RENDERED: AUGUST 9, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000520-MR

KATHY LOVELY — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 07-CI-00276

CHRISTIAN PHILLIP BARNETT;
DAVIN BARNETT; STEPHEN
BARNETT; PHILLIP W. BARNETT,
individually, and as next friend of
Stephen Barnett; HALEY RAE SLUSHER;
HEATHER GEARHEART, Guardian ad Litem
for HALEY RAE SLUSHER;
GREGORY A. ISAAC, Special Administrator
of the Estate of Donnie R. Barnett, Deceased;
AND MICHAEL LONG AND JEFFREY
NEIL LOVELY, Co-Trustees of the
Donnie Ray Barnett Revocable Trust — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Kathy Lovely appeals from the trial court's declaratory judgment regarding the construction of the terms of a trust awarding certain partnership interests to the testator's nephews. After careful review, we affirm.

This case concerns the estate of Donnie Ray Barnett, who died on January 14, 2007. Some of the issues presented in this appeal were previously addressed by this Court in an opinion rendered on June 11, 2010. *Lovely v. Barnett Builders, Inc.*, 2010 WL 2326517 (Ky. App. 2010). Because the facts are largely set forth in that opinion, we will utilize the statement of facts accordingly:

> The facts underlying this action are complicated but largely undisputed. Donnie was in the construction business and had extensive holdings in several business and partnership ventures in Kentucky, West Virginia, and North Carolina. Donnie and Kathy were married for twenty-three years when they divorced in 1992. Their union produced one daughter, Rae Beth Barnett, and one grandchild, Haley Rae Slusher. Kathy had custody of the minor grandchild from the time she was one month old and Donnie was very close to the child. Following his divorce from Kathy, Donnie married Andrea Barnett, divorced her a year later, remarried her several years later, and divorced her again in 2006, approximately five months prior to his death. Donnie had resumed a relationship with Kathy following his second divorce from Andrea.
>
> Donnie was diagnosed with cancer in 2003 and was able to successfully combat the disease for a number of years. However, in early December 2006, his condition began to rapidly deteriorate and doctors informed him he should not expect to live much longer. Donnie thus began to put his affairs in order, first by seeking the counsel of his attorney and long-time friend, Gordon Long, to prepare a last will and testament as well as deeds transferring his interest in several tracts of land to Kathy. Long prepared a will for Donnie leaving his entire estate to Kathy and

Haley in equal shares. He intentionally did not provide for his daughter due to her severe substance abuse problem. Donnie executed this will on December 8, 2006. Long advised Donnie to obtain estate planning from another attorney, Terri Stallard, an expert in the field, due to his sizeable estate.

On December 18, 2006, Donnie and Kathy met with Stallard in her Lexington, Kentucky, office to discuss Donnie's assets and his estate plan. Donnie added two important elements to his estate plan which were not a part of the will prepared by Long. First, he informed Stallard he wished to leave a three-fifths interest in his numerous partnership interests to his nephews, Christian, Davin, and Stephen Barnett, subject to a $100,000.00 floor that was to pass to Kathy and Haley. Second, Donnie indicated he wished for any assets passing to Kathy outside the estate to be credited against her probated share. The balance of his estate was to pass in equal shares to Kathy and Haley. Under both wills, Kathy was named as executrix of Donnie's estate and as trustee of any trusts created by the will. After leaving Stallard's office, Donnie visited a Lexington bank and changed approximately $400,000.00 in certificates of deposit to “payable on death” or “P.O.D.” instruments whereby Kathy would receive the proceeds immediately upon his death and without those amounts being added to his estate.

Stallard prepared the necessary documents to effectuate Donnie's estate plans and delivered them electronically to Long on December 22, 2006. Due to Donnie's worsening condition, Long was unable to immediately have the documents executed. However, on January 3, 2007, Long traveled to Donnie's home to have the documents signed. The circumstances surrounding the execution are in dispute in this appeal. Kathy contends the will was not duly executed while the appellees herein rely on Long's trial testimony that the will was, in fact, executed in proper form. Regardless, at some time shortly after the ceremony, Donnie allegedly directed Kathy to shred the signature pages of the will and trust documents Stallard had prepared. Kathy followed Donnie's wishes thus

> destroying the only fully executed copy of the second will. Donnie mistakenly believed such actions would revoke the second will and its accompanying trust and reinstate the first will he had executed on December 6, 2006. Although the attempted revocation was contested in the trial court, the parties have now agreed the trial court correctly determined that Donnie's actions were insufficient to constitute a valid revocation of the second will, and that issue is not properly before us in this appeal.
>
> Donnie died on January 14, 2007. On February 2, 2007, Kathy tendered the December 6, 2006, will to the Magoffin District Court and moved that it be admitted to probate. The first will was ordered probated on February 14, 2007. On October 18, 2007, the instant action was filed in the Magoffin Circuit Court seeking, inter alia, an order setting aside the February 14 order probating the first will and substituting the second will in the probate action. On January 18, 2008, the trial court removed Kathy as executrix and appointed a special administrator for the estate and a receiver for Barnett Builders, Inc.
>
> A bench trial was conducted on August 27, 2008, to determine which, if either, of the two wills was in effect on the date of Donnie's death. Following the trial, the court determined that the probate of the first will should be set aside, the second will should be probated, and Kathy should be permanently removed as executrix and trustee.

This Court affirmed the trial court's decision to probate the second will, and that opinion was not further appealed and became final on July 22, 2010.

On October 14, 2010, the Special Administrator sought to probate the second will and trust and filed a motion requesting that a trustee be appointed to receive any assets which were transferred to the trust once the estate had been finalized. In response to this motion, Kathy argued that the only beneficiaries

under Donnie's second will and trust were herself and Donnie's granddaughter, Haley Rae Slusher. Kathy contended that the second will and trust contained nothing more than an unfunded bequest, which resulted in the exclusion of Donnie's nephews as beneficiaries under the instrument. The nephews responded that Kathy's construction of Donnie's second will and trust was both without merit and wholly inconsistent with the previous rulings of both the trial and appellate courts. Additionally, the nephews argued that Kathy's arguments were barred by the law of the case doctrine and res judicata.

By order entered on February 12, 2012, the trial court held that the language in the second will and trust was unambiguous in its direction "to leave a three-fifths interest in [Donnie's] numerous partnership interests to [Donnie's] nephews, Christian, David, and Stephen Barnett, subject only to a $100,000.00 floor that was to pass to [Kathy] and Haley." *Lovely*, *supra*, at 1. Alternatively, the trial court held that certain imperfectly worded provisions of the trust created an inherent internal ambiguity that allowed for the Court's consideration of parol evidence to ascertain Donnie's true intent. In ascertaining this intent, the trial court relied upon the trust language, an affidavit submitted by Terry Stallard, the attorney who drafted Donnie's final will and trust, the testimony submitted in the 2008 trial, and the court's previous rulings resulting from that trial, which were binding under the "law of the case" doctrine and res judicata. This appeal now follows.

"In cases where a summary judgment has been granted in a declaratory judgment action and no bench trial held, the standard of review for summary

judgments is utilized." *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010) (citation omitted).

> The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is 'no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.' CR 56.03. The trial judge must view the evidence in a light most favorable to the nonmoving party, resolving all doubts in its favor. *Spencer v. Estate of Spencer*, 313 S.W.3d 534, 537 (Ky. 2010) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991)). Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions. *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky. 2009) (citing *Schmidt v. Leppert*, 214 S.W.3d 309 (Ky. 2007)). Furthermore, it is well established that '[t]he construction as well as the meaning and legal effect of a written instrument ... is a matter of law for the court.' *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992); *see also Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). In such cases, this Court reviews the issue de novo. *Cumberland Valley Contractors, Inc.*, 238 S.W.3d at 647.

Hammons v. Hammons, 327 S.W.3d 444, 448 (Ky. 2010).

The same rules of construction apply to both wills and trusts. *Department of Revenue v. Kentucky Trust Co.*, 313 S.W.2d 401, 404 (Ky. 1958). When interpretation of a will or trust is in dispute, Kentucky follows the "polar star" rule of construction that a testator's intent is the polar star for interpretation and is controlling unless there is an ambiguity. *Benjamin v. JP Morgan Chase Bank,*

N.A., 305 S.W.3d 446, 451 (Ky. App. 2010). When the plain language of the document is reasonably clear to express the intent, there is no need for further analysis. *Id*. at 451-52.

Kathy argues that the trust clearly requires the limited partnership interests to be distributed outright upon Donnie's death. Article II of the trust is entitled "Disposition Upon the Settlor's Death" and provides:

> Upon the death of the Settlor, the Trustee may, if deemed advisable in the sole discretion of the Trustee, pay all or any part of the Settlor's funeral expenses, legally enforceable claims against the Settlor or the Settlor's estate, reasonable expenses of administration of the Settlor's estate, and allowances by court order to those dependent upon the Settlor, and any estate, inheritance, succession, death, or similar taxes payable by reason of the Settlor's death, together with any interest thereon or other additions thereto, without reimbursement from the Settlor's executor or administrator, any beneficiary of insurance upon the Settlor's life, or any other person; PROVIDED HOWEVER, that in no event shall any asset of the Settlor's estate which is subject to the "minimum distribution rules" of Section 401(a)(9) of the *Internal Revenue Code of 1986*, as amended (hereinafter referred to as the "Code"), be used for any such payment. All such payments, except of interest, shall be charged generally against that portion of the Trust principal that is included in the Settlor's estate of the federal estate tax purposes, and any interest so paid shall be charged generally against the income thereof.
>
> …
>
> The Trustee shall distribute the balance of the Trust Estate, including the proceeds of life insurance and all property then or thereafter receivable by the Trustee, or which may become payable to the Trustee under the terms of the

Settlor's Last Will and Testament or otherwise, as follows:

A. The trustee shall distribute one-half (1/2) of the Trust Estate outright to KATHY LOVELY, if she survives the Settlor. If KATHY LOVELY does not survive the settlor, then this one-half (1/2) share of the Trust Estate shall be distributed pursuant to paragraph B, of this Article.

B. The Trustee shall hold, IN TRUST, for the benefit of the Settlor's granddaughter, HALEY RAE SLUSHER, one-half (1/2) of the Settlor's Trust Estate, to be distributed pursuant to the terms of the *Haley Rae Slusher Trust* as provided in Article III of this Trust Agreement. If the Settlor's granddaughter predeceases the Settlor, the Trustee shall distribute this one-half (1/2) share as the Settlor's granddaughter may have generally appointed under the Settlor's granddaughter's Last Will and Testament. In the event that the Settlor's granddaughter shall not leave a valid Will expressly and specifically exercising this general power of appointment in whole or in part, then the Trustee shall distribute this one-half (1/2) share of the Trust Estate to the Settlor's granddaughter's then surviving issue, *per stirpes*, subject to the terms of the *Haley Rae Slusher Trust* set forth herein, if any, and if none, to KATHY LOVELY, outright and free of Trust.

C. In addition hereto, if the Settlor's estate and/or Revocable Trust receives income or proceeds from the Settlor's limited partnership interest and/or general partnership interest in the amount of One Hundred Thousand Dollars ($100,000), the Trustee shall distribute the proceeds as follows:

    1. The Trustee shall distribute Fifty Thousand Dollars ($50,000) outright to KATHY LOVELY, if she survives the Settlor. If KATHY LOVELY does not survive the Settlor,

then this distribution shall lapse and shall be distributed pursuant to Item 2. of this Article.

2. The Trustee shall distribute to the *Haley Rae Slusher Trust* Fifty Thousand Dollars ($50,000) to be held and distributed pursuant to the terms of the *Haley Rae Slusher Trust* as set forth in Article III of this Trust Agreement. If HALEY RAE SLUSHER does not survive the Settlor, then this distribution shall lapse and shall be distributed pursuant to Item 1. of this Article.

D. In addition hereto, if the Settlor's estate and/or Revocable Trust receives income or proceeds from the Settlor's limited partnership interest and/or general partnership interest in an amount over One Hundred Thousand Dollars ($100,000), the Trustee shall distribute the proceeds as follows:

1. The Trustee shall distribute outright a one-fifth (1/5) share of the income or proceeds to KATHY LOVELY, if she survives the Settlor. If KATHY LOVELY does not survive the Settlor, then this one-fifth share shall lapse and shall be distributed to HALEY RAE SLUSHER, pursuant to the terms of the *Haley Rae Slusher Trust* provided in Article III.

2. The Trustee shall hold, IN TRUST, a one-fifth (1/5) share of the income or proceeds for the benefit of HALEY RAE SLUSHER, if she survives the Settlor, pursuant to the terms of the *Haley Rae Slusher Trust* provided in Article III. If HALEY RAE SLUSHER does not surive the Settlor, then this one-fifth (1/5) share shall be distributed to the surviving issue of HALEY RAE SLUSHER, *per stirpes*.

3. The Trustee shall distribute outright a one-fifth (1/5) share of the income or proceeds to CHRISTIAN PHILLIP BARNETT, outright if he survives the Settlor. If CHRISTIAN

PHILLIP BARNETT does not survive the Settlor, then this one-fifth (1/5) share shall lapse and shall be distributed to the surviving issue of CHRISTIAN PHILLIP BARNETT, *per stirpes*.

4. The Trustee shall distribute outright a one-fifth (1/5) share of the income or proceeds to DAVID BARNETT, outright if he survives the Settlor. If DAVID BARNETT does not survive the Settlor, then this one-fifth (1/5) share shall lapse and shall be distributed to the surviving issue of DAVID BARNETT, *per stirpes*.

5. The Trustee shall distribute outright a one-fifth (1/5) share of the income or proceeds to STEPHEN BARNETT, outright if he survives the Settlor. If STEPHEN BARNETT does not survive the Settlor, then this one-fifth (1/5) share shall lapse and shall be distributed to the surviving issue of STEPHEN BARNETT, *per stirpes*.

6. Notwithstanding the foregoing, if the Settlor's assets do not pass through probate and shall become an asset of KATHY LOVELY'S estate due to the Settlor's death, these assets shall be considered a part of KATHY LOVELY'S one-half (1/2) interest in the Settlor's estate.

E. Notwithstanding the foregoing, if the Settlor's assets do not pass through probate and shall become an asset of KATHY LOVELY'S estate due to the Settlor's death, these assets shall be considered a part of KATHY LOVELY'S one-half (1/2) interest in the Settlor's estate.

Kathy argues that Article II Section A repeatedly uses the language "shall distribute" and "outright," where as Article II Section B uses the language "shall hold in trust" unless Haley pre-deceases Donnie. Kathy contends that the language

in the partnership sections provides for distributions of portions of the limited partnerships "outright" to Kathy and the other plaintiffs below, but the language concerning Haley provides for the funds to be held and that this distinction clearly demonstrates an intention of a distribution at the time of Donnie's death and not some indefinite time in the future or subject to an ongoing trust.

The nephews (hereinafter "the Appellees") counter that Kathy's construction is contrary to the plain meaning of the trust. Specifically, the Appellees argue that there are several provisions of the trust which demonstrate the decedent's intent for assets to be held in trust past his death. For example, the first paragraph of Article II expressly provides for the Trustee to pay the decedent's debts, taxes, and estate administration expenses prior to distributing the balance of the trust estate pursuant to Sections A through E. The Appellees argue that the "trust estate" identified in those sections must be held in trust for at least the period of time necessary for the debts, taxes, and estate administration expenses under paragraph one to be paid. *See e.g.*, *CIR v. First Trust & Deposit Co.*, 118 F.2d 449, 452 (2nd Cir. 1941) (holding that trustee was under no duty to divide or distribute trust income immediately upon vesting of trust beneficiaries' interest in proceeds because said income was subject to the payment of taxes, commissions and expenses incident to the winding up of the trust).

The Appellees further argue that the fourth paragraph of Article II supports their interpretation of the trust. That paragraph defines the balance of the trust estate as including "all property then or thereafter receivable, or which may

become payable to the Trustee." Such forward-looking language, the Appellees argue, is simply not consistent with Kathy's contention that the trust does not allow for the Trustee to receive or realize assets beyond the date of the decedent's death.

The Appellees also point out that in Subsections C and D of Article II, the trust provides that the Trustee may receive and realize income and proceeds following the decedent's death in the following language: "[i]n addition hereto, if the Settlor's estate and/or Revocable Trust receives income or proceeds from the Settlor's limited partnership interest and/or general partnership interest…the Trustee shall distribute the proceeds as follows…." They contend that this language anticipates that income or sale proceeds will be received by the trust after the probate estate is settled and closed. The Appellees contend that when all of the trust language is considered as a whole, the only reasonable conclusion is that the trust in fact provides for the Trustee to receive and distribute income and sale proceeds for an extended period following Donnie's death. We agree with the Appellees that Kathy's interpretation is attenuated at best. Nothing in the trust language clearly expresses an intent to distribute the partnership interests or any income received therefrom immediately upon Donnie's death.

The Appellees also argue that Kathy's interpretation of the trust would render several portions of the trust meaningless. In particular, they contend that her construction would result in Subsections C and D being read completely out of the trust document. Such a myopic and incomplete reading of trust language was expressly rejected in *Hall's Adm'r v. Compton*, 281 S.W.2d 906 (Ky. 1955), where

the appellant attempted to interpret a will's residuary clause in a way that would have nullified two other clauses of the instrument. *Id*. at 910. In rejecting that interpretation, the *Compton* Court held that due weight must be given to "every part" when interpreting such documents and it is presumed that "every word or phrase" has meaning. *Id*. at 909. "No part of the language used in a will is to be rejected if a reasonable effect can be given it." *Id*.

We agree with the Appellees and the trial court that the fundamental rules of trust and will construction direct that general legacies or residuary provisions must yield to specific bequests. *Lincoln Bank & Trust Co. v. Bailey*, 351 S.W.2d 163, 166 (Ky. 1961) ("there is an old bromide in the law to the effect that the specific limits the general"). Under Kathy's construction, the general provisions of Sections A and B would consume the specific bequests provided for the nephews in Sections C and D. This is contrary to Kentucky law, and we agree with the Appellees and the trial court that this was not Donnie's intention.

Next, Kathy argues that the trial court's finding that the trust language was ambiguous and thus parol evidence should be considered was in error. She argues that the trust language is crystal clear that the trust assets are to be distributed to the beneficiaries outright at the time of Donnie's death, except for Haley Slusher, if at the time of the distribution there is more than $100,000.00 in income or proceeds from the limited partnerships. The Appellees argue that the trust provisions were ambiguous and the trial court properly relied on parol evidence to determine Donnie's intent.

"'[I]n the absence of ambiguity a written instrument will be enforced strictly according to its terms,' and a court will interpret the contract's terms assigning language its ordinary meaning and without resort to extrinsic evidence." *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010), quoting *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). The trust provisions clearly state an intention to give any income from Donnie's partnership interests to Kathy, Haley, and Donnie's nephews in a 5-way trust. However, the trust is silent as to when this interest is to be determined, or when the trust is to be closed so as to determine whether the partnership income exceeds the requisite $100,000.00. Thus, it is ambiguous to this extent and the trial court properly looked to parol evidence to determine the settlor's true intent.

Where language is "so imperfectly worded or arranged as to leave in doubt the intent of the testator by what he said, evidence of the circumstances surrounding the testator, at the time of the execution of the will, the relationship between him and his devisees, and perhaps other pertinent facts, is competent to clarify the imperfections or supply the omissions in an endeavor to determine what the testator intended to say in the use of the words he employed in drafting the will." *Johnson v. Foley*, 302 Ky. 848, 851 (1946). In the instant case, the parol evidence submitted was convincing and unequivocal. In addition to the trust language, the trial court relied upon its previous rulings regarding Donnie's intent from 2008 and the deposition testimony and affidavit of the drafting attorney, Terri Stallard. Her testimony clearly indicated that it was Donnie's intent to have his

nephews benefit under his estate to the fullest extent possible from his partnership interests.

On the whole, when looking at the actual language of the trust provisions and the parol evidence regarding any ambiguities, it is clear that Donnie intended for Kathy and Haley to share the bulk of his estate and for his partnership interests to be divided five ways among Kathy, Haley, and his nephews. The trial court's entry of judgment in this regard is supported by the evidence of record and by the intention of the testator and is consistent with the trial court's previous judgment and this Court's opinion affirming that judgment.

Thus, we find no error in the trial court's entry of the February 22, 2012, declaratory judgment in this regard, and we affirm the judgment of the Magoffin Circuit Court

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark L. Moseley
Lexington, Kentucky

BRIEF FOR APPELLEES KRISTIAN BARNETT, DAVIN BARNETT AND STEPHEN BARNETT:

John T. Hamilton
Lexington, Kentucky