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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001384-DG

JERRY WAYNE GARLAND, II

APPELLANT

ON DISCRETIONARY REVIEW FROM KNOX CIRCUIT COURT
v. HONORABLE GREGORY A. LAY, SPECIAL JUDGE
ACTION NO. 18-XX-00001

BECKY GARLAND MILLER (NOW
CARR); M.M. AND G.M., MINOR
CHILDREN, BY AND THROUGH THEIR
GUARDIAN AD LITEM, JEFFREY
TIPTON; AND JACOB CALLOWAY CARR, III,
INDIVIDUALLY AND AS PARENT
AND NEXT FRIEND OF LUKE
BECKHAM CARR

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jerry Wayne Garland, II (Garland) brings this appeal from an
August 24, 2018, Order of the Knox Circuit Court, affirming an Order of the Knox

District Court entered November 28, 2017. This Court granted discretionary review by Order entered November 26, 2018. The district court terminated an Irrevocable Trust established by Becky Garland Miller, now Carr (Carr), Garland's sister. Garland was trustee of the Trust and opposed termination. Based on the reasoning that follows, we conclude that continuing the Trust was unnecessary to advance any material purpose of the Trust and thus affirm.

Background

The circuit court summarized the relevant material facts as follows:

On May 10, 2009, Jerry Wayne Garland died testate and left his three children joint executors of his estate. The three children, including Appellant Garland and Appellee Carr, each inherited, among other things, a 1/3 share of the decedent's interest in G&M Oil Company, Inc. Thereafter, on January 11, 2012[,] Carr executed an Irrevocable Living Trust Agreement, naming Garland as Trustee. However, on September 19, 2017, Carr filed a Verified Petition for Termination of the Irrevocable Living Trust and a Renewed Petition to Terminate Trust on November 14, 2017. Both petitions were filed pursuant to [Kentucky Revised Statutes] KRS 386B[.]4-110(1) and KRS 386B[.]4-110(2) because the settlor and all of the beneficiaries consented to the termination of the trust and alternatively claiming continuation of the trust is not necessary to achieve a material purpose of the trust.

The District Court heard arguments on the petitions and granted Carr's Petition to Terminate Trust based on the finding that the settlor and beneficiaries all consented to the termination of the trust and because the trust could no longer serve a material purpose. The District Court thus ordered the trust terminated and ordered Garland to convey, assign, and transfer all property and assets held

in trust back to Carr. On December 8, 2017, however, Garland filed a motion to Alter, Vacate, and Amend the Judgment or for Additional Findings. The District Court heard arguments on this motion as well and denied Garland's motions. . . .

Circuit Court Record at 14.

As the circuit court noted in affirming the district court, included with Carr's assets that were placed in trust was her 1/3 interest in G&M Oil Company, Inc. (G&M), the family business. Garland argues that this particular asset was placed in the Trust to maintain family control of G&M in the future. Garland actively managed the day-to-day operation of G&M.

Article I(A) of the Trust Agreement set out the Trust purpose as follows:

This Trust is being created to provide for the convenient administration of the assets of BECKY GARLAND MILLER without the necessity of court supervision in the event of the Trustor's incapacity or death. . . .

District Court Record at 13.

Also relevant to this appeal are the provisions set out in Article II(D) and Article IX(D) of the Trust, which effectively state that Carr did not reserve the power nor had the right to terminate the Trust in the future. District Court Record at 15 and 29.

Carr initiated this action in Knox District Court to terminate the Trust in accordance with KRS 386B.4-110(1) and (2), part of Kentucky’s Uniform Trust Code,¹ which provides in relevant part:

(1) Except as otherwise provided in the terms of the trust, a noncharitable irrevocable trust may be . . . terminated upon consent of the settlor and all beneficiaries, without court approval, even if the . . . termination is inconsistent with a material purpose of the trust. . . .

. . . .

(2) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. . . .

For simplicity’s sake, this Opinion will refer to Trust termination under KRS 386B.4-110(1) as a “section one termination” and a termination under KRS 386B.4-110(2) as a “section two termination.”

As noted, Garland objected to the termination of the Trust. Garland argued a section two termination would be improper because the Trust continued to serve the material purpose of protecting control of G&M from the claims of a spouse if Carr were to get divorced. Toward that end, Garland wanted to depose

¹ The Kentucky General Assembly enacted the Uniform Trust Code effective July 15, 2014, and it is codified in Kentucky Revised Statutes (KRS) Chapter 386B. The Trust in this case was created prior to the enactment of the statute but nonetheless is subject to its provisions per KRS 386B.11-040(1).

the attorney who drafted the Trust. Garland also argued a section one termination would be improper because Carr’s express waiver of the right to revoke or amend the Trust fit squarely within the “[e]xcept as otherwise provided in the terms of the trust” exception to the general ability of the settlor and beneficiaries to agree to a section one termination.

The sole issue in this appeal looks to whether the Trust could be properly terminated under either Section (1) or Section (2) of KRS 386B.4-110. Both the district court and circuit court concluded that the Trust could be terminated under either section of the statute. Our review proceeds accordingly.

Standard of Review

Our review of this appeal is twofold. First, we must interpret KRS 386B.4-110. It is well-established that interpretation of a statute presents an issue of law, and our review is *de novo*. *Spencer Cty. Pres., Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007). When interpreting an ambiguous statute, words are to be afforded their plain meaning unless to do so would lead to an absurd result. *Cosby v. Commonwealth*, 147 S.W.3d 56, 59 (Ky. 2004); *Ky. Occupational Safety and Health Review Comm’n v. Estill Cty. Fiscal Court*, 503 S.W.3d 924, 929 (Ky. 2016). And, a statute is interpreted by considering it as a whole. *Cosby*, 147 S.W.3d at 58-59.

Second, as concerns the Trust Agreement, in Kentucky, the interpretation and legal effect of a written instrument is a matter of law for the court. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). When construing a trust agreement, the duty of the court is to examine the language employed and ascertain the intent of the settlor based on that language. *Citizens Fid. Bank & Trust Co. v. McNeal*, 279 S.W.2d 751, 754 (Ky. 1955). Likewise, the rules applicable to the construction of wills apply to the construction of trust agreements. *Dep't of Revenue v. Kentucky Trust Co.*, 313 S.W.2d 401, 404 (Ky. 1958).

We will now review KRS 386B.4-110(1) and (2) in conjunction with the applicable Trust provisions in this case.

Analysis

A. The Trust Was Not Subject to a Section One Termination.

KRS 386B.4-110(1), which governs section one terminations, provides in relevant part that “[e]xcept as otherwise provided in the terms of the trust, a noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, without court approval, even if the modification or termination is inconsistent with a material purpose of the trust.” (Emphasis added.) There is no dispute that Carr and all beneficiaries agreed to

terminate the Trust, so the question is whether the terms of this Trust preclude such a termination by consent.

Unfortunately, the parties have not cited, nor have we independently located, *any* authority offering *any* clear guidance as to what the General Assembly meant by the “except as otherwise provided” clause. Section 411 of the model Uniform Trust Code, upon which KRS 386B.4-110 is based, lacks a similar clause. In fact, our research reflects that none of the approximately 35 states that have adopted the Uniform Trust Code chose to add an “except as otherwise provided” clause—except Kentucky. Finally, the parties have not cited, nor have we independently located, any helpful legislative history. Thus, we must interpret and apply the clause according to the usual canons of statutory construction.

To begin, our review of the statute looks to the intent of the legislature. *City of Lebanon v. Goodin*, 436 S.W.3d 505, 513 (Ky. 2014). When terms in a statute are not defined, such as the clause at issue here, we construe the terms under their “commonly understood meaning.” *Id.* at 512.

Even prior to adoption of the Uniform Trust Code, an irrevocable trust generally was revocable “with the consent of the settlor and all the beneficiaries.” *Cruse v. Leary*, 727 S.W.2d 408, 410 (Ky. App. 1987) (citation omitted). The section one termination provision looks to this common law principle. We must presume the General Assembly was aware of the status of the law, including the

common law, when it enacted the Uniform Trust Code. *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005). Therefore, by adding the “except as otherwise provided” exception, the General Assembly clearly wanted to allow a settlor to preclude or restrict their ability to terminate a trust by consent with the beneficiaries.

In reviewing the unambiguous Trust terms as written, we must afford those terms their plain meaning. *New York Life Ins. Co. v. Conrad*, 107 S.W.2d 248, 250-51 (Ky. 1937). Here, Article II(D) of the Trust states that Carr “does not reserve the right to revoke or amend this instrument” and Article IX(D) even more sweepingly provides that Carr retains “no right or power to terminate this trust.” (Emphasis added.) That unambiguous language reflects that Carr intended to waive her ability to participate in the termination of the Trust. To hold that Carr somehow reserved the ability to help effectuate a section one termination would distort beyond recognition the statement in the Trust that she reserved “no right” to terminate it.

Therefore, because section one terminations require the settlor’s consent, which Carr had surrendered, the Trust *sub judice* was incapable of such a termination. KRS 386B.4-110(1). The circuit and district court’s conclusions to the contrary were erroneous.

B. The Trust Served No Material Purpose so a Section Two Termination Was Proper.

KRS 386B.4-110(2), governing section two terminations, provides in relevant part that “[a] noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.” The consent of the settlor is thus irrelevant for a section two termination. Since it is undisputed that all beneficiaries consented to terminating the Trust in this case, the question is whether continuing the Trust was necessary to achieve any material purpose.

Garland argues there were two reasons for the Trust’s creation which are not contained within the Trust itself: “(1) protecting Carr’s current and future assets from a future divorce and (2) maintaining family control and experienced leadership in the operation of G&M Oil.” Garland’s Brief at 16. But those purposes may only be considered via extrinsic evidence since they are not contained in the Trust.

An unambiguous document is construed solely from the language contained therein. *Smithfield Farms, LLC v. Riverside Developers, LLC*, 566 S.W.3d 566, 570 (Ky. App. 2018). There is nothing ambiguous about the statement of purpose in the Trust: “to provide for the convenient administration of the assets of BECKY GARLAND MILLER without the necessity of court

supervision in the event of the Trustor’s incapacity or death.” District Court Record at 13.² Garland’s argument that there were additional, unexpressed terms behind the Trust’s creation does not create ambiguity where none is contained in the Trust Agreement. We consequently must construe the Trust from only the language it contains, which requires rejecting Garland’s argument that he should have been permitted to provide parol evidence, particularly from the attorney who drafted the Trust, to establish an unexpressed purpose for the Trust.

Similarly, no interrogatory responses or depositions (which would inevitably be parol evidence) would have been admissible since the only purpose of the discovery would have been to seek to expand, or vary, the unambiguous terms of the Trust. Consequently, the circuit court correctly held that there was no need to conduct discovery because nothing obtained in that process would have been “reasonably calculated to lead to the discovery of admissible evidence.” Kentucky Rules of Civil Procedure (CR) 26.02(1). As a result, the Trust’s only material purpose must be the unambiguous one as stated: to conveniently administer Carr’s assets upon her incapacitation or death. We therefore must determine if continuing the Trust was necessary to achieve that purpose.

² Because the Trust contained an express purpose, it did not fall within the ancient, limited exception to the parol evidence rule whereby a court can examine extrinsic evidence to ascertain a trust’s purpose. *Best v. Melcon*, 210 S.W. 662, 666 (Ky. 1919); *Fidelity & Columbia Trust Co. v. Gwynn*, 268 S.W. 537, 538 (Ky. 1925).

Carr's death was covered by Articles III and IV of the Trust. Under Article III(F), at Carr's death the trustee was directed to make specific gifts of tangible property as directed by Carr's will or by Schedule B to the Trust. District Court Record at 16. There was no Schedule B attached to the Trust. Thus, Carr's will would control the Trust distributions upon Carr's death, effectively making the Trust nothing more than a redundant statement of the will. Additionally, Article IV(A) further provides that at Carr's death "distributions shall be made according to Schedule C." District Court Record at 16. There is no Schedule C attached to the Trust. As a result of these provisions, the Trust would not have served to conveniently administer Carr's assets at her death. Whether by design or inartful drafting, the Trust deferred to Carr's will for the distribution of her assets upon her death. Accordingly, the continuation of the Trust was not necessary to achieve the material purpose of the Trust and section two termination by the Knox District Court was proper.

For the foregoing reasons, the August 24, 2018, Order of the Knox Circuit Court affirming the decision of the Knox District Court to terminate the Trust is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE BECKY
GARLAND MILLER (NOW CARR):

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