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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1409

In re Rutherford D. Brosious Trust Agreement.

Filed May 14, 2018
Affirmed
Johnson, Judge

Washington County District Court
File No. 82-CV-16-4334

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Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Randall, Judge.[*]

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[*]Retired judge of the Minnesota Court of Appeals, serving pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

JOHNSON, Judge

This appeal concerns a trust that was created to provide for the grantor's wife, the grantor's two children, and three designated charitable organizations. The estate of one of the grantor's children petitioned the district court for a determination of rights to certain trust assets after the death of the grantor's wife. On motions for summary judgment, the district court determined that, after the death of the grantor's wife, certain assets shall be distributed to the grantor's sole surviving child, not to the estate of the child who pre-deceased the grantor's wife. We affirm.

FACTS

In 1983, Rutherford D. Brosious created the Rutherford D. Brosious Trust to provide for his then-current wife, Ann Brosious, and for his two adult children from a previous marriage, Rutherford K. Brosious (Randy) and Barbara S. Brosious.

Rutherford amended the trust agreement in 1999. As amended, the trust agreement provides that, during the lifetime of both Rutherford and Ann, the trustee must pay income to Rutherford or expend income for Ann's benefit, and the trustee may distribute principal to Rutherford and Ann. The amended trust agreement also provides that, upon Rutherford's death, the trustee shall make certain distributions of tangible personal property, real property, and specified amounts of money to designated persons. The amended trust agreement further provides that, if Ann survives Rutherford, the trustee shall administer one-half of the remaining assets of the trust for her benefit by paying her net income and distributing to her whatever principal the trustee "deems advisable for [her] care, support, and maintenance." In addition, the trustee "shall administer the remainder of [the] trust [*i.e.*, the other one-half of trust assets, if Ann survives Rutherford] . . . in equal shares for the benefit of [Rutherford's] children," Randy and Barbara.

The amended trust agreement includes additional provisions that govern after Ann's death, and those provisions are at issue on appeal. The amended trust agreement provides as follows:

> [3](E) At my spouse's death, accrued and undistributed income shall be paid to my spouse's estate and the remaining assets shall be added to the trust provided in paragraph Fourth below and administered or distributed in accordance with those provisions.
>
> FOURTH: My Trustee shall administer the remainder of my trust, or all of my trust, if my spouse predeceases me, or upon her subsequent death, in equal shares for the benefit of my children, or the survivor thereof, for a period of five (5) years from the date of my death a[1] follows:
>
> (A) [Randy and Barbara] shall receive the net income from his or her trust in monthly or other installments convenient to them.
>
> (B) In addition . . . , the Trustee shall pay such sum or sums out of the principal of his or her trust [to Randy and Barbara] as the Trustee in its sole discretion deems advisable . . . .
>
> (C) On the date which is the fifth (5th) anniversary of my death, the trusts shall be divided into equal shares and one share shall be distributed to [Randy] if he is then living, and the remaining share shall continue to be held in trust by my Trustees for the benefit of Barbara, . . . if she is then living. In

[1]In their respective briefs, appellant and the beneficiary respondents assume that a typographical error appears here and that the amended trust agreement was intended to read "as follows:." Accordingly, we adopt that assumption.

> the event either of my said children is deceased, his or her share shall be added to the share of my surviving child.
>
> (D) The share held in trust for the benefit of Barbara . . . shall be administered by my Trustees in accordance with the provisions of paragraph Fourth (B) above. Upon the death of my said daughter, the remaining assets of the trust . . . shall be distributed to the following charitable organizations . . . :
>
> 1. Children's Hospitals and Clinics . . . .
>
> 2. The Science Museum of Minnesota . . . .
>
> 3. The White Bear Lake Area Educational Foundation . . . .
>
> It shall be provided, however, that Barbara . . . shall have the power to appoint one-half (1/2) of the remainder of the trust assets held for her benefit, in any manner, by referring to this power in [Barbara's] Will.

Rutherford died in 2000. He was survived by Ann, Randy, and Barbara. Five years later, in 2005, Randy's portion of the children's share of the trust, then valued at $1,098,973, was distributed to him, as required by subparagraph 4(C).

Randy died in 2015. One of Randy's two children, Gilbert Brosious, was appointed to serve as the personal representative of Randy's estate. In October 2016, Gilbert, on behalf of the estate, petitioned the district court for a determination of the rights of Randy's estate and other interested parties to assets of the trust upon Ann's eventual death. Specifically, Gilbert asked the district court to interpret the amended trust instrument to provide that Randy's estate is entitled to a distribution of one-half of the marital share of the trust after Ann dies. Barbara and the charitable organizations identified in paragraph

4(D) of the amended trust agreement filed separate objections to the petition. The trustee, U.S. Bank, did not take a position.

In June 2017, Ann, Barbara, and the charitable organizations filed separate motions for summary judgment. They argued that the plain language of the amended trust agreement provides that a child of Rutherford may receive a distribution of the marital share of the trust after Ann's death only if the child has survived Ann. Accordingly, they argued that Randy's estate will not be entitled to a distribution from the marital share of the trust after Ann dies because Randy has pre-deceased Ann. In response, Gilbert argued that summary judgment is improper because the amended trust agreement is ambiguous. Gilbert submitted certain extrinsic evidence into the summary-judgment record, including, among other things, prior versions of the trust agreement and the deposition testimony of the attorney Rutherford retained to draft the trust agreement and its amendments.

The district court granted the motions for summary judgment. The district court reasoned as follows:

> The four corners of the Trust Agreement unambiguously express Settlor's intent for the remaining property and assets in the Marital Fund to flow to any child who survived Settlor's Wife, not a child who predeceased Settlor's Wife. If Settlor's Daughter is living at the time of Settlor's Wife's death, the remaining property and assets of the Marital Trust are to be distributed to the Children's Trust or the Benefit of Settlor's Daughter, in which the Interested Parties have a remainder interest.

Gilbert appeals. Ann and Barbara have filed separate responsive briefs, in which they argue that the district court correctly interpreted the amended trust agreement. The three charitable organizations have filed a joint responsive brief in which they also argue that the district court correctly interpreted the amended trust agreement. U.S. Bank has filed a responsive brief only to state that it has "an interest in having the dispute resolved and the beneficiaries of the marital trust after Ann's death determined, as those beneficiaries [presently] have certain administrative rights under Minnesota law."

D E C I S I O N

Gilbert argues that the district court erred by granting the motions for summary judgment. Gilbert contends that the amended trust agreement is ambiguous concerning the disposition of the assets in the marital share of the trust after Ann's death. Gilbert further contends that a trial is necessary to allow the district court to consider extrinsic evidence that will resolve the ambiguity.

A district court must grant a motion for summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see also* Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment and views "the evidence in the light most favorable to the party against whom summary judgment was granted." *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

If a court is required to interpret a trust agreement, the court's purpose "is to ascertain and give effect to the grantor's intent." *In re Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012). "A court should seek out the grantor's dominant intention by construing the trust agreement in its entirety." *In re G.B. Van Dusen Marital Trust*, 834 N.W.2d 514, 520 (Minn. App. 2013), *review denied* (Minn. June 26, 2013). A trust instrument is to be construed "to give effect to the [grantor's] intent as expressed in the plain language of the will." *In re Kischel*, 299 N.W.2d 920, 923 (Minn. 1980). Accordingly, "[i]f the trust agreement is unambiguous, a court should look to the language of the agreement to discern the grantor's intent and not consider extrinsic evidence." *Van Dusen*, 834 N.W.2d at 520; *see also In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). "Under all circumstances [the trust] must be construed to carry out the main object of the settlor as disclosed by its terms notwithstanding inaccuracies of expression, ineffectiveness of terms, or the presence of provisions therein which on their face appear inconsistent therewith." *In re Fiske's Trust*, 242 Minn. 452, 460, 65 N.W.2d 906, 910 (1954). "This court applies a *de novo* standard of review to a district court's interpretation of a trust agreement." *Van Dusen*, 834 N.W.2d at 520.

The district court determined that the amended trust agreement unambiguously expresses Rutherford's intent that the assets in the marital share of the trust should, after

Ann's death, be distributed to the child or children who have survived Ann. In light of that interpretation, the district court determined that Randy's estate will not be entitled to a distribution from the marital share of the trust after Ann's death.

Gilbert's argument for reversal is based on the fact that more than five years have passed since Rutherford's death and the fact that Randy's share of the children's trust no longer exists. Gilbert contends that the termination of Randy's share of the children's trust creates an ambiguity concerning the disposition of the assets in the marital share of the trust after Ann's death and that extrinsic evidence is necessary to resolve the ambiguity.

Our analysis begins with subparagraph 3(E), which provides that, after Ann's death, "the remaining assets [of the marital share of the trust] shall be added to the trust provided in paragraph Fourth below [*i.e.*, the children's share] and administered or distributed in accordance with those provisions." This reference to "paragraph Fourth" incorporates the subparagraphs that follow the introduction to the fourth paragraph of the amended trust agreement. This is necessarily so because the introduction to the fourth paragraph concludes by stating that the trustee shall administer the children's share of the trust "as follows:." Both the words "as follows" and the colon that comes after those words indicate that, if the trustee must follow paragraph 4, the trustee must follow all of the subparagraphs that follow the introduction. *See U.S. Nat'l Bank v. Independent Ins. Agents, Inc.*, 508 U.S. 439, 454, 113 S. Ct. 2173, 2182 (1993) (interpreting statute with words and punctuation "as follows:").

Subparagraphs 4(A) through 4(D) govern the children's share of the trust. During the first five years after Rutherford's death, Randy and Barbara were entitled by subparagraph 4(A) to receive the net income of the children's share of the trust. During that same period of time, Randy and Barbara were permitted by subparagraph 4(B) to receive discretionary distributions of principal. On the fifth anniversary of Rutherford's death, Randy was entitled by subparagraph 4(C) to a distribution of half of the children's share of the trust, "if he is then living." Randy was living on the fifth anniversary of Rutherford's death, and he received a distribution of one-half of the children's share of the trust. Subparagraph 4(D) is concerned solely with Barbara and is not directly at issue in this appeal.

Consistent with subparagraph 3(E) and the introduction to the fourth paragraph, we look to all provisions in paragraph 4 to determine the disposition of the marital share of the trust after Ann's death. Under subparagraph 4(C), Randy would be entitled to a distribution of some or all of the principal of the marital share of the trust if he could satisfy an express condition: "if he is then living." Because Randy has died, he will not be able to fulfill that condition. Subparagraph 4(C) provides for the scenario in which one of Rutherford's children has died: that subparagraph concludes by stating, "In the event either of my said children is deceased, his or her share shall be added to the share of my surviving child." In light of that sentence, the half of the marital share of the trust that would have been distributed to Randy if he had survived Ann must be "added to" Barbara's share.

Accordingly, the plain language of the amended trust agreement provides that, in light of Randy's previous death, the marital share of the trust will be added to Barbara's share of the trust after Ann dies. Given the plain language of the amended trust agreement, the trustee may not distribute any part of the marital share of the trust to Randy's estate after Ann dies. Because the plain language of the amended trust agreement provides for the disposition of the marital share of the trust after Ann dies, the amended trust agreement is not ambiguous, and there is no need to consider extrinsic evidence.

Thus, the district court did not err by granting the motions for summary judgment and determining that Randy's estate does not have an interest in the marital share of the trust.

Affirmed.