STATE OF MICHIGAN

COURT OF APPEALS

In re WELLINGTON HAYES and ELIZABETH L. HAYES REVOCABLE TRUST.

ROBERT P. LADD,

Petitioner-Appellee,

v

PATRICIA SUNDERMAN,

Respondent-Appellant.

UNPUBLISHED
November 2, 2010

No. 288746
St. Clair Probate Court
LC No. 2007-000229-TV

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Respondent Patricia Sunderman appeals as of right from the trial court's order requiring that she "return and/or convey to the Wellington Hayes Revocable Trust" various funds and stocks, and also from an earlier order declaring two purported amendments to the trust void. We affirm.

I. FACTS

Wellington Hayes and Elizabeth L. Hayes were husband and wife. Respondent is Wellington Hayes' daughter from an earlier marriage. Wellington and Elizabeth Hayes executed the subject trust in April 1994, naming themselves as settlors and co-trustees, and a bank as successor trustee. Wellington and Elizabeth Hayes reserved to themselves the right to revoke, alter, or amend the trust, or to designate a different successor trustee. Elizabeth Hayes died in 1997. In October 2004, Wellington Hayes executed an amendment to the trust, removing the bank as successor co-trustee and naming himself sole trustee, naming respondent as successor trustee, and changing the distributions. A second amendment followed in July 2006, this one granting respondent a house plus any automobile owned by Wellington Hayes upon his death.

In late 2005, Wellington Hayes transferred a number of stocks that he held in certificate form into an investment account. As of March 31, 2006, that account had a balance of $508,170. In March and April 2006, securities were sold, and the proceeds of $60,000 transferred to

Wellington Hayes' checking account. In August of that year, Wellington Hayes appointed respondent his attorney in fact, and added her as a signatory to his checking account.

On September 30, 2006, there was $636,860 in the trust's investment account. On October 16, 2006, respondent, asserting her power of attorney over Wellington Hayes, opened a money market account in both names with rights of survivorship, and directed a bank employee to sell a variety of securities in the trust account and transfer the proceeds to the new joint account. Over the next several days, $325,374.89 was thus transferred, as was an additional $82,940.76 the following month.

In late October 2006, respondent withdrew $260,770.83 from the joint money market account and deposited it into her personal account. On November 1, 2006, respondent withdrew $1,000 from the joint account, the next day she withdrew an additional $50,000, then twelve days later she withdrew another $82,000. In late October 2006, respondent deposited $12,000 from the trust account into Wellington Hayes' checking account, and thereafter she wrote a check for $5,000 against that account toward the purchase of certain real property of hers.

In early December 2006, the securities remaining in the investment account, consisting of 6,000 shares of DTE Energy, were transferred to an account at Smith Barney, which was apparently a joint account between respondent and Wellington Hayes. Respondent testified that Wellington Hayes opened this account and intended to sell some of the DTE Energy stock, but the trial court stated that no documentation relating to the establishment of this account was provided. Wellington Hayes died on February 10, 2007.

Petitioners, the nieces and nephew of Elizabeth Hayes and beneficiaries under the trust, petitioned to invalidate the two amendments to the trust that Wellington Hayes executed after Elizabeth Hayes died. The trial court did so, on the ground that the trust permitted amendment only by both settlors, not by the one who has survived the other.

The trial court additionally concluded that the vast majority of the withdrawals made by respondent in late 2006 were not for Wellington Hayes' support, care, comfort, maintenance, or enjoyment. The court identified several withdrawals that violated the trust's provisions, and ordered respondent to reimburse the trust in the amount of $397,770.83 plus interest, and to convey the DTE Energy stock, plus all income received from it, to the trust.

II. VALIDITY OF AMENDMENTS

Respondent argues that the trial court incorrectly held that the two amendments to the trust executed by Wellington Hayes after Elizabeth Hayes had died were invalid. We disagree.

"When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered." *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

Paragraph 2 of the trust sets forth its manner of amendment:

> **WELLINGTON HAYES and ELIZABETH L. HAYES**, hereby reserves [*sic*] to themselves, the right to revoke, alter or amend this trust

> agreement in whole or in part, to withdraw assets from the trust estate and to designate a different successor trustee. Thus trust agreement may not be altered, revoked or amended by a guardian, conservator or other person acting on behalf of Settlors. [Respondent's Exhibit 1, pp 1-2 (capitals and bold in the original).]

The trial court cited an unpublished opinion[1] of this Court in support of its conclusion that "[r]eservation of the authority to amend the Trust to the Settlors jointly precludes the survivor of them . . . from acting individually to amend the Trust." That opinion in turn offered a quotation from a legal text that the trial court also used: "'If the power to amend is reserved to two settlors, it must be exercised by both, and the survivor cannot use the power.'" Slip op pp 4-5, quoting Bogert, Trusts and Trustees (2d ed), § 993, pp 241-242).[2]

Respondent in turn offers language from a different text:

> "During the lifetimes of both settlors the joint trust is revocable and amendable. Generally, both must agree to amend the trust. Each may have the unilateral power to revoke. Both settlors retain the right to benefit from the entire trust. The survivor is entitled to enjoy all the trust assets after one settlor has died. In addition, the survivor may amend or revoke the trust." [Brief at 8, citing Michigan Estate Planning Handbook (Carol J. Karr ed., ICLE 2d ed, 2006), ch 22, § 22.4.]

Consulting the text for its actual language, however, brings some differences to light:

> During the lifetimes of both settlors the joint trust is revocable and amendable. Generally, both must agree to amend the trust. Each may have the unilateral power to revoke.
>
> Both settlors remain in a position to benefit from the entire trust. The survivor is entitled to benefit from all the trust assets after one settlor has died. In addition, the survivor may amend or revoke the trust (unless he or she has disclaimed this right as to part of the trust). . . . [Michigan Estate Planning Handbook (Carol J. Karr ed., ICLE 2d ed, 2006), ch 22, § 22.4.]

Aside from the different paragraph formatting, and substitution of "benefit from all the trust assets" for "enjoy all the trust assets," the parenthetical in the latter, following the provision for the survivor's right to amend the trust, "(unless he or she has disclaimed this right . . .)," clarifies that a trust may be written to guarantee that right or not, as the case may be.

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[1] The trial court duly noted that it was not bound by unpublished decisions of this Court, see MCR 7.215(C)(1), but that that they may be consulted as persuasive authority. See *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005).

[2] The current edition of this text retains this language verbatim. Bogert, Bogert, & Radford, Trusts and Trustees (3d ed, 2006), § 993, pp 180-181.

These texts, and this Court's unpublished opinion the subject, indicate that whether the surviving settlor of a joint trust has the right to amend the trust must be determined on a case-by-case basis.

In this instance, the provision for amendment refers to the settlors "themselves," with no provision for either, or a survivor, acting alone. Accordingly, the trial court noted the provision for the two settlors jointly amending the trust, and lack of any provision for a survivor doing so, and applied the default rule as recognized by this Court's unpublished opinion and the Bogert treatise and held that Wellington Hayes' attempts to amend the trust after the death of Elizabeth Hayes were invalid.

Respondent argues that the trial court erred in deciding this question without taking guidance from a certificate, dated May 19, 1994, and signed by Wellington and Elizabeth Hayes, declaring that the trust appoints them as original trustees, and that "[a]ny one may act alone" (reproduced by respondent as Exhibit 2). The trial court declined to examine that certificate as a document extrinsic to the trust, on the ground that the parties stipulated that the trust language itself was not ambiguous in the first instance and thus not subject to interpretation by resort to extrinsic evidence.

Where a provision in an estate document is unambiguous, it should be interpreted according to its plain language without resort to extrinsic evidence. See *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 424-425; 655 NW2d 614 (2002).

Respondent states that "[i]t is not exactly clear from the record that . . . all parties agreed that the trust document was unambiguous." But the transcript of the evidentiary hearing shows otherwise. On the subject of ambiguity of the trust document, the trial court asked, "I guess everybody thinks the document's clear and unambiguous," and counsel for both parties summarily agreed. That there is disagreement on the interpretation of a written provision does not itself render that provision ambiguous. See *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 15 n 2; 743 NW2d 902 (2008); *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 165-166; 680 NW2d 840 (2004). For these reasons, the trial court correctly treated the trust document at issue as an unambiguous one, which thus had to be read according to its four corners, with no resort to extrinsic evidence. See *Karam*, 253 Mich App at 424-425.

Respondent cites authority for the proposition that documents executed contemporaneously with a trust agreement that transfer assets into a trust are not extrinsic to the trust agreement. But, in this case, the trust agreement was executed on April 28, 1994, and the certificate in question was executed on May 19, 1994, twenty-one days later. The latter was thus an action taken in furtherance of an existing trust, not as part of its creation.

Further, even if the trial court had consulted the certificate, it is not obvious that the declaration that "[a]ny one may act alone" extends to a surviving settler the power to amend the trust. That statement logically covers the ordinary duties and prerogatives of a trustee, such as managing trust assets or withdrawing funds for permitted purposes. But it was in their capacity as settlors, not trustees, that Wellington and Elizabeth Hayes set forth their reservation to "themselves" of the power of amendment.

For these reasons, the trial court correctly held that the two amendments to the trust executed by Wellington Hayes after Elizabeth Hayes had died were invalid.

III. TRANSFERS OF TRUST ASSETS

Respondent argues that the trial court incorrectly found that several transfers of trust assets effected by respondent and Wellington Hayes violated the terms of the trust. We disagree.

"When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered." *LaFond*, 226 Mich App at 450.

The purposes for which income or assets from the trust estate may be disbursed are set forth in paragraph 5 of the trust document:

> During their joint lifetimes, **WELLINGTON HAYES and ELIZABETH L. HAYES**, shall be entitled to all of the income of the trust estate, and in the event Successor Trustee shall be acting, it shall pay such sums to such persons and at such times as it, in its sole and uncontrolled discretion, shall deem advisable and proper for the support, care, comfort, maintenance and enjoyment of Settlors. If the income of the trust estate is insufficient for such purpose, the Successor Trustee may use the principal thereof. [Respondent's Exhibit 1 (bold and capitals in the original).]

Respondent characterizes the transactions in dispute as having been made by Wellington Hayes. In fact, respondent was the moving force behind most of the disputed transactions, and also the principal beneficiary.

Respondent further attributes to Wellington Hayes, a co-settlor and original co-trustee, what the above provision sets forth in connection with any successor trustee—the "uncontrolled discretion" to tap into the trust for his "support, care, comfort, maintenance and enjoyment." We agree that it would be incongruous to read the trust as granting greater discretion to a successor trustee than to the original trustees in this regard. And although the trust does indeed grant very broad discretion, it nonetheless guides that discretion by directing that it be exercised for the settlors' benefit. The direction that trust assets be used for the settlors' "support, care, comfort, maintenance and enjoyment" would be meaningless if the grant of broad discretion in the matter meant that a trustee were free to withdraw or redistribute trust assets for any purpose whatever.

The trial court identified five improper transactions:

a. The October 26, 2006 withdrawal, in the amount of $260,770.83.

b. The November 2, 2006 withdrawal, in the amount of $50,000.

c. The November 13, 2006 withdrawal, in the amount of $82,000.

d. The $5,000 check paid to the realtor.

e. The conveyance of the DTE Energy stock into a jointly held account.

The trial court accordingly ordered those amounts returned or conveyed to the trust, along with statutory interest.

The trial court found that the October 26, 2006 withdrawal was made by respondent, who transferred money from the joint money market account to her personal account, and that, on the same day, respondent deposited $12,000 from the trust account into Wellington Hayes' checking account. The court found that respondent wrote a check for $5,000 against that account toward the purchase of certain real property she still owned. The court attributed the November 2 and 13, 2006 withdrawals to respondent, and found that they came from the joint money market account. The court further found that 6,000 shares of DTE Energy stock were transferred from an investment account at the bank named as successor trustee and ultimately placed into an account that was joint between Wellington Hayes and respondent.

Respondent does not explain how her withdrawals of $260,770.83, $50,000, and $82,000 from the money market account, which was initially funded with the sale of trust assets, were in furtherance of Wellington Hayes' support, care, comfort, maintenance, or enjoyment. The same is true of her payment of $5,000 from Wellington Hayes' checking account toward her acquisition of real property. Respondent offers no explanation to reconcile these actions with the duty to use the trust assets only for the settlors' benefit, other than emphasizing that the trust envisioned the use of broad discretion in doing so. But, as stated above, the trust envisioned guided discretion, not unbridled discretion.

Concerning the DTE Energy stock, respondent testified that Wellington Hayes himself hoped to profit from the sale of some of it, but a bank employee testified that she was surprised by that transaction because Wellington Hayes had stated that he wished never to sell that stock. In light of the latter testimony, the trial court did not clearly err in concluding that the transfers of DTE Energy stock were not done for Wellington Hayes' benefit, as required by the trust document. .

For the above reasons, the trial court correctly identified several transfers of trust assets effected by respondent and Wellington Hayes that violated the terms of the trust.

IV. DTE ENERGY STOCK

Respondent argues that the trial court clearly erred in charging respondent with responsibility for the DTE Energy stock and in ordering her to return it to the trust. We disagree.

"When reviewing equitable actions, this Court employs review . . . for clear error of the findings of fact in support of the equitable decision rendered." *LaFond*, 226 Mich App at 450. A trial court's findings are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

Concerning respondent's possession of, or control over, 6,000 shares of DTE Energy stock, the trial court stated as follows:

18. On August 25, 2006, Mr. Hayes appointed [respondent] as his attorney in fact.

19. On that same date, he also added [respondent] as a signatory to his checking account at Chase Bank . . . .

* * *

26. On September 30, 2006, there was $636,860 in the Trust's investment account at Chase Bank.

* * *

38. Finally, on December 6, 2006, the securities remaining in the Chase Bank investment account (6,000 shares of DTE Energy) were transferred to an account at Smith Barney.

39. According to an inventory filed by [respondent], it appears the DTE Energy stock was placed in an account which is joint between Mr. Hayes and [respondent].

40. [Respondent] testified Mr. Hayes opened the Smith Barney account, and that he intended to sell some of the DTE Energy stock, in the hopes of receiving a greater return. No documentation relating to the establishment of this account was provided to the Court.

41. [A bank employee] testified that she was surprised by this final transaction, as Mr. Hayes told her he "never wanted to sell" the DTE Energy stock.

Respondent complains of a lack of evidence that she ever had control of that stock but, significantly, respondent does not put forward any contrary assertion.

In fact, in her brief on appeal, respondent states, "At some point, Mr. Hayes transferred all the stock held in the Chase investment account to an account held at Smith Barney, which was titled as a joint account with rights of survivorship with [respondent]." This Court may hold a party's admissions, supported or not, against that party. See *Luptak v Lizza*, 251 Mich App 187, 189-190; 650 NW2d 364 (2002).

Moreover, a Chase Bank employee testified that Wellington Hayes "[f]or some reason . . . loved DTE Energy and he said he never wanted to sell it," but continued that "[t]his stock was delivered to another brokerage firm, Smith Barney." Respondent herself told the trial court, "What my dad did is sell the stocks. He put it in a joint account with me . . . ."

For these reasons, respondent has not shown that the trial court clearly erred in charging her with responsibility for the DTE Energy stock or in ordering her to return it to the trust.

V. STAY PENDING APPEAL

Respondent argues that the trial court erred in denying the motion for a stay of probate proceedings pending appeal. We decline to address this issue as moot because the question of a stay pending appeal vanishes upon our decision.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens