

[J-46-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: PASSARELLI FAMILY TRUST : No. 71 MAP 2019
: :
: Appeal from the Order of the Superior
APPEAL OF: MARGARET G. PASSARELLI : Court dated March 28, 2019 at No.
: 3150 EDA 2016 Reversing the
: Chester County Court of Common
: Pleas, Orphan’s Court, Decree dated
: September 19, 2016 at No. 1516-
: 0101
: :
: ARGUED: May 21, 2020

OPINION

JUSTICE DONOHUE

DECIDED: December 22, 2020

In this discretionary appeal, we are asked to determine the burden of proof for a settlor of an irrevocable trust in order to void the trust on grounds of fraudulent inducement in the creation of the trust. We hold that a settlor averring fraud in the inducement of an irrevocable trust must prove by clear and convincing evidence the elements of common-law fraud. In doing so, we reject the analysis set forth in *In re Estate of Glover*, 669 A.2d 1011 (Pa. Super. 1996), because it represents an inaccurate statement of the elements required to establish fraud in the inducement. We affirm the Superior Court’s ruling that the complaining settlor did not prove fraud in the inducement.

I. BACKGROUND

Margaret Passarelli (“Wife”) and Joseph Passarelli (“Husband”) were married in November 1998 and have two children.¹ Husband sold his software business in 2010 for \$12 million dollars, but as of early 2015, Wife and Husband had not formed an estate plan. At or around this time, Wife was undergoing testing for cancer (a diagnosis that did not materialize). Husband took the initiative to meet with Attorney Michael Perna, a veteran scrivener, on May 14, 2015 to discuss estate-planning options, including the creation of an irrevocable trust. Over the next several days, Attorney Perna prepared estate documents, which he forwarded to Husband. On May 21, 2015, Wife and Husband met with Attorney Perna to discuss estate-planning matters. At the meeting, Attorney Perna presented Wife with documents for the creation of the Passarelli Family Trust (the “Trust”) and spent most of an hour answering her questions, including whether the Trust would survive a divorce; he informed Wife that it would. It was Wife’s desire to ensure that assets accumulated during their twenty years of marriage remained in their family. In particular, she wanted to secure the assets for the children of their marriage in the event Husband, at some future date, remarried and had more children. Wife’s Brief at 8; N.T., 6/23/2016, at 18–19. At the end of the meeting, the parties executed the Trust document. On at least one occasion after executing the Trust document, Wife returned to Attorney Perna’s office to execute additional estate-planning documents and documents necessary to transfer title in certain jointly held properties to the Trust. N.T., 6/23/2016, at 171–73. Pursuant to the Trust, Husband was trustee, Husband and Wife

¹ The Passarelli children were minors when Husband and Wife executed the Trust. Although they are now adults, their guardian ad litem (“GAL”) has filed a participant’s brief supporting the Superior Court’s decision.

were settlors, and their children were additional beneficiaries. As trustee, Husband had discretion to distribute income to the settlors and their children. In the event the settlors died, the Trust would continue for the benefit of the children and their living issue. Passarelli Family Trust, 5/21/2015, ¶ 4(a).

The corpus of the Trust consisted of numerous assets totaling approximately \$13 million, including two real estate property companies called Japen Holdings, LLC, and Japen Properties, LLP (collectively “Japen”), which were valued collectively at approximately \$4.2 million. Although acquired during the marriage, Japen was owned 100% by Husband. Unbeknownst to Wife, among Japen’s assets were two residential properties in Florida (the “Florida Properties”). When presented with the Trust inventory of assets (“Schedule A”), Wife did not question its contents, which included Japen, but not a listing of its specific holdings, e.g., the Florida Properties.

Approximately four months after the creation of the Trust, in September 2015, Wife discovered that Husband had been having an affair and that his paramour was living in one of the Florida Properties. Wife promptly filed for divorce on September 29, 2015. The following month, she filed an emergency petition for special relief to prevent dissipation of the marital assets, including assets in the Trust. Wife argued that Husband’s motive in creating the Trust was to gain control over the marital assets and avoid equitable distribution. Emergency Petition for Special Relief, 10/22/2015. Following a hearing, the family court judge accepted Wife’s argument by freezing certain accounts included in the Trust and directing Husband to collect rent from his paramour. N.T., 11/17/2015, at 99; Order, 12/4/2015.

On January 19, 2016, Wife filed in the orphans' court a "Petition for Citation to Terminate Irrevocable Trust" pursuant to Chapter 77 of the Probate Estates and Fiduciaries Code, known as the Uniform Trust Act, 20 Pa.C.S. §§ 7701–7799.3 (the "Act"). Specifically, Section 7736 of the Act provides that "[a] trust or an amendment to a trust is voidable^[2] to the extent its creation was induced by fraud, duress or undue influence." 20 Pa.C.S. § 7736.³ Wife originally challenged the Trust on the grounds of fraud, duress, and undue influence. Petition for Citation to Terminate Irrevocable Trust, 1/19/2016, ¶¶ 28–30. Her fraud claim was specifically based on Husband's failure "to disclose all of the marital assets." Trial Memo in Support of Petition to Terminate Irrevocable Trust, 5/2/2016, at 2. On June 23, 2016, the orphans' court conducted an evidentiary hearing at which Wife, Attorney Perna, and Husband testified. At the hearing, Wife abandoned the duress and undue influence claims and proceeded before the

² Given this statutory framework, the grant of relief would result in the Trust being void ab initio, not termination of the Trust upon entry of the order.

³ Section 7736 codifies the remedy of voiding a trust in cases of fraud, duress, or undue influence. The Restatements of Trusts and the Restatement of Property contain similar remedies, as explained in the Uniform Law Comment to Section 7736 of the Act:

This section is a specific application of Restatement (Third) of Trusts Section 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. See *also* Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

20 Pa.C.S. § 7736 Uniform Law Comment.

orphans' court exclusively on the ground of fraudulent inducement, namely, that Husband induced Wife to create the Trust by not disclosing the Florida Properties. N.T., 6/23/2016, at 143–45.

The parties and the orphans' court agreed that a challenge to the validity of a trust on grounds of fraud was similar to a will challenge based on fraud. Thus, the orphans' court turned for guidance to *In re Estate of Glover*, 669 A.2d 1011 (Pa. Super. 1996), a will contest based on both undue influence and fraud. Faced with “scant little case law” regarding fraud in the inducement of a will, *Glover* was derived from this Court's decision in *In re Paul's Estate*, 180 A.2d 254 (Pa. 1962), a will challenge involving a claim of undue influence through fraud and misrepresentation. *Glover* and *Paul's Estate* are discussed more fully later in this opinion. In short, the *Glover* court extracted from *Paul's Estate* a two-part test to establish fraud in the context of a will contest: “[B]efore a contestant can establish that the execution of a will was fraudulently induced, the contestant must prove that: (1) the testatrix had no knowledge of the concealed or misstated fact, and (2) the testatrix would not have made the same bequest had she known the truth.” *Glover*, 669 A.2d at 1016.

Applying the two-part *Glover* test to the Trust challenge in this case, the orphans' court determined that Wife proved fraudulent inducement by clear and convincing evidence. In doing so, the orphans' court noted:

Although much has been made during this matter about the parties' marital relationship, the state thereof, and the parties' divorce action, the court need not delve into such matters in order to properly dispose of the Petition [to Terminate Irrevocable Trust] before it. The focus of this court's inquiry is what [Wife] knew, or did not know, at the time the Trust was executed and whether [Wife] would have acted

differently had she known of any undisclosed or misstated information.

Orphans' Court Opinion, 9/19/2016, at 5. The orphans' court credited Wife's testimony that she had no knowledge of Husband's purchase of the Florida Properties with marital assets⁴ and that she trusted her husband, but had she been informed that he purchased the Florida Properties, she would not have executed the Trust. It also found that Husband purposely suppressed the existence of the Florida Properties. Based on its findings, the orphans' court "terminated" the Trust pursuant to Section 7736 of the Act, returning all assets titled in the Trust "to the title which was in place prior to the execution of the Trust[.]" Decree, 9/19/2016.

Husband appealed to the Superior Court, which reversed with one judge dissenting. *In re Passarelli Family Trust*, 3150 EDA 2016 (Pa. Super. Nov. 16, 2017). Wife filed an application for re-argument en banc, which the Superior Court granted. Husband again contested the orphans' court's ruling on grounds that he had no legal duty to disclose each and every asset contributed to a trust and that Wife failed to demonstrate all of the elements of fraud in the inducement. In an opinion authored by the Honorable Judge Anne Lazarus, a unanimous en banc panel of the Superior Court agreed with Husband and reversed. *In re Passarelli Family Trust*, 206 A.3d 1188 (Pa. Super. 2019) (en banc). In reversing, the Superior Court rejected the orphans' court's reliance on

⁴ The orphans' court used the term "marital assets," in that the corpus represented assets accumulated during the parties' marriage. The record reflects that the assets transferred in trust included joint property worth about \$6 million and Husband's property worth about \$7 million, including Husband's 100% ownership interest in Japen. N.T., 6/23/2016, at 166–67, 208. Wife does not challenge these valuations or that the corpus represented all of the parties' marital assets.

Glover, finding *Glover*'s fraud test problematic due to its misinterpretation of *Paul's Estate*. *Id.* at 1194.

Instead of the *Glover* test, the Superior Court relied for its disposition on the elements of a common-law fraud claim, which, unlike the *Glover* test, include inter alia “knowing or reckless misrepresentation, intention to mislead another into reliance, and resulting injury caused by reliance.” *Passarelli Family Trust*, 206 A.3d at 1195–96. The Superior Court elaborated that a party seeking to demonstrate fraud in the inducement must establish:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Id. at 1195 (quoting *Eigen v. Textron Lycoming Reciprocating Engine Division*, 874 A.2d 1179, 1185 (Pa. Super. 2005)). Testing Wife's assertions against these elements, the Superior Court concluded that she failed to prove a material misrepresentation. It highlighted Husband's disclosure of Japan and the lack of anything “in the law of trusts ... requiring that each and every asset composing the *res* of a trust be specifically identified by a settlor.” *Id.* at 1196. Thus, the Superior Court held that the orphans' court erred in ruling that the Trust was fraudulently induced. *Id.*⁵

We granted Wife's petition for allowance of appeal on the following questions:

- a. Whether the Superior Court's reversal of the orphans' court's termination of an irrevocable inter vivos trust pursuant to 20 Pa.C.S. § 7736, which explicitly allows for the voidability

⁵ Having reversed on the basis that fraud in the inducement of a trust may not be premised upon a failure to identify each and every asset contributed to a trust, the Superior Court declined to address Husband's remaining issues. *Id.* at 1196 n.9.

of a trust induced by fraud, conflicts with another appellate court's opinion?

b. Whether the Superior Court's reversal of the orphans' court's termination of an irrevocable trust pursuant to 20 Pa.C.S. § 7736, and implicit overruling of *Estate of Glover*, is at odds with this Court's holding in *Paul's Estate* regarding the factors by which a trust may be terminated?

c. Whether the Superior Court's reversal of the orphans' court's termination of an irrevocable inter vivos trust pursuant to 20 Pa.C.S. § 7736 presents an issue of first impression, especially where the Superior Court has held that a stricter standard should apply when a party seeks to rescind an irrevocable trust that was induced by fraud?

d. Whether the Superior Court's imposition of a stricter standard to terminate an irrevocable inter vivos trust on the basis of fraud in the inducement presents an issue of such substantial public importance as to require the prompt and definitive resolution by the Pennsylvania Supreme Court?

In re Passarelli Family Trust, 217 A.3d 809 (Pa. 2019). Wife's issues are interrelated; therefore, we address them together. Well-settled principles guide our review:

In reviewing the decision of the orphans' court, this Court's responsibility is to assure that the record is free from legal error and to determine if the orphans' court's findings are supported by competent and adequate evidence. In determining whether the findings of the orphans' court are supported by competent evidence, we must take as true all the evidence supporting the findings and all reasonable inferences therefrom. Further, all conflicts in testimony must be resolved by the hearing judge, who is the sole arbitrator of credibility. Findings of the orphans' court supported by evidence of record are entitled to the same weight given a jury verdict and must be sustained unless the court abused its discretion or committed an error of law.

In re Estate of Plance, 175 A.3d 249, 259–60 (Pa. 2017) (internal quotation marks and citations omitted). Misapplying the law or ruling outside the framework of the law is an abuse of discretion. *Commonwealth v. Gill*, 206 A.3d 459, 466 (Pa. 2019).

II. ARGUMENTS OF THE PARTIES

Wife characterizes the Superior Court's decision as "a swift departure" from recent Superior Court cases using the *Glover* analytical framework.⁶ Wife's Brief at 26. By using a "stricter test" for fraud in the inducement, Wife asserts that the Superior Court implicitly overruled *Glover*⁷ and diverged from *Paul's Estate*, which the Superior Court has used in the context of will contests and should remain the authority in this Commonwealth for proving fraud in the inducement. Wife's Brief at 29, 31–32; Reply Brief at 13–20.⁸

Given what Wife perceives as the lack of a definitive standard by which a fraudulently induced irrevocable trust may be set aside, she observes that courts apply

⁶ See Wife's Brief at 20, 25 (citing *Estate of Sacchetti v. Sacchetti*, 128 A.3d 273, 289 (Pa. Super. 2015); *Estate of Flatlow*, 1248 EDA 2015, 2016 WL 5193240, at *10 (Pa. Super. July 15, 2016) (non-precedential decision); *In re Estate of Rotheberg*, 2391 & 2795 EDA 2014, 2015 WL 6954970, at *21 (Pa. Super. June 26, 2015) (non-precedential decision)). Wife's reliance on these cases is misplaced. In *Sacchetti*, the Superior Court voided a prenuptial agreement based on fraud where the surviving spouse claimant hid the fact of her bigamy and stole from the decedent; *Flatlow* and *Rothberg* are non-precedential, undue influence cases.

⁷ *Glover* was an opinion by a three-judge panel. The en banc Superior Court panel in this matter had the authority to overrule *Glover*.

⁸ Wife also sees a conflict between the Superior Court's decision and *Rebidas v. Murasko*, 677 A.2d 331 (Pa. Super. 1996), in which the Superior Court focused on the existence of a confidential relationship to affirm the rescission of an irrevocable trust based on mistake. Wife's Brief at 27–28. She parallels her situation with that of the *Rebidas* settlor: both were dealing with a stressful, personal situation when they executed a trust; were unsophisticated with respect to irrevocable trusts; acted without the advantage of independent counsel; relied on a trusted family member who initiated the estate planning and retained full control; and "made a mistake of exceptional proportion." Wife's Brief at 28. Contrary to Wife's assertion, *Rebidas* is not "to a large degree" similar to the instant case. *Id.* The *Rebidas* court did not decide the case within a fraud framework; it considered whether there was clear and convincing evidence of a mistake that would warrant setting aside an irrevocable trust. *Rebidas*, 677 A.2d at 333. Moreover, making a mistake of exceptional proportion is not the same as proving fraud, and *Rebidas* was decided before the enactment of 20 Pa.C.S. § 7736, which does not include mistake as a basis for voiding an irrevocable trust.

one of “two distinct bodies of law” regarding fraud — *Paul’s Estate* and its progeny or the common-law test for fraud. Wife’s Brief at 39, 41, 42–43. Under the first approach, Wife maintains, unmoored to any standard of materiality, that had she known about the Florida Properties, she would not have executed the Trust and thus it must be voided. *Id.* at 43 (citing *Paul’s Estate*, 180 A.2d at 254; *Glover*, 669 A.2d at 1011; *Estate of Sacchetti v. Sacchetti*, 128 A.3d 273, 289 (Pa. Super. 2015); *Estate of Flatlow*, 1248 EDA 2015, 2016 WL 5193240, *10 (Pa. Super. July 15, 2016) (non-precedential decision); *In re Estate of Rotheberg*, 2391 & 2795 EDA 2014, 2015 WL 6954970, *21 (Pa. Super. June 26, 2015) (non-precedential decision)).

Alternatively, by intermingling undue influence concepts and interjecting circumstances considered irrelevant by the orphans’ court, Wife contends that even under the common-law fraud framework, she proved each element of fraud. Wife’s Brief at 44–46 (citing *Eigen, Bank of New York/Mellon v. Pryor*, 2610 EDA 2015, 2017 WL 1476312, *4 n.1 (Pa. Super. April 25, 2017) (non-precedential decision), and *ECBOB’s Parts & Accessories, Inc. v. Ed Tucker Distributing, Inc.*, 1389 MDA 2016, 2017 WL 1505243, *4 (Pa. Super. April 21, 2017) (non-precedential decision)); Reply Brief at 4–7. First, Husband failed to disclose the Florida Properties. Second, Husband’s incomplete representations were material because Wife would not have signed the Trust documents if she had known about the Florida Properties and who was living in one of them. Wife’s Brief at 44, 45. Third, Husband admitted that he did not disclose his infidelity. *Id.* at 45–46. Fourth, Husband was well aware that Wife would not have signed the Trust documents if she had known about his paramour. *Id.* Fifth, Wife justifiably relied on Husband because, having been married to him for almost twenty years, she would have

signed whatever he asked her to sign. *Id.* at 46. Sixth, Wife was damaged by her unwitting surrender of control over the parties' assets to Husband and the loss of assets that Husband used to support his paramour. *Id.*⁹

While claiming to have satisfied the elements for common-law fraud, Wife criticizes that framework's "nominal level of disclosure" as preventing her from making an informed decision by allowing Husband to use Japen to conceal a material fact, namely his purchase of the Florida Properties. Wife's Brief at 47, 49; Reply Brief at 7–9. Moreover, she complains, because the burden of proving an intent to defraud is onerous, a

⁹ Despite Wife's abandonment of claims for undue influence and duress, the bulk of Wife's brief focuses on Husband's undisclosed infidelity, her cancer testing and her reliance on Husband's management of the marital assets, discussing this latter point in terms of surrendering the task to him. Husband counters, and the record confirms, that Wife had no interest in being involved in the management of the parties' financial affairs. The record also reflects the nature of the parties' relationship, including that Husband and Wife spent substantial periods of time apart, taking advantage of residences in various locations. The orphans' court aptly noted that these circumstances had no bearing on the narrowly structured fraudulent inducement claim lodged by Wife: specifically, the failure to disclose the existence of the Florida Properties. Orphans' Court Opinion, 9/19/2016, at 5.

While it is obvious that Wife's challenge is emotionally animated by Husband's undisclosed infidelity, that is not the undisclosed fact upon which her fraudulent inducement claim is based. Despite her emphasis on the infidelity in her briefing, at no time has Wife challenged the orphans' court's articulation of her fraudulent inducement claim: the failure to disclose the existence of the Florida Properties. The Concurring and Dissenting Opinion bases its dissenting posture on a theory of fraud that was not advanced in this litigation. Contrary to the concurring and dissenting Justice's assertion (Saylor, C.J., Concurring and Dissenting Op. at 2), the orphans' court did not rely on Husband's failure to disclose the extra-marital affair as a reason for terminating the Trust. The entire focus of the orphans' court opinion was on the non-disclosure of the Florida Properties. Other than mentioning the affair as the reason Wife filed for divorce in Finding of Fact No. 27, Orphans' Court Opinion, 9/19/16, at 3, the orphans' court did not mention the affair. In fact, the orphans' court stated that consideration of the parties' marital relationship was not necessary to dispose of the petition. *Id.* at 5 and *supra* at p. 5. Like the orphans' court, the Superior Court's entire focus was on the failure to disclose the Florida Properties.

fraudulently induced trust could remain intact. Wife’s Brief at 50, 51. Also, allowing a party “to bypass equitable distribution” by fraudulently inducing the creation of a trust intensifies the harm to spouses and children caused by divorce. *Id.* at 52–53; Reply Brief at 22–24.

Husband discounts the relevance of *Paul’s Estate* and *Glover*, arguing that those two cases involved the exercise of undue influence on a testatrix, whereas Wife withdrew her claim of undue influence (and duress) in the trial court. Husband’s Brief at 6 (citing N.T., 6/23/2016, at 143–44). Husband suggests that Wife’s fraud claim should be held to the standard applied in other non-disclosure cases. *Id.* at 12 (citing *Porreco v. Porreco*, 811 A.2d 566 (Pa. 2002) (plurality) (“[P]ersons claimed to have been harmed by non-disclosure have no claim where they have the opportunity to acquaint themselves with the actual facts.”). Moreover, Husband contends that Wife had the opportunity to acquaint herself with the assets of the Trust. She had no desire to do so. *Id.* at 12–13. Thus, Husband argues, Wife’s claim of ignorance about the Florida Properties and her reliance on Husband’s financial management did not warrant voiding the Trust. *Id.* at 14–15.

Husband invokes an understanding of common-law fraud that this Court has used since the 1940s: “Fraud is practiced when deception of another to his damage is brought about by a misrepresentation of fact or by silence when good faith required expression.” Husband’s Brief at 17–18 (citing *In re Thorne’s Estate*, 25 A.2d 811, 816 (Pa. 1942), *In re Reichert’s Estate*, 51 A.2d 615, 617–18 (Pa. 1947), *In re McClellan’s Estate*, 75 A.2d 595, 598 (Pa. 1950)).¹⁰ Advocating for common-law fraud as the appropriate test in this

¹⁰ Alternatively, Husband cites this Court’s analysis in *Moser v. DeSetta*, 589 A.2d 679 (Pa. 1991), as a standard for fraud. Husband’s Brief at 19. That case involved a mentally

case, Husband echoes the Superior Court’s opinion that “irrevocable trusts are intended to be just that; irrevocable.” Husband’s Brief at 21 (citing *Passarelli Family Trust*, 206 A.3d at 1194). He cautions that Wife’s “loose standard” for fraud allows a settlor to rescind an irrevocable trust simply by identifying any omission of fact, whether material or damaging, and “invites predatory conduct.” *Id.* at 22. Lastly, Husband argues that the litany of “misdeeds” alleged by Wife cannot serve to invalidate the Trust because they relate to his management of the Trust. *Id.* at 24 (citing *First Federal S&L Assoc. of Erie v. Great Northern Corp.*, 422 A.2d 1145 (Pa. Super. 1980) (elements to create a valid trust are met if the beneficiary, the corpus, and the purpose of the trust are identified)).¹¹ If, however, the failure to disclose the Florida Properties supports a claim of fraud, the proper remedy would be to remove those assets from the Trust, not to terminate the Trust: “The law should not invalidate a trust which is good in part.” *Id.* at 25 (citing *In re McClellan’s Estate*, 70 A. 737 (Pa. 1908)).

impaired seventy-eight-year-old husband whose sister took him to an attorney to discuss divorcing his wife. With the help of his sister, Mr. Moser moved out of the marital residence and met his wife at a local bank where they transferred \$115,000 from a joint account to an account held by the husband and his sister; two months later, Mrs. Moser obtained an agreement that she would receive half of the transferred funds. When Mr. Moser died, his two sisters shared the remaining half of the transferred funds, prompting Mrs. Moser to sue her sisters-in-law for fraud. The trial and appellate courts rejected the fraud claim. Affirming, this Court defined fraud as composed of a misrepresentation, fraudulently uttered with the intention to induce the action undertaken in reliance on it, to the damage of the victim. *Moser*, 589 A.2d at 682. We explained that, although Mrs. Moser may not have understood the full effect of the bank transaction, not understanding a transaction “falls far short of what would be required as proof of fraud.” *Id.* at 683.

¹¹ Wife acknowledges Husband’s point that the Act provides remedies for a breach of trust. Reply Brief at 24 (citing 20 Pa.C.S. § 7781(a) and Husband’s Brief at 24). However, Wife claims that Husband’s argument ignores Section 7736, which the General Assembly enacted to allow a party to rescind a trust under the circumstances presented here, “where the trust was procured by ... fraud.” *Id.*

According to the GAL, the Superior Court's departure from *Glover* was warranted where the *Glover* court failed to distinguish between the separate legal theory of undue influence when adopting a standard for fraudulent inducement. GAL's Brief at 5. The GAL points out that, in resolving this case, the Superior Court recognized that the *Glover* analysis resulted "in a body of case law that is inconsistent with and divergent from core fraud principals." *Id.* at 7, 8 (citing *Passarelli Family Trust*, 206 A.3d at 1193). Moreover, Wife did not prove by clear and convincing evidence that a misrepresentation occurred. GAL's Brief at 5.

In support of its position, the GAL makes several points. First, Husband did not have a duty to disclose the existence of his paramour and his failure to do so is not a misrepresentation of fact; all the requirements for creating a trust (settlor has capacity and signs a writing that indicates an intention to create a trust and provisions of the trust; the trust has a definite beneficiary; the trustee has duties; and same person is not sole trustee and sole beneficiary) were satisfied in the language of the Trust. GAL's Brief at 14, 15 (citing 20 Pa.C.S. § 7732(a)). Second, Husband made a full and fair financial disclosure in the form of Schedule A, which permitted Wife to make an informed decision about which assets were being transferred to the Trust. *Id.* at 19, 21–22. Third, revoking the Trust, along with the expense of divorce, will reduce, if not eliminate, the children's interest in the Passarelli estate, which is contrary to Wife's expressed goal of keeping the family money within the family. *Id.* at 22–24 (citing 23 Pa.C.S. § 3102(a)(4)). Fourth, the protections of the Domestic Relations Code were not available to Wife when the Trust was executed because no complaint in divorce had been filed. *Id.* at 24–25. Lastly, Wife has the greater position of control over the Trust because the Act affords her the right to

request accountings, faithful execution of duties, and the removal of a breaching trustee. *Id.* at 25–26 (citing 20 Pa.C.S. §§ 7780.3 (“Duty to inform and report”), 7772 (“Duty of loyalty”), 7773 (“Duty of impartiality”), and 7781 (“Breach of trust”)).

III. ANALYSIS

The path pursued by Wife in the orphans’ court was a claim based solely on Husband’s failure to disclose the Florida Properties for the alleged purpose of fraudulently inducing Wife to create the Trust as part of their estate plan. Fueling Wife’s challenge is the Superior Court’s rejection of *Glover* as the appropriate standard for determining if Husband fraudulently induced Wife to create the Trust. *Glover*, in turn, was based on the Superior Court’s interpretation of this Court’s decision in *Paul’s Estate*. A review of these cases is required to resolve this appeal.

Paul’s Estate

Paul’s Estate involved a will contest based on a claim of undue influence through fraud and misrepresentation. The eighty-three-year-old testatrix distributed gifts of personalty and realty to family and friends, with the residual bequeathed to her nephews. *Paul’s Estate*, 180 A.2d at 256. At issue was a gift of eighty-four shares of capital stock, a filing cabinet, and its contents to the lawyer who drafted Paul’s will, John McCreight. The value of the residual bequest to the nephews, originally valued at \$163,367.52, was severely reduced to less than \$1,900 after the payment of taxes imposed by state and federal governments on the stock bequest. The nephews charged the attorney, who was in a confidential relationship with the testatrix, with misrepresenting to her the value of the stock bequeathed to him as \$50 per share when he knew it was actually worth much more. They alleged that the testatrix relied upon the attorney’s misrepresentation and

made the bequest not knowing the actual value of the stock was \$800 per share. *Id.* at 256, 259. This Court determined that the nephews had to prove, by clear and convincing evidence, that the attorney exercised undue influence through fraud and misrepresentations as to the value of the stock, thereby causing the testatrix to bequeath him 33% of her estate when she intended to bequeath him 3% of the estate. *Id.* at 262.

The Court did an extensive factual analysis of the record from the orphans' court pertaining to the value of the stock, the attorney's knowledge of the value at various points in time, and the testatrix's own knowledge of its value. Noting that the evidence was contradictory as to what the attorney knew and when he knew it, the record was clear that the testatrix had independent knowledge of the value of the stock based upon her conversations with the owner of the company that issued the stock and her acknowledged receipt of dividends per share for years preceding the execution of the will that far exceeded the \$50 per share value represented to her. The Court expressly noted that although the testatrix was elderly, she was not only mentally sound and not infirm, "but an intelligent business woman." *Paul's Estate*, 180 A.2d at 261. The Court explicitly noted that "there is not a scintilla of evidence" that the attorney unduly or otherwise influenced the testatrix to name him in her will. In fact, it was evident that it was her idea. Such desire was clearly expressed in the last three wills she made. *Id.* at 261 n.9.

The Court in *Paul's Estate*, after recapping the record offered to support fraud, stated:

[T]here is no evidence that testatrix did not know the true value of this stock and there is no evidence that, even if she did not know its true value and believed it to be worth only \$50 per share, that she would not have made this bequest had she known its true value.

Paul's Estate, 180 A.2d at 262 (emphasis supplied). To cull this one sentence from the detailed factual analysis performed by the Court and reference it as the definition of fraud is a misstatement of the case.¹² It is clear in context that the Court parsed the record for a misrepresentation and that the materiality was patent (\$50 per share versus \$800 per share); the court considered whether there was an intent for the testatrix to rely on it (the attorney and the testatrix were aware of the dividends); and whether the testatrix relied on it (no evidence that she did not know the true value or that it made a difference in the bequest). Under the facts, the challengers failed to meet their burden to establish both undue influence and fraud in accomplishing it.

Glover

Glover involved a will contest based on claims of undue influence and fraudulent inducement. Through a 1989 will, the testatrix “Frankie” Glover distributed her \$8 million dollar estate to family and friends, including her personal assistant, Hurley. *Glover*, 669 A.2d at 1014. At issue was a bequest of \$50,000 to Hurley, who, along with Frankie’s financial advisor, had misappropriated \$1.6 million from Frankie. The Superior Court concluded that the heirs failed to prove Frankie was the victim of Hurley’s undue influence

¹² The Court stated that for the challengers to prevail, four propositions had to be sustained:

- (a) that the true value of the stock was \$800, not \$50, per share; (b) that [the attorney] knew this true value; (c) that, by fraud and misrepresentation, [the attorney] concealed the true value from testatrix and lulled her into believing that, on the basis of a \$50 per share value, she was bequeathing [the attorney] less than 3% of her estate; (d) that had testatrix known the true value of the Penn stock which represented approximately 33% of her gross estate she would not have made this bequest.

Paul's Estate, 180 A.2d at 261. The court specifically noted that it would focus only on the last proposition. *Id.*

or that Hurley forged Frankie's initials to interlineations on the will that included the \$50,000 bequest. *Id.* at 1014–15. As for the claim that Hurley fraudulently induced Frankie to execute the \$50,000 bequest interlineation, the Superior Court concluded that, “before a contestant can establish that the execution of a will was fraudulently induced, the contestant must prove that: (1) the testatrix had no knowledge of the concealed or misstated fact, and (2) the testatrix would not have made the same bequest had she known the truth.” *Id.* at 1016. The Superior Court opined that, had Frankie known Hurley misappropriated \$1.6 million from her, Frankie would not have bequeathed \$50,000 to Hurley. *Id.* at 1017.

Presented with a fraudulent inducement challenge, the *Glover* court ostensibly relied on *Paul's Estate*. In doing so, the *Glover* court generalized its truncated factual summary of *Paul's Estate* by omitting the key elements of materiality, knowledge/recklessness, reliance, and injury. *Glover*, 669 A.2d at 1016. The effect of the *Glover* court's interpretation of *Paul's Estate* was to eliminate, inter alia, the need to prove a misrepresentation of a material fact by act or omission in a fraudulent inducement case. Thus, the *Glover* court did not engage in any type of fraud analysis before concluding that the \$50,000 bequest to Hurley must fail as it “was clearly procured through fraudulently inducing Frankie to execute the corresponding interlineation in her will.” *Id.* at 1017. As a result, we reject *Glover*, as it stands out as an anomaly in the test for common-law fraud by reducing decades of fraud jurisprudence to a two-part test derived from a summation of select facts in *Paul's Estate*.

Common Law Fraud¹³

For more than a century, our courts have reviewed fraudulent inducement claims in myriad contexts using the elements of common-law fraud. See *Muelhof v. Boltz*, 64 A. 527 (Pa. 1906) (sale of business); *Silvagni v. Shorr*, 113 A.3d 810 (Pa. Super. 2015) (legal malpractice); *Harter v. Reliance*, 562 A.2d 330 (Pa. Super. 1989) (insurance coverage); *Fed. Bank v. Fetner*, 510 A.2d 344 (Pa. Super. 1979) (mortgage foreclosure); *Stringert & Bowers v. On-Line Systems, Inc.*, 345 A.2d 194 (Pa. Super. 1975) (mechanic's lien). Against this backdrop, we reject Wife's complaints that the elements of common-law fraud present too strict of a test for voiding an irrevocable trust.¹⁴ The durable nature

¹³ As an alternative to the common law test for fraud, Wife passingly endorses the Restatement (Third) of Property: Wills & Donative Intent § 8.3(d) ("Section 8.3(d)"), which she perceives as different from the common-law test. Reply Brief at 9. This section reads: "A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made." Restatement (Third) of Property: Wills & Donative Intent § 8.3(d). Wife concedes that Section 8.3(d) has not been adopted as law in Pennsylvania. Wife's Brief at 38. Notably, neither of the lower courts nor Husband discussed Section 8.3(d) as a test for fraud.

This case does not present the opportunity for us to consider adoption of Section 8.3(d). Pennsylvania common law provides a workable and established test to prove fraud in the inducement. Moreover, Section 8.3(d) is, in fact, comparable to common-law fraud in that both include a false representation knowingly or recklessly made about a material fact to mislead another person that was relied upon by the other person. The parties have not provided sufficient advocacy concerning the distinctions, if any, between the restatement and Pennsylvania common law formulations or the benefits and/or risks of adopting Section 8.3(d). Further, the lower courts offered no assessment or practical perspective regarding adoption of Section 8.3(d) as the preferred test for fraud in the context of donative transfers, including irrevocable trusts.

¹⁴ Wife argues that utilizing the test for common-law fraud in the inducement allows a spouse to use an irrevocable trust "as a vehicle to evade the legislative regime of equitable distribution." Reply Brief at 22. Because Wife opted to pursue her challenge in the orphans' court by petitioning to terminate the trust under Section 7736 instead of

of an irrevocable trust warrants imposing on a party who seeks to set aside such a trust pursuant to 20 Pa.C.S. § 7736 the burden of proving an intentional representation (or omission), of a material fact, made falsely, with an intent to mislead a settlor, that the settlor relied upon to their detriment. Application of this standard is consistent with the statutory scheme, which distinguishes between termination or modification of irrevocable trusts and revocable trusts, the latter being terminable or modifiable with relative ease.¹⁵ Based on the foregoing, we adopt the elements of common-law fraud as the standard for determining fraud in the inducement of an irrevocable trust.

The Passarelli Family Trust

This Court identified the meaning and essential elements of a trust almost a century ago: A trust is “a relation between two persons, by virtue of which one of them as trustee holds property for the benefit of the other. ... There must be sufficient words to raise a trust, property to be subject to it, and a purpose to be accomplished.” *In re Vosburgh’s Estate*, 123 A. 813, 815 (Pa. 1924). Pennsylvania codified these elements in the Act: “A trust may be created by: (1) transfer of property under a written instrument to another person as trustee during the settlor's lifetime or by will or other written disposition taking effect upon the settlor's death... .” 20 Pa.C.S. § 7731(a). A settlor must

attempting to address the validity of the Trust before the equitable distribution court, we do not address the interplay between an irrevocable trust and equitable distribution. See 23 Pa.C.S. §§ 3502(e) (powers of the court), 3505 (disposition of property to defeat obligations), and 3323(f) (equity power and jurisdiction of the court).

¹⁵ A settlor “may revoke or amend” a revocable trust “as provided in the trust instrument” or by a later writing. 20 Pa.C.S. § 7752(a), (c). In contrast, an irrevocable trust may only be terminated or modified with the consent of the settlor(s) and all beneficiaries, 20 Pa.C.S. § 7740.1(a), or with the consent of all or some of the beneficiaries and court approval, *id.* § 7740.1(b).

have capacity to create a trust and sign a writing that indicates an intention to create the trust, contains provisions of the trust, identifies a definite beneficiary, assigns duties to the trustee, and does not provide that the same person is the sole trustee and sole beneficiary of the trust. 20 Pa.C.S. § 7732(a)(1–5). “Generally, a trust executed without reservation of power by a settlor to revoke or reform the trust is irrevocable.” *Rebidas*, 677 A.2d at 333.

The usefulness of trusts in estate planning cannot be overstated.¹⁶ Irrevocable inter vivos trusts in particular are used to avoid probate administration, to reduce the estate and gift tax costs of transferring assets to beneficiaries, to shift income within the family unit, to afford the settlor protection from future creditors, or to take care of the needs of an incompetent or financially insecure family member. See Edward F. Koren, 1 Est. Tax & Pers. Fin. Plan. § 1:11; 2 Est. Tax & Pers. Fin. Plan. §§ 19:54, 19:55 (identifying beneficial uses of irrevocable trusts). Given the shelter that is created and to provide certainty and stability in the protection and disposition of assets, an irrevocable trust is not easily changed. Of course, the use of an irrevocable trust carries a price — irrevocability. Because a grantor gives up the right to amend or rescind an irrevocable trust, care must be taken in drafting, reviewing, and funding a trust, as undesirable control and financial consequences may occur. Koren, 2 Est. Tax & Pers. Fin. Plan. § 19:61.

Turning to Wife’s fraudulent inducement claim, it rests on an allegation that Husband fraudulently induced her to create the Trust by failing to disclose that the Trust

¹⁶ One commentator opined, “If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.” Koren, 2 Est. Tax & Pers. Fin. Plan. § 19:1 (quoting Maitland, *Selected Essays*, at 129).

would include the Florida Properties, valued at \$445,000. These two properties were not specifically listed as assets on Schedule A of the Trust document, but were wholly owned by two business entities that were disclosed on Schedule A and appropriately valued at \$4.2 million. According to the orphans' court, Husband's failure to disclose the inclusion of the Florida Properties was a false representation of a fact material to Wife, and therefore the Trust was voidable under Section 7736 of the Act. Orphans' Court Opinion, 9/19/2016, at 5–6. In contrast, the Superior Court ruled that Husband was not liable on Wife's fraudulent inducement claim because his failure to disclose the Florida Properties was not a misrepresentation. *Passarelli Family Trust*, 206 A.3d at 1196. Applying the common-law test for fraud, our review addresses whether nondisclosure of the Florida Properties was a material misrepresentation that induced Wife to create the Trust.

We first address whether the failure to disclose specifically the existence of the Florida Properties constituted an actionable misrepresentation. This Court has long recognized that “the deliberate nondisclosure of a material fact amounts to a culpable misrepresentation no less than does an intentional affirmation of a material falsity.” *Neuman v. Corn Exch. Nat'l Bank & Trust Co.*, 51 A.2d 759, 764 (Pa. 1947); *Bortz v. Noon*, 729 A.2d 555, 560 (Pa. 1999). Pennsylvania trust law does not, however, require that trust property be identified or described in any particular manner or to any particular level of detail. Indeed, “[a] declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer.” 20 Pa.C.S. § 7731 Editor's Note, Uniform Law Comment. The law requires only that the property be identifiable. See *In re Vosburgh's Estate*, 123 A. at 815 (“It is the identity of the fund, not the pieces of coin or bank notes, that controls.”);

DiLucia v. Clemens, 541 A.2d 765, 767 (Pa. Super. 1988) (holding that “the identity of the shares was clear and the description sufficient because the shares were fungible”).

Schedule A identifies four categories of Trust property: bank accounts, brokerage accounts, real estate, and businesses, including Japen, which Husband solely owned and used to purchase investment properties. N.T., 6/23/2016, at Exhibit P-1. On that point, the record indicates — and Wife does not dispute — that Schedule A was “culled” from a “more elaborate schedule” of Japen’s assets provided by Husband to Attorney Perna, who considered it easier to convey Husband’s sole ownership of Japen instead of listing its individually held properties, which were its primary assets. N.T., 6/23/2016, at 100–01, 163–64, 183–84, 186,191–92, Exhibit P-11. As such, in creating the Trust, Husband transferred his ownership of Japen rather than transferring each of its individual real estate holdings (including the Florida Properties). Schedule A represents a sufficient description of the Trust property. Wife has not argued that the represented values of the assets disclosed on "Schedule A" were not full and fair, or that all of the identified assets (including Japen) were not transferred into the Trust. In sum, Wife has presented no evidence that would demonstrate that Husband designed Schedule A to deceive her or to hide the existence of the Florida Properties. To the contrary, Schedule A merely identified the interests and assets to be transferred into the Trust.

Moreover, the undisclosed fact relied on by Wife, i.e., the existence of the Florida Properties, is not a material misrepresentation. “A misrepresentation is material when it is of such a character that if it had not been made, the transaction would not have been entered into.” *DeJoseph v. Zambelli*, 139 A.2d 644, 647 (Pa. 1958). “[T]he primary focus must be on the intent of the settlor at the time of the creation of the alleged trust.”

Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317, 1324 (Pa. 1985). With respect to a claim for fraudulent inducement to create a trust, a misrepresentation is material when it tends to convince a settlor that his or her intentions in creating the trust are being achieved, when in fact they are not.

Wife claims that the non-disclosure of the Florida Properties was material to creation of the Trust because if they had been specifically identified on Schedule A, she would not have signed the Trust documents. However, the record contains no evidence to support this contention. To the contrary, the record confirms that Wife's intention in creating the Trust had nothing to do with the Florida Properties or any other specific assets to be transferred to the Trust. Instead, Wife's clear intention was to ensure that all of the assets that were accumulated during the twenty years of her marriage to Husband remained in her family. In particular, she wanted to secure the marital assets for the children of their marriage in the event that Husband, at some future date, remarried and had more children. In other words, Wife's intent was to create a trust that provided herself and her children with financial security and protected all of the marital assets in the event Wife and Husband did not remain married and Husband had other children in a later marriage. Wife does not dispute that, at the time of its creation, the Trust accomplished these purposes. N.T., 6/23/2016, at 19, 51–52, 60, 64, 179.

Wife had knowledge of the Trust's nature as a matter of law and as a matter of fact,¹⁷ as the document is clearly entitled

¹⁷ For the purposes of the Act, "a person has knowledge of a fact involving a trust if the person has: (1) actual knowledge of it; (2) received a notice or notification of it; or (3)

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N.T., 6/23/2016, at 16, 151–52, 154–55, Exhibit P1. Wife also had knowledge that the Trust assets and their values were identified in Schedule A. *Id.* at 100, Exhibit P1. When presented with Schedule A’s inventory of assets, Wife did not question any of its contents, though she did understand and confirm that the Trust would “encompass all of their marital property at the time” of the execution of the Trust documents. Orphans’ Court Opinion, 9/26/2016, at 5. Given this record, Wife fails to demonstrate how specifically listing the Florida Properties on Schedule A would have thwarted her intention in creating the Trust.

Further undermining Wife’s position is that she now challenges the non-disclosure of **only** the Florida Properties.¹⁸ At the time she settled the Trust, Wife’s intent was to secure **all** of the marital assets for her and her children’s financial security. The Florida Properties are income-producing assets, jointly valued at \$445,000, that inure to the benefit of Wife and the Passarelli children. If the Florida Properties, which represented only a small percentage of the entire \$14 million Trust corpus, were material to creating a trust that protected the marital assets and provided the children with financial security, then disclosure of all of its assets would be material to those same purposes, including the other Japen assets and the unidentified stocks in the two brokerage accounts listed on Schedule A. Wife has not demonstrated how identifying two minor assets that became

reason to know it from all the facts and circumstances known to the person at the time in question.” 20 Pa.C.S. § 7704.

¹⁸ The reason for this is obvious. The latent source of Wife’s post-settlement angst is not Husband’s failure to disclose the Florida Properties, but his failure to disclose the person he housed in one of them.

Trust property through the transfer of their corporate owner to the Trust would have negated creation of the Trust.

When Wife settled the Trust, transferring the marital assets into the Trust to protect them and provide for herself and her children was exactly what it professed to be — her choice. See *Paul's Estate*, 180 A.2d at 258 (“It is the duty of the law to ensure that a person’s disposition of property shall be what it professes to be, literally, his or her will.”) (emphasis omitted). Wife has not demonstrated the particular materiality of the Florida Properties, such that identifying them on Schedule A at the time of the creation of the Trust would have altered her intent in creating the Trust. See *Presbytery of Beaver-Butler*, 489 A.2d at 1324; *Paul's Estate*, 180 A.2d at 262 (holding that, where testatrix desired to bequeath stock to attorney, allegation of attorney’s fraud regarding stock value failed to establish that testatrix would not have bequeathed stock to attorney if she had known its true value). Thus, Husband’s failure to identify the Florida Properties does not serve as a basis for voiding an otherwise valid, irrevocable trust agreement.

Conclusion

To void an irrevocable trust based on fraudulent inducement pursuant to 20 Pa.C.S. § 7736, a challenging settlor must prove the elements of common-law fraud by clear and convincing evidence. This aligns with the Uniform Law Comment to 20 Pa.C.S. § 7736, the authority cited therein and general principles of Pennsylvania law.

Wife has failed to prove that Husband’s failure to disclose the Florida Properties constituted a material misrepresentation, and thus, the specific non-disclosure did not fraudulently induce her to settle the Trust.

The Superior Court’s order is affirmed.

Justices Baer, Todd, Dougherty and Wecht join the opinion.

Chief Justice Saylor files a concurring and dissenting opinion in which Justice Mundy joins.