

RENDERED: OCTOBER 28, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000667-MR

MARION PATRICK LEWIS;
BEN STOCKTON LEWIS;
GAVIN BRUCE DUNN;
COOPER DUNN; AND UNKNOWN AND/OR FUTURE
HEIRS AT LAW OF MARION A. LEWIS, SR. APPELLANTS

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 14-CI-00523

MARION A. LEWIS, JR.;
FRANK JASON LEWIS;
AND MARLA KASEY LEWIS DUNN APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, Marion Patrick Lewis, Ben Stockton Lewis, Gavin
Bruce Dunn and Cooper Dunn, appeal from an order of the Henderson Circuit

Court granting Appellees', Marion Lewis, Jr., Frank Jason Lewis, and Marla Kasey Lewis Dunn, motion for summary judgment and dissolving a noncharitable irrevocable family trust. For the reasons set forth herein, we reverse the trial court.

In 2007, Marion A. Lewis, Sr. (Mr. Lewis) created the Lewis Real Estate Trust with the only asset being a 100-acre farm located in Henderson County, Kentucky. The trust was established for the benefit of Mr. Lewis' three children, Appellees herein, as well as his "more remote descendants based on a per stirpital method of distribution." Mr. Lewis' son, Marion Lewis, Jr., was named as trustee. Appellants are Mr. Lewis' four minor grandchildren, as well as his unknown or future heirs. The trust was designed to end by its own terms "following the death of the last of [Mr. Lewis'] descendants who [were] living at the time of [his] death." Mr. Lewis died in 2008, making the trust irrevocable.

On August 26, 2014, Appellees filed a complaint in the Henderson Circuit Court against the Lewis Real Estate Trust seeking termination of the trust and sale of the real estate. All three Appellees filed affidavits with the Complaint stating that Mr. Lewis "intended to united [sic] the family by creating the trust. The trust was not created for tax reasons but merely to provide a common interest of the three heirs at law . . . [T]his purpose has been accomplished and . . . the trust no longer serves a legitimate purposes [sic] . . . and should be dissolved."

Appellees thereafter filed a motion for summary judgment on October 7, 2014, which was granted by the trial court on October 20, 2014. However, during the process of terminating the trust and preparing the real estate for sale, the

title examiner requested that all contingent beneficiaries be named and guardian ad litem appointed to represent their interests. As a result, on October 30, 2014, Appellees filed an amended complaint adding Appellants as defendants, and requesting that guardian ad litem be appointed for the two classes of secondary beneficiaries (Mr. Lewis's grandchildren and any unborn heirs). Appellees then filed a second motion for summary judgment. Following a hearing, the trial court entered an order on January 30, 2015, denying summary judgment. Therein, the trial court noted that although Appellees all consented to termination of the trust, the guardian ad litem representing the grandchildren and unknown heirs did not consent. The court concluded,

[T]he Court does not believe that the trust in this case should be terminated. Reading the language of the trust, it appears that the real property was to be held for the benefit of the grandchildren as well and it was to be held in trust until the children's death to ensure that the grandchildren were able to benefit from the property.

Briefly, under these circumstances, the Court does not believe that continuing the trust is not necessary to achieve its material purposes or that the interests of the contingent beneficiaries would necessarily be adequately protected by the other beneficiaries.

Appellees thereafter filed a CR 59.05 motion to alter, amend or vacate essentially arguing that upon Mr. Lewis' death, the class of identifiable beneficiaries was fixed and consisted of the minor children of two of the Appellees. Further, Appellees contended that because they had the authority to consent for their minor children, there was no conflict of interest between

Appellees and Appellants. As a result, Appellees suggested that the trial court did not even have jurisdiction because KRS 386B.4-110(7) confers exclusive jurisdiction to the district court if there is no conflict of interest.

Shortly after the filing their CR 59 motion, Appellees submitted affidavits stating that 15% of each Appellee's share of the proceeds from the sale of the trust real estate would be placed into a guardianship account for each of their minor children to vest when said children reached the age of twenty-eight years. Frank Lewis, the only Appellee without children, agreed to place 15% into a guardianship account for a period of fifteen years in the event a child was born to him. On March 31, 2015, the trial court entered an order granting Appellees motion to alter, amend or vacate. The trial court ordered the trust real estate sold and the proportionate shares of the proceeds placed into guardianship accounts as set forth in Appellees' affidavits. This appeal ensued.

This matter is controlled by the Kentucky Uniform Trust Code, KRS Chapter 386B, enacted July 15, 2014. The Code applies to all trusts created before or after its enactment, all judicial proceedings concerning trusts commenced on or after its enactment, as well as judicial proceedings concerning trusts commenced before its enactment, "unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." KRS 386B.11-040. Because the Code was so recently enacted, we are without the benefit of any Kentucky law pertaining to the statutory sections at issue herein.

Appellants first argue in this Court, as Appellees did below, that the trial court lacked subject matter jurisdiction as such was vested exclusively in the district court pursuant to KRS 386B.4-110. That statute, entitled Modification or termination of noncharitable irrevocable trust by consent, provides in relevant part:

- (1) Except 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. A settlor's power to consent to a trust's modification or termination may be exercised:
 - (a) By an agent under a power of attorney only to the extent expressly authorized by the power of attorney and not prohibited by the terms of the trust;
 - (b) By the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized and the conservator is not prohibited by the terms of the trust; or
 - (c) By the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed and the guardian is not prohibited by the terms 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. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

...

- (4) Upon termination of a trust under subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.
- (5) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:
 - (a) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
 - (b) The interests of a beneficiary who does not consent will be adequately protected.
- ...
- (7) The District Court shall have exclusive jurisdiction over matters under subsection (2) of this section.

Appellants argue that subsection (7) vests exclusive jurisdiction of the modification or termination of a trust under subsection (2) in the district court, and because subsection (5) refers back to subsection (2), the district court has exclusive jurisdiction of matters within the purview of subsection (5) as well. Ironically, Appellees have now reversed their position to argue herein that jurisdiction was properly vested in the circuit court because a conflict of interest exists among the parties.

We are of the opinion that KRS 386B.4-110(2) and (7) clearly authorize the district court to modify or terminate a trust where all of the beneficiaries consent and the court concludes that modification is not inconsistent with a material purpose of the trust. In other words, the district court has exclusive jurisdiction in

those matters where there is no conflict of interest or any other disagreement among the parties. However, where all beneficiaries have not consented, as is the case herein, subject matter jurisdiction lies in the circuit court. As such, we conclude that the trial court herein properly had jurisdiction over the instant matter.

Appellants next argue that the trial court erred in terminating the trust because its continuance was necessary to achieve a material purpose of the trust, there was a lack of consent from all beneficiaries, and the interests of the non-consenting beneficiaries were not adequately protected. We agree.

As previously noted, KRS 386B.4-110 governs the modification or termination of trusts. If termination of a trust is sought with the consent of all of the beneficiaries under subsection (2), the trial court must make a finding that continuance of the trust is no longer necessary to achieve a material purpose of the trust before early termination can be granted. In the event that all beneficiaries do not consent to termination of the trust, subsection (5) provides that the court may approve early termination if it is satisfied that (a) if all beneficiaries had consented, the trust could have been terminated under the statute (requiring a finding that continuance of the trust is no longer necessary to achieve a material purpose of the trust) and (b) the interests of a beneficiary who does not consent will be adequately protected.

Our first determination must be whether all of the beneficiaries effectively consented to termination of the trust. Obviously, Appellants through their guardians ad litem contested early termination of the trust. However,

Appellees argue that they are able to consent to termination of the trust on behalf of their minor children pursuant to KRS 386.3-030. Said provision provides, in pertinent part, that “[t]o the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute: . . . (6) A parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed[.]” While Appellees are correct that a guardian ad litem is not deemed a “guardian” for purposes of Chapter 386B, KRS 386B.1-010, they fail to recognize that there is a clear conflict of interest,¹ as early termination of the trust would certainly allow for them to take the lion’s share of the proceeds generated from the sale of the real estate while potentially reducing and/or eliminating the monies that other beneficiaries would be entitled to if the trust remained intact. Indeed, we presume the legislature recognized such potential conflict by enacting KRS 386B.3-050, which provides:

- (1) If the court determines that an interest is not represented under this subchapter, or that the otherwise available representation might be inadequate because of conflict or otherwise, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

¹ Inexplicably, Appellees argue that jurisdiction was properly vested in the circuit court because of the conflict between the parties, yet at the same time maintain that they are able to consent to termination of the trust for their minor children because there is no conflict between their interests and those of their children.

- (2) A guardian ad litem may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.
- (3) In making decisions, a guardian ad litem may consider general benefit accruing to the living members of the individual's family.

We believe the inherent conflict between the parties herein is precisely the reason the title examiner requested that Appellants be named in the legal action and is why guardian ad litem were, in fact, appointed to represent their interests. We believe to hold, as Appellees suggest, that parents can unequivocally bind their minor children to a trust decision regardless of the potential conflict would lead to an absurd result and undoubtedly an abuse of trust administration procedures.

Because we conclude Appellees cannot consent on behalf of Appellants, termination of the trust is governed by KRS 386B.4-110(5) which requires specific findings that continuance of the trust is no longer necessary to achieve a material purpose of the trust and that the interests of all non-consenting beneficiaries are adequately protected. Neither requirement is satisfied herein.

Appellants argue that the plain language of the trust document clearly indicates that Mr. Lewis created the trust for the material purpose of guaranteeing a revenue stream not only to Appellees, but also to his future descendants to be enjoyed during their lives. Appellees, on the other hand, would have this Court believe that because there was no specific statement of Mr. Lewis' intent in the trust and that because they are the only named beneficiaries, the material purpose

of the trust was to provide for them with a lesser interest reserved for the remote descendants. In fact, Appellees initially asserted in the trial court that the sole purpose of the trust was to “merely provide a common interest of Mr. Lewis’ three children.” It was not until the title examiner raised the issue regarding the other beneficiaries that Appellees even named them as parties.

Although termination of a trust is statutorily governed by KRS Chapter 386B, under Kentucky law, “[t]he construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court.” *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) (Citing *Equitable Life Assurance Society of the United States v. Wells*, 101 F.2d 608 (6th Cir. 1939)). 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). Moreover, because 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), “[i]f the language used is a reasonably clear expression of intent, then the inquiry need go no further.” *Clarke v. Kirk*, 795 S.W.2d 936, 938 (Ky. 1990). However, “if [the language used] is not such a clear expression, then it is necessary to construe [it] according to appropriate rules of construction.” *Id.* 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).

The trust at issue herein clearly stated that the trust property was to be held for the benefit of Appellees, as well as Mr. Lewis' more remote descendants. Further, the trust directed that the trustee was to "hold, use, and distribute the net trust income in annual or more frequent installments among [Mr. Lewis] children and more remote descendants based upon these per stirpital shares." Finally, only after the death of the last descendant living at Mr. Lewis' death was the trust to terminate and be distributed to Mr. Lewis' then-living descendants. Appellants contend that because Mr. Lewis was aware he had four minor grandchildren, and because those grandchildren would necessarily have been contemplated to be included in the class of Mr. Lewis' descendants who were living on the date of his death, it is reasonable to assume that those grandchildren would reach adulthood and have children of their own, which inherently would create a future class of unborn beneficiaries that would not be provided for if the trust was terminated early. We agree.

It is clear from the trust language that Mr. Lewis specifically intended for the trust to continue and to provide a revenue stream, however small, until the last descendant living at his death died. In fact, given that Mr. Lewis had several grandchildren at his death, it is reasonable to conclude that Mr. Lewis only intended for Appellees to enjoy trust income during their lifetime, reserving the proceeds from termination and distribution of the trust to those more remote

descendants. Accordingly, we cannot conclude that continuance of the trust was no longer necessary to achieve a material purpose of the trust.

We are similarly of the opinion that the interests of the non-consenting minor beneficiaries were not adequately protected. The trial court's judgment allocated 15% of the proceeds from the sale of the real estate to each Appellant. During the hearing, Appellees' counsel admitted that the 15% amount was arbitrarily decided upon, and was neither based upon any mathematical or scientific formula nor constituted a determination of the actual value of what Appellants were entitled to. Further, we believe it would be impossible to determine at this point in time the portion or percentage of trust assets that would need to be preserved to ensure that future beneficiaries received what was intended by Mr. Lewis.

The trial court initially correctly ruled that continuing the trust was necessary to achieve its material purpose. We do not believe that Appellees' arbitrary apportionment of 15% of the proceeds to Appellants somehow worked to fulfill the purpose of the trust and justify its termination. As such, we conclude that the trial court erred in granting Appellees' motion for summary judgment and terminating the Lewis Real Estate Trust.

The order of the Henderson Circuit Court granting summary judgment in favor of Appellees is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Robert Norris
Henderson, Kentucky

Kevin Dane Shields
Henderson, Kentucky

BRIEF FOR APPELLEE:

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