E. and A. 1943) on the opinion of the lower court, Vice-Chancellor Bigelow stated the principle thus at page 48:

" * * * So long as the trustee uses his discretionary powers in a sound and honest manner the court will not interfere. *Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 499; *O'Gorman v. Crowley*, 80 N. J. Eq. 101, 83 Atl. 379; *Id.* 81 N. J. Eq. 520; 86 Atl. 442."

The case of *Commonwealth-Merchants Trust Co. v. Seglie*, 127 N. J. Eq. 160 (Ch. 1940) shows the application of this principle to a trust situation exactly like that in the case at bar. There the testator directed his executors and trustees to pay to his wife for life the income from the trust estate. It was yielding about \$5,000 a year. The testator further provided (p. 161):

"In the event that the net income from my said property and estate should at any time be insufficient to properly provide for and maintain my said beloved wife in the manner in which she has been accustomed to live, I authorize and direct my Executors and Trustees hereinafter named to use any part of the principal of my said property and estate that may be necessary for such purpose, the comfort and welfare of said beloved wife to be their sole consideration in such a situation."

Vice-Chancellor Egan held at page 164:

"In the event that the estate's income be insufficient to maintain decedent's wife in the comfort to which she had been accustomed, then the executors and trustees are given discretionary power to use any part of the prin-

cipal of the estate as may be necessary for the purpose. Such discretionary power the courts refrain from interfering with. They hold that such interference would, in effect, be substituting their judgments for those of the trustees. Unless there is an abuse of discretion, or a betrayal of trust, or a display of bad faith by the trustees, the courts will not interfere with discretionary powers vested in trustees. *Tansey v. New Brunswick Trust Co.*, 124 N. J. Eq. 558; 3 Atl. Rep. (2d) 575 *New Jersey Title Guarantee and Trust Co. v. Dailey*, 123 N. J. Eq. 205; 196 Atl. Rep. 703; *Fidelity Union Trust Co. v. Dignan*, 105 N. J. Eq. 750; 146 Atl. Rep. 466; *Coffin v. Watson*, 78 N. J. Eq. 307; 79 Atl. Rep. 275.

In the instant case the authority given to the trustees to use and pay over to Clotilde Seglie any part of the *corpus* of decedent's estate is final and exclusive. Their discretion in the circumstances will not be interfered with."

The theory of non-interference as expressed by the Courts of New Jersey is very lucidly stated by the appellate court in the State of Wisconsin in a case which, on its facts, is strikingly similar to the case at bar.

In re Lyon's Estate, 183 Wis. 276, 197 N. W. 710 (1924) involved the construction of a will containing a trust in which the trustees were to pay over to the testator's wife, without any reservation, the income from the trust estate, and (page 710);

"* * *if in their discretion a greater sum than the net income should be deemed necessary or desirable for her comfort and enjoyment, then to pay such further sum or sums from the capital of my estate as they may deem necessary or desirable for the purpose."

The testator's wife had an independent income of her own, and the court, in deciding that the trustees had the right to take this into consideration in determining whether the income from the estate was sufficient to support her, said (at page 711);

“It seems too plain for argument that whether the widow should receive anything beyond the income from the estate was a matter left wholly and entirely to the discretion of the trustees and to the discretion of no one else. As the testator laid down no rules by which this discretion was to be exercised, it is not apparent how a court may presume to do so. He made the widow and his brother the trustees. He evidently reposed the utmost confidence in his brother to deal fairly with his widow—very likely feeling that his brother would be as considerate of her comfort and welfare as he himself would be. He made no reservation, attached no limitations, and prescribed no rule or condition to govern the trustees in the exercise of her discretion. In view of the unqualified discretion thus vested, a court should not assume to lay down a rule for its exercise.”

The trustees in the case at bar have not been guilty of bad faith, abuse of discretion, or betrayal of trust. Indeed, the testimony shows they have made every effort to determine the needs of Mrs. Pearce, for her comfort and maintenance, but she has continually blocked them (S. C., p. 77, ll. 28-40; p. 78, ll. 1-10).

The Vice Chancellor in his oral findings relied principally for authority on three cases; *Rezimini v. Brooks*, 236 N. Y. 184, 140 N. E. 237 (1923) (S. C., p. 44, l. 30); *Camden Safe Deposit Company v. Read*, 124 N. J. Eq. 599 (Ch. 1939); and *New Jersey Title Guarantee and Trust Company v. Dailey*, 123 N. J. Eq. 205 (Ch. 1938) (S. C., p. 44, ll. 10-16).

The *Rezzimini* case is a decision of another state which is contrary to the principles of equity which have been laid down in this state by the Court of Errors and Appeals in *Read v. Patterson*, (*supra*), in 1888, and followed since then as shown by the cases cited previously in this brief.

The case of *Camden Safe Deposit and Trust Company v. Read*, (*supra*), relied on by Vice-Chancellor Berry involved a will which ordered payment of the income of the trust to the testator's son, and also provided (page 600):

"I further direct and empower the said Trust Company, if at any time it shall become necessary owing to bad health or accident to my said son, to use so much of the said principal as they may deem necessary for his medical care and comfort during said sickness and convalescence."

The Court said at page 605:

"The trustee seeks to impose upon the Court the fixing of such amount. There seems to be no occasion for the Court to do so under the construction which is now placed upon the testator's will. The duty rests upon the trustee to ascertain and determine what amount is necessary to be expended for Mr. Read's medical care, comfort and convalescence, including a reasonable and sensible amount for expenses to the south during our cold months, taking into consideration Mr. Read's station in life, and the increase or decrease of the severity of his ailment. This son was the object of testator's special testamentary care and provision, and the conclusions here reached seem to be clearly indicated by the circumstances of this case."

The case is distinguishable from the case at bar. In the case quoted from the trustees have no discretion as to where the money shall come from

to pay medical expenses—the will “directs” them to apply the principal. They are empowered to use discretion, however, in determining the amount to be so applied. The case at bar is basically different because the will places in the trustees discretion not only as to how much of the principal they shall use but whether they shall use it at all.

The Vice-Chancellor relied, in addition, on *New Jersey Title Guarantee and Trust Company v. Dailey* (*supra*). This case is not at all in point for the reason that the discretion was placed in the beneficiary rather than in the trustees. The trustees were to invest the rest, residue and remainder of the estate and to distribute it as follows (see page 206):

“* * * to pay over the income arising therefrom, and so much of the principal thereof as she may desire unto my wife during the term of her natural life.”

The residue, “if any,” after the termination of the life estate was given over to named relatives free of the trust.

The case is the converse of the one at bar. Vice-Chancellor Egan concluded that the trustees had to give the wife all of the income and as much of the principal as she might choose, and that the trustees could not exercise any judgment as to whether her demands were reasonable or unreasonable. They could not question the application of any payments made to her whether from income or principal. Contrasting the will there with that involved here, it will be seen: (1) In the *Dailey* case there are no strings attached to the use to which the principal may be put; in the case at bar it must be used for support and maintenance. (2) In the case cited the principal was to be paid

out as she, the beneficiary, desired, without even the requirement of exercise of judgment; but in Captain Pearce's will the payment of any part of the principal was left to the discretion of the named trustees. (3) The testator in the former case anticipated that the whole of the principal might be used up since he provided for a gift over of the residue "if any"; in this case the language used to describe the gift over is exactly the same as that which describes the trust *corpus*. In addition, Captain Pearce provided the provisions for his wife were to be in lieu of her right of dower.

POINT II.

The Court of Chancery erred in fixing the amounts of money which the trustee should pay for past and future support and maintenance of the beneficiary, and in defining "complete comfort and support".

The most that might be assumed against the trustees is that they acted under mistake as to the scope of their duties and powers. The record is barren of evidence tending to show bad faith, abuse of discretion, or betrayal of trust. Under these circumstances the Court of Chancery refrains from substituting its judgment for that of the trustees. Instead, it will give directions to the trustees explaining their powers and duties, but leaving the discretion as to amount of payments where the testator placed it, in the hands of the trustees whom he selected and on whose exercise of judgment he relied. See *Commonwealth-Merchants Trust Co. v. Seglie* (*supra*) and the New Jersey cases cited therein; *Scott on Trusts*, sec. 187; *Bogert, Trusts and Trustees*, sec. 560.

The order of the decree which requires the trustees to pay over \$4,093.89 from principal for her past expenditures (S. C., p. 48, l. 39) and the order to provide from principal and income so much as shall be necessary for the complete comfort and support of the complainant (S. C., p. 48, l. 28) are founded on an erroneous interpretation of the terms "complete comfort and support" as used in the Will. The Vice-Chancellor stated in his opinion that he assumed from the language of the Will that the testator meant his wife to continue to live on the same plane or scale as that which he established during his lifetime (S. C., p. 41, ll. 15-22). The Will does not contain either that language or an inference of such intent. To take an example:—it may be that Captain Pearce hired registered nurses to take care of his wife during her spells of arthritis, but Dr. Albright has given his undisputed opinion that Mrs. Pearce can be made quite comfortable by the work of a practical nurse, and that the service of a much more expensive registered nurse is not necessary (S. C., p. 114). What is required for the complete comfort and support of the beneficiary is to be determined by the trustees in the exercise of their discretion. The language of the disputed paragraph of Captain Pearce's Will provides so expressly (S. C., p. 86, ll. 20-40; p. 87, ll. 3-4). In the circumstances it is not for the Court to fix the meaning of the terms or the amount of money necessary to provide the requirements for comfort and support.

The order of the decree with respect to future support and maintenance of the complainant (S. C., p. 48, ll. 29-38) is a distortion of the testator's direction as expressed in his Will in that it eliminates the discretion which he placed in the trustees as to whether the income would be sufficient for the purpose.

With respect to the order to pay in the future the sums of \$35.00 a week from principal for a nurse for Mrs. Pearce (S. C., p. 49, ll. 10-23), the Court took away from the trustees the discretionary powers (1) to decide whether the wages for a nurse can be met from income alone, and (2) to get a competent nurse at the lowest possible cost, there being no evidence offered that a capable nurse could not be obtained for less than the sum fixed. This is the type of substitution of judgment which the Court specifically ruled outside the province of Chancery in the case of *Commonwealth-Merchants Trust Co. v. Seglie*, (*supra*).

It is respectfully urged that Orders 1, 2, 3 and 7 contained in the decree entered in this suit on June 29, 1945, be reversed.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel
with Appellants, Gilbert L.
Marcellus and Julia L. Osborne.

SAMUEL D. HOFFMAN,
Solicitor for and of Counsel
with Appellant, Agnes Coleman.

With respect to the order to pay in the future the sum of \$5000 a week from principal for a nurse for Mrs. Foster (S. C. 11-10-22), the Court took away from the trustee the discretion any nurse (1) to decide whether the wages for a nurse should not from income alone and (2) to get a competent nurse at the lowest possible cost, there being no evidence offered that a capable nurse could not be obtained for less than the sum fixed. This is the type of substitution of judgment which the Court especially ruled outside the province of Chancery in the case of *Chambers v. Health-Maintenance Fund for the Sick (Infants)* 100 Cal. 2d 707, 32 P.2d 707, 138 A.2d 811.

It is respectfully urged that Order T, 2, 3 and 4 contained in the decree entered in this suit on June 22, 1942, be reversed, so that the order of the court may be reversed and the parties be restored to the status quo ante.

Respectfully submitted,
 Arthur T. Vandenbrink
 Attorney for and of Counsel
 with Applicant Gilbert James
 Marcellus and Julia L. Osborne

Samuel D. Horvath
 Attorney for and of Counsel
 with Applicant Agnes Coleman

Witness my hand and seal of my office this 15th day of August, 1942.

Witness my hand and seal of my office this 15th day of August, 1942.

New Jersey Court of Errors and Appeals

OCTOBER TERM — 1945

Between

FLORENCE L. PEARCE,
Complainant-Appellee,

and

GILBERT L. MARCELLUS, JULIA L.
OSBORNE, Individually and as
Executors and Trustees of the
Last Will and Testament of
W. Irving Pearce, Deceased,
and AGNES COLEMAN,
Defendants-Appellants.

On Appeal from
the Court of
Chancery

BRIEF FOR COMPLAINANT-APPELLEE

The Complainant, Mrs. Pearce, is the widow of W. Irving Pearce, late of Manasquan, New Jersey. Captain Pearce was a retired mariner. Captain Pearce died June 16, 1942 and left an estate of One Hundred Sixteen Thousand (\$116,000.00) Dollars, which after settlement amounted to Ninety-Six Thousand (\$96,000.00) Dollars.

Mrs. Pearce, during her lifetime had received from her family a substantial estate. Mrs. Pearce, the Complainant, is seventy-five years of age. She is afflicted with arthritis, has received medical attention and shortly after the Captain's death was compelled to employ nurses to care for her. She continued to reside in the same residence which she and her husband had occupied during his lifetime. She continued to employ a

housekeeper and a handyman. She did not change her standard of living.

In his Will Captain Pearce provided

“SECOND: I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatsoever kind and nature and wheresoever situate, real, personal and mixed, to GILBERT L. MARCELLUS and JULIA L. OSBORNE, my Executors and Trustees hereinafter named, in trust upon the trust that they shall hold and invest the same and pay the net income therefrom, semi-annually to my beloved wife, FLORENCE L. PEARCE, if she shall survive me, for her sole use and benefit so long as she may live, and if the net income from my said estate is not sufficient in the opinion of my Executors and Trustees to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE.”

By the Third Paragraph of his Will, Captain Pearce gave one-fourth of his estate to Gilbert Marcellus, one of the executors and trustees; one-fourth to Julia L. Osborne, the other executor and trustee; one-fifth to his niece, Agnes Coleman. The remaining portion of his estate, by reason of the decease of his brother, was divided equally between the two executors and trustees. Thus, the two executors and trustees, at the death of Mrs. Pearce, will each receive forty per cent of the residue and are vitally interested in the conservation of the principal of the trust.

Mrs. Pearce received from the executors an income of approximately Four Thousand (\$4,000.00) Dollars a year. Her actual living expenses exceed Five Thousand (\$5,000.00) Dollars a year. The expenses of medical and nursing care have exceeded Eight Thousand (\$8,000.00) Dollars. The trustees, who are the remaindermen, have refused to invade the corpus and pay these expenses. After a notice requesting them to make such payments was served upon them, with which notice they refused to comply, the Complainant filed this Bill requesting the aid of the Court of Equity to compel the executors to comply with the directions of the Will and charged that the executors were influenced and their discretion biased by their own self-interest. The executors in turn claim that they have full discretion and can compel Mrs. Pearce to use her own estate for her "complete comfort and support". The final hearing was held before Vice Chancellor Berry who found that the Will clearly directed the executors and trustees to use the income and principal for the complete comfort and support of the widow and that the trustees, influenced by their interest in the principal, had disregarded this direction. When the Decree was settled, various amounts which Mrs. Pearce had claimed were disallowed and a sum certain found and incorporated in the Decree which the executors were directed to pay from the corpus.

The two executors and trustees, each vested with an interest of forty per cent respectively in the corpus, and the remaining legatee, who is vested with a twenty per cent interest, prosecute this appeal from the Decree.

Grounds of Appeal

The Appellants, while the Petition of Appeal charges numerous errors, actually argue that the Decree was erroneous because:

1. The Court had no power to interfere with the discretion of the executors.
2. The Court erred in determining a fixed sum to be paid for the past support of the Complainant and erred in the definition of the words "complete comfort and support".

Review of Evidence

The Will of Captain Pearce is set forth at S. C. p. 86. By stipulation it was agreed that Mrs. Pearce had received from the estate income as follows:

1943	\$4463.81
1944	1639.75
.....	1887.41
1945	1536.25

(S. C. p. 52)

Mrs. Pearce, the widow, testified that she was seventy-five years of age. Her husband, Captain Pearce, had followed the sea. She herself had her own separate funds which had been left her by her father, who died in 1899 (S. C. p. 53). She now resides in the same house at Manasquan in which she and her husband lived. Her husband paid the expenses of running the house, the wages of the housekeeper, the wages of a handyman, the medical and dental bills.

"He paid for everything" (S. C. p. 54).

The Complainant has been afflicted with arthritis. Two nurses have been in constant attendance upon her (S. C. p. 55). She has kept her checks and expenses and tabulated these. The checks and tabulations were offered in evidence and marked "Exhibit C-2". The expenditures for the period since her husband's death amounted to Twenty-One Thousand Three Hundred Dollars Forty-One Cents (\$21,300.41) (S. C. p. 56). Mrs. Pearce has been under the professional care of Doctor Albright (S. C. p. 56). To pay for the necessary expenses, Mrs. Pearce has been compelled to use her own funds (S. C. p. 57). On cross examination Mrs. Pearce stated that she had had for the past year and a half a day and a night nurse who gave her massages, direct her diet and brought her meals to her (S. C. p. 63). Her hands are crippled and she is unable to go up and down stairs without assistance. She cannot take a bath without assistance.

"I do all that I can so that I won't be entirely helpless, and I do all that I can do, but I can't do any more than I do" (S. C. p. 64).

Captain Pearce's estate amounted to One Hundred and Sixteen Thousand (\$116,000.00) at the time of his death and, after settlement, to Ninety-Six Thousand (\$96,000.00) Dollars (S. C. p. 65). See Exhibit DE-1, S. C. p. 115.

Mrs. Naden testified that she had served as housekeeper for Mrs. Pearce for five years. She expends in cash for various supplies an average of Six (\$6.00) Dollars a week (S. C. p. 66). Mrs. Pearce has had a day and night nurse for the past year and a half who administer to her and are in attendance upon her (S. C. p. 67).

Mrs. Moore, a trained nurse, has been in attendance upon Mrs. Pearce since November, 1943. She alternates weekly in day and night with Mrs. Bogue, the other nurse. In November, 1943, when Mrs. Moore began her services, Mrs. Pearce was unable to sit up for more than two hours. Her appetite was poor and she was all crippled up. By the Spring of 1944 Mrs. Pearce had improved under the treatment so she was able to get downstairs. At the start of her services Mrs. Pearce was not even able to wash her face (S. C. p. 68). In the treatment of arthritis it is necessary to keep the patient moving the limbs as much as possible and this has been one of the functions of the nurses. At night Mrs. Pearce receives a complete bath, massage and has to be adjusted in bed several times a night (S. C. p. 69). Mrs. Moore has served under the directions of Doctor Albright. Mrs. Moore and her co-worker have been in constant touch with Doctor Albright. Practical nurses had been of no assistance and Mrs. Moore and Mrs. Bogue were called because these practical nurses were getting nowhere (S. C. p. 70).

The statements of Doctor Albright were offered in evidence to save his personal appearance in Court. These statements are Exhibits C-3, C-4, S. C. p. 112 *et seq.*, 114 *et seq.* Doctor Albright attended Mrs. Pearce first in January of 1937 when she was suffering from chronic arthritis. He visited her from time to time during all of which time she was suffering from chronic arthritis (S. C. p. 113). His latest statement certified that he last visited her on May 15th, 1945 when she was still afflicted with chronic arthritis:

“She has improved considerably but was still considerably disabled by her joint dis-

ease. At the age of 75 years and with such a chronic disease she undoubtedly requires the attention and assistance of some capable person at all times" (S. C. p. 114).

Gilbert Marcellus, the only defendant who took the stand, was interrogated at length by the Court. He testified that he lived four blocks away from Mrs. Pearce, that he attempted to communicate with her by telephone but that she had refused to talk over the phone. Vice Chancellor Berry replied that

"I can readily understand why she might refuse to talk to you on the phone after hearing her on the witness stand this morning; she has a defect in speech which would probably prompt her to refuse to talk to anybody on the telephone" (S. C. p. 77).

Mr. Marcellus had not discussed Mrs. Pearce's condition with Doctor Albright but knew that the doctor had been treating her for arthritis.

"The Court: Well, is there any change in her method of living since he died from what it was before he died, with the exception of these nurses?

"The Witness: There is no particular change that I know of, sir, except the addition of the trained nurses. Of course when she was sick he would have nurses there.

"The Court: He had nurses for her when she was ill?

"The Witness: Yes.

"The Court: Trained nurses?

"The Witness: I know two practical nurses that were there and one trained nurse" (S. C. p. 79).

Mr. Marcellus told the Court that the income from the estate was insufficient to maintain Mrs. Pearce on the same scale Captain Pearce provided and further insufficient to pay for the nurses (S. C. p. 81).

The Opinion of Vice Chancellor Berry

The Vice Chancellor delivered his opinion orally at the close of the hearing (S. C. p. 39). The Court found that from the language it was the intention of Captain Pearce to provide for his wife out of his own estate the same comforts that he had provided for in his lifetime and that

“she was to continue her existence or mode of living on the same plane, on the same scale as that which he established himself during his lifetime.”

He found that the executor knew that she was living on the same plane and that the income was insufficient for assuming the expenses of her life:

“Therefore, we may say that the Executors are of the opinion that the income of this estate is insufficient to properly support and maintain the wife in complete comfort. That is the only inference that can be drawn from that testimony” (S. C. p. 41).

After a discussion of the testimony concerning the living expenses, the Vice Chancellor emphasized the word “direct” in the clause which authorized and directed the executors to use so much of the principal as necessary for the complete comfort and support of Mrs. Pearce. He further commented upon the word “complete”

which had been used in two different places in the Will defining the "complete comfort and support" of the widow (S. C. p. 43). He then found that the fact that the executors had refused to use the corpus and had not denied their refusal

"is strongly evidential of an abuse of the discretion which is vested in them by the will" (S. C. p. 43).

He further found that if a practical nurse could do the work of the trained nurses that the executors must provide for one (S. C. p. 46).

The Decree

The Decree was entered June 29th, 1945. The hearing was held on May 17, 1945. As a result of conferences between counsel, certain items included by Mrs. Pearce were eliminated, including payments for income taxes, capital improvements and expenditures upon the summer home occupied by Mrs. Pearce. As a result of these eliminations and a further elimination by the Court, the gross amount of expenditures was reduced to the sum of Fourteen Thousand Three Hundred Ninety Dollars and Sixty-Six Cents (\$14,390.66) (S. C. p. 48) and the executors were ordered to pay to the Complainant from the principal of the estate the difference between this amount and the income received, namely a sum slightly in excess of Four Thousand (\$4,000.00) Dollars. The executors were further directed to pay the sum of Thirty-Five (\$35.00) Dollars a week towards nursing expenses with leave to the Complainant to employ graduate nurses and bear the excess wages.

The Complainant was ordered upon notice of the executors to submit herself to a physical examination by a physician selected by the executors and was also ordered to allow the executors to visit her home to determine the manner, standard and plane of living (S. C. p. 49).

ARGUMENT

I

The intent of the will is clear and unambiguous.

The Will of Captain Pearce contains a clear and explicit direction to the executors and trustees. The executors and trustees received the estate upon the express trust to pay the income to Mrs. Pearce and if the net income was not sufficient in the opinion of the executors and trustees

“to properly support and maintain my said wife in complete comfort, I hereby authorize and direct my said Executors and Trustees to use so much of the principal of my said estate for that purpose as they may deem necessary for the complete comfort and support of my said wife, FLORENCE L. PEARCE.”

At the time of the hearing Mrs. Pearce was seventy-five years of age. The Will had been drawn four and one-half years before so that at the time of the Will Mrs. Pearce was under seventy years of age. She at that time was suffering from arthritis. When she had been ill the Captain had supplied the attendance of a trained nurse for her care and comfort. He had borne

all the expenses of the home. She continued to reside in the same home. She employed the same housekeeper and the yardman. The trustees admit that she lives in the same way she did before the death of her husband. The account filed by her is a picture and story of her manner of life. Under no stretch of the imagination can any luxuries or extravagances be found in this account.

Mrs. Pearce and her husband lived a thrifty and careful existence together. Upon his death the widow pursued the same manner of life. The Will of the Captain in certain and explicit terms directs his trustees to use the principal in addition to the income to maintain his widow. There is no reference made in the Will to her own independent estate. The Captain in his Will uses the word "complete". His first expression is "to properly support and maintain my said wife in complete comfort". The Captain further used the words "authorize and direct" in his instructions to his executors.

He reiterated the manner in which he desired his wife to live in "complete comfort". Captain Pearce twice used the words "complete comfort". He used the word "properly". He used the word "direct". Within a single paragraph Captain Pearce with definiteness and certainty ordered his trustees to use the corpus if the income was insufficient to provide for the complete comfort and support of his wife.

The well settled law of this State is trenchantly and tersely stated by Vice Chancellor Egan in *N. J. Title Guarantee and Trust Company v. Dailey*, 123 N. J. E. 205:

"The court's main concern is not so much what the testator meant to say as it is to determine what he meant by what he did say.

German Pioneer Verein v. Meyer, 70 N. J. Eq. 192. It cannot speculate as to the testator's intention; it must ascertain that intention from the four corners of the will. Its problem arises from that instrument when the language therein expressed purports to convey the testator's intention."

In the four corners of this Will, indeed within one paragraph of this Will, are found the intentions of the testator. In clear and unmistakable language the Captain directed that his wife be maintained in complete comfort and if the income were not sufficient that then the principal was to be used. The learned Vice Chancellor in the construction of these words limited the words "complete comfort" to the same standard or plane of living that the widow had enjoyed during the lifetime of her husband. It may well be argued that such a limitation unnecessarily confined the words "complete comfort". Complainant, however, has accepted this definition. There can be no criticism of a definition of such words when it is limited to maintaining the same standard of living as the testator himself afforded his wife.

II

The Court properly decreed payment of the sum by which the monies actually spent for support and maintenance exceeded the income received.

The findings of fact are all contained in the Decree (S. C. pp. 47 and 48). The total income received by Mrs. Pearce from the estate between June 16, 1942 and April 30, 1945 was stipulated. The total disbursements made by Mrs. Pearce, according to Exhibit C-1, between the same dates, amounted to Twenty-One Thousand Three Hundred Dollars and Forty-One Cents (\$21,300.41). This sum was reduced by conferences between counsel and by discussion at the time of the settling of the Decree to the sum of Fourteen Thousand Three Hundred Ninety Dollars and Sixty-Six Cents (\$14,390.66), a sum admittedly in excess of the sum received.

As will appear by the Decree, Mrs. Pearce is limited to the sum of Thirty-Five (\$35.00) Dollars a week for nursing care though the money expended is far greater than this sum. Vice Chancellor Berry heard the evidence of Mrs. Pearce, Mrs. Naden, one of the nurses, and considered the certificates of Doctor Albright. The Vice Chancellor also conducted the examination of Mr. Marcellus, one of the trustees. He elicited from the trustee the admission that the income from the estate was not sufficient to pay the widow's ordinary living expenses and when the cost of medical care was added was entirely inadequate. Where payments from a trust are clearly indicated, the Court of Chancery has re-

peatedly directed the trustees to perform their duties.

This Court, in the case of *Read v. Patterson*, 47 N. J. Eq. 595, unanimously affirmed an opinion of Vice Chancellor Van Fleet. It is significant that a previous decision in this case is cited as an authority by the appellants for a reversal of the Decree. The executor of Read's estate had been directed to pay out of the income of the estate such sum as in his judgment should be necessary for the support and maintenance of the children of the testator's daughter during their minority. The children claimed that the sum was grossly insufficient. This Court adopted the opinion of Vice Chancellor Van Fleet:

"In the exercise of such a power as that which has been conferred on the executor in this case, the court rarely interferes. It never interferes except it is clearly shown that the executor refuses to exercise the power at all, or that he exercises it in such manner as to constitute an abuse of it. The court of errors and appeals, in this very case, has said, that where the testator has expressly directed that so much of the income of a fund as should, in the judgment of his trustee, be necessary for that purpose, should be applied to the support and maintenance of an infant, the court will not take upon itself to regulate the maintenance, but will leave it to the judgment of the trustee, and will not interfere if the trustee exercises a discretion within the limit of a sound and honest execution of the trust. *Read v. Patterson*, 17 Stew. Eq. 211, 222.

"My consideration of the proofs in this case has led me to a very decided convic-

tion, that the amount allowed by the defendant, out of the income of the testator's estate, for the support of the infant complainants, is so grossly insufficient as to show of itself that it was not the result of a fair exercise of judgment, but rather of a determination to give them as little as possible, and to withhold as much as he could.

"The allowance that the testator intended should be made was such as would be sufficient to give the complainants food, raiment and shelter suitable to their rank in life. Their rank in life was that of the children of a respectable, well-to-do farmer."

Vice Chancellor Van Fleet then proceeded to specify in detail the monies that should be paid by the executor for the support of the children.

In *Smith v. Field*, 98 N. J. Eq. 532, the Will directed the executor to pay the income to the testator's son and also gave the right to use such portion of the principal as the son should need for his living. The power of the Court to determine whether this income was sufficient was expressly stated:

"Should he need any of the principal for his living only, by proper application to the executors, he would undoubtedly receive it, or, if they refused his request, an application to the court would bring about a proper adjustment."

The evidence in the present case is clear and uncontradicted that Mrs. Pearce has expended a sum far in excess of the income and that her expenditures in the future will exceed the income. The trustees have refused to pay this sum. They

say in the first instance that Mrs. Pearce is entitled to no funds in excess of the income if her own funds are sufficient for her living. This refusal on their part gave the Court of Chancery jurisdiction. The trustees then said that in the determination of the meaning of complete comfort and support the widow was not entitled to medical care and to the same provisions that her husband had given her in his lifetime. Both these questions were resolved against the trustees by the learned Trial Court. It was clearly the duty of the Trial Court when the trustees refused to perform the duties laid upon them by the Will, to determine what the trustees should do.

Mrs. Pearce on direct and cross examination testified as to her mode of living and her needs. The same housekeeper who cared for the home during the lifetime of her husband described the maintenance of the home. The trained nurse detailed the care and attention required by Mrs. Pearce. Mrs. Pearce with scrupulous care and honesty kept an account of all her expenditures. The amount was not in doubt. Likewise, the amount of the income received was certain. After the elimination of certain items the sum was fixed and definite. The Vice Chancellor had full power and authority to determine the amount of the deficiency. He further had the power and authority to define the further duties of the trustees, who deny that they were required to support the complainant in complete comfort. The Decree incorporates common sense directions to the trustees and was within the full power of the Court.

III

The trustees under the terms of the will were obligated to use the corpus to the extent that the income was sufficient to maintain the widow in complete comfort and the Court had jurisdiction to direct the trustees to perform their duties because of the pecuniary interest of the trustees in the fund.

A. The trustees were obligated to maintain Mrs. Pearce in complete comfort and use the corpus to the extent that the income was insufficient for that purpose without regard to the personal means of Mrs. Pearce. The wealth of Mrs. Pearce under the terms of the Will is immaterial. Captain Pearce not only authorized his trustees but used the word "direct" when he made the provision for his wife's comfort. He provided that if the net income was not sufficient, then the trustees were directed to use so much of the principal as would be necessary. Similar Wills have been construed.

In *Re: Clark's Will*, 19 N. E. 2d 1001, 280 N. Y. 155, the Court of Appeals of New York unanimously passed upon a similar provision. The Will provided:

"In the event that the income provided for my said wife under paragraph "Fourth" above shall, in the judgment of my trustee, be insufficient for her every comfort and support, I authorize my said trustee to pay to her, in addition to income, such portion of the principal of the said trust as it shall from time to time deem necessary.'"

The trustee had advanced the sum of Nineteen Hundred (\$1,900.00) Dollars out of the trust. Exceptions were filed to this account and the Surrogate approved of the account of the trustee. The Appellate Division reversed this. The Court of Errors and Appeals in turn reversed the Appellate Division's decision and affirmed the decree of the Surrogate. The Court said:

“Her every care, comfort and support in the condition in life in which she was accustomed to live was obviously the testator's primary concern and gifts to others were clearly secondary. . . . In conformity to that purpose and intent, the trustee is required to furnish every comfort and support for the widow which it may deem in a sound discretion necessary out of income and, if required, out of the corpus, even to the extent of exhausting the entire corpus of the trust, without taking into consideration or account the personal income of the beneficiary from any other source. *Holden v. Strong*, 116 N. Y. 471, 22 N. E. 960; *Rezzemini v. Brooks*, 236 N. Y. 184, 140 N. E. 237. What is necessary for that purpose is limited only by the amount of the income and the corpus of the trust. Whatever income the beneficiary may have from sources other than the trust is of no concern to the trustee in forming its judgment as to the amount necessary for her every comfort and support. The testator did not contemplate that his widow should be required to use her own personal income or to incur individual obligations for her comfort and support as long as there was anything in the trust that might, in the sound discretion of the trus-

tee, be used for that purpose. In forming its judgment, the trustee must take into consideration the conditions under which she has been accustomed to live, her health and her every comfort and support, with a view of carrying out her husband's solicitude for her welfare and happiness after he had passed away. Exercise of ordinary care and a sound discretion in making its determination is all that is required of the trustee."

In the case of *Rezzemini v. Brooks*, 236 N. Y. 184, 140 N. E. 237, the Will provided:

" 'If the income from my estate shall be insufficient for the proper support of my said son, then in that event, I authorize and empower my said trustee to expend so much of the principal thereof as may be necessary for that purpose.' "

The son, John Durant, was possessed of certain income of his own. The Appellate Division had previously ruled that the son was compelled to expend his own income before resort was had to the estate for his support and maintenance. The Court of Appeals unanimously reversed the Appellate Division by an opinion in which the late Justice Cardozo and Justice Pound concurred, saying:

"Our decision in the case of *Holden v. Strong, supra*, involved the construction of a will wherein the testator gave to a trustee 'full power and authority to use so much of the trust fund, either interest or principal, as shall, in his judgment and discretion, be necessary for the proper care, comfort and maintenance' of the plaintiff so long as he

should live. We held that the plaintiff there was entitled to support and maintenance even though he was able to support himself and had accumulated a fund which he had on deposit in a bank. The reasoning and principle laid down in that case we regard as controlling the case under consideration."

In *Re Robinson's Will*, 144 Atl. 457, the Supreme Court of Vermont construed a clause which gave to a legatee the residue of the property to be used for his own personal benefit "so far as he requires it" and thereafter to a hospital. An appeal was taken from the order of distribution. The Court held that Davis had the right to use the property for his support without resort to his own or his wife's earnings or resources. The Court said:

"How far Davis may go in exhausting the property will depend upon a variety of circumstances which it is impossible to anticipate. It is enough here to say that he is not obliged to restrict himself to his present scale of living, or to resort to his own or his wife's industry or resources. He cannot squander the property to keep it away from the hospital; he cannot give it or will it away. In his calls upon the estate he must act reasonably and in good faith toward the hospital."

In *Garvey v. Garvey*, 150 Mass. 185, 22 N. E. 889, the trustee was directed to pay

"in such sum or sums, as by sickness or other misfortune he may need the same: provided, moreover, that any and all such payments shall be left entirely to the good judgment of said trustee."

The son's wife was dying of consumption. He had incurred expenses for the sickness and funeral of a son and a daughter. He owned a house and he and another son worked for wages. The plaintiff himself had not been sick. Chief Justice Morton directed the trustee to make payment to the son for the expenses incurred through the illness of his wife and the illness and death of his children.

“It was not the intention of the testator merely to confer upon the trustee a bare power to furnish aid to the plaintiff, if he saw fit. It contemplates that the plaintiff might, by sickness or other misfortune, be in need of his father's bounty, and its purpose and legal effect are to give him the right to such bounty, if he is thus in need. It gives to the trustee a large discretion to judge of such need, but it is not an arbitrary and unlimited discretion. He is to act upon his ‘good judgment,’ and not upon his mere will or caprice, or from selfish or corrupt motives. He ought to exercise the good judgment which a reasonable man, having no hostility to the plaintiff, or selfish interest of his own, would exercise under the same circumstances. . . . This presents a case of need of assistance which a fair-minded trustee would consider as calling for aid, according to the intention of the testator. The defendant acted under a mistaken view of his rights and duties when he refused assistance on the ground that no money was left to be spent on the plaintiff's family, and that ‘plaintiff was not sick, and did not need money for his misfortunes.’ And when we consider that in doing this he acted under

‘a hostile disposition towards plaintiff, and the influence of a pecuniary interest to withhold from plaintiff any benefit or assistance from said trust,’ and thus appropriate the whole trust fund to his own use, we think a case is made out in which the plaintiff has been unjustly dealt with, and the intention of the will defeated.”

This is the general rule of law. *Page on Wills (Lifetime Edition)*, Volume 3, Section 1170, page 472, says:

“It is usually held that a gift of support and the like with no restrictions or exceptions means that the beneficiary is to be supported from testator’s estate without regard to other sources of income or property which such beneficiary may possess.”

In this jurisdiction Vice Chancellor Davis, in *Camden Safe Deposit & Trust Co. v. Read*, 124 N. J. Eq. 599, construed the provision:

“if at any time it shall become necessary owing to bad health or accident to my said son, to use so much of the said principal as they may deem necessary for his medical care and comfort during said sickness and convalescence.”

The son suffered serious ill health and on medical advice spent the winter and spring in the tropics. The residuary legatees contested any payments from the principal and sought an order of the Court that the trustees increase the income of the estate by either selling or leasing non-productive real estate so the corpus would not be invaded. Vice Chancellor Davis held that

the terms of the Will authorized an invasion of the corpus:

“I feel that the provisions made for him under such conditions are such as to justify the trustee in considering, in addition to actual medical care, the question of his comfort during his sickness and convalescence, and such amounts as the trustee may deem necessary for such purposes are properly chargeable against the said principal. The testator’s intention, gathered from the language of the will, was to provide for his son not only medical care arising because of bad health, but also comfort during his sickness and convalescence.”

Mrs. Pearce has means of her own. Her husband’s Will made no reference to her means. The Captain directed his trustees to provide for the complete comfort and support of his widow and directed an invasion of the corpus if the income was insufficient for this purpose. The trustee who testified has admitted that the income was insufficient. A careful search has revealed no precedent which holds contrary to the decisions cited above. An explicit direction to use the corpus if income is insufficient for the complete support and maintenance of a beneficiary requires the trustee to disregard the means of the beneficiary. The sole question for determination is the amount necessary and if this exceeds the income then the trustee bears the duty of using the corpus.

B. The Court of Chancery properly ordered the trustees to invade the principal to maintain the widow in complete comfort. The appellants argue at length that the Court of Chancery has

no power to direct trustees to perform acts which are committed to their discretion. The Will uses the words "if the net income from the said estate is not sufficient in the opinion of my executors and trustees" and follows this with the words "as they may deem necessary". The numerous authorities cited by the Appellants in their brief in each instance are qualified by proper action on the part of the trustees.

In *Read v. Patterson*, 44 N. J. Eq. 211, the words "unless he has exercised his discretion mala fide" are used. In a later opinion of this Court in the same case, which has been heretofore cited, 47 N. J. Eq. 595, the executor was ordered to comply with the Will. Reference was made to the above case, the law of which was restated:

"and will not interfere if the trustee exercises a discretion within the limit of a sound and honest execution of a trust".

The executor was ordered to make further allowances, the Court saying:

"The amount allowed by the defendant, . . . is so grossly insufficient as to show of itself that it was not the result of a fair exercise of judgment, but rather of a determination to give them as little as possible, and to withhold as much as he could."

So in the instant case the trustees have gone even further. They have not paid as little as possible, they have paid nothing above the income. They have withheld the entire corpus. This is, in accordance with the decision of this Court, complete and convincing proof of an abuse of discretion.

In *Latorraca v. Latorraca*, 132 N. J. Eq. 41, Vice Chancellor Bigelow said that the discretion of an executor must be exercised "in a sound and honest manner".

Vice Chancellor Egan in *Commonwealth-Merchants Trust Co. v. Seglie*, 127 N. J. Eq. 160, qualified the right of discretion but where there is

"an abuse of discretion, or a betrayal of trust, or a display of bad faith"

the Court of Equity has the duty and authority to examine the actions of trustees in the performance of their discretionary powers and to order them to perform those powers in accordance with sound reason and impartial judgment.

In *Colton v. Colton*, 127 U. S. 300, 32 Supreme Court 138, the Court thoroughly reviewed both the authorities in this country and the English authorities. The Will which was under consideration directed the trustee to provide for the testator's daughter in the trustee's discretion. The trustee raised the same argument that the Appellants here raise, that the Court will not interfere with the discretion of the trustee. The Supreme Court said:

"It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power; so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the mainte-

nance, but will leave it to the trustees. But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real or personal security, and the trust fund is outstanding upon any hazardous security.

* * *

“On the whole, therefore, our conclusion is that each of the complainants in these bills is entitled to take a beneficial interest under the will of David D. Colton, to the extent, out of the estate given by him to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities and the amount and value of the fund from which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it.”

This right of the Court to control the action of executors and trustees is well recognized.

Scott on Trusts (1939), Volume II, Paragraph 187, page 986, says:

“This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a rea-

sonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment. In other words, although there is a field, often a wide field, within which the trustee may determine whether to act or not and when and how to act, yet beyond that field the court will control him. How wide that field is depends upon the terms of the trust, the nature of the power, and all the circumstances."

The author then proceeds to lay down five rules which the Court will use in determining whether the trustee is acting within the bounds of a reasonable judgment. All of these rules are present in the case at bar. (1.) The extent of discretion conferred upon the trustees under the Will is limited by the word "direct"; the words "complete comfort", twice used; and the direction to use principal for that purpose. (2.) The existence of an external standard by which the reasonableness of the conduct of the executor can be judged was present when the trustee himself testified that the widow was living in the same plane of circumstances and that the income from the estate was less than the cost of the widow's maintenance. (3.) The circumstances surrounding the exercise of the power are apparent from the complete knowledge which the trustee had both of the manner of life of the widow before and after the death of Captain Pearce. (4.) The motives of the trustees in refusing to invade the principal are apparent since the trustees receive eighty per cent of the principal. (5.) The existence of an interest in the trustees conflicting with that of the beneficiary is present because of their interest in the principal.

In *Restatement of the Law of Trusts*, Volume I, Section 187, page 480, six tests are laid down. The additional test is "the purposes of the trust". The purpose of the trust in the case at bar is clear. The primary declaration of the testator was a direction to maintain in complete comfort his widow. Vice Chancellor Berry in his oral conclusions said:

"These Executors are residuary legatees under this will to the extent of fifty per cent of the trust fund or fifty per cent of the fund which may remain after the death of the wife. So it is quite natural, I think, for us to assume that their judgment might possibly be influenced to some extent by that interest. Their discretion might very possibly be warped. I do not say that it is, but I say the fact that they have refused, and that refusal is not denied, to use any of this corpus for the comfortable maintenance of the widow is strongly evidential of an abuse of the discretion which is vested in them by the will."

Every dollar that the executors and trustees retained in the corpus of the estate will result in adding eighty cents to their personal enrichment. The executors have a definite monetary interest in paying Mrs. Pearce as little as possible. They have no discretion so far as the income is concerned. So far as the principal is concerned they have definite directions for the use of it in accordance with an honest and sound discretion.

When the uncontradicted evidence shows an elderly woman stricken with arthritis living in the same manner in which her husband had maintained her and a refusal, upon demand made

by her upon the executors, to use the principal in accordance with the directions of the Will, it is submitted that the proof is plenary of an abuse of discretion. The substantial interest these executors and trustees have in the principal is indicative of an abuse of discretion.

Conclusion

It is respectfully submitted that the Will of Captain Pearce provided for the maintenance of his widow, the Complainant, in complete comfort and that the independent means of the widow was not contemplated by the Will. The pecuniary interest of the trustees and their refusal to pay the undisputed excess of expenditures over income is plenary evidence of an abuse of discretion.

It is respectfully submitted that the decree advised by Vice Chancellor Berry should be affirmed and this appeal dismissed.

Respectfully submitted,

PARSONS, LABRECQUE & BORDEN,
Solicitors for Complainant-Appellee.

THEODORE D. PARSONS,
Of Counsel.

the law upon the executor to use the principal
in accordance with the direction of the Will, it
is admitted that the trust is primarily of an
estate of inheritance. The substantial interest
these executors and trustees have in the principal
is not indicative of an estate of inheritance.

Conclusion

It is respectfully submitted that the Will of
the testator is valid and that the maintenance of
the widow by the executors in payment of the
and that the independent means of the widow
was not contemplated by the Will. The pecuni-
ary interest of the trustee and their refusal to
pay the independent estate of executors over
to the independent estate of an estate of disre-
spect is clearly evidence of an estate of disre-
spect. It is respectfully submitted that the decree
advised by Vice Chancellor Terry should be
affirmed and this appeal dismissed.

Respectfully submitted,

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