FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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NAOMI TURNBULL, as Successor Trustee of THE KENNETH TURNBULL, SR. REVOCABLE TRUST, *Plaintiff*,	CASE NO. ST-10-CV-550
v.	ACTION FOR PARTITION AND DEBT
KENNETH TURNBULL, JR., KEITH TURNBULL, KLARIA TURNBULL, KAREN TURNBULL-WHEATLEY, and VIVETTE TURNBULL, *Defendants*.	

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KENNETH TURNBULL, JR.
Defendant

VIVETTE TURNBULL
Defendant

CARTY, RENÉE GUMBS, Judge

MEMORANDUM OPINION
(Filed: May 4, 2018)

Pending before this Court is Defendants' "Motion for Summary Judgment filed By Keith, Klaria and Karen Turnbull" on April 12, 2017. Plaintiff Naomi Turnbull, as successor trustee of the Kenneth Turnbull, Sr. Revocable Trust (hereinafter "Plaintiff") filed "Reply to Defendants'

Motion For Summary Judgment" ("Plaintiff's Reply") on May 8, 2017. Defendants filed their "Reply to Plaintiff's Opposition to Motion for Summary Judgment Filed by Keith, Klaria and Karen Turnbull" on June 13, 2017.[1] For the reasons set forth below, the motion will be **DENIED.**

I. FACTUAL BACKGROUND

In the present case, the record shows that the property at issue is Parcel No. 13BAA Estate Enighed, No. 1 Cruz Bay Quarter, St. John, U.S. Virgin Islands ("Property"). Upon the death of the original property owner, Ivy R. Turnbull,[2] the interest in this property was divided through a probate action ending in 2009. The recipients of the property interest consisted of Kenneth Turnbull, Sr., who has an undivided one-third interest; and Kenneth Turnbull, Sr.'s children, the Defendants, Karen Turnbull-Wheatley, Kenneth Jr., Keith and Klaria Turnbull, who had the remaining collective share of two-thirds interest.

Receipts from the record show that at some point in time Kenneth Turnbull, Sr. began renovating the property, with at least the partial approval of Defendants. In December 2005, the renovations were completed. It was at this time that Kenneth Turnbull, Sr. began renting out the property to recoup the money he put into the property. This lasted until April 2008, when Defendant Karen Turnbull-Wheatley took over the property. On September 3, 2008, Kenneth Turnbull Sr. executed both, a will and a trust document ("September 2008 Trust"), specifically noting that agreements to reimburse for the renovations were not paid back and that the trust may collect any outstanding debts.

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1 The Court reminds the parties that they are limited to the arguments raised in their motions and any new arguments raised in a subsequent reply are waived.

2 Ivy R. Turnbull was the wife of Kenneth Turnbull, Sr. and the mother of Kenneth Turnbull, Jr., Keith Turnbull, Klaria Turnbull, and Karen Turnbull-Wheatley (the Defendants in this case). The property in question was purchased by Ivy Turnbull via warranty deed on September 25, 1961, and recorded as such. It was upon the death and subsequent probating of Ivy Turnbull's estate that resulted in the interest being split amongst the parties accordingly.

On September 27, 2010, Plaintiff Kenneth Turnbull, Sr. filed his complaint against Defendants Kenneth Turnbull, Jr., Keith Turnbull, Klaria Turnbull, Karen Turnbull-Wheatley, and Vivette Turnbull (wife of Kenneth Turnbull, Jr.) due to issues stemming from payment for the renovations. On October 26, 2010, Defendants Karen Turnbull-Wheatley, Keith Turnbull, and Klaria Turnbull filed an answer in opposition. On March 12, 2014, Default was entered by the Clerk of the Court against Defendants Kenneth Turnbull, Jr. and Vivette Turnbull.[3] It was further ordered that Naomi Turnbull, as successor Trustee of The Kenneth Turnbull, Sr. Revocable Trust was substituted as Plaintiff in this matter.[4] After extensive motions practice, Defendants filed the present motion for summary judgment on April 12, 2017. Upon reviewing the record in this case, and for the reasons stated below, the Court will deny Defendants' Motion for Summary Judgment.

II. LEGAL DISCUSSION

A. Summary Judgment Standard

A motion for summary judgment is governed by Virgin Islands Rule of Civil Procedure 56(a).[5] Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, electronically stored information, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the

[3] Order for Entry of Default filed on March 12, 2014, by the Clerk of the Court.

[4] Defendants contend that Plaintiff orally moved for a "Motion to Clarify" during the March 12, 2014, hearing, that was never ruled upon. However, in Plaintiff's Reply it refutes the existence of any "Motion to Clarify", noting that they actually filed a "Motion for Modification of the Motion for Substitution" on January 17, 2014. As the Court has no record of any written motion from Plaintiff filed on the grounds alleged by Defendants, pursuant to Rule 6-1(a) of the Virgin Islands Rules of Civil Procedure, that motion is not before this Court.

Additionally, while this Court is not inclined to provide either party a "second bite at the apple", the Court finds these arguments marginally dissimilar to earlier arguments. Assuming as Plaintiff suggests, that Judge Christian had ruled the November 2008 Trust "irrelevant" due to the property being placed in the September 2008 Trust, there remains the question of whether the September 2008 Trust was revoked.

[5] V.I. R. Civ. P. 56(a), *In Re Adoption of Virgin Islands Rules of Civil Procedure* promulgated on March 31, 2017, replacing the Federal Rules of Civil Procedure. The Virgin Islands Rules of Civil Procedure replaces federal rules by promulgation of the V.I. Supreme Court order. Technically, Rule 56 adopts a different name, however, the rule number and substance remain the same.

moving party is entitled to judgment as a matter of law.[6] When assessing these materials, the Court must draw all reasonable inferences in favor of the non-moving party.[7] Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[8]

The role of the Court is not to weigh the evidence for its truth or credibility, but merely to ascertain whether a triable issue of fact remains in dispute, and if not, who ought to succeed in the merits.[9] To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on an essential element of that party's case, and on which that party will bear the burden of proof at trial.[10] Due to summary judgment being a "drastic remedy, it should be granted only when 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'"[11] Thus, once the non-moving party has presented more than a scintilla of evidence that may sway a jury, even if it amounts to less (in the evaluation of the court) than a preponderance, both parties should be granted an equal opportunity to present their facts to the jury.[12]

B. The September 2008 Trust is the real party in interest.

Defendants argue in their motion that Kenneth Turnbull, Sr. failed to comply with the requirements for creating a trust with regards to the November 2008 Trust, but that simultaneously

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[6] *Manbodh v. Hess Oil V.I. Corp. et al.* (In re Manbodh Asbestos Litigation Series), 47 V.I. 215 (V.I. Super. Ct. Nov. 23, 2005).
[7] *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014).
[8] *Martin v. Martin*, 54 V.I. 379, 387 (V.I. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[9] *Suid v. Phoenix Fire & Marine Ins. Co., Ltd.*, 26 V. I. 223, 225 (D.V.I. 1991).
[10] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[11] *Walters*, 60 V.I. at 775 (quoting *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 707 (V.I. 2011).
[12] *United Corp.*, 55 V.I. at 707.

the November 2008 Trust must serve as evidence of Kenneth Turnbull, Sr.'s revocation of the September 2008 Trust. This Court finds no authority that supports this belief, and Defendants have failed to support their arguments with any controlling authority from this jurisdiction.

i. Kenneth Turnbull, Sr. executed the September 2008 Trust in accordance with Virgin Islands law.

A trust is "a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary."[13] The Supreme Court has recently determined that to create a valid express trust according to the soundest rule for the Virgin Islands, there must be "(1) a valid conveyance of a trust property, (2) from a settlor who intends to create a trust, (3) to a trustee to hold legal title, (4) for the benefit of a third party beneficiary."[14] Pursuant to Title 28 of the Virgin Islands Code, Section 241 reads, in relevant parts, "no trust... can be created... otherwise than – (2) by a deed of conveyance or other instrument in writing, signed by the person creating... or by his lawful agent under written authority, and executed with such formalities as are required by law."[15]

Based on the evidence presented, the Court finds that Kenneth Turnbull, Sr., as the settlor, intended to create, then executed a valid trust on September 3, 2008. The operating trust agreement, the September 2008 Trust, was signed by Trustee Kenneth Turnbull, Sr., as well as two attesting witnesses (Margaret M. Garcia and Maria Hughes), and notarized by Judith L. Hobson. Further, Kenneth Turnbull, Sr. made a valid conveyance of trust property when he designated that the physical property he owns (Parcel No. 13BAA Estate Enighed, No. 1 Cruz Bay Quarter, St. John, Virgin Islands) as part of the trust corpus. The trust agreement identified Kenneth Turnbull,

13 *Jensen v. Jensen*, 2017 WL 6403891, *5 (V.I. Super. Ct. Dec. 15, 2017) (citations omitted).
14 *King v. Appleton*, 61 V.I. 339, 351-53 (V.I. 2014).
15 Title 28 V.I.C. § 241.

Sr., himself, as the trustee to manage the trust – with Naomi Turnbull and Ludence Turnbull to serve as successor trustee, and alternative successor trustee, respectively. Kenneth Turnbull, Sr.'s sister, Evelyn Mark was also appointed as third alternative successor. Finally, Naomi and Ludence were the third-party beneficiaries of the trust. Therefore, the September 2008 trust agreement satisfies the elements of an express trust and are valid pursuant to Virgin Islands law.

ii. There was no revocation of the September 2008 Trust.

Finding the September 2008 Trust to have been validly executed, this Court next turns its attention to whether the September 2008 Trust was revoked. In the Virgin Islands, the Supreme Court has not yet determined what is required to revoke a non-charitable trust. Similarly, there is no statutory authority which is instructive on this issue. Therefore, to determine what is required to revoke a non-charitable trust, in the absence of binding authority this Court must conduct a *Banks* analysis.[16] As noted in the recent Supreme Court decision, *James v. Faust*, a *Banks* analysis requires this Court to "...examine which common law rule Virgin Islands courts have applied in the past; ... identify the majority rule adopted in other jurisdictions; and... determine which common law rule is soundest for the Virgin Islands."[17]

1. Part 1 of *Banks:* Virgin Islands Courts

In *Hodge v. Hodge*, the District Court of the Virgin Islands held that trusts were irrevocable unless the power to revoke was reserved.[18] Additionally, the manner of revocation must be limited to the terms of the trust.[19] Similarly, relying on the Restatement (Second) of Trusts, the Territorial Court of the Virgin Islands found that "[i]f the settlor specifies in the terms of the trust the

16 *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 981-84 (V.I. 2011).
17 *James v. Faust*, 2016 V.I. Supreme LEXIS 33, *16 (V.I. 2016).
18 *Hodge v. Hodge*, 15 V.I. 154, 174-75 (D.V.I. 1979).
19 *Id.*

particular manner in which the trust can be revoked, the settlor can... only revoke the trust in that manner."[20]

2. Part 2 of *Banks*: Other Jurisdictions

This Court next identifies the majority rule from other jurisdictions. As most jurisdictions have looked to the Restatement of Trusts in one way or another, we find a discussion of the relevant Restatements necessary to our analysis. The Second Restatement on Trusts provides that "[t]he settlor has power to revoke the trust... to the extent that by the terms of the trust he reserved such a power."[21] Comment B continues, where the trust is created in writing, "and there is no provision in the trust instrument as to the power of the settlor to revoke... the trust is not revocable."[22] However, when such power of revocation is reserved, but not specified, "the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust."[23] Still, "[i]f the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust only in that manner or under those circumstances."[24]

Most jurisdictions have common law that adopts one of two schools of thought regarding revocable trusts.[25] On one hand, courts have held that trusts are revocable solely by the "terms of the trust".[26] Generally, these courts have limited revocations to instances where a power to revoke

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20 *In re Estate of Savain*, 39 V.I. 77, 88 (Terr. Ct. 1998).
21 Restatement (Second) of Trusts § 300 (1959).
22 *Id.* at cmt. B.
23 *Id.* at cmt. I.
24 *Id.* at cmt. J.
25 *Compare Estate of Noell v. Norwest Bank Wyoming*, 960 P.2d 499, 501 (Wyo. 1998) ("A trust agreement is governed by the plain meaning contained in the four corners of the document... [and] may [be] validly revoke[d] ... pursuant to the trust's terms." (citations omitted)) *and Concannon v. Winship*, 81 P.2d 11, 13 (Nev. 1978) (holding that a trust could be revoked "by a manifestation of his intention to revoke the trust" without requiring the observance of particular formalities to demonstrate such an intention).
26 *See Scalfaro v. Rudloff*, 934 A.2d 1254, 1257 (Pa. 2007); *Austin v. City of Alexandria*, 574 S.E.2d 289, 292 (Va. 2003); *One Valley Bank, Nat. Ass'n v. Hunt*, 561 S.E.2d 516, 520 (W. Va. 1999); *Matter of Estate of Sanders*,

was reserved, and the revocation was done strictly in accordance to the terms of the trust.[27] On the other hand, some courts have held that a trust is revocable by the implied actions of the settlor, usually by any act sufficient to manifest the settlor's intent to revoke.[28] These states, such as Maryland and Utah, do not all require the settlor to reserve the power of revocation, therefore allowing revocations that can be implied from the settlor's intent."[29] While the majority of jurisdictions require strict adherence to the trust's terms, it is interesting that, returning to the Second Restatements of Trusts, Comment A from § 300 reads: "[t]he phrase "terms of the trust" means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings."[30] Therefore, it appears that this minority view, takes the general view of Comment A, irrespective of the specific situations articulated in § 300's subsequent Comments.

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929 P.2d 153, 158-59 (Kan. 1996); *Schroeder v. Herbert C. Coe Trust*, 437 N.W.2d 178, 185 (S.D. 1989); *Tierce v. Macedonia United Methodist Church of Northport*, 519 So.2d 451, 458 (Ala. 1987); *Connecticut General Life Ins. Co. v. First Nat. Bank of Minneapolis*, 262 N.W.2d 403, 405 (Minn. 1977); *Ripley v. Lucas*, 255 N.W. 356, 359 (Mi. 1934) (holding that a revocation not done by the terms of the trust was invalid as the court cannot "substitute another and different method of revocation").

[27] *See Scalfaro*, 934 A.2d at 1257 ("[w]hen a settlor or a trust reserves a power to revoke in a given manner and under certain conditions, revocation cannot be effected in another manner"); *Austin*, 574 S.E.2d at 292 (finding a right to revoke when done "in accordance with the terms specified by the trust agreement"); *One Valley Bank, Nat. Ass'n*, 561 S.E.2d at 520 (relying explicitly on Restatement (Second) of Trusts § 330 to determine the validity of the revocation); *Matter of Estate of Sanders*, 929 P.2d at 159 (holding that where a settlor reserved a power to revoke the trust by a transaction *inter vivos*, that trust could not be revoked by will, as wills are not executed during a testator's lifetime, and therefore, would violate the terms of the trust); *Schroeder*, 437 N.W.2d at 185 ("[a] trust cannot be revoked by the trustor after its acceptance… unless the declaration of trust reserves a power of revocation to the trustor and in that case the power must be strictly pursued"; *Connecticut General Life Ins. Co.*, 262 N.W.2d at 405.

[28] *See Warne v. Warne*, 275 P.3d 238, 248 (Utah 2012) (allowing revocation where there was substantial compliance with a method provided in the terms of the trust); *From the Heart Church Ministries Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548, 568 (Md. 2002) ("in the absence of a [trust being designated as either revocable or irrevocable] the trust is revocable by any act sufficient to manifest the settlor's intention to revoke"); *Williams v. Bank of California, N.A.*, 639 P.2d 1339, 1344-45 (Wash. 1982) (allowing revocation by substantial compliance); *Concannon*, 81 P.2d at 13; *Lipic v. Wheeler*, 242 S.W.2d 43, 46 (Mo. 1951) (finding where no method of revocation had been specified, "revocation powers may be exercised in any manner sufficiently manifesting an intention to alter or to partially revoke").

[29] *See, e.g., From the Heart Church Ministries Inc.*, 803 A.2d at 568; *see also Warne*, 275 P.3d at 248 (discussing Utah Code Ann. § 75–7–605(3)(a) that allows trusts to be revoked by a clear and convincing manifestation of intent when methods of revocation are not "expressly made exclusive", or by "substantial compliance" with the trusts methods provided).

[30] Restatement (Second) of Trusts § 300 cmt. a (1959).

3. Part 3 of *Banks*: Soundest Rule of Law

Considering this analysis, we find the soundest rule of law for the Virgin Islands is: A trust shall be revocable only when the settlor has reserved the power of revocation. When such power has been reserved,[31] revocation may only be accomplished by strict adherence to the terms of the trust.

Adopting the principles of the Restatement (Second) on Trusts § 300, specifically as outlined in Comment B and Comment J, this rule follows the progeny of Virgin Islands cases that have limited revocation of trusts to the terms of the trust.[32] Similarly, this mirrors the majority standard governing revocation of trusts in other jurisdictions of the United States, thereby maintaining the Virgin Islands' uniformity alongside other jurisdictions without rejecting the rule of past courts of the Territory.

Additionally, this Court finds that adopting this approach is in the public's interest. One of the fundamental principles in this area of law is that documents disposing of one's estates should, whenever possible, be interpreted in accordance with the decedent's intent.[33] These testamentary documents are often all that remains of a person's legacy, and as a society we have agreed that such "final wishes" should be executed to the best extent possible. It follows, that the role of the courts is to carefully preserve the intent of the decedent.

In other words, the courts serve as the gatekeeper to these final wishes, and must regard challenges to such, with a fair level of suspicion. This is true even where the challenge comes from the settlor via a subsequent trust or a perceived manifestation of the settlor's intent. While

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[31] This Court recognizes that in the present manner revocation was prescribed in a particular method. Therefore, this Court does not address how revocation may be executed when the power is reserved, but silent on the methods of revocation, as that question is not presently before this Court.

[32] *See In re Estate of Savain*, 39 V.I. at 88; *Hodge*, 15 V.I. at 174-75.

[33] *See In re Estate of Paraliticci*, 42 V.I. 71, 74-75 (Terr. Ct. 2000).

the Court does not aim to be overly burdensome, it is with no hesitation that we adopt a rule which holds all accountable. Future settlors stand to lose little as they are limited only by their own terms. On the other hand, potential beneficiaries who, but for, a controlling trust document might be entitled to a larger inheritance, will have a higher burden of proof to demonstrate that a trust be revoked. Whereas if this Court adopted a broader rule, allowing what parties perceive to be "intent of revocation" as 'the soundest rule of the Virgin Islands', we would be lowering the bar. This slippery slope would allow revocations in ways that might contradict the original trust document, so long as this change in intent could be inferred. Thus, the effect of a broader rule would allow a perceived change of intent to usurp the creation of a trust that was formed after observing necessary formalities under Virgin Islands law. Inferences without more, should not create distrust in the actual word of the settlor. So while our holding may make it more difficult for third parties to challenge a trust that was revoked, it is a burden this court knowingly holds in the interest of safeguarding the wishes of decedents. This Court finds that the consistency and protections fostered by the adoption of the Restatement (Second) of Trusts: § 300 outweigh the challenges posed by it. For these reasons, this constitutes the soundest rule of law for the Virgin Islands with respect to the methods in which revocable trusts may be revoked.

Article I of the September 2008 Trust establishes it as a revocable trust. In Article IV, it establishes the methods of doing so. It reads, "[t]he Settlor may, by signed instruments delivered to the Trustee during the Settlor's life: ...(5) revoke this Trust in its entirety or any provision therein." Defendants argue that the mere creation of the November 2008 Trust is evidence of Kenneth Turnbull, Sr.'s intent to revoke the September 2008 Trust. Plaintiff refutes this conclusion, arguing there's no authority that, by its mere existence, a new trust revokes all previous trusts.

We agree with Plaintiff. By the terms of the September 2008 Trust, there must be a signed instrument delivered to the Trustee during the Settlor's life. Defendants have provided no evidence of such an instrument. Therefore, by the terms of the September 2008 Trust, no revocation occurred.

Still, the Court notes that the trustee for the September 2008 Trust is Kenneth Turnbull, Sr. Under some courts, to require delivery of a signed instrument in this instance, would be an idle act.[34] The law neither does nor requires idle acts. Still, under this contention Defendants' arguments would still fail. *Assuming arguendo* that the delivery of a signed instrument was an idle act, the revocation would occur because of the November 2008 Trust's execution. As noted by Defendants, the November 2008 Trust changes trustees but does not provide a way for co-trustees to accept, nor are there any signatures from the co-trustees. Without the execution of such formalities, there is no execution of the November 2008 Trust.[35] To quote Plaintiff's Reply, "if the November 4, 2008 trust is invalid then there is no basis to… assert that it revoked the September 3, 2008 trust." Under these circumstances, without a valid execution of the subsequent trust, there cannot be a valid revocation of the prior trust. Therefore, even *assuming arguendo*, this Court is not inclined to find that the November 2008 Trust, although not executed in accordance with the formalities of law, was sufficiently executed to revoke a properly executed trust.

C. Defendants are not entitled to judgment as a matter of law.

Finding the September 2008 Trust to be properly executed, with no valid revocations, Defendants have not demonstrated being entitled to judgment as a matter of law. Defendants'

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[34] *E.g., Alerus Financial, N.A.*, 750 N.W. 2d at 422-23 (finding that a trust that required delivery of a written notice to the trustee need not be followed when the settlor was trustee as that would create an idle act).

[35] *See* 28 V.I.C. 241.

argument was premised upon both the September 2008 Trust and November 2008 Trust both being void, and all of Kenneth Turnbull, Sr.'s property passing to Defendants intestate, as children of Kenneth Turnbull, Sr. As noted, this assumption lacks merit, even coupled with the fact that Kenneth Sr. specifically disinherited his children. Defendants are therefore not entitled to judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' Motion for Summary Judgment. Kenneth Turnbull, Sr. executed the September 2008 Trust in accordance with Virgin Islands law. Although Defendants presented evidence of a November 2008 Trust, after a *Banks* analysis of what is required to revoke a trust in the Virgin Islands, we find the November 2008 Trust to not be a valid revocation under Virgin Islands law. As Defendants' Motion for Summary Judgment relied upon both trusts being void, we find they are not entitled to judgment as a matter of law. An Order consistent with this Opinion shall follow.

Dated: May 4, 2018

Renée Gumbs Carty
Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 5/4/2018