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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) 1 CA-CV 11-0766
)
WILLIAM FRANCIS PORINI,) DEPARTMENT B
)
Deceased.) **MEMORANDUM DECISION**
_____) (Not for Publication -
) Rule 28, Arizona Rules
ANNETTE PORINI, as Trustee of the) of Civil Appellate
Elmer and Lillian J. Porini) Procedure)
Trust,)
)
Petitioner/Appellee,)
)
v.)
)
SHERRIE BUNTEN, as Personal)
Representative of the Estate of)
William Francis Porini,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB2010-000782

The Honorable David O. Cunanan, Judge Pro Tempore

AFFIRMED

Law Offices of Kelly J. McDonald, P.L.L.C.
by Kelly J. McDonald
Attorneys for Petitioner/Appellee

Phoenix

P O R T L E Y, Judge

¶1 Sherrie Buntten, as Personal Representative of the Estate of William F. Porini, appeals the ruling that the Elmer and Lillian J. Porini Trust (the "Trust") was not required to distribute Trust funds to the Estate of William F. Porini. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Annette Porini ("Annette") is the Trustee of the Trust. She and William were the children of Elmer and Lillian Porini, the Trustors, and were secondary beneficiaries under the Trust. As such, each was entitled to a fifty percent share of the remainder of the Trust estate after the death of their parents, though William's distribution was subject to certain conditions.

¶3 Both survived their parents. During the remainder of William's life, he received distributions pursuant to the Trust's Special Instructions. He subsequently died without issue, but left a handwritten will devising "whatever I have" to Buntten.

¶4 After Buntten was named Personal Representative of William's estate, she was advised that the Trust would not make

distributions to his estate. Although Bunten believed that William's estate was entitled to his share in the Trust, Annette, as Trustee, sought a declaration that the Trust did not have to make any further distributions to William's estate and that his share should be distributed to Annette as the sole surviving beneficiary of the Trust.

¶15 As the Trustee, Annette argued that because William had no issue and made no appointment, his share of the Trust must be distributed according to the terms in Article VI¹

¹ Article VI of the Trust provides in pertinent part:

C. Distribution of Remainder of Trust Estate. Upon the death of the Surviving Spouse, the Trustee shall . . . divide the remainder of the trust estate . . . into shares set forth as follows and shall hold, administer and distribute each share according to the provisions of ARTICLE VI.E hereinbelow:

ANNETTE L. PORINI	50%
WILLIAM F. PORINI	50%

Special Instructions: William F. Porini's share shall be held in trust with Annette L. Porini as Trustee. Commencing on the date WILLIAM F. PORINI contacts Trustee, WILLIAM F. PORINI shall receive the income from the Trust, not less often than quarterly, and he shall receive TEN PERCENT (10%) of the principal on the anniversary dates of the last Trustor to die until said Trust has been exhausted or terminated in accordance with Article VII.A. If WILLIAM F. PORINI does not contact Trustee prior to the anniversary date of the last Trustor to die, Trustee shall take WILLIAM F. PORINI'S

providing for the distribution of the remainder of the Trust and

share for that particular year and WILLIAM F. PORINI shall have no right to recover any such share.

D. Distribution of Deceased Beneficiary's Share. In the event a beneficiary named in Paragraph C. of this ARTICLE VI. is not then living, the share of such deceased beneficiary shall be distributed to the other surviving beneficiaries. If neither beneficiary survives both Trustors, the estate shall be distributed to Trustor's issue then living, per stirpes.

E. Distributions of Income and Principal.

. . . .

4. Upon the death of a beneficiary for whom a trust is then held prior to final distribution to such beneficiary, if said decedent is survived by issue, that portion of such trust (including both principal and any accrued or undistributed income) which is not exempt from the generation-skipping transfer tax imposed by Chapter 13 of the Internal Revenue Code of 1986 (or any successor provisions) shall be distributed to such one or more persons or entities, including the decedent's estate, and on such terms and conditions, either outright or in trust, as the decedent shall have appointed by the last dated instrument delivered to the Trustee, including a Will (whether or not admitted to probate), specifically referring to and exercising this power of appointment. Any of such portion of the trust as is not appointed . . . shall be distributed to the issue of the beneficiary, and if none, then according to the terms set forth in this ARTICLE hereinabove providing for the distribution of the remainder of the Trust Estate.

that, under Article VI(D), if a beneficiary was deceased, his share was to be distributed to the other surviving beneficiaries. She further claimed that the Trustors intended that the Trust be distributed to and used by their family. Consequently, she took the position that the Trust should make no further distributions to William's estate, but that William's share should be distributed to Annette as the sole remaining beneficiary of the Trust.

¶16 Bunten argued that Article VI(D) did not apply because it referred to a beneficiary not living at the time the surviving trustor died, not a beneficiary such as William, who died after the last trustor died. Bunten's position was that the Special Instructions to Article VI(C) controlled because they provided that distributions to a beneficiary stopped only when the Trust was exhausted or terminated at the discretion of the Trustee if the trust was valued at \$20,000 or less – circumstances that had not occurred.

¶17 After an evidentiary hearing, the court found that the Trust was not required to provide distributions to William's estate and that the Trust could distribute the assets to Annette.² We have jurisdiction over Bunten's appeal pursuant to

² The transcript of the evidentiary hearing has not been provided on appeal even though the minute entry ruling states that the court's decision is based "upon the matters presented and for the reasons set forth on the record."

Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(9) (West 2012).

DISCUSSION

¶8 The parties agree that California law governs the interpretation of the terms of the Trust. As a result, our primary goal is to determine and give effect to the intent of the Trustors as expressed in the document. Cal. Prob. Code § 21102(a); *Gardenhire v. Superior Court*, 26 Cal. Rptr. 3d 143, 147 (Ct. App. 2005); *Kropp v. Sterling Sav. & Loan Ass'n*, 88 Cal. Rptr. 878, 884 (Ct. App. 1970). In doing so, we look at the document as a whole. Cal. Prob. Code § 21121; *Estate of Powell*, 100 Cal. Rptr. 2d 501, 504 (Ct. App. 2000); *Wells Fargo Bank v. Marshall*, 24 Cal. Rptr. 2d 507, 511 (Ct. App. 1993). We interpret an instrument to give effect to all provisions and to avoid making any provisions superfluous. Cal. Prob. Code § 21120. Where the instrument is ambiguous, extrinsic evidence may be considered to interpret the document, but not to give it a meaning to which it is not reasonably susceptible. Cal. Prob. Code § 21102(c); *Ike v. Doolittle*, 70 Cal. Rptr. 2d 887, 901 (Ct. App. 1998); *Kropp*, 88 Cal. Rptr. at 884. The instrument is ambiguous where it is susceptible of two or more constructions. *Ike*, 70 Cal. Rptr. 2d at 901. The proper analysis is whether the language is reasonably susceptible of the interpretation suggested by the rule of construction or the extrinsic evidence.

Estate of DeLoreto, 13 Cal Rptr. 3d 513, 516 (Ct. App. 2004). Where intent is uncertain, we interpret the document in favor of natural heirs rather than strangers. *Estate of Holmes*, 191 Cal. App. 2d 285, 293 (Ct. App. 1961). The interpretation of a trust instrument presents a question of law, which we review de novo, absent a conflict in extrinsic evidence. *Powell*, 100 Cal. Rptr. 2d at 504.

¶9 The parties agree that: William had received distributions from his share of the Trust prior to his death; he died testate; and he was not survived by issue. Both also agree that the Trust is unambiguous, but disagree on its meaning to resolve this dispute.

¶10 Bunten asserts that Article VI(C), which is titled "Distribution of Remainder of Trust Estate," governs, and argues that the distributions to William would cease only when the Trust had been exhausted or when it had fallen below \$20,000 and the Trustee distributed the remaining funds, terminating the Trust. She contends that Article VI(E)(4) addresses the death of a beneficiary without issue who had not exercised the power of appointment, and provides that any remaining portion of the Trust belonging to the deceased beneficiary shall be distributed "according to the terms set forth in this ARTICLE hereinabove providing for the distribution of the remainder of the Trust Estate." Bunten contends the language could refer only to

Article VI(C) because of the similarity of that language to the title of Article VI(C). Bunten asserts that William, or now his estate, is entitled to continue to receive distributions until his share of the Trust is exhausted or terminated.

¶11 Annette argues, however, that the Special Instructions in Article VI(C) require William to contact the Trustee yearly before the anniversary date of the last Trustor to die and provides that if he fails to do so, the "Trustee shall take [his] share for that particular year." She asserts that because William can no longer meet the annual requirement, his estate is not entitled to his share. Bunten challenges Annette's argument, and contends that William was required to contact the Trustee only once under the Special Instructions of Article VI(C). She notes that the subsection required William to contact the Trustee on the "anniversary date" of the date of death of the last Trustor to die, and not the "anniversary dates," and that after initial contact the income was to be distributed at least quarterly and ten percent of the principal was to be distributed on the "anniversary dates of the last Trustor to die."

¶12 Applying California law, we interpret the Special Instructions of Article VI(C) as requiring William to contact the Trustee only once. The subsection provides that William was entitled to a portion of the principal "on the anniversary dates

of the last Trustor to die" "commencing on the date" he contacted the Trustee. The language contemplates annual distributions starting with the single contact with the Trustee. Nothing in the language suggests that annual contact was required.³ We interpret the language Annette relies on, referring to William's forfeiture of his share for "that particular year" if he "does not contact Trustee prior to the anniversary date of the last Trustor to die," as referring to the initial contact – not an annual requirement. For example, if William had not contacted the Trustee by the first anniversary date of the last Trustor to die, his share for that year would go to the Trustee. Likewise, if he failed to contact the Trustee by the second anniversary of the date of death of the last Trustor to die, he would forfeit his share for that year. If, however, he contacted the Trustee before the third anniversary, he would from that time on be entitled to receive the distribution of principal on the subsequent anniversary dates. Our interpretation reconciles the two portions of the subsection to which the parties ascribe opposite meanings.

³ During the appellate oral argument, it was suggested that William sent his sister annual Christmas cards to demonstrate that he was alive and to provide an address to send the check.

¶13 Although William had to contact his sister only once to receive his portion of the Trust proceeds pursuant to the Special Instructions, to resolve the dispute we have to determine how the Trust intended to dispose of William's share upon his death and in the absence of issue and a valid appointment. Both parties find that Article VI(E)(4) governs, but differ on what it means.

¶14 Article VI(E)(4) is applicable because it directs what happens "[u]pon the death of a beneficiary for whom a trust is then held prior to final distribution." The article discusses how the funds are handled if the beneficiary leaves issue with or without providing for the appointment of any amount of proceeds "which [are] not exempt from the generation-skipping transfer tax." The article also discusses what occurs if the beneficiary had no issue regardless of whether the power of appointment is exercised. Specifically, the article provides that if the beneficiary died without issue then the share "shall be distributed . . . according to the terms set forth in this ARTICLE hereinabove providing for the distribution of the remainder of the Trust Estate."

¶15 Buntzen argues the language clearly refers to Article VI(C) because of its similarity to the heading of that subsection - "Distribution of Remainder of Trust Estate." Although Annette had argued in her answering brief that Article

VI(D) was the provision being referred to, she abandoned that position during the appellate oral argument. And, as Bunten points out, Article VI(D) refers to a beneficiary who predeceased the Trustors, and the provision is not applicable because William did not die before his parents.

¶16 After the oral argument, the parties appear to agree that Article VI(E)(4) had to refer to Article VI(C) entitled "Distribution of Remaining Trust Estate." But, that provision does not address what should happen with the remaining proceeds after the beneficiary dies without issue. Article VI(E)(4) addressed that, where the beneficiary had issue, he or she could appoint funds that were not exempt from the generation-skipping transfer tax to "one or more persons or entities, including the decedent's estate, and on such terms and conditions, either outright or in trust." Article VI(C), however, is silent about what should occur in the event that one sibling predeceased the other and left no issue. As a result, the intention of the Trustors is not revealed in Article VI(C).

¶17 At the evidentiary hearing, Annette testified that the Trustors wanted their property to stay in the family. Although we would review the transcript of the hearing, Bunten has not provided us with a transcript. We assume, as a result, that the record supports the court's decision that Bunten was not entitled to the funds from the Trust because they wanted the

Trust property or proceeds to stay within the family.⁴ See *Kline v. Kline*, 221 Ariz. 564, 572, ¶ 33, 212 P.3d 902, 910 (App. 2009).

¶18 Annette's testimony and the ruling are also supported by reviewing Article VI(F)(15). Although Article VI(F) generally discusses how Trust funds should be kept in a separate trust in the event a beneficiary might lose government benefits if he or she received trust funds, the last provision, (F)(15) outlines how that estate can be distributed if there are no issue. The provision states that if the beneficiary fails to exercise the power of appointment and dies without issue, the funds in the separate trust shall be distributed "to the Trustor's issue by right of representation." And Annette is the only remaining issue of the Trustors. Consequently, the Trust supports the determination that in the absence of issue and the valid exercise of a power of appointment, which would have allowed a transfer by the power of appointment outside of the family, the Trustors wanted to keep the Trust proceeds within their family.

⁴ Buntun argues that Annette's testimony is undermined by the fact that the Trust allowed for a power of appointment. The Trust, however, limited William's ability to exercise his power of appointment; he could only exercise it if he had issue and then only for a portion of his remaining share, with the other portion going to his issue - the Trustors' grandchildren. Trust, Article VI(E)(4). Consequently, the Trust does not contradict Annette's testimony.

CONCLUSION

¶19 Based on the foregoing, we affirm the judgment.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Judge

/s/

RANDALL M. HOWE, Judge