# IN THE MISSOURI COURT OF APPEALS
# WESTERN DISTRICT

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| C. DAVID ROUNER AND ALISHA HUDSON, | ) | |
| Appellants, | ) | |
| v. | ) | WD75305 |
| CARI RENEE WISE, INDIVIDUALLY AND AS CO-TRUSTEE OF THE K.R. CONKLIN LIVING TRUST, AND CARLI NICOLE CONKLIN, INDIVIDUALLY AND AS CO-TRUSTEE OF THE K.R. CONKLIN LIVING TRUST, | ) | Opinion filed: July 30, 2013 |
| Respondents. | ) | |

**APPEAL FROM THE CIRCUIT COURT OF ADAIR COUNTY, MISSOURI**
**The Honorable Karl DeMarce, Judge**

Before Division Three: Joseph M. Ellis, Presiding Judge,
Cynthia L. Martin, Judge and Robert Clayton, Special Judge

Appellants C. David Rouner and Alisha Hudson appeal from a judgment entered by the Circuit Court of Adair County in favor of Respondents Cari Wise and Carli Conklin on Appellants' petition for declaratory judgment. Appellants' declaratory judgment petition requested that the circuit court enter an order declaring Appellants beneficiaries of the K.R. Conklin Living Trust ("the Trust") and instructing Respondents, the Trust's successor trustees, to distribute the Trust's assets accordingly. The petition

further requested that the circuit court find Respondents had violated the Trust's "no-contest" clause by contesting Appellants' petition for declaratory judgment. For the following reason the judgment is affirmed in part and reversed in part.

In 1996, K.R. Conklin ("Decedent") executed the K.R. Conklin Living Trust ("the Trust").[1] The Trust designated Decedent as the trustor and the Trust's trustee during Decedent's lifetime. It further designated Decedent's biological daughters, Cari Wise and Carli Conklin (collectively, "Respondents"), as successor trustees upon Decedent's death. As the trustor, Decedent had the power to add or remove property from the Trust and the power to amend or revoke the Trust during his lifetime. Any amendment to the Trust, however, had to be delivered to the Trust's trustee in writing. The Trust further contained a "no-contest" clause that prohibited any individual that contested the validity of the Trust, or any amendment thereto, from taking his or her interest in the Trust's property.

Prior to 1990, Decedent and Respondents' mother divorced. In 1990, Decedent began living with Diana Jo Conklin ("Jo"). Jo had two children, C. David Rouner and Alisha Hudson (collectively "Appellants"), who were then ages 10 and 5, respectively. C. David Rouner lived with Decedent and Jo and was raised by them from 1990 until the time he left for college and ultimately adult life.[2] Alisha Hudson split time living with her natural father, but lived either a majority, or at least half of the time, with Jo and Decedent. In April of 2000, Decedent and Jo were married and remained married until his unexpected death on May 21, 2009.

[1] It is undisputed that the Trust constitutes a revocable living trust.
[2] From at least 1990, perhaps before, C. David Rouner had no relationship with, and did not spend time with, his natural father.

In 2011, litigation arose regarding the distribution of the Trust's assets. At the forefront of that litigation was a three-page, handwritten document penned by Decedent on November 1, 2002. Decedent had drafted the document while riding in the car with Jo on the way to the airport to catch a flight to Phoenix, Arizona. The writing was addressed to Cari, Carli, David and Alisha and provided:

> Am writing this in the car on the way to KC, MO so excuse the penmanship.
>
> If you are reading this it means that Jo & I have met our demise either going to or coming back from Phoenix.
>
> The [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled.

The writing then went on to describe how certain debts were to be paid and disposed of the majority of Decedent's property by designating either Cari, Carli, David, Alisha, or a combination of the four children as the intended recipient of the property. Both Decedent and Jo signed the 2002 writing. The writing was eventually put in an envelope addressed to Cari and placed in the glove box of Decedent's vehicle.

Decedent and Jo returned safely from their trip to Phoenix. However, some time prior to Decedent's death, the envelope containing the 2002 writing was removed from the glove box and opened by Decedent. Following Decedent's death, the writing was found in a file folder with Decedent's life insurance policy information.

Believing the 2002 writing constituted an amendment to the Trust that made them beneficiaries thereunder, Appellants filed a petition for declaratory judgment against Respondents, the Trust's co-trustees. In their second amended petition, Appellants requested the trial court enter an order requiring Respondents to distribute the Trust's assets in accordance with the terms of the Trust as well as the terms of the

2002 writing. Respondents denied that the 2002 writing made Appellants beneficiaries of the Trust.

On April 28, 2012, the parties proceeded to trial to determine the significance of the 2002 writing in relation to the Trust. At trial, Respondents elicited testimony from several witnesses regarding statements Decedent made about the trip to Phoenix, the 2002 writing, and Decedent's strategy with respect to estate planning. The following witnesses were permitted to testify, over Appellants' objections, as to Decedent's statements.

First, Respondents elicited testimony from Kenneth Conklin, Decedent's brother, that Decedent had told him that Decedent wrote the 2002 writing so Decedent "could have a pleasant trip out and back" to Phoenix because Jo started complaining "what if we were killed" and Decedent did not "intend to listen to 2,000 miles of bitching." Kenneth further testified that Decedent told him several times that Jo was "a financial disaster" and that Decedent "had a real concern [as to] how [Decedent] could provide for Jo without . . . disturbing anything and making sure that she was comfortable." Kenneth further explained that Decedent believed re-titling his assets to include Jo's name was probably the best way to provide for her.

Respondents next called Adam Davis, who worked for Decedent. Davis testified that Decedent told him Jo was "awful worried" about the trip to Phoenix. He then explained that he saw Decedent drafting a document the night before Decedent left for Phoenix that Decedent referred to as the "shutting Jo up" paper.[3] He further testified

[3] Davis further testified that the document written by Decedent that night was thrown away and, thus, was not the 2002 writing now in question.

that sometime between 2004 and 2006, Decedent told Jo he was going to the dentist but Decedent actually went to visit his estate lawyer.

Finally, Ronald Conklin, also one of Decedent's brothers, testified that Decedent told him about the 2002 writing. He explained that Jo insisted Decedent draft the document and that Decedent wrote it "so [Decedent] could have peace and quiet on the trip out and back from Arizona."

In addition to these witnesses, Respondents also testified at trial. Each testified to receiving a phone call from either Jo or Decedent on November 1, 2002, telling her that if something happened during the Phoenix trip, there was something in the glove box for her. Carli further testified that Decedent was "a big packrat."

The trial court took the case under submission and, on May 7, 2012, entered its judgment in favor of Respondents. In doing so, the trial court found that the 2002 writing did meet the requirements of a Trust amendment. Nevertheless, the trial court concluded that Appellants were not beneficiaries to the Trust because the 2002 writing was an amendment conditioned upon Decedent and Jo meeting their demise on the Phoenix trip and that condition was never satisfied.

The trial court determined that the "heart of the case" turned upon the interpretation of the writing's second and third sentences: "If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix. The [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled." The trial court found that these two sentences could be interpreted as either Decedent expressing his motivation for drafting the 2002 writing or an expression of Decedent's intent that the 2002 writing become operative only if he

met his demise going to or coming home from Phoenix. Thus, the trial court deemed the writing ambiguous as to that point and admitted extrinsic evidence to determine whether Decedent intended the writing to be an absolute or conditional amendment to the Trust.

The trial court reasoned that the "if you are reading this" language suggested that "Decedent never intended his children or stepchildren to read the letter at all" unless he and Jo met their demise in Phoenix. The trial court further highlighted testimony from Decedent's brothers that he was writing the letter to appease Jo's fears about the Phoenix trip and Davis's testimony that Decedent kept his meeting with his estate attorney a secret from Jo. The trial court also noted that, although Decedent had kept the letter, he was known to be "a big pack rat" and did not keep the 2002 writing with his other Trust papers. The trial court further emphasized that Decedent's management of his property after the 2002 trip was inconsistent with the disposition of his property in the 2002 writing, especially the fact that he re-titled his assets as tenancies by the entirety so Jo would be provided for if he predeceased her.

Based on such evidence, the trial court found that "although the language of the 2002 writing itself [was] ambiguous, Decedent's intent [was] not. Decedent intended the 2002 writing to be contingent in nature, conditioned upon the occurrence that both 'Jo and [Decedent] met [their] demise going to or coming back from Phoenix.'" Accordingly, the trial court concluded that "the 2002 writing never became, and is not now, operative as an amendment to the . . . Trust."

With respect to the Trust's no-contest clause, the trial court determined that Respondents were defending the Trust's integrity and that a finding that Respondents'

successful defense of the Trust violated the no-contest clause "would lead to an absurd result." The trial court's judgment also awarded attorney's fees to Respondents, to be paid from the corpus of the Trust pursuant to § 456.10-1004, on the basis that Respondents incurred their litigation expenses in successfully defending the Trust and were the sole beneficiaries thereunder. Appellants now raise four points of error on appeal.

We review declaratory judgment cases under the same standard as any other court-tried case. ***Commerce Bank, N.A. v. Blasdel***, 141 S.W.3d 434, 442 (Mo. App. W.D. 2004). Thus, we "will affirm the decision of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applied the law." ***Id.*** (internal quotation omitted). In doing so, we give no deference to the trial court's judgment with respect to questions of law and review such matters *de novo*. ***Id.*** We, nevertheless, give due regard to the trial court's credibility and factual findings. ***Id.***

However, "[w]hen the factual disputes are minimal, . . . an appellate court is as capable of interpreting and construing a written instrument as is the trial court." ***Helmer v. Voss***, 646 S.W.2d 738, 742 (Mo. banc 1983). "Whether an ambiguity exists in the instant trust instrument is a question of law[,] and we are free to make our own determination as to the meaning of the trust instrument." ***Theodore Short Trust v. Fuller***, 7 S.W.3d 482, 488 (Mo. App. S.D. 1999).

Because Appellants' first two points of error are interrelated, we discuss them together. In their first point, Appellants assert that the trial court erred in finding that the 2002 writing was conditioned upon Decedent and Jo not returning from Phoenix

because Respondents failed to satisfy their burden of proving that the 2002 writing was expressly conditioned upon Decedent and Jo meeting their demise in Phoenix. Appellants contend that such language merely expressed Decedent's motivation for drafting the 2002 writing, not a condition precedent to it becoming an operative amendment to the Trust. In their second point, Appellants aver the trial court erred, as a matter of law, in admitting extrinsic evidence of Decedent's statements made before, on, or after November 1, 2002, to determine whether Decedent intended the 2002 writing to be conditional. Thus, Appellants' first two points challenge the trial court's construction of the 2002 writing.

The trial court construed the 2002 writing as a conditional amendment to the Trust. Missouri courts have long recognized that wills and trusts can be made conditional in nature. *See* ***Robnett v. Ashlock***, 49 Mo. 171, 173 (Mo. 1872). In Missouri, "[i]t is perfectly possible to execute a will which has no effect at all unless a specified condition is performed or occurs." ***Helmer***, 646 S.W.2d at 742. When such expressed conditions are present in a will or a trust, Missouri courts must uphold and enforce them. ***Id.*** Thus, "[a] will [or trust] is inoperative if it was intended by the testator [or settlor] to be effective only upon the happening of a condition, and the condition did not happen." ***Albright v. Albright***, 901 S.W.2d 144, 144 (Mo. App. W.D. 1995).

While the trial court correctly recognized that it needed to determine whether Decedent intended the 2002 writing to be an absolute or conditional amendment to the Trust, it failed to apply Missouri's established rules for construing trust provisions. In finding the 2002 writing to be conditional, the trial court focused on the writing's second and third sentences: "If you are reading this it means that Jo and I have met our demise

either going to or coming back from Phoenix. The [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled." The trial court reasoned that the language in the 2002 writing "can be read either to create a condition, or simply to state a motivation for writing." Thus, the trial court concluded that the 2002 writing was ambiguous as to whether Decedent intended the writing to constitute a conditional or absolute amendment to the Trust.

The trial court went on to reason that "[w]here the words used are ambiguous, extrinsic evidence has been freely admitted to show whether the testator intended to make an absolute or conditional will." In support of its reasoning, the trial court cited ***In re Estate of Desmond***, 223 Cal. App. 2d 211 (1963).

In *Estate of Desmond*, a California appellate court determined that "[e]xtrinsic evidence is admissible to show whether the testatrix intended to make an absolute or conditional will." ***Id.*** at 214. The court then explained the types of extrinsic evidence it deemed appropriate in determining whether a testator intended a will to be absolute or conditional:

> The circumstances which the court may take into consideration in determining whether the deceased regarded the contingency as relating to the motive inducing the making of the will, rather than as a condition, differ in each case, but include in addition to the language in context, the circumstances surrounding the execution of the document and its delivery; the testator's state of health; his plans for the future; the preservation of the document, particularly after the contingency has failed; instructions upon delivery; subsequent declarations of the testator; lack of another subsequent will; lack of alternative disposition of the property and the amount of the estate disposed by the instrument.

***Id.*** It is unclear why the trial court chose to rely on this single California case as authority, but it is clear that the standard enunciated in *Estate of Desmond* is not the standard by which Missouri courts construe provisions of a will or trust.[4]

In Missouri, the paramount rule in construing the meaning of a trust provision is that the settlor's intent is controlling. ***Commerce Bank, N.A. v. Blasdel***, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004). "[A]bsent any ambiguity in the terms of a legal instrument, the intent of its maker, including the intent of a testator or the settlor of a testamentary or *inter vivos* trust, is to be ascertained from the four corners of the instrument without resort to parol evidence as to that intent." ***Id.*** at 444. Courts must glean a settlor's intent from the trust instrument as a whole by examining the trust agreement in its entirety, giving no undue preference to any single word, clause or provision. ***In re Gene Wild Ins. Trust***, 340 S.W.3d 139, 143 (Mo. App. S.D. 2011). Thus, when determining whether an ambiguity exists, "courts must look to the language used within the *entire instrument*." ***Blasdel***, 141 S.W.3d at 445 (internal quotation omitted) (emphasis added).

Consistent with these construction principles, the Missouri Supreme Court, in ***Helmer***, 646 S.W.2d 738, addressed how courts determine whether a will or a trust effectuates only upon the occurrence of an expressed condition. In *Helmer*, a trial court had deemed a will inoperative on the basis that the decedents intended the will to have effect only in the event that they died in a common disaster and the decedents had not, in fact, died in a common disaster. ***Id.*** at 741. The will was drafted in eight separate provisions, some of which expressed that the decedents were bequeathing the property

[4] "Missouri courts use the same rules for construing both wills and trusts." ***In re Living Trust of Johnson***, 190 S.W.3d 469, 474 (Mo. App. S.D. 2006).

"in the event of a common disaster." ***Id.*** at 739-40. In particular, the second provision stated that "the purpose of this will is to devise and bequeath the property of the parties in the event of a common disaster." ***Id.*** at 739.

On appeal, the Court acknowledged that courts must uphold and enforce express conditions that effectuate a will. ***Id.*** at 742. Nevertheless, the Court cautioned that unless the language was compelling, courts should "hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will." ***Id.*** Equally important, the Court opined that questions pertaining to whether a will is absolute or conditional are generally to "be [re]solved within the four corners of the will" and "extrinsic evidence as to what the testator[] may have intended is not admissible." ***Id.*** at 741. Thus, based "almost entirely" upon its "reading of the will," the Court concluded that the entire will was not conditioned upon the event of a common disaster because not all the will's provisions contained the "in the event of a common disaster" language and because the will did "not say in so many words that the document is to be totally ineffective" unless the decedents die in a common disaster. ***Id.*** at 742, 744.

Here, we have a similar situation in which the 2002 writing does not say, in so many words, that it is expressly conditioned upon Decedent and Jo meeting their demise either going to or coming from Phoenix. Rather, when read in the context of the 2002 writing as whole, the language pertaining to the Phoenix trip is more aptly interpreted as Decedent expressing his motivation for drafting the 2002 writing.

The 2002 writing begins as follows:

> Cari, Carli, David & Alisha
>
> Am writing this in the car on the way to KC, MO so excuse the penmanship.
>
> **If you are reading this it means that Jo & I have met our demise either going to or coming back from Phoenix.**
>
> The [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled.

(Emphasis added). Decedent then devotes the remainder of the three-page document to bequeathing his property among the four children.

Reading the language bolded above in isolation, the trial court determined that the 2002 writing was ambiguous as to whether Decedent intended it to be conditioned upon his and Jo's demise during the Phoenix trip. When read in context, however, such language is expressed in the context of Decedent stating his motivation for drafting the document.

Immediately preceding the Phoenix language, Decedent tells the addressees where he is writing the document – in the car on the way to Kansas City. Immediately after the Phoenix language, and just before bequeathing his property, Decedent explains why he is drafting the 2002 writing – the Trust has not been updated in several years and he wishes to express how he wants his property handled. The language in question, therefore, is expressed between two sentences that clearly convey the occasion and motivation for drafting the 2002 writing. Thus, when reading the 2002 writing in its entirety, the language pertaining to the Phoenix trip is in the context of Decedent expressing his motivation and occasion for drafting the 2002 writing.

Moreover, the conditional nature of the "if you are reading this" language is not used in the context of distributing the Trust's assets. We recognize that the word "if" is often used in common parlance to express a condition or limitation and we are not to

ignore its significance in the context of construing a will or trust. *See* ***Naylor v. Koeppe***, 686 S.W.2d 47, 50 (Mo. App. E.D. 1985) (explaining that "'if' may be a small word, but all know its meaning, and instead of a more formal phrase it is used in common language to express condition or limitation;" thus, we may not ignore the testator's use of the word under the guise of construction). Nevertheless, as used in the 2002 writing, the word "if" does not condition Decedent's distribution of the Trust's assets.

Our review of Missouri case law reveals only two instances in which an appellate court has deemed a will completely inoperative on the basis that its effectiveness was contingent upon the occurrence of a condition. In both of those cases, the term "if" directly precedes how the property is to be devised or distributed if said condition occurs. *See* ***Naylor***, 686 S.W.2d at 48 (finding the following language was conditional: "*if* my said wife and I should perish in a common disaster . . . then I make instead the following provisions for distribution of said residue of my estate that my said wife would have taken had we not died from such a common disaster: . . .") (emphasis added); ***Robnett***, 49 Mo. at 172 (finding the following language was conditional: "I this day start to Kentucky; I may never get back. *If* it should be my misfortune, I give my property to my sisters' children") (emphasis added). Additionally, the Court in ***Helmer*** noted the significance of the expressed condition's placement with respect to a will's dispositive clauses. 646 S.W.2d at 742 (noting that the court in *Robnett* found that the expressed condition governed the entire will because "the expressed condition appeared just before the only substantial dispositive clause," as opposed to the expressed condition in

the decedents' will that did not appear immediately before the disposition of property in each of the will's eight separate provisions).

Here, Decedent did not use any conditional language with respect to the distribution of the Trust's assets in the 2002 writing. Instead, prior to bequeathing the Trust's property, Decedent merely states "[t]he [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled." Therefore, when read in context, Decedent does not condition the disposition of the Trust's assets upon him and Jo meeting their demise during the Phoenix trip.

In light of such circumstances, we are not convinced that the language regarding Decedent and Jo meeting their demise during their trip to Phoenix constitutes compelling language evidencing a condition precedent to the writing becoming an effective amendment to the Trust. Again, as the Court instructed in *Helmer*, courts should be hesitant to construe language expressing the purpose or occasion for making a will or a trust as establishing a condition precedent to the instrument becoming operative absent compelling language that the effectiveness of the will or trust is contingent upon a certain condition occurring. ***Id.*** at 742. Here, we have conditional language that bears no connection to Decedent's disposition of property expressed in the context of Decedent's purpose or occasion for drafting the 2002 document. Such language does not compel a finding that Decedent intended to condition the effectiveness of the 2002 writing as an amendment to the Trust upon him and Jo meeting their demise in Phoenix. Rather, when read in the context of the writing as a whole, such language unambiguously reflects Decedent's motivation for drafting the 2002 writing, not a condition precedent to its effectiveness.

Because no ambiguity exists with respect to the Phoenix language when the 2002 writing is examined as a whole, extrinsic evidence should not have been admitted to construe it. *See* ***Blasdel***, 141 S.W.3d at 444 ("[A]bsent any ambiguity in the terms of a legal instrument, the intent of its maker, including the intent of a testator or the settlor of a testamentary or *inter vivos* trust, is to be ascertained from the four corners of the instrument without resort to parol evidence as to that intent."). Furthermore, even if we were to find the language pertaining to the Phoenix trip ambiguous, the trial court erroneously admitted extrinsic evidence of Decedent's statements regarding his intent.

Generally, courts look disfavorably upon admitting extrinsic evidence regarding a testator's or settlor's statements as to intent regardless of whether such statements were made before, at the time of, or subsequent to the execution of one's will or trust. ***Breckner v. Prestwood***, 600 S.W.2d 52, 56 (Mo. App. E.D. 1980). Such caution stems from the fact that the testator or settlor reduced his or her intentions to writing and the testator or settlor, now deceased, could not dispute proffered evidence of intent. ***Id.*** Furthermore, evidence as to the settlor's intent is susceptible to perjury and violates the rule that testamentary instruments should be reduced to writing. ***Id.***

Despite such concerns, extrinsic evidence as to a testator's or a settlor's declarations is admissible, under limited circumstances, to resolve certain ambiguities. Two types of ambiguities exist in the context of construing a will or trust: (1) patent ambiguities and (2) latent ambiguities.[5] ***Schupbach v. Schupbach***, 760 S.W.2d 918, 923 (Mo. App. S.D. 1988). "A patent ambiguity occurs when the duplicity,

[5] The term "ambiguity" refers to "duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument." ***Trust of Johnson***, 190 S.W.3d at 475 (internal quotation omitted). "[A] trust agreement is not ambiguous merely because the parties differ as to its interpretation." ***Blue Ridge Bank & Trust Co. v. Am. Ass'n of Orthodontists Foundation***, 106 S.W.3d 543, 548 (Mo. App. W.D. 2003).

indistinctness, or uncertainty of meaning appears on the face of the instrument being considered." ***Id.*** "A latent ambiguity occurs when the instrument being considered is unambiguous on its face but becomes open to more than one interpretation when applied to the factual situation in issue." ***Id.***

If a patent ambiguity exists, "extrinsic evidence of objective, operative facts concerning events in the testator's life may be introduced . . . to ascertain his exact intent, and to give precise and explicit meaning to the language used in the instrument." ***Id.*** However, extrinsic evidence of a testator's or settlor's declarations as to intent is generally inadmissible to resolve patent ambiguities. ***Id.***

Conversely, extrinsic evidence of a testator's or settlor's intent is admissible to resolve latent ambiguities. ***Breckner***, 600 S.W.2d at 56. Nevertheless, two types of trust provisions generally give rise to latent ambiguities:

> (1) [A] provision that describes a person or a thing and more than one person or thing fits that description exactly, and (2) a provision that describes a person or a thing and no person or thing fits the description, but two or more persons or things fit the description in part and imperfectly.

***Trust of Johnson***, 190 S.W.3d at 476. Thus, extrinsic evidence as to a testator's or settlor's intent has been admitted with respect to latent ambiguities under the theory that the provision giving "rise to a latent ambiguity is itself an explicit name of a beneficiary or an explicit description of property, and evidence of the testator's declaration of intent does not add or replace this explicit designation but merely gives the designation the precise meaning intended by the testator." ***Breckner***, 600 S.W.2d at 56. Thus, "testimony regarding declarations made by the testator concerning such matters as the identity of a beneficiary, the identity of ambiguously described property, or to rebut

some equity or presumption is" admissible to resolve latent ambiguities. ***Schupbach***, 760 S.W.2d at 923.

Here, the extrinsic evidence admitted did not pertain to identifying beneficiaries or property under the Trust; rather, the extrinsic evidence admitted pertained solely to statements made by Decedent regarding the 2002 writing and his trip to Phoenix. Such extrinsic evidence was not intended to clarify explicit designations made in the Trust. Instead, it was introduced for the sole purpose of determining whether Decedent intended the 2002 writing to be a conditional or absolute amendment to the Trust. Such evidence, therefore, was improperly admitted to construe the language in the 2002 writing.[6]

Respondents further contend that even if we were to find the 2002 writing was not conditioned upon Jo and Decedent dying in Phoenix, the 2002 writing is not binding because it is precatory in nature. In support of their argument, Respondents point to Decedent's use of the words "wish," "want," and "desire" throughout the 2002 writing. Decedent's use of precatory language alone, however, does not make the 2002 writing inoperative.

[6] Respondents contend that even if evidence regarding Decedent's statements was not admissible as extrinsic evidence to construe the 2002 writing, such evidence was still admissible under the state of mind exception to the hearsay rule. "The state of mind exception to the hearsay rule permits admission of a contemporaneous statement relating to a person's existing intent to prove the person actually had such intent if the intent is a relevant issue in the case." ***Lunceford v. Houghtlin***, 326 S.W.3d 53, 69 (Mo. App. W.D. 2010). It is true that "[d]eclarations of a decedent have been held admissible in an action to contest a will and set aside deeds because of undue influence as they may show the testator's state of mind, his expressed affections for his children, or even his susceptibility to undue influence." ***Ryterski v. Wilson***, 740 S.W.2d 374, 375 (Mo. App. S.D. 1987) (internal quotation omitted); *see also* ***In re Estate of Dawes***, 891 S.W.2d 510, 520 (Mo. App. S.D. 1994) (admitting testimony regarding statements made by the decedent under the state of mind exception to the hearsay rule because they "were relevant to show Decedent's desire to treat his four offspring equally and to demonstrate the confidence he placed in Defendant"). However, this case does not involve an action to contest a will or set aside a deed because of undue influence. Rather, the present issue is whether Decedent intended the 2002 writing to be a conditional or absolute amendment to the Trust. Thus, such evidence is not admissible under the state of mind exception to the hearsay rule in the context of this case.

"[P]recatory words such as 'wish' or 'desire' or 'request' may or may not be of intended mandatory meaning and effect in the varying context of various wills." ***Thompson v. Smith***, 300 S.W.2d 404, 406 (Mo. 1957). Nevertheless, "[a] trust may be created by precatory words . . . if the context of the instrument and the full circumstances show an intention to settle a trust." ***Penney v. White***, 594 S.W.2d 632, 639 (Mo. App. W.D. 1980). Here, it is undisputed that Decedent penned the 2002 writing. Furthermore, the writing clearly states that "[t]he [T]rust has not been updated for several years so I will express my desire on how I wish everything to be handled." Thus, although Decedent used precatory language in the 2002 writing, the writing still evidences a clear intent by Decedent to amend the Trust. Respondents' argument regarding precatory language, therefore, is without merit.

In sum, the 2002 writing is not ambiguous as to whether Decedent intended the writing to constitute an absolute amendment to the Trust. Rather, the language pertaining to the Phoenix trip, when read in the context of the writing as a whole, reflects Decedent's motivation for drafting the 2002 writing and, thus, cannot be construed as a condition precedent to the effectiveness of the 2002 writing as an amendment to the Trust. Therefore, the trial court erred in construing the 2002 writing as a conditional amendment to the Trust. Points I and II are granted.

In their third point, Appellants contend that the trial court erred in authorizing that Respondents' attorney's fees and costs be paid from the corpus of the Trust because Respondents were not defending the Trust but were, instead, defending their rights as beneficiaries of the Trust. Here, the trial court awarded attorney's fees to Respondents on the basis of § 456.10-1004 RSMo Cum. Supp. 2008. "[W]here the legislature

statutorily authorizes an award of attorney's fees in the discretion of the trial court[,] the granting or refusal to grant attorney's fees is reviewable for abuse of discretion." ***In re Gene Wild Revocable Trust***, 299 S.W.3d 767, 782 (Mo. App. S.D. 2009) (internal quotation omitted). "The trial court abuses its discretion in awarding attorney's fees when its award is either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration." ***Id.*** (internal quotation omitted).

Section 456.10-1004 provides that "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Case law interpreting § 456.10-1004 is scant. *See* ***id.*** at 783; ***Klinkerfuss v. Cronin***, 289 S.W.3d 607, 617 (Mo. App. E.D. 2003). Nevertheless, an award of attorney's fees pursuant to § 456.10-1004 has been deemed proper where the "litigation was brought and defended in good faith and there were issues raised which could only have been settled via judicial determination," ***Gene Wild Revocable Trust***, 299 S.W.3d at 782, and where a trustee performed his or her duty to the trust by participating in the litigation. *See* ***Klinkerfuss***, 289 S.W.3d at 619.

Here, the trial court determined that the complex issues raised in Appellants' petition were not frivolous and required judicial resolution. It further determined that Respondents incurred their attorney's fees in defending the Trust. The trial court, therefore, concluded that this case involved issues requiring judicial determination and that Respondents incurred their litigation expenses while carrying out their duty as trustees to defend the Trust. We concur in the trial court's assessment and cannot say

the trial court abused its discretion in awarding attorney's fees to Respondents pursuant to § 456.10-1004.

Appellants, however, do not challenge the award of attorney's fees on the basis of § 456.10-1004; rather, they contest the award of attorney's fees on the basis that "where a challenge is made by a party solely for his own benefit and no benefit to the trust estate is demonstrated, an award for attorney fees payable from the trust estate cannot normally be made." ***Hammerstrom v. Bank of Kansas City, N.A.***, 808 S.W.2d 434, 439 (Mo. App. W.D. 1991). Appellants, however, point to no evidence in the record that Respondents challenged the petition solely for their own benefit. Instead, they rely on the fact that Respondents stand to gain more if the 2002 writing was deemed an inoperative amendment because Respondents would then be the only beneficiaries of the Trust. That fact, in and of itself, is insufficient to prove that Respondents challenged the petition solely for their own benefit, especially in light of the fact that, as the Trust's co-trustees, Respondents had a duty to "prosecute or defend actions, suits, claims or proceedings for the protection or benefit of the [T]rust." Thus, it follows that Appellants have failed to establish that the trial court abused its discretion by authorizing that Respondents' attorney's fees be paid from the corpus of the Trust. Point denied.

In their fourth point, Appellants assert the trial court erred in finding that Respondents did not violate the Trust's no-contest clause because Respondents, acting in conjunction with one another, contested the validity of the 2002 writing as a valid amendment to the Trust. The Trust contained the following no-contest clause:

> If any person or entity, other than [the trustor], singularly, or in conjunction with any other person or entity, directly or indirectly, contests in any court

> the validity of this trust agreement, including any amendments thereto, then the right of that person or entity to take any interest in the [T]rust property shall cease, and that person (and his or her descendants) or entity shall be deemed to have predeceased [the trustor].

No-contest clauses are valid and enforceable under Missouri law. However, such clauses are not favored by the law and, thus, are subject to strict construction – that is, a no-contest clause is to be enforced only when "it is clear that the trustor (or testator) intended that the conduct in question should result in the forfeiture of a beneficiary's interest under the trust (or will)." ***Tobias v. Korman***, 141 S.W.3d 468, 477 (Mo. App. E.D. 2004). Therefore, in determining whether a no-contest clause is applicable, we carefully review the particular facts of the case as well as the language contained within the clause itself. ***Id.***

Under the facts of this case, we find that Respondents' participation in the suit was not of the type of conduct Decedent intended to result in the forfeiture of Respondents' interests as beneficiaries of the Trust. Appellants, not Respondents, are the individuals that initiated the litigation regarding the 2002 writing and the Trust. As previously explained, Respondents, as co-trustees of the Trust, have a duty to represent the Trust in all proceedings, actions, suits, and claims against it. Respondents' participation in the action, therefore, amounted to them fulfilling their duties to the Trust. Thus, it follows that finding Respondents' conduct violated the no-contest clause would put Respondents in the untenable position of choosing between their duties as trustees to the Trust and their interests as beneficiaries of the Trust. Decedent clearly intended Respondents to be both trustees and beneficiaries of the Trust. Thus, it can be reasonably inferred that Decedent did not intend for Respondents' performance of their duties as trustees to result in the forfeiture of their

interests under the Trust as beneficiaries. Accordingly, mindful of the fact that no-contest clauses are enforceable only when the trustor clearly intended the conduct in question to result in the forfeiture of a beneficiary's interest, ***id.***, Respondents' participation in this litigation cannot be construed as violating the Trust's no-contest clause. Point denied.

Finally, we note that Appellants sought payment of their attorney's fees from the Trust. The trial court denied their request, finding that there was no basis to support an award because by "not having prevailed upon the merits," there was no benefit to the Trust resulting from the litigation initiated by Appellants. As we are reversing the trial court's judgment on the merits, it is apparent that Appellants have now prevailed and that the enforcement of the 2002 amendment of the Trust is a direct benefit to the Trust in that all provisions of the Trust as amended will now be enforced. Accordingly, the trial court's denial of Appellants' request for payment of their attorney's fees by the Trust is reversed, and the matter is remanded to the trial court for entry of an award of attorney's fees to Appellants.

In sum, the trial court erred in concluding that the November 1, 2002 writing constituted a conditional amendment to the Trust that never became operative. Rather, the November 1, 2002 writing is an operative and enforceable amendment of the Trust. Thus, the judgment with respect to the effectiveness of the 2002 writing as a conditional amendment to the Trust is reversed, as is the trial court's denial of an award of attorney's fees to Appellants, and the case is remanded to the trial court for entry of a judgment directing the co-trustees to carry out the directives of the Trust and the November 1, 2002 amendment by distributing the Trust assets consistent therewith, for

entry of an award of attorney's fees to Appellants to be paid from the Trust prior to such distribution, and for such further proceedings as are consistent with this opinion. The judgment is affirmed in all other respects.

Joseph M. Ellis, Judge

All concur.