In the District Court of Appeal of the State of Florida, Fourth District
1525 Palm Beach Lakes Blvd., West Palm Beach, FL 33401

PAULA MINASSIAN,
Appellant,
vs.
REBECCA RACHINS and
RICK MINASSIAN,
Appellees.

Case No. 4D13-2241
L.T.: File No. 12-1320(61)
Broward County, Probate Div.
Honorable Charles Greene

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida

APPELLEES' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

ZAVEN MINASSIAN ("ZAVEN") was married to PAULA MINASSIAN ("PAULA"). ZAVEN had 2 children, REBECCA RACHINS and RICK MINASSIAN (collectively referred to herein as the "CHILDREN").

ZAVEN established the ZAVEN MINASSIAN TRUST initially on December 29, 1999, and completely restated it in the 126-page Restatement of ZAVEN MINASSIAN TRUST executed July 16, 2008, which PAULA in her Initial Brief and the CHILDREN in this Answer Brief refer to as the "ZAVEN TRUST" (R 402-528).

The ZAVEN TRUST sets forth 18 numbered Articles, with the pages of each Article prefixed with the number of that Article (i.e., p. 6-7 is page 7 of Article Six). The 18 Articles are grouped under the following headings as set forth in the Table of Contents (R 404-405):

"Introduction

Article One..... Restatement of My Trust

Article Two..... My Family

Article Three..... Funding My Trust

Providing for Me and My Family during My Lifetime

Article Seventeen.....	My Trustee's Administrative and Investment Powers
Article Eighteen.....	Definitions, General Provisions and Signatures

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ZAVEN funded the ZAVEN TRUST prior to ZAVEN's death. When ZAVEN died on May 11, 2010, the ZAVEN TRUST was already funded with $2,508,283.19 held in a UBS account in the name of "ZAVEN MINASSIAN REV. TRUST." It was not until more than 19 months later that PAULA retitled the name of this UBS account to the name of "ZAVEN MINASSIAN FAMILY TRUST." Therefore no assets were held in the "Family Trust" until January 2012.

The provisions of the ZAVEN TRUST are explicit that the CHILDREN are considered part of the "FAMILY" and that they take all of the trust res held pursuant to the ZAVEN TRUST upon the death of PAULA.

Various portions of the ZAVEN TRUST are discussed in more detail in the body of this Brief.

SUMMARY OF THE ARGUMENT

The CHILDREN are each a "beneficiary" and a "qualified beneficiary" under the Florida Trust Code. The ZAVEN TRUST had $2,508,283.19 in a UBS account at the time of ZAVEN's death. The ZAVEN TRUST permits that the Trustee (PAULA) can distribute income and/or principal to PAULA (individually) only after taking into consideration PAULA's own assets and available public assistance, and then only pursuant to an "ascertainable standard." Absent an invasion by the Trustee, PAULA has no right to any assets (income or principal) from the ZAVEN TRUST.

From the time of ZAVEN's death on May 11, 2010 through January 31, 2013 (less than 33 months), PAULA withdrew $1,350,214.00 from the ZAVEN TRUST (more than half the trust res).

PAULA argues that because all of the assets in the ZAVEN TRUST were placed in the name of the "Family Trust" some 19 months after the death of ZAVEN, and because the trust res is now held pursuant to the ZAVEN TRUST provisions which control administration of the trust res while subject to the provisions of the "Family Trust," that the CHILDREN have no interest in the "Family Trust" because it "shall terminate" on the death of PAULA.

PAULA is in error, and if she is not in error, then the ZAVEN TRUST fails,

and the trust res should be distributed by intestacy, 50% to PAULA, and 50% to the CHILDREN.

STANDARD OF REVIEW

The standard governing review of a decision dealing strictly with the construction of a trust document (i.e., the ZAVEN TRUST), is a matter of law, and review of that construction is *de novo*, as asserted by PAULA.

The determination by the trial court that the appointment of a trust protector was improper (R 601) is not a sole question of law, but is a mixed question of fact and law (i.e., the terms of the ZAVEN TRUST and the factual appointment of ANDERSEN). The Florida Supreme Court applies a mixed standard of review in such cases: the factual determinations are affirmed if supported by competent, substantial evidence; the legal conclusion is reviewed *de novo*. *Shellito v. State*, 121 So.3d 445, 451 (Fla. 2013).

ARGUMENT

POINT ON APPEAL

AS STATED BY *APPELLANT*:

THE CHILDREN ARE NOT "QUALIFIED BENEFICIARIES" OF THE ZAVEN TRUST, THUS HAVE NO STANDING TO INQUIRE INTO THE ACTIVITIES OF THE TRUSTEE.

AS RESTATED BY *APPELLEES*:

The CHILDREN *are* "qualified beneficiaries" of the ZAVEN TRUST, *and have standing* to inquire as to whether the trustee is complying with the terms of the Trust.

With the exception of the "trust protector" provisions (discussed later), the ZAVEN TRUST has the same standard dispositive plan as thousands and thousands of trusts in Florida, i.e., upon the settlor's death, the trust res benefits the surviving spouse during her life, and upon the death of the surviving spouse then benefits the settlor's children.

This dispositive plan, in a bit more detail, in these thousands of trusts is as follows:

(1) At the death of the settlor, the trust res is held to first benefit the surviving spouse. This is done by holding some of the trust res pursuant to "Family Trust" provisions (keyed to what was

long called the unified credit amount for federal tax purposes), and hold the remainder of the trust res pursuant to "Marital Trust" provisions. The "Marital Trust" provisions have more liberal benefit provisions for the surviving spouse, than do the "Family Trust" provisions. The "Family Trust" provisions usually allow invasion of trust res only pursuant to "ascertainable standards" such as health, education, and maintenance. They are called "ascertainable standards" because they can be objectively determined under federal and state law.

(2) During the life of the surviving spouse, the trustee administers the trust res pursuant to the provisions for administering the "Marital Trust" and for administering the "Family Trust." (As relates specifically to the ZAVEN TRUST, because of the federal tax laws at the time of ZAVEN's death, none of the trust res was held and administered pursuant to the "Marital Trust" provisions, but rather all the trust res was held pursuant to the "Family Trust" provisions.)

(3) On the death of the surviving spouse, the remaining assets in the trust either go outright to the children, or are held in further

trust for the benefit of the children.

PAULA argues that this is not the dispositive plan of the ZAVEN TRUST, hanging her argument hat on the proposition that because the "Family Trust" "terminates" upon her death, the CHILDREN cannot be beneficiaries of the "Family Trust" since it terminates before they receive their interest. Respectfully, PAULA stands the concept of "standing" on its head (no pun intended), by arguing for an interpretation of one word in the ZAVEN TRUST ("terminate") in such a way as to wipe out 126 pages of provisions, and allow PAULA to take trust assets at her whim, unchecked.

ZAVEN's intent was to benefit both PAULA and the CHILDREN. Further, ZAVEN's intent to benefit PAULA was not to allow her to take assets from the ZAVEN TRUST willy-nilly, at her whim, but to maintain substantial (or all) of the assets in the ZAVEN TRUST during PAULA's life, in order to serve as a substantial safety net of assets, to be used only under very specific preconditions and pursuant to ascertainable standards. PAULA has no right to any income or principal under the "Family Trust" provisions. She is only a permissible beneficiary.

There are 3 practical questions underlying the POINT ON APPEAL:

(1) Whether (under the terms of the ZAVEN TRUST) the CHILDREN as

remainder beneficiaries (who take all remaining trust assets upon the death of PAULA) have the right to question actions taken by PAULA in administering the ZAVEN TRUST as sole trustee (i.e., whether the CHILDREN have "standing"); and if the CHILDREN have such standing, then

(2) Whether PAULA, during the course of the trust litigation taking place in the trial court, had the ability to appoint a "trust protector," and then have the "trust protector" purportedly amend the ZAVEN TRUST, with the intent of defeating the "standing" of the CHILDREN to question PAULA's administration of the ZAVEN TRUST; and

(3) Assuming that PAULA could so appoint a "trust protector," whether the purported amendment to the ZAVEN TRUST executed by the "trust protector" has destroyed the "standing" of the CHILDREN.

Practical Answer 1:

1. Under the terms of the ZAVEN TRUST, REBECCA and RICK are remainder beneficiaries (who take all remaining trust assets upon the death of PAULA), and as such have the right to question actions taken by PAULA in administering the ZAVEN TRUST as sole trustee.

A. At Initial Brief pages 18-20 ("IB 18-20"), PAULA argues:

(1) That neither of the CHILDREN is a "beneficiary" as defined in F.S. §736.0103(4).

(2) Therefore, neither of the CHILDREN can be a "qualified beneficiary" as defined in F.S. §736.0103(14).

(3) Therefore, the CHILDREN lack standing to inquire into the activities of the trustee.

PAULA attempts to defeat the standing of the CHILDREN, by arguing that because the "FAMILY TRUST" shall "terminate" on her death, the CHILDREN cannot be beneficiaries of the "FAMILY TRUST" since it ceases to exist. This is an argument that the undersigned attorney has never heard in 35 years of practice as an estate planning attorney, and an attorney doing probate and trust litigation. There are a number of problems with PAULA's argument. The fact that a trust "shall terminate" does not mean that the taker (or a person with an interest in the remaining trust res) on such termination is not a beneficiary of the trust.

One problem with PAULA's argument is that she is trying to interpret a 126-page document based on her contended construction of the term "terminate," in isolation from (1) the other provisions of the ZAVEN TRUST, (2) the explicit intent of ZAVEN as reflected therein, and (3) the explicit dispositive plan set forth therein. This is legally erroneous.

The intention of the settlor (i.e., ZAVEN) as expressed in the trust (i.e., ZAVEN TRUST) controls the effect of the dispositions made in the trust. *Knauer v. Barnett,* 360 So.2d 399, 405 (Fla. 1978); *Arelanno v. Bisson*, 847 So.2d 998,

1000 (Fla. 3d DCA 2003).

In interpreting a trust to determine the settlor's intent, a court should not resort to isolated words and phrases. Rather, the court should construe the trust instrument as a whole, taking into account the general disposition scheme set forth in the trust. *Roberts v. Sarros*, 920 So.2d 193 (Fla. 2d DCA 2006).

The opinion in *Ryan v. Dethlefs*, 959 So.2d 314, 317 (Fla. 3d DCA 2007) is on point regarding the instant case. It states in part:

> "The polestar of trust or will interpretation is the settlor's intent. *Arlellano v. Bisson*, 847 So.2d 998 (Fla. 3d DCA 2003); *Phillips v. Estate of Holzmann*, 740 So.2d 1 (Fla. 3d DCA 1998). Intent is ascertained from the four corners of the document through consideration of 'all the provisions of the will taken together, rather than from detached portions or any particular form of words. This rule prevails whether the entire will or some specific clause or part of it is being construed.' *Sorrels v. McNally*, 89 Fla. 457, 462-63, 105 So. 106, 109 (1925). In construing the instrument as a whole, the court should take into account the general disposition scheme. *Pounds v. Pounds*, 703 So.2d 487, 488 (Fla. 5th DCA 1997). The meaning applied, however, cannot lead to absurd results. *Roberts v. Sarros*, 920 So.2d 193, 196 (Fla. 2d DCA 2006)."

Applying the *Ryan* principles (which summarize Florida trust law) to PAULA's argument that because the "Family Trust" "terminates" at her death, the CHILDREN cannot be beneficiaries of the "Family Trust," the correct analysis goes as follows:

1. PAULA's argument is based on trying to interpret a particular word

("terminate") in a way inconsistent with the intent of the settlor as reflected within the four corners of the ZAVEN TRUST.

2. PAULA's argument would destroy the disposition scheme of the ZAVEN TRUST, by allowing her to withdraw all of the trust res without having to comply with the terms of the trust (including the "ascertainable standards" which must be met before PAULA can withdraw any assets from the trust). The terms of the ZAVEN TRUST are not only for the benefit of the CHILDREN (i.e., that there be some assets for them when PAULA dies), but more importantly for the benefit of PAULA (not to permit her to willy-nilly withdraw trust assets and gamble them away (PAULA admits at IB 16 that she gambled frequently), but rather that there continues to be a trust res during her remaining lifetime to serve as a safety net if PAULA needs such assets, but only after taking into account all her own assets and public assistance, and then only by permitting withdrawals pursuant to the "ascertainable standards").

In a trust that provides that a spouse is a permissible income and principal beneficiary, and on the death of the spouse the trust shall "terminate" and the 2 children of the settlor of the trust each take an equal trust share in the assets

remaining in the trust, the children are unquestionably beneficiaries.

A second problem with PAULA's argument is apparent from the case of *Mesler v. Holly*, 318 So.2d 530 (Fla. 2d DCA 1975) (discussed in detail below). The settlor created two trusts–a Florida trust (with the settlor and his spouse as co-trustees, and beneficiaries), and a "Massachusetts Fund" trust (with the settlor's grandchildren being the principal beneficiaries). Upon the surviving spouse's death, the remainder in the Florida trust would pour over into the Massachusetts trust. The Florida courts held that the grandchildren had standing to question the surviving spouse's administration of the Florida trust, even though the Florida trust would terminate upon her death, and the grandchildren would receive their interest of the Florida trust, by virtue of the assets remaining in the Florida trust at the death of the surviving spouse, pouring over into the Massachusetts trust. The fact that a trust "terminates" does not make the remaindermen who take any less of a beneficiary with standing.

A third problem with PAULA's argument relates to what F.S. §736.0103(4) and §736.0103(14) actually say. The response of the CHILDREN to IB 18-20 relating to F.S. §736.0103(4) and §736.0103(14), is as follows:

(1) The CHILDREN *are* each a "beneficiary" under F.S. §736.0103(4).

F.S. §736.0103(4) states in relevant part:

> "'Beneficiary' means a person who has a present or future beneficial interest in a trust, vested or contingent, ..."

The "trust" in the instant case is the ZAVEN TRUST, a single trust instrument (i.e., one document) comprised of 126 pages (R 402-528). It establishes one trust–the ZAVEN TRUST. Within the ZAVEN TRUST, provision is made to hold assets pursuant to trust provisions for administering a "Marital Trust", and provisions for administering a "Family Trust" (R 442-455).

Pursuant to F.S. §736.0103(20), a "Trust instrument" means an instrument executed by a settlor that contains terms of the trust,...." In the instant case, the trust instrument is the ZAVEN TRUST. (R 402-528).

Pursuant to F.S. §736.0103(19), "'Terms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument . . . ."

The terms of the ZAVEN TRUST provide for the disposition of the trust res, from the date of the trust's initial establishment (including provisions which apply during the life of ZAVEN), through the life of PAULA, then through the lives of the CHILDREN.

Following the death of ZAVEN, the ZAVEN TRUST provides that some of the trust funds be held pursuant to the terms of "Marital Trust" provisions set forth in the ZAVEN TRUST (if certain conditions were present); and that the remainder of funds (or all the funds if no funds were to be held pursuant to the terms of the "Marital Trust" provisions) would be held pursuant to the terms of the "Family Trust" provisions set forth in the ZAVEN TRUST.

Both the CHILDREN and PAULA agree that based on federal tax law in effect at the time of ZAVEN's death, all of the ZAVEN TRUST res held at the time of settlor's death would be held pursuant to the terms of the "Family Trust" provisions.

B. The CHILDREN *are* each a "qualified beneficiary" as defined in F.S. §736.0103(14).

F.S. §736.0103(14) states in relevant part:

"(14) 'Qualified beneficiary' means a living beneficiary who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust

> income or principal if the trust terminated in accordance with its terms on that date."

PAULA and the CHILDREN are each a "qualified beneficiary."

PAULA comes within §736.0103(14)(a), in that PAULA is a permissible distributee of both trust income or trust principal, pursuant to ascertainable standards and preconditions set forth in the ZAVEN TRUST. (R 453-454).

The CHILDREN each come within either §736.0103(14)(b) or 736.0103(14)(c), in that they would each take upon the death of PAULA. If the death of PAULA *did not cause the trust to terminate*, the CHILDREN would take under 736.0103(14)(b). If the death of PAULA *did cause the trust to terminate* (as PAULA argues), the CHILDREN would still take under 736.0103(14)(c).

A fourth problem with PAULA's argument relates to the explicit definition of "My Family" by ZAVEN in the ZAVEN TRUST. ZAVEN defines it to include PAULA and the CHILDREN (R 409):

Article Two

My Family

My spouse's name is PAULA MARCIA MINASSIAN. All references to 'my spouse' in this agreement are to her.

The names of my children are:

REBECCA M. RACHINS

RICHARD Z. MINASSIAN

All references to 'my children' in this agreement are to these children.

It is explicit that ZAVEN considered both PAULA and the CHILDREN as "Family" and as such, beneficiaries of the "Family Trust."

At IB 20-21 PAULA argues that the ZAVEN TRUST only reflects (1) an intention to create a trust for the CHILDREN in the future, and (2) that there was no funding of a trust for the CHILDREN. The argument, and the causes and treatise cited, are inapposite.

PAULA's argument ["(1)" above] that the CHILDREN have no interest in the trust until PAULA dies misapprehends the nature of a beneficiary's interest in a trust.

PAULA misapprehends the nature of trust interests, and specifically the nature of a "present or future beneficial interest in a trust." From the time of ZAVEN's death, the CHILDREN each had a remainder interest in all assets which would still be held under the ZAVEN TRUST at the time of PAULA's death. The amount of the separate trust share for each of the CHILDREN would ultimately depend on (1) the amount of funds held in the ZAVEN TRUST at the death of

ZAVEN, and (2) the amount of funds properly withdrawn by PAULA (acting as trustee of the ZAVEN TRUST) in compliance with the terms and conditions of the ZAVEN TRUST, until the death of PAULA.

Further, the opinion in *Ryan* also is on point regarding the status of the CHILDREN as beneficiaries:

". . . the law favors the early vesting of estates. *Lumbert v. Estate of Carter*, 867 So.2d 1175, 1179 (Fla. 5th DCA 2004) (citing *Sorrels v. McNally*, 89 Fla. 457, 105 So. 106 (1925)). As this Court stated in *Estate of Richard v. Greenberg*, 406 So.2d 469 (Fla. 3d DCA 1981), any doubt as to whether an interest is vested or contingent should be resolved in favor of vesting:

> This Court is committed to the doctrine that remainders vest on the death of the testator or at the earliest date possible unless there is a clear intent expressed to postpone the time of vesting. It is also settled that in case of doubt as to whether a remainder is vested or contingent, the doubt should be resolved in favor of its vesting if possible, but these general rules all give way to the cardinal one that a will must be construed so as to give effect to the intent of the testator.

406 So.2d at 473 (quoting *Krissoff v. First Nat. Bank of Tampa*, 159 Fla. 522, 32 So.2d 315 (1947)). Accordingly, no estate should be held to be contingent 'unless very decided terms are used' and 'unless there is a clear intent to postpone the vesting.' *Sorrels*, 89 Fla. at 467, 105 So. at 110. Indeed, '[t]he presumption that a legacy was intended to be vested applies with far greater force, where a testator is

making provision for a child or grandchild, than where the gift is to a stranger or to a collateral relative.' *Sorrels*, 89 Fla. at 467, 105 So. at 110."

Given the terms of the ZAVEN TRUST and the dispositive scheme reflected by ZAVEN's intent, the nature of a beneficiary's interest in a trust, and the fact that the presumption of vesting at the death of a trust settlor applies with "far greater force" with a gift to a child as opposed to someone else, the trust interest of the CHILDREN vested upon the death of ZAVEN.

Regarding the funding issue ["(2)" above], the ZAVEN TRUST *was funded by ZAVEN before his death, and at the time of his death the amount of* ***$2,508,283.19*** *was held in a UBS account in the name of the "ZAVEN MINASSIAN REV. TRUST."* (R 554)

Assuming (for purposes of argument) that there had been no funding upon ZAVEN's death of an interest for the CHILDREN and thus their interest failed, PAULA is hoist with her own petard. Neither was there funding of a "Family Trust" upon ZAVEN's death, since all assets were held in the name of the ZAVEN TRUST. Not until more than 19 months after ZAVEN's death were any assets titled in the name of the "ZAVEN MINASSIAN FAMILY TRUST." If the CHILDREN's interest fails for non-funding, PAULA's interest likewise fails. If these interests fail, then all of the assets in the ZAVEN TRUST return to

ZAVEN's probate estate, and pass by intestacy. See *Davis v. Rex*, 876 So.2d 609, 613 (Fla. 4th DCA 2004) ("If the designation of the beneficiaries is deemed too indefinite for enforcement of the provisions of a trust, the usual result is that the trust is void and 'the designated trustee holds the corpus under a resulting trust in favor of the estate of the settlor.").

As set forth at pages 10-1 and 10-2 of the ZAVEN TRUST (R 453-454), PAULA has no right to income or to principal during her life. PAULA is only a permissible beneficiary, pursuant to the ascertainable standards (and other conditions) set forth in the ZAVEN TRUST:

Article Ten

Section 1. My Spouse's Right to Income

"My Trustee may distribute to, or apply for the benefit of, my spouse as much of the net income of the Family Trust as my Trustee, in its sole and absolute discretion, shall consider advisable ***for my spouse's health, education, and maintenance***." [***emphasis added***]

* * * *

Section 2. Principal Distributions in My Trustee's Discretion

"My Trustee may distribute to or apply for the benefit of my spouse as much of the principal of the Family Trust as my Trustee, in its sole and absolute discretion, shall consider advisable ***for my spouse's health, education, and maintenance***." [***emphasis added***]

* * * *

Section 4. Discretionary Guidelines for My Trustee

"My Trustee shall be mindful that my primary concern and objective is to provide for the health, education, and maintenance of my spouse, and that the preservation of principal is not as important as the accomplishment of these objections.

"I specifically express, however, my desire that the funds in this Family Trust not be used to replace public assistance benefits which would be available to my spouse without the existence of this trust.

"'Health' as used in this Article, is intended to cover normal health care needs, as contrasted with needs involving catastrophic circumstances where custodial or extraordinary care expenses could substantially deplete the principal of this Family Trust.

"When considering the needs of my spouse, it is my preference that my Trustee take into account resources in the following order of priority:

> First, to the extent that my Trustee, in its sole and absolute discretion, deems advisable, any income or other resources which are available to my spouse outside of my trust; then
>
> Second, all public resources which are or would be available to my spouse, then
>
> Third, principal of the Marital Trust; and
>
> Finally, principal from the Family Trust

* * * *

Section 7. Termination of the Family Trust

"The Family Trust shall terminate at the death of my spouse. The remainder of the Family Trust, including any accrued and undistributed net income,

shall be administered as provided in the Articles that follow."

PAULA does not have unfettered power to invade trust income and trust principal as she pleases.

Trustee discretion which is "sole and absolute" is not, under Florida law, "sole and absolute" in the sense that the standard to be considered in exercising the discretion (here "health, education, and maintenance") can be ignored.

Even a trustee who is also the sole beneficiary, and who is given "absolute discretion to distribute so much of the principal of the trust estate as the co-trustees deem necessary to maintain the standard of living to which [she] has become accustomed" has limits on trustee discretion. *Mesler v. Holly*, 318 So. 2d 530 (Fla. 2d DCA 1975). In *Mesler*, the settlor had created two trusts: a Florida trust for the joint benefit of himself and the Appellee for life, of which they were also the Co-Trustees, and a "Massachusetts Fund" Trust for the benefit of his great grandchildren, which would be predominantly funded by the remainder of the Florida trust upon the death of the Appellee, who was both trustee and beneficiary. *Id.* at 531. A second co-Trustee was appointed for the Florida Trust after the settlor's death, whom the Appellate court found to be only a nominal co-trustee. *Id.* at 532. The settlor's great grandchildren, who were not beneficiaries of the

Florida trust directly, but interested parties as primary beneficiaries of the "Massachusetts Fund" Trust that took the remainder of the Florida trust, filed against the trustee/beneficiary of the Florida trust, alleging that some of the invasion of principal by the trustee/beneficiary on her own behalf were unreasonable and excessive, and that the "absolute discretion" clause did not give unbridled discretion to the trustee(s) to determine or establish a standard of living for the trustee/beneficiary, but rather to determine the manner, mode and extent of distributing the trust assets, including principal, in order to maintain the standard of living to which she had become accustomed. *Id.* at 533. As in the instant case, the plaintiffs alleged that defendant was trustee and sole lifetime beneficiary, had not furnished any accounts or reports of her administration to the remaindermen, and was not confining her invasions of principal to reasonable limits. The trial court dismissed the case for failure to state a cause of action. *Id.* at 531.

The appellate court in *Mesler* reversed and remanded, instructing the trial court that if the trial court found abuse of discretion on the part of one or more of the trustees, especially where the trustee was a beneficiary, the court "can order appropriate adjustments to correct any abuses in the past and take steps (*e.g.*, to require bonding of trustees, periodic accountings to remaindermen and appropriate supervisory measures) to prevent abuses in the future." *Id.* at 533-34. In reaching

this conclusion, the appellate court reasoned as follows:

> Even though a grant of "absolute discretion" to a fiduciary is very broad, it does not relieve a trustee from the exercise of good faith or from being judicious in his administration of the trust, which administration is subject to court review in appropriate instances. Likewise, a trustee is always subject to accountability to remaindermen where discretion is improperly, arbitrarily or capriciously exercised.
>
> * * * *
>
> Moreover, the courts recognize that where, as here, a trustee is also the sole lifetime beneficiary, such factor is a viable judicial consideration in determining whether the trustee is properly exercising discretionary powers. . . . Concededly, determination of [trustee/beneficiary]'s standard of living is, in the first instance, a function and responsibility of the trustees. While perhaps a court should not fix the criteria for exercise of the discretionary power of a trustee to invade the principal, it certainly may review the exercise of such power. We think, too, that when a trustee is peculiarly influential in making such determination for her own benefit, her discretion in the premises becomes particularly vulnerable to a challenge by remaindermen. And, we apprehend the legitimacy of the plaintiffs' concern where, as here, (1) there is no requirement for the trustee to post a bond for faithful performance of their duties, (2) either trustee may withdraw funds from any bank account in the name of the trust and (3), as the trial court determined, there is no specific requirement in the trust instrument to furnish any inventory, accounting or other information to the remaindermen beneficiaries until their eligibility for receiving distribution. Clearly, a trustee who is also a beneficiary and who is given power, or discretion to invade the trust principal has a fiduciary obligation to the remaindermen to keep her demands within reasonable limits. Even an unlimited power of invasion is subject to implied limitations to protect the remaindermen.
>
> *Id.* at 533.

The instant case is similar to *Mesler* in many ways. The great grandchildren in *Mesler* raised the concern that "certain purposes for which the principal has already been invaded are unreasonable and excessive." *Id.* at 532. In the instant case, the CHILDREN allege (in both their TRUST COMPLAINT (R 1) and their SUPPLEMENTAL TRUST COMPLAINT (R 553)) that PAULA is not exercising her trustee powers to distribute to herself according to the ascertainable standards (and other limitations) set forth in the ZAVEN TRUST.

Both ZAVEN and PAULA are appointed as co-trustees of the ZAVEN TRUST. PAULA becomes (and in fact did become) sole trustee upon ZAVEN's death. ZAVEN funded the ZAVEN TRUST while alive, and on the date of his death the UBS account in the name of "ZAVEN MINASSIAN REV. TRUST" had assets valued at $2,508,283.19.

Although ZAVEN died on May 11, 2010, PAULA failed to comply with various portions of F.S. §736.0813:

A. As trustee of the ZAVEN TRUST, PAULA was obligated (within 60 days of acceptance of the trust) to give notice to the CHILDREN of PAULA's acceptance of the trust, and the full name and address of the trustee (F.S. §736.0813(1)(a)). PAULA failed to comply with this

requirement, and the CHILDREN were forced to obtain this information through discovery in ZAVEN's probate administration proceeding.

B. As trustee of the ZAVEN TRUST, PAULA was obligated (within 60 days of the death of Decedent) to give notice to the CHILDREN of the existence of the ZAVEN TRUST, the identity of the settlor, the right of the CHILDREN to request a copy of the trust instrument, and the right to accountings (F.S. §736.0813(1)(b)). PAULA failed to comply with this requirement, and the CHILDREN were forced to obtain this information through discovery in ZAVEN's probate administration proceeding.

Through discovery in ZAVEN's probate administration proceeding, the CHILDREN: ultimately received a copy of the ZAVEN TRUST; and received UBS account statements from PAULA reflecting that she had removed $805,000.00 from the ZAVEN TRUST, from the date of ZAVEN's death on May 11, 2010, through December 31, 2011. (R 2-3). The CHILDREN filed a TRUST COMPLAINT on March 29, 2012. (R 1).

Concerned that PAULA (proceeding with no supervision or oversight) would bankrupt the ZAVEN TRUST within a matter of months, the CHILDREN

were able to obtain a court order dated May 15, 2012, restricting to $25,000 the basic monthly withdrawal limit for PAULA. PAULA was also permitted in that order to apply to the court for additional funds, including for payment of her attorneys, which she has continuously done since that date.

Subsequent to the filing of the TRUST COMPLAINT, through discovery in the trust action, PAULA provided additional UBS account statements for the period from January 1, 2012 through January 31, 2013, which reflect that PAULA had taken an additional $545,214.00 from the ZAVEN TRUST during that 13-month period. (R 554-555).

IN SUMMARY, for the period from the date of ZAVEN's death (May 11, 2010) through January 31, 2013 (slightly less than a 33-month period), ***PAULA has withdrawn $1,350,214.00*** *from the ZAVEN TRUST, either for her individual benefit, or to pay her attorneys to litigate the instant case. This is a withdrawal of more than 50% of the total trust assets held in the ZAVEN TRUST at the date of ZAVEN's death (i.e., more than 50% of $2,508,283.19).*

Further, while the CHILDREN do not concede the idea that there is more than one trust (the CHILDREN contend that there was but one trust--the ZAVEN TRUST--which created a subtrust with provisions to administer a "Family Trust," operative only during the period that PAULA is alive), even if there were more

than one trust--and even if the ZAVEN TRUST did not require periodic accountings (which it does)-- *Mesler* indicates that where, as here, the trustee is the beneficiary and is vested with great discretion, no bond was posted, and only one signature is required to make withdrawals from the TRUST account, trustees are accountable to the courts, and the courts can order appropriate adjustments to correct past abuses and prevent future abuses. *Mesler* was cited with approval in *Hoppe v. Hoppe*, a Fourth District case involving a trustee abuse of "absolute and uncontrolled" discretion allegation. *Hoppe v. Hoppe*, 370 So. 2d 374, 375 (Fla. 4th DCA 1978). (*See also, Friedman v. Friedman*, 844 So. 2d 789 (Fla. 4th DCA 2003) (finding in a divorce case that even where a trustee had absolute discretion to pay out income and principal to the beneficiaries, he still had a duty to administer the trust diligently for benefit of the beneficiaries and "must deal impartially with the trust beneficiaries, i.e., treat them even-handedly and act in the interest of the trust as a whole."). The court in *Hoppe* also found, regarding a trustee with broad discretion, that "a trustee may be held personally liable if he fails to exercise the care and skill of a prudent man in the protection of the trust." *Hoppe*, 370 So. 2d at 375.

Article Eleven of the ZAVEN TRUST (R 457) provides that upon the death of PAULA, ". . . all of the trust property which has not been distributed under

prior provisions of this agreement shall be divided, administered, and distributed under the provisions of the Articles that follow." This includes all remaining trust property, whether previously administered under the "Family Trust" provisions, the "Marital Trust" provisions, or otherwise.

Article Twelve of the ZAVEN TRUST (R 458-466) deals with separate shares for the CHILDREN and their issue:

Article Twelve

The Distribution of My Trust Property

Section 1. Creation of Separate Shares

All trust property not previously distributed under the terms of my trust shall be divided into a separate trust share for each of my following named beneficiaries as follows.

Beneficiary	**Relationship**	**Share**
REBECCA M. RACHINS	Daughter	Equal
RICHARD Z. MINASSIAN	Son	Equal

* * * *

Note that Article Twelve does *not establish any new trust or trusts*. It simply provides that *all the trust property* that has not been previously distributed

under the terms of the ZAVEN TRUST (which includes assets held pursuant to the "Family Trust" provisions) be divided into a *separate trust share* for each of the settlor's child.

C. Each Appellee has standing to inquire into the activities of the Trustee.

Since the CHILDREN are each a "beneficiary" and a "qualified beneficiary" of the ZAVEN TRUST, each has standing to question PAULA's administration of the ZAVEN TRUST. PAULA admits such result at IB 18.

Practical Answer 2:

2. PAULA did not have the ability to appoint a "trust protector" during the course of the trust litigation taking place in the trial court, and then have the "trust protector" purportedly amend the ZAVEN TRUST, with the intent of defeating the "standing" of the CHILDREN to question PAULA's administration of the ZAVEN TRUST.

Use of a "trust protector" according to the provisions included in the ZAVEN TRUST is not authorized under Florida statutory or common law, and is anathema to Florida public policy.

Further, assuming that a "trust protector" can be appointed, the appointment of William E. Andersen as "trust protector" violates various provisions of the ZAVEN TRUST.

A. Use of a "Trust Protector" is not valid in Florida.

The initial brief asserts that F.S. §736.0808 is Florida's statute authorizing appointment of a "trust protector." The relevant portion of the statute is F.S. §736.0808(2), which states:

"(2) If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust."

Four points. First, the ZAVEN TRUST appoints trustees by name (R 406, 479-480) but does not appoint a trust protector by name. To comply with F.S. §736.0808(2), the trust document must confer the power to direct on a specific person. The ZAVEN TRUST states that a trust protector "may be appointed," but it does not appoint one. (Page 16-12, R 495).

Second, a trust protector under §736.0808(2) is only given the "power to direct certain actions of the trustee," and the trustee shall take such directed action "unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." Thus, the appointment of a trust protector does not remove the ultimate

decision from the hands of the trustee. A trust protector would direct action; it would be up to the trustee to comply or not comply.

Third, the **black letter** common law rule is that a trustee may not delegate discretionary powers to another. *Thomas v. Carlton*, 106 Fla. 648, 659; 143 So. 780, 785 (Fla. 1932); *Mann v. Cooke*, 624 So.2d 785, 787-788 (Fla. 1st DCA 1993) (". . . by law, a trustee may not delegate discretionary powers.") The new Florida Trust Code authorizes certain types of delegation, but the common law prohibition still stands.

In the new Florida Trust Code, F.S. §736.0807(1) allows a trustee to ". . . delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances, ..." This language in the new Florida Trust Code is similar to explanation and limitation language in *Thomas v. Carlton, pp. 659 and 755,* and confirms that not all duties and powers may be delegated.

F.S. §736.0807(1)(b) requires that "The trustee shall exercise reasonable care, skill, and caution in: . . . . (b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust." F.S. §736.0807(1)(c) requires that "The trustee shall exercise reasonable care, skill, and caution in: . . . . (c) Reviewing the agent's actions periodically, in order to monitor

the agent's performance and compliance with the terms of the delegation." The delegation by PAULA pursuant to the terms of the ZAVEN TRUST would neither be specific, nor involve a continuing delegation which could be monitored by the trustee.

Fourth, on the issue of modifying a trust, the Florida Trust Code explicitly deals with the methods required to modify a trust. These are by judicial modification pursuant to F.S. §§736.0410-736.04115; and by non-judicial modification pursuant to F.S. §736.0412. *NOTE that these provisions for modifying a trust prevail over the terms of the ZAVEN TRUST (i.e., they are mandatory rules)*, as set forth in F.S. §736.0105(2)(j) and (k). As a result, the "trust protector" provisions of the ZAVEN TRUST which purport to permit a "trust protector" to modify the ZAVEN TRUST are invalid.

B. If the "Trust Protector" provisions of the ZAVEN TRUST are valid, the appointment of William E. Andersen ("ANDERSEN") thereunder as "Trust Protector" was not valid.

On August 31, 2012, PAULA purportedly executed a document purportedly appointing a "Trust Protector," to wit: William E. Andersen, Esq. ("ANDERSEN"). (R 392)

The ZAVEN TRUST at Article Sixteen, Section 18 b. regarding "Qualification of Trust Protector" (R 496) states:

"The Trust Protector may be a person, a bank with trust powers, or a trust company. However, despite any conflicting provision in this agreement, the Trust Protector may not be:

a. 'related or subordinate party' to me or any beneficiary under the trust as defined in Internal Revenue Code §672(c); or

'Subservient to' the wishes of myself, any member of my family, or any direct or indirect beneficiary within the meaning of Internal Revenue Code §674(c)."

ANDERSEN and his firm come within the definitions of a"subordinate party" to PAULA within the meaning of IRC §672(c) (an "employee"), and "subservient to the wishes of" PAULA within the definition set forth in IRC §674(c) (relating to the "power to control beneficial enjoyment"), in that: ANDERSEN and his firm have previously represented, and presently represent, PAULA in her capacity as Personal Representative of the Estate of ZAVEN MINASSIAN, currently under probate in Broward County, Florida, Circuit Court, Probate Division Case No. PRC100004109 (61J). See deposition transcript of ANDERSEN. (R 577).

ANDERSEN and his firm have previously represented, and presently represent, PAULA regarding her personal estate planning. See deposition transcript of ANDERSEN. (R 577).

ANDERSEN and his firm presently represent PAULA in the instant law

suit, both at the trial and appellate levels, as reflected by the trial and appellate pleadings.

ANDERSEN cannot properly be appointed "trust protector" under the provisions of the ZAVEN TRUST.

The determination by the trial court that the appointment of a trust protector was improper (R 601) is not a sole question of law, but is a mixed question of fact and law (i.e., the terms of the ZAVEN TRUST and the factual appointment of ANDERSEN). The Florida Supreme Court applies a mixed standard of review in such cases: the factual determinations are affirmed if supported by competent, substantial evidence; the legal conclusion is reviewed *de novo*. *Shellito v. State*, 121 So.3d 445, 451 (Fla. 2013).

Practical Answer 3:

3. Assuming that PAULA could so appoint a "trust protector," the purported amendment to the ZAVEN TRUST executed by ANDERSEN on November 5, 2012 (R 393-394) does *not* destroy the standing of the CHILDREN.

The original Article Twelve, Section 1 of the ZAVEN TRUST (R 458) states:

> **"Section 1. Creation of Separate Shares**
>
> All trust property not previously distributed under the terms of my trust shall be divided into a separate trust share for each of my following named beneficiaries as follow: [names of CHILDREN, relationship and designation

of equal for each]."

The purported amendment by the Trust Protector (R 394) states:

"**Section 1. Creation of a Trust with Separate Shares**

Upon the death of Paula Minassian and the termination of the Family Trust as provided in Article Ten, Section 7, if there is any property remaining, it shall be disbursed to a new trust to be created upon the death of Paula Minassian with a separate share for each of the following named beneficiaries as follows: [no change in remainder of provision].

It is ironic that with all the effort taken by PAULA in an attempt to defeat the standing of the CHILDREN to question PAULA's administration of the ZAVEN TRUST, the purported Trust Amendment by the "Trust Protector" does *not* do that. PAULA continues to attempt to celebrate form over substance, as making a substantive difference.

Please see the argument of this Answer Brief at preceding pages 7-36, including the references to *Messler*, *Ryan*, and F.S. §§736.0103(4) and (14). Whether the "Family Trust" terminates on PAULA's death, and the remaining trust res goes into a new subtrust for the CHILDREN under the ZAVEN TRUST (the purported amendment by ANDERSEN), or whether the CHILDREN each have a separate share in the remaining assets of the ZAVEN TRUST following the death of PAULA, PAULA asserts a distinction without a substantive difference.

The CHILDREN each receive a share of the remaining trust res at PAULA's death under either scenario, and under either scenario the CHILDREN are impacted by PAULA's administration of the ZAVEN TRUST during her life.

Finally, if the "Trust Protector" provisions of the ZAVEN TRUST are valid; and if the appointment of ANDERSEN is valid; and if the Trust Amendment done by ANDERSEN has the effect of deleting the CHILDREN as beneficiaries so that there is no one to hold PAULA accountable in administration of the ZAVEN TRUST; then the whole ZAVEN TRUST is invalid on one or more of the following grounds:

A. The TRUST fails for indefiniteness;

B. The TRUST fails for frustration of purpose;

C. The TRUST has become an illusory trust and fails;

D. The TRUST has become against public policy and fails.

If the ZAVEN TRUST fails, then the trust res passes through ZAVEN's probate estate, by intestacy, 50% outright to PAULA, and 50% outright to the CHILDREN. *Davis v. Rex*, 876 So.2d 609, 613 (Fla. 4th DCA 2004).

CONCLUSION

The Order under review and the Judgment entered thereon ought to be *affirmed*; and if not affirmed, the Fourth District Court of Appeal ought to determine that the res of the ZAVEN TRUST be distributed under intestacy, 50% to PAULA and 50% to the CHILDREN, as requested in Plaintiffs' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT 2 OF THE SUPPLEMENTAL TRUST COMPLAINT.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2014, the original copy hereof has been e-filed with the Clerk of Court for the Fourth District Court of Appeal and that a true and correct copy of the foregoing has been served via e-mail service to Thomas F. Luken, Esq., Of Counsel to THE ANDERSON FIRM, P.C., 500 E. Broward Blvd., Suite 1600, Ft. Lauderdale, FL 33394 (tomluken@comcast.net, jgula@theandersonfirm.com).

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing complies with the font standards of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

BY: _____
James A. Herb, Esquire