

**COMMONWEALTH OF MASSACHUSETTS  
PROBATE AND FAMILY COURT DEPARTMENT**

**ESSEX DIVISION**

**Docket No. ES15E0085QC**

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Sally Ann Cormier, )

) *Plaintiff,* )

v. )

Ronald Koning, Jr. and )

Jon Koning, )

) as co-Trustees of the Koning Family )

) Irrevocable Business Trust and )

) Individually, and )

Ronald Koning, Jr., )

) as Trustee of the Ronald Koning, Sr. )

) Life Insurance Trust )

) *Defendants.* )

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**FINDINGS OF FACT**

*(on Plaintiff's Equity Complaint filed on August 13, 2015 as amended June 15, 2016)*

This matter came before the Court (Ross, J.) for trial on December 12, 13, and 15, 2017. Plaintiff, Sally Ann Cormier was present and represented by Attorney Kurt S. Kusiak and Attorney Kate Billman-Golemme. Defendants, Ronald Koning Jr. and Jon Koning were present and represented by Attorney Leo Cushing and Attorney Miranda Patton. Seven (7) witnesses testified and forty-nine (49) exhibits were entered into evidence. After due consideration of all the credible evidence, the testimony of the witnesses, review of exhibits and all reasonable inferences therefrom, the Court finds the following facts<sup>1</sup>:

**I. Background Information**

1. In 1988, Ronald Koning Sr. ("Ron Sr.") and his wife, Sandra, founded State Electric Company ("SEC" or "the Company"), as an S-Corporation to perform electrical contracting and engineering work.
2. SEC is a closely held family business. Ron Sr. and Sandra each owned half the voting shares of SEC. After Sandra's death, Ron Sr. held all the shares of SEC in his own name.

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<sup>1</sup> The Court incorporates the parties' First Amended Stipulation of Uncontested Facts herein.

3. Ron Sr. and Sandra have four adult children: Ronald Koning Jr. ("Ron Jr."), Jon Koning ("Jon"), Sally Ann Cormier ("Sally" or "Plaintiff"), and Jennifer Hine ("Jennifer").
4. SEC's first headquarter was Ron Jr.'s home in North Reading, Massachusetts. A short time later, SEC moved to Ron Sr. and Sandra's home in Wilmington, Massachusetts.
5. SEC is now headquartered in Bedford, Massachusetts.
6. Ron Jr. is the President and Jon is the Vice President of SEC.
7. Both Ron Jr. and Jon are licensed union electricians and have worked for SEC in some capacity since its inception, except for a brief period of time in 1995 when Jon worked for another company.
8. Sally worked for State Electric between 1996 and 1998, as well as between 2000 and 2004. Sally was last employed by SEC the week of September 15, 2004.
9. In 2004, Sally moved to Arizona with her husband. Since 2005, Sally has been a successful, licensed real estate agent.
10. As of December 31, 2005, SEC had 2,000 shares of voting stock. Ron Sr. owned 1,976 shares in a revocable trust and Ron Jr., Jon and Jennifer each owned eight (8) shares.
11. In late 2005 or early 2006, Ron Sr. retained Attorney Brian MacCormack to draft an estate plan to address his concerns regarding asset protection and tax planning.
12. Attorney MacCormack recommended that Ron Sr. establish two irrevocable trusts, the Koning Family Irrevocable Business Trust (hereinafter "Business Trust") and the Ronald Koning Sr. Life Insurance Trust (hereinafter "Life Insurance Trust"). Attorney MacCormack subsequently drafted the Business Trust and Life Insurance Trust.
13. Ron Sr. relied upon Attorney MacCormack to prepare his estate plan in accordance with his direction. Ron Sr. did not explain his estate plan to any of his children, in detail, if at all. Ron Sr. chose to keep his estate plans to himself to avoid conflict between the children.
14. On March 10, 2006, Ron Sr. established the Life Insurance Trust to assist in the payment of estate taxes due upon his death. Ron Jr. was appointed as Trustee of the Life Insurance Trust and has served in that capacity since its inception.

15. Jon was appointed as successor Trustee of the Life Insurance Trust, but has yet to serve in that capacity.
16. The Life Insurance Trust purchased a life insurance policy with a death benefit of \$2,000,000 and it has an annual premium of \$120,184.
17. On June 30, 2006, Ron Sr. established the Business Trust as an Intentionally Defective Grantor Trust (hereinafter "IDGT") under Internal Revenue Code, §675(4)(C) to remove SEC assets from his estate; to provide flexibility in managing SEC; and to minimize estate taxes due at the time of his death.
18. Ron Jr. told Sally about the Business Trust in 2006 although she did not receive a copy of the Business Trust until several years later.
19. Attorney MacCormack explained that an IDGT is eligible to be an S-Corporation shareholder, pursuant to I.R.C. § 1361(c)(2)(A)(i). He testified that as income is generated by the grantor trust, here the Business Trust, the Grantor (Ron Sr.) is responsible for paying the income tax generated by the shares in the trust.<sup>2</sup>
20. On or about June 30, 2006, Ron Jr., Jon, and Jennifer each transferred their eight (8) voting shares (24 total shares) into the Business Trust.
21. Since SEC only had voting shares, Attorney MacCormack recommended the creation of SEC nonvoting shares.
22. SEC recapitalized the shares with a 9 to 1 stock dividend, issuing nine (9) nonvoting shares for each outstanding share of voting stock.
23. As a result, since the Business Trust already owned twenty-four (24) voting shares (those of Ron Jr., Jon and Jennifer), it received 216 nonvoting shares. Ron Sr., who owned 1,976 of voting shares received 17,784 nonvoting shares.
24. In order to take advantage of allowable valuation discounts permitted by the Internal Revenue Service (hereinafter "IRS"), Attorney MacCormack structured the transfer of nonvoting SEC shares into the Business Trust by part gift and part sale in 2006 and by the sale of voting shares in 2007.
25. Ron Sr. gifted 6,345 of his nonvoting shares to the Business Trust. A gift tax return reporting the gift was filed and accepted by the IRS.

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<sup>2</sup> Article 30 of the Business Trust, "Grantor Trust Provisions" states that while alive, Ron Sr. "intend[s] this trust to be a grantor trust for federal income tax purposes...that the power granted in this Section will cause the income of my trust to be taxed to me under certain provisions of Section 671-677 of the Internal Revenue Code. To carry out this intent, the following provisions shall apply in the administration of my trust."

26. On June 30, 2006, Ron Sr. sold his remaining 11,439 nonvoting shares to the Business Trust in exchange for a Private Annuity Agreement (hereinafter "First Annuity Agreement") under which he would receive \$176,377 per year for life.
27. The Memorandum of Sale for the June 30, 2006 transaction listed the purchase price of the 11,439 nonvoting shares as \$1,543,121. Article 10 of the First Annuity Agreement, entitled "Amendments" provided that the terms of the First Annuity Agreement could be amended, altered or modified in writing and executed by all parties.
28. As of July 1, 2006, the appraised value of SEC was \$1,470,000.
29. At the end of 2006, the Business Trust held twenty-four (24) voting shares of SEC stock and 18,000 nonvoting shares of SEC Stock. Ron Sr. still held 1,976 voting shares of SEC stock in a revocable trust.
30. On June 28, 2007, Ron Sr., Ron Jr., and Jon executed an Amended Memorandum of Sale for the June 30, 2006 sale of 11,439 nonvoting shares to the Business Trust "due to a revised appraisal report dated April 4, 2007."
31. The appraiser reported a discount to net asset value of twenty percent for lack of control and forty percent for lack of marketability, bringing the net price per share to \$35.28 ( $\$403,569 / 11,439 = \$35.28$ )
32. The purchase price of the nonvoting shares decreased from \$1,543,121 to \$403,569. Accordingly, the annual annuity payment to Ron Sr. decreased to \$46,127 per year.
33. Using the same net price per share, the value of the 6,345 gifted shares was \$223,851.60.
34. On July 28, 2007, Ron Sr. sold his remaining 1,976 voting shares of SEC stock to the Business Trust in exchange for a second private life annuity (hereinafter "Second Annuity Agreement") under which he would receive \$12,501 per year.
35. The Memorandum of Sale for the June 28, 2007 transaction listed the purchase price for 1,976 SEC voting shares as \$145,236.
36. As with the First Annuity Agreement, the Second Annuity Agreement provided that the Business Trust "shall be absolutely liable for the payments due...and such payments are in no way contingent upon future earnings, if any" from the transfer of nonvoting and voting shares to the Business Trust. No amount of the annuity or the value of the stock at the time of Ron Sr.'s death would be includable in his estate.

37. Neither the 2006 sale of the nonvoting shares nor the 2007 sale of the voting shares were taxable events because the Business Trust was designed to be an IDGT under Internal Revenue Code § 675(4)(C).
38. As of June 28, 2007, the Business Trust owned all SEC voting and nonvoting stock. Ron Sr. was responsible for paying the income taxes on the profit of SEC, but the Business Trust provided that he could be reimbursed each year for the incremental tax he paid attributable to SEC profits.
39. Attorney Michael Riley, Plaintiff's expert witness, agreed that the plan was an effective estate planning technique to reduce if not eliminate estate taxes which would be incurred upon the death of Ron Sr.
40. The value of SEC has grown from \$1,470,000 in 2006 to \$20,000,000 to \$22,000,000 in 2015, with 400 employees. Since taking over the company in 2006, along with advice from their father, Ron Jr. and Jon have been solely responsible for the growth of the company and the substantial increase in its value.
41. The Court credits Attorney MacCormack's testimony that the estate tax savings solely attributable to removing the stock from Ron Sr.'s estate was approximately \$8 million using a forty percent (40%) estate tax bracket.

## **II. Terms of the Business Trust**

42. The Business Trust held 2,000 voting shares of SEC stock until June 15, 2009 and 18,000 nonvoting shares of SEC stock until January 1, 2014.
43. As the Grantor of the IDGT, Ron Sr. was responsible for income tax generated by the Business Trust; however, the value of the stock held by the Business Trust is not includable in his estate at the time of death.
44. During Ron Sr.'s lifetime, Beneficiaries of the Business Trust are "members living at the time of payment, of a class consisting of the Grantor's issue of all generations."
45. After Ron Sr.'s death, Beneficiaries of the Business Trust are Ron Jr., Jon, Sally, and Jennifer. If any Beneficiary should not be living at the time of Ron Sr.'s death, their portion would pass to their living issue.
46. The parties stipulated that there are eight members of the class of Beneficiaries: Ron Jr., Jon, Sally, Jennifer, Austin Koning, Heather Koning, Paige Koning, and Alex Seavey.

47. The Court credits the testimony of Attorney MacCormack and Ron Sr. that an unintended consequence of the Business Trust was that it created complexity with regard to Ron Sr.'s taxes because SEC did business in several states.
48. Ron Sr. appeared each day during the trial and testified as a witness without objection. Ron Sr. is eighty-two (82) years old. He works and rides his bicycle three (3) miles every day. He is fully competent. The Court credits his testimony.
49. Ron Sr. specifically chose Ron Jr. and Jon as Co-Trustees of the Business Trust because of their knowledge and experience running SEC. They have served in that capacity since the Business Trust was formed. Jennifer is named as successor Co-Trustee.
50. Before he agreed to act as Co-Trustee of the Business Trust, Ron Jr. met with Attorney MacCormack to better understand trust administration and fiduciary duties.
51. Jon did not receive an explanation of his duties as Trustee of the Business Trust.
52. Article 2.01 of the Business Trust, entitled "Payments During Grantor's Life" provides that:

During the lifetime of the Grantor, other than as provided in Article 2.02, the Trustee may, in its discretion, at any time or times and for any reason, pay any part or all of the income and principal of the trust to or for the benefit of any one or more (or all) of those members living at the time of payment, of a class consisting of the Grantor's issue of all generations.
53. Article 7.01 of the Business Trust provides that the Trustees may make discretionary distributions and "may consider other resources available to a Beneficiary, but may make such distributions even though there are other resources available except as otherwise provided herein."
54. The Business Trust does not provide an ascertainable standard that must be considered prior to the Trustees making a distribution.
55. The Business Trust was drafted without an ascertainable standard to allow the officers the greatest flexibility in running the company.

56. Article 7.02 of the Business Trust provides that:
- Whenever income or principal is payable in the discretion of the Trustee, to or for the benefit of a Trustee, or such Trustee's issue, without an ascertainable standard, such discretion shall be exercisable solely by the other Trustee or Trustees.
57. The Court credits the testimony of Attorney Bove that the purpose of Article 7.02 is not to prevent self-dealing by the Trustees. Rather, it is a provision that is included to avoid a general power of appointment, which would cause the Trustees to be considered as the owners of the property in the Trust and would pose serious income and estate tax consequences because the property would be included in their estate.
58. Article 7.03 of the Business Trust provides that "the powers and discretions of the Trustee shall not be exercised in such a manner as would cause any part of this trust to be included in the Grantor's estate."
59. Article 14 of the Business Trust requires the Trustees to provide "an accounting at least annually to the income Beneficiaries of the trust during the accounting period."
60. The Trustees failed to provide Sally with an accounting when she requested one.
61. While the failure to provide such accounting is a technical breach of fiduciary duty, the Court finds that the appropriate remedy is not removal of the Trustees but to order that an accounting be provided. In the present case, the documents provided by the Trustees during the extensive discovery in this matter have now satisfied the requirement of an accounting.
62. Article 15 of the Business Trust provides that the Trustee may appoint a Trust Protector, who shall exercise "discretion with respect to distributions for taxes pursuant to Article 31 [of the Business Trust]."
63. Article 31 of the Business Trust provides that the Trust Protector, in their discretion, may make distributions to the IRS (or similar state agency) "in order to satisfy any federal or state income tax liability incurred by the Grantor...which is attributable to income of this trust or any share thereof."
64. Attorney MacCormack testified that a Trust Protector was necessary to make tax payments on behalf of the grantor of a "defective trust" like the Business Trust.
65. Ron Jr. testified that Lou Sannella was appointed Trust Protector though he was not appointed in writing, and that there was "no formal agreement" with Mr. Sannella.

66. Although Ron Jr. testified that there were “probably hundreds” of emails between Mr. Sannella and Ron Jr. with questions about the Business Trust, no emails from Mr. Sannella were produced during the litigation. In addition, the Trustees did not list Mr. Sannella in their answers to interrogatories which asked for identification of anyone knowledgeable of any matter relevant to the subject matter of this lawsuit.
67. The consequence of the failure to appoint a Trust Protector is that there could be an inadvertent loss of S-Corporation status. However, as Attorney Riley pointed out on cross-examination, the trust document does not require that appointment of the Trust Protector be in writing. If someone were appointed as Trust Protector, orally, and acted pursuant to that appointment then all the tax benefits flowing from having a Trust Protector would be available. Either party could have called Mr. Sanella as a witness to clarify his role. They chose not to do so.
68. The Court finds that if there was a failure to appoint a Trust Protector, this conduct does not constitute breach of fiduciary duty requiring removal of the Trustees.

#### **A. Crummey Notices**

69. Article 3.05 of the Business Trust provides that a “Crummey Notice” be given as follows:

The Trustee or Grantor shall give to each person...who is entitled to this withdrawal power, notice of the power created by this Article. Such notice shall describe the property subject to the power and tell the Beneficiary how the power may be exercised. A separate notice shall be required with respect to each addition to the trust.
70. Article 3.02 of the Business Trust provides for “Crummey Withdrawal Rights” as follows:

...any Beneficiary may, by writing delivered to the Trustee prior to the expiration date of such withdrawal right provided in this Article, demand payment to himself of a sum equal to the value of a portion of such addition to the trust property not exceeding the value of his proportionate share of such addition, the Trustee shall promptly pay over and distribute to such Beneficiary such sum.
71. Article 3.03 of the Business Trust provides how each Beneficiary’s proportionate share of the value of the gift should be calculated.



72. This provision converts a future interest in a gift to a present interest in a gift, for purposes of the gift tax exclusion. The purpose of the Crummey withdrawal power is to make a gift by Ron Sr. to the Business Trust eligible for the gift tax present interest exclusion of \$10,000 per year, per donee, according to Internal Revenue Code § 2503(b).
73. Attorney Riley testified that for a gift to qualify for a gift tax present interest exclusion, the Beneficiaries must receive notice of their Crummey withdrawal rights.
74. The only gift made to the Business Trust and subject to the Crummey Notice requirement was the June 30, 2006 gift by Ron Sr. of 6,345 nonvoting shares.
75. Crummey Notices describing the June 30, 2006 gifted property and notifying the beneficiaries of their withdrawal power were not sent.
76. Article 3.05 of the Business Trust provides that:
- The Trustee and the Grantor shall have no liability to any person for failure to send any notice called for by this paragraph and the withdrawal rights granted hereby shall expire as provided herein regardless of whether such notice is given, except as otherwise specifically provided.
77. Attorney MacCormack testified that when establishing an estate plan in a closely held business, the family understands to not exercise Crummey withdrawal powers because there is a tax benefit to the family. He testified that there “was no way Ron Sr. would have allowed that to happen.”
78. The consequence of failure to send a Crummey Notice is that the Grantor would not be able to report part of the gift as part of the annual exclusion and thus, there would be an additional taxable gift. In relation to the 2006 gift of voting stock, a gift tax return was filed to report the gift.
79. The terms of the Business Trust provide that neither the Trustee nor the Grantor will have any liability to any person for failure to send any notice called for by Article 3 and the Crummey withdrawal rights granted thereby shall expire as provided therein regardless of whether such notice is given, except as otherwise specifically provided.
80. The Court finds that the Trustees’ failure to send a Crummey Notice for the 2006 gift of nonvoting shares to the Business Trust was unintentional and does not constitute a breach of fiduciary duty requiring Plaintiff’s retroactive exercise of Crummey withdrawal rights.

## **B. Distributions from the Business Trust**

81. As President and Vice President of SEC, Ron Jr. and Jon received salaries and bonuses from SEC, separate and apart from any distribution they received from the Business Trust.
82. The Business Trust made distributions to and for the benefit of the Beneficiaries, namely, Ron Jr., Jon, Sally and Jennifer.
83. In 2005, SEC paid federal and state income taxes for Ron Sr. in the amount of \$428,677.
84. In 2006, SEC paid federal and state income taxes for Ron Sr. in the amount of \$343,487.
85. On November 2, 2007, the Trustees distributed income from the Business Trust as follows:
  - a. \$60,000 to Ron Jr.;
  - b. \$60,000 to Jon;
  - c. \$15,000 to Sally; and
  - d. \$15,000 to Jennifer
86. Ron Jr. testified that the 2007 distributions were made in accordance with grantor's future intent. At the time, Ron Jr. and Jon made the 2007 distribution pursuant to the future percentages set forth in Article 5.01 of the Business Trust, because they "saw no reason not to do so."
87. Attorney Riley explained that Sally was a discretionary Beneficiary of the Business Trust and had no present interest in her 10% trust share so long as Ron Sr. is alive.
88. Since Ron Sr. is still alive, the percentages allocated to the Beneficiaries at the time of his death are irrelevant to distributions made during his lifetime.
89. The Trustees did not inquire about Sally's financial state before making the initial distribution from the Business Trust in 2007.
90. In 2007, the Business Trust made distributions of \$150,215, total.<sup>3</sup>
91. SEC's reported net income for 2007 was \$592,232.
92. On February 22, 2008, the Business Trust distributed \$25,000 to Jon.
93. On February 23, 2008, the Business Trust distributed \$25,000 to Ron Jr.

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<sup>3</sup> On November 7, 2007, SEC wired \$215 to the Business Trust to set up the trust account, which accounts for the additional \$215 not listed in paragraph 85.

94. Sally did not receive a distribution from the Business Trust in 2008 and the Trustees did not inquire about her financial state prior to making distributions.
95. In 2008, only Ron Jr. and Jon received distributions from the Business Trust.
96. In 2008, the Business Trust made distributions of \$50,000, total.
97. In 2008, SEC paid federal and state income taxes for Ron Sr. in the amount of \$468,664.
98. SEC's reported net income for 2008 was \$5,492,982.
99. On January 12, 2009, the Business Trust made distributions of \$250,000 in the following manner:
  - a. \$112,500 to Ron Jr.;
  - b. \$112,500 to Jon;
  - c. \$12,500 to Sally; and
  - d. \$12,500 to Jennifer
100. Neither Ron Jr. nor Jon asked Sally about her financial state prior to making these distributions nor did they discuss with her the amount of distributions the other Beneficiaries received.
101. As discussed in greater detail below, on June 15, 2009, the Trustees distributed 1,000 shares of voting stock to both Ron Jr. and Jon pursuant to Article 2.01 and 7.02.
102. After the transfer of voting shares out of the Business Trust, Ron Jr. and Jon received distributions from the Business Trust and from SEC.
103. As of June 15, 2009, the Business Trust held 18,000 shares of nonvoting stock.
104. On June 19, 2009, the Business Trust made the following distributions:
  - a. \$270,000 to Ron Jr.;
  - b. \$30,000 to Sally; and
  - c. \$30,000 to Jennifer
105. On July 1, 2009, the Business Trust distributed \$270,000 to Jon.
106. On October 10, 2009, the Business Trust made the following distributions:
  - a. \$300,000 to Ron Jr. and
  - b. \$300,000 to Jon

107. On December 8, 2009, the Business Trust made the following distributions:
  - a. \$101,000 to Ron Jr.;
  - b. \$101,000 to Jon;
  - c. \$101,000 to Sally; and
  - d. \$101,000 to Jennifer
108. In 2009, the Business Trust distributed \$1,854,000, total.
109. In 2009, SEC paid federal and state income taxes for Ron Sr. in the amount of \$2,007,510.
110. SEC's reported net income for 2009 was \$2,125,382.
111. On July 30, 2010, the Business Trust distributed \$85,000 to Ron Jr.
112. In 2010, SEC paid federal and state income taxes for Ron Jr. in the amount of \$38,122 and for Jon in the amount of \$49,944.
113. Neither Sally, nor Jennifer received a distribution from the Business Trust in 2010.
114. In 2010, the Business Trust distributed \$173,066, total.
115. In 2010, SEC paid federal and state income taxes for Ron Sr. in the amount of \$879,856.
116. SEC's reported net income for 2010 was \$43,222.
117. In 2011, SEC paid federal and state income taxes for Ron Jr. in the amount of \$2,000 and for Jon in the amount of \$2,000.
118. Neither Sally, nor Jennifer received a distribution from the Business Trust in 2010.
119. SEC's reported net loss for 2011 was \$786,416.
120. In January of 2012, Sally filed for bankruptcy and moved back to the East Coast. Ron Jr. testified that Sally called him asking for money to cover the expense of returning to Arizona.
121. On January 27, 2012, the Business Trust distributed \$8,000 to Sally.
122. On September 24, 2012, the Business Trust distributed \$3,000 to Jennifer.
123. On December 28, 2012, the Business Trust distributed \$510,000 to EMF Realty, LLC, of which Ron Jr. and Jon are the sole owners.

124. The Court credits Ron Jr.'s testimony that the distribution directly to EMF Realty, LLC from the Business Trust was "a mistake."
125. The Court finds that the distribution directly to EMF Realty, LLC was permissible pursuant to Article 2.01 of the Business Trust, which allowed the Trustees, in their discretion, to make a distribution "to or for the benefit of" a Beneficiary.
126. The Court finds that EMF Realty, LLC was created "for the benefit of" Ron Jr. and Jon.
127. On April 12, 2013, the Business Trust made the following distributions, which were deemed part of the Business Trust's distributions for 2012:
  - a. \$57,142 to Sally and
  - b. \$62,142 to Jennifer
128. On the same day, SEC distributed \$38,209 to Ron Jr. and \$38,209 to Jon, as a "2012 distribution."
129. In 2012, the Business Trust distributed \$640,284, total.
130. SEC's reported net income for 2012 was \$2,338,869.
131. In 2013, SEC paid federal and state income taxes for Ron Jr. in the amount of \$110,397 and for Jon in the amount of \$116,125.
132. Sally and Jennifer did not receive distributions from the Business Trust in 2013.
133. SEC's reported net income for 2013 was \$1,687,444.
134. On January 1, 2014, the Trustees transferred the nonvoting shares out of the Business Trust. As of the same day, the Business Trust no longer held shares of SEC stock.
135. Sally and Jennifer did not receive distributions from the Business Trust in 2014.
136. In 2014, SEC paid federal and state income taxes for Ron Jr. in the amount of \$467,167 and for Jon in the amount of \$465,730.
137. SEC's reported net income for 2014 was \$3,603,636.
138. On January 16, 2015, the Business Trust distributed \$100,000 to Ron Jr. and \$100,000 to Jon, as a "2013 Distribution."
139. Sally and Jennifer did not receive a distribution from the Business Trust in 2015.
140. SEC's reported net income for 2015 was \$4,353,574.

141. The parties stipulated that the value of SEC, as of December 31, 2015, was \$20,000,000 to \$22,000,000.
142. SEC's reported net income for 2016 was \$5,441,541.
143. To the extent that the Beneficiaries of the Business Trust did not benefit equally, the Court finds the terms of the Trust explicitly allowed the Trustees to use their discretion when making distributions to the Beneficiaries and that these terms were specifically requested by Ron Sr., a seasoned and thoughtful businessman.
144. The Court finds that pursuant to Articles 2.01 and 7.01 of the Business Trust, the Trustees were not required to inquire about the financial state of any Beneficiary before making a distribution.
145. The Court finds that an ascertainable standard applied only to any distribution from the Business Trust, which would occur after Ron Sr.'s death and only for distributions to Sally and Jennifer.
146. The Court further finds that by not including an ascertainable standard for distributions while he is alive, Ron Sr. explicitly meant to provide his Trustees with broad discretionary powers.
147. The Court finds that all distributions made from the Business Trust, from 2007 to 2015, were made in accordance with Articles 2.01, 7.01, and 7.02 of the Business Trust.
148. The Court finds that in making distributions made from the Business Trust, neither Ron Jr. nor Jon acted under an arrangement to make reciprocal distributions to each other. The Court finds that the Defendants each acted independently and in good faith.

### **C. Transfer of Stock Out of Business Trust**

149. Attorney MacCormack testified that in and around 2009, Ron Sr. complained to him about the complexities of his state and federal income taxes and "wanted the voting shares out of the [Business Trust]," so he would no longer be responsible for paying the pass through taxes.
150. Attorney MacCormack suggested to Ron Jr. and Jon that the voting shares be transferred out of the Business Trust.
151. In accordance with the restrictions contained on the stock certificates, 1,000 voting shares of SEC stock were transferred into Ron Jr.'s personal family trust and the remaining 1,000 voting shares of SEC stock were transferred into Jon's personal family trust.

152. On June 15, 2009, Ron Jr., Jon, and Ron Sr., acting in limited capacity as Director of SEC, executed a “Waiver of Notice of Joint Special Meeting of the Shareholder and Director of State Electric Corporation and Unanimous Written Consent of the Shareholder and Director to Corporate Votes” (“Waiver”), which:
  - a. waived the restriction on the transfer of shares to allow Ron Jr. and Jon, as Trustees of the Business Trust, to transfer 1,000 voting shares of stock to Ron Jr. and 1,000 voting shares of stock to Jon and
  - b. authorized the officers of SEC to issue a certificate of no-par voting common stock for 1,000 shares to both Ron Jr. and Jon.
153. Ron Jr. and Jon executed the Waiver in their capacities as Trustees of the Business Trust.
154. The Court credits Jon’s testimony that he made the decision to transfer the voting shares to Ron Jr. independently.
155. The Court credits Ron Jr.’s testimony that he made the decision to transfer the voting shares to Jon independently.
156. When the voting shares were transferred out of the Business Trust in 2009, Ron Jr. testified that the taxes were split in several ways. The Trustees’ consideration of the tax implications was part of the decision to transfer the nonvoting shares out of the Business Trust, when deemed appropriate.
157. Ron Sr. testified that Ron Jr. and Jon were always supposed to receive the voting shares. He gave the brothers preference because they were running the company. His stated intent corroborates the Court’s interpretation of the terms of the Business Trust.
158. The Court finds that the 2009 transfer of voting shares was allowed under the express terms of the Business Trust. It was not misconduct and did not constitute a breach of fiduciary duty.
159. On or around October of 2013, Ron Sr. met with Ron Jr., Jon, and Attorney MacCormack to suggest removing the nonvoting shares from the Business Trust.

160. On January 1, 2014, Ron Jr. and Jon, as shareholders of SEC and Ron Sr. and Jon, as directors of SEC, executed the "Consent of the Shareholders and the Board of Directors of State Electric Corporation," which:
  - a. waived any and all notice requirements;
  - b. waived the restriction on the transfer of shares to allow Ron Jr. and Jon, as Trustees of the Business Trust, to transfer 9,000 nonvoting shares of SEC stock to Ron Jr.;
  - c. waived the restriction on the transfer of shares to allow Ron Jr. and Jon, as Trustees of the Business Trust, to transfer 9,000 nonvoting shares of SEC stock to Jon;
  - d. authorized and directed Ron Jr. as President of SEC, to execute and deliver stock certificates and other documents as deemed necessary; and
  - e. voted that that shareholders, directors, and officers acted "in good faith on the Corporation's behalf."
161. Once the transfer took place, Ron Sr. was no longer responsible for paying the taxes on SEC's pass through income.
162. As of January of 2014, Ron Sr. sat on the Board of Directors of SEC.
163. By the terms of the "Consent of the Shareholders and the Board of Directors of State Electric Corporation" dated January 1, 2014, both Ron Jr. and Jon participated in votes to transfer 9,000 nonvoting shares of SEC to Ron Jr. and both Ron Jr. and Jon participated in votes to transfer 9,000 nonvoting shares to Jon.
164. On June 23, 2014, Ron Jr. and Jon, as shareholders of SEC and Ron Jr. and Jon, as directors of SEC, executed the "Consent of the Shareholders and the Board of Directors of State Electric Corporation," which:
  - a. waived any and all notice requirements;
  - b. waived the restriction on the transfer of shares to allow Ron Jr. to transfer 9,000 nonvoting shares of SEC stock to Ron Jr.'s personal family trust;
  - c. waived the restriction on the transfer of shares to allow Jon to transfer 9,000 nonvoting shares of SEC stock to Jon's personal family trust;
  - d. waived the restriction on the transfer of shares to allow Ron Jr. to transfer 1,000 voting shares of SEC stock to Ron Jr.'s personal family trust;
  - e. waived the restriction on the transfer of shares to allow Jon to transfer 1,000 voting shares of SEC stock to Jon's personal family trust;
  - f. authorized and directed Ron Jr. as President of SEC, to execute and deliver stock certificates and other documents as deemed necessary; and
  - g. voted that that shareholders, directors, and officers acted "in good faith on the Corporation's behalf."
165. The Massachusetts Uniform Trust Code (hereinafter "MUTC"), G.L. c. 203E, §814, applied to the 2014 transfer of SEC nonvoting shares out of the Business Trust.



166. The Court finds that the transfer of the nonvoting shares out of the Business Trust did not violate G.L. c. 203E, §814(b), as the transfer was expressly authorized by the terms of the Business Trust, in Articles 2.01, 7.01, 7.02, 21.21, and 21.22.
167. The Court credits Ron Sr.'s testimony that in 2013 his taxes had grown increasingly complex and he was dissatisfied paying taxes in numerous states where SEC did business. Ron Sr. habitually filed his taxes late and tax liens were placed on Ron Sr.'s home as a result.
168. The Court credits Ron Sr.'s testimony that he suggested that the Trustees distribute SEC nonvoting shares to themselves, to simplify federal and state tax filings for everyone involved.
169. Aware of their father's wishes and his expressed intent to otherwise provide for Sally and Jennifer in his will, and consistent with simplifying the income tax compliance and facilitating the further growth of SEC and the risks associated with personal guaranties for bonding and lending, the Trustees independently exercised their discretion as Trustees to distribute SEC nonvoting shares to Ron Jr. and Jon, individually.
170. Attorney Bove testified that the transfer of voting and nonvoting shares of SEC stock by Ron Jr. and Jon to each other as Beneficiaries was permissible under the terms of the Business Trust.
171. Attorney Bove testified that the transfer of voting and nonvoting shares of SEC stock by Ron Jr. and Jon to each other as Beneficiaries did not constitute misconduct as a matter of law because the transfer was permissible under the terms of the Business Trust.
172. Attorney Riley testified that the transfer of voting and nonvoting shares of SEC stock by Ron Jr. and Jon to each other as Beneficiaries was permitted by the terms of the Business Trust. Attorney Riley testified that Section 7.02 of the Business Trust permitted a distribution from one Trustee to another Trustee and was entirely acceptable under the terms of the trust instrument.
173. Attorney Bove testified that the discretionary distributions did not represent a breach of fiduciary duty. He testified that Ron Jr. and Jon were entitled to consider the Grantor's specific intentions and that considering these intentions justified their exercise of discretion as Trustees.
174. Attorney Bove testified that there is nothing more important than a Trustee ascertaining the Settlor's intent and taking permissible action in reliance of such intent.

175. Attorney Bove testified that the discretionary distributions did not represent a breach of the duties of good faith and loyalty.
176. Attorney Riley testified that a discretionary distribution is permissible if it takes into account the interests of all of the Beneficiaries and rationally reflects a consideration of these interests.
177. The Court finds that the transfer of voting and nonvoting shares was done in good faith and did not constitute a breach of fiduciary duty, but was undertaken and executed as a prudent Trustee in accordance with the terms of the Trust, as corroborated by the grantor's stated intent.

### **III. Terms of the Life Insurance Trust**

178. During Ron Sr.'s lifetime, Beneficiaries of the Life Insurance Trust are described as "members consisting of the Donor's issue living from time to time."
179. After Ron Sr.'s death, Beneficiaries of the Life Insurance Trust are described as the "children of the Donor then living and children of the Donor then deceased leaving issue then living."
180. Attorney MacCormack advised Ron Jr. and Jon to pay the life insurance premiums directly from SEC and book it as a distribution to themselves, which they did during the years that SEC was held in the Business Trust.
181. For the years 2014, 2015, and 2016, when SEC stock was no longer in the Business Trust, Ron Jr. and Jon paid the premiums personally. The payments of \$120,184.00 were treated as loans to Ron Sr. from Ron Jr. and Jon secured by interest bearing promissory notes.
182. The Court finds that it was not improper for Ron Jr. and Jon to structure their payment of these premiums as loans and that by paying the premiums they prevented the policy from lapsing, which benefitted the Plaintiff.
183. Attorney MacCormack testified that "the way it is supposed to work" is that Ron Sr. would make a contribution to the Life Insurance Trust in the amount of the premium and then a Crummey notice would be sent to the Beneficiaries notifying them of their Crummey withdrawal right a certain amount of the contribution.
184. As with the Business Trust, the purpose of a Crummey withdrawal power is to make a gift by Ron Sr. to the Life Insurance Trust eligible for the gift tax present interest exclusion of \$10,000 per year, per donee, according to Internal Revenue Code § 2503(b).

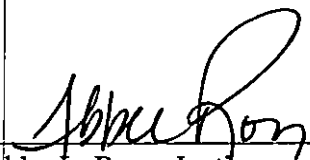
185. Attorney Riley testified that to qualify a gift to the Life Insurance Trust for gift tax present interest exclusion, the Beneficiaries must receive notice of their withdrawal rights, also known as a Crummey Notice.
186. As similarly provided for in the Business Trust, this provision converts a future interest in a gift to a present interest in a gift, for purposes of the gift tax exclusion.
187. As previously stated, Attorney MacCormack testified that, in general, when drafting an estate plan that includes a closely held business, it is understood among the family that no one will exercise their Crummey withdrawal power, because of the estate tax benefit to the family for not doing so.
188. Attorney MacCormack testified that he was responsible for drafting Crummey Notices for the Life Insurance Trust and sent them to Sally for the years 2010, 2011, 2012, 2013, 2014, and 2015.
189. Sally testified that she did not receive Crummey Notices from the Life Insurance Trust for the years 2016 and 2017.
190. In 2011, Sally exercised her Crummey withdrawal right, but did not receive her proportionate share. Sally did not exercise her Crummey withdrawal right to other years.
191. The Court finds that Article 4 of the Life Insurance Trust contains the Crummey withdrawal power of the Beneficiaries and was specifically included for estate planning purposes.
192. The Court finds that the failure to send Crummey Notices to the Life Insurance Trust Beneficiaries for the years mentioned above was not intentional.
193. Pursuant to Article 3 of the Life Insurance Trust, entitled "Payments During Donor's Life," the Trustee may "in its discretion, at any time or times and for any reason, pay any part or all of the income and/or principal of the trust to or for the benefit of any one or more (or all) of those members consisting of the Donor's issue living from time to time...in such proportions among them as the Trustee sees fit."
194. The Life Insurance Trust still holds the life insurance policy for the benefit of the listed Beneficiaries. Neither income nor principal was ever paid out from the Life Insurance Trust.
195. The Court finds that by the express terms of the Life Insurance Trust, Ron Sr. sought to release the Trustee of the Life Insurance Trust from any liability for failure to send Crummey Notices.

196. The Court finds that the express intent of Ron Sr., in executing the Life Insurance Trust was to provide liquidity for estate taxes and lower estate taxes pursuant to the present interest exclusion. The intended purpose of the Life Insurance Trust was not to provide any Beneficiary with a proportionate share of the gift. The Court finds that Ron Jr. administered the terms of the Life Insurance Trust in good faith.
197. Article 16 of the Life Insurance Trust provides that upon the request of any income Beneficiary or after receiving any property over one hundred dollars (\$100), the Trustee "shall render each year an accounting of the administration of the Trust...to the person or persons of full age eligible at the time to receive the income thereof..."
198. Sally testified that on July 22, 2015 she replied to an email from Jon asking what the amount of the gift to the Life Insurance Trust was, as well as asking for a copy of the Life Insurance Trust and an accounting.
199. Despite making a demand for an accounting and copy of the Life Insurance Trust, Sally never received either.
200. The Court finds that the Trustee administered the Life Insurance Trust in good faith.
201. While the failure to provide such accounting is a technical breach of duty, the Court finds that the appropriate remedy is not removal of the Trustee but to order that an accounting be provided.
202. The Court further finds that the discovery exchanged during litigation provides a sufficient accounting of the Life Insurance Trust to satisfy the accounting requirement.
203. The Court finds that failure to send Crummey Notices, provide an accounting or a copy of the Life Insurance Trust to Sally did not rise to the level of misconduct.
204. The consequence of failing to send Crummey Notices is that the grantor would not be able to report part of the gift as part of the annual exclusion and thus, there would be an additional taxable gift.
205. The Court finds that the Trustee's failure to send a Crummey Notice for the years 2016 and 2017 was unintentional and that the terms of the Life Insurance Trust provide that neither the Trustee nor the grantor will have any liability to any person for failure to send any notice called for by Article 4 and the withdrawal rights granted thereby shall expire as provided therein regardless of whether such notice is given, except as otherwise specifically provided.

**FURTHER FINDINGS AND RATIONALE**

This case is about a family torn apart because of a disagreement about their father's estate plan, which includes an Intentionally Defective Grantor Trust ("Business Trust") that he established specifically to deal with concerns about a business he started with his wife in 1986. The business is an electrical construction company. The changing economy, lawsuits against the business, tax consequences and family dynamics all played a role in Ron Sr. establishing the Business Trust. He was guided by qualified professionals in setting up his estate plan, who advised him about his options and obligations. Ron Sr.'s intentions were memorialized in the terms of the Business Trust. When he executed the Business Trust, his sons were running the company and it was clear that they would continue to do so. In order to accomplish his goals, he gave his sons flexibility and control in the terms of the Business Trust. They stood to benefit more than their sisters, even upon their father's death. As the company grew and became more successful, running the business became more complicated. The brothers took personal risks in order to grow the company. Tax issues arose which could be resolved if the company was removed from the Business Trust. Ron Sr. took steps to provide for his daughters by leaving them significantly more in his estate. He did not communicate his thoughts to all of the siblings nor is there any requirement that he do so. He wanted to avoid conflict but his lack of transparency caused conflict. Significantly, he is still alive and was able to reiterate that the actions taken by his sons, as Co-Trustees of the Business Trust, were in accordance with his intentions. To find otherwise, would be to rewrite the Business Trust and impose obligations that were intentionally not provided for by the terms of the Business Trust.

Date: 5/15/18

  
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Abbe L. Ross, Justice  
Essex Probate and Family Court