Hornbostel v. Martin, No. 40-7-08 Gicv (Rainville, J., Oct. 29, 2009)

STATE OF VERMONT
GRAND ISLE COUNTY, SS

Martha Hornbostel, in her capacity as Trustee of the Martin/van Tubergen Trust, a/k/a the van Tubergen/Harris Trust, Plaintiff	)	GRAND ISLE SUPERIOR COURT
	)	DOCKET NO. 40-7 Gicv
v.	)	
Jennifer Martin, Defendant	)	

DECISION AND ORDER

The dispute before the Court concerns a trust executed by Plaintiff Martha Hornbostel (a.k.a. Martha van Tubergen) and Plaintiff's former husband, Peter M. Martin, Sr. Since its creation, the trust has been identified by multiple titles including the Martin/Van Tubergen Trust and the Van Tubergen/Harris Trust. The instrument is herein referred to as the Trust. The Plaintiff is represented by Andrew H. Montroll, Esq., and the Defendant is represented by Audrey J. Bryant, Esq.

According to Plaintiff, the Trust was enacted on April 18, 1989, and would have terminated under its original terms on April 18, 2007. The basis for Plaintiff's assertion is that the signatures and the notary acknowledgment on the Declaration of Trust are dated April 18, 1989. Plaintiff further asserts that she and Peter M. Martin, Jr. effectively amended the terms of the Trust on April 9, 2007, and that through this amendment, she was made Sole Trustee, the termination of the Trust was postponed from April 18, 2007, to April 18, 2012, and Adam van Tubergen was made the primary beneficiary. Based upon this 2007 Amendment, Plaintiff further contends that the Warranty Deed executed in 2007 by herself and Peter M. Martin, Jr. is valid.

Defendant contends that the Trust terminated on January 23, 2007, which is 18 years after the typed date of the Declaration of Trust and the date of other documents referenced in the Trust. In the alternative, Defendant asserts that Plaintiff's purported April 9, 2007, amendment and 2007 Warranty Deed are invalid under the Trust provisions. Additionally, Defendant has filed a counterclaim against Plaintiff alleging that she breached her fiduciary obligations. Although the parties have filed other claims and counterclaims concerning the corpus and the Trust, it is the aforementioned concerns which the parties have requested the Court resolve on summary judgment.

Procedural History

This matter came before the Court on Plaintiff's Motion for Partial Summary Judgment. On November 19, 2008, a hearing was held on the matter before the Honorable Judge A. Gregory Rainville. On March 27, 2009, the Court issued an Order denying Plaintiff's Motion for Partial Summary Judgment. This Order was based on a finding that the Trust's date of enactment presented a genuine issue of material fact that was outcome determinative as it dictated whether Plaintiff's actions in early April of 2007 occurred before the Trust terminated. On June 29, 2009, Plaintiff filed a Motion to Reconsider the Order. Defendant filed a Motion for Reconsideration on July 10, 2009. In support of these motions, the parties submitted a Joint Stipulation of Uncontested Facts signed on June 19, 2009.

Finding of Fact

On January 23, 1989, Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) executed a Warranty Deed ("1989 Warranty Deed") conveying real property in the town of North Hero, Vermont, to John Verba. An Option Agreement ("1989 Option") with respect to approximately 22 acres of property located at [address redacted], North Hero, Vermont (the "Property") was granted on January 23, 1989, by John Verba to Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) as Trustees in partial consideration for the 1989 Warranty Deed. On January 23, 1989, John Verba, Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) signed an

amendment to the 1989 Option ("1989 Amendment"). On April 18, 1989, Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) signed the Declaration of Trust ("the Trust"). The Declaration of Trust was notarized on April 18, 1989. The initial Trust corpus was the 1989 Option.

On June 17, 1992, John Verba, Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) signed a second amendment to the 1989 Option ("1992 Amendment"). Peter M. Martin, Sr. died in 1995. Peter M. Martin, Jr. was named the successor Co-Trustee by the Declaration of Trust. John and Jodi Verba executed a Warranty Deed conveying the Property to Martha van Tubergen and Jennifer Martin Harris as Trustees on September 24, 1996 ("1996 Warranty Deed").

On October 9, 1996, Martha van Tubergen (Hornbostel) and Jennifer Martin Harris signed a Vermont Property Transfer Tax Return with respect to the conveyance of the Property under the 1996 Warranty Deed. On June 30, 1997, John and Jodi Verba executed a Corrective Warranty Deed conveying the Property to Martha van Tubergen (Hornbostel) and Jennifer Martin Harris as Trustees. On April 9, 2007, Martha Hornbostel and Peter M. Martin, Jr. executed an amendment in which they purported to extend the date of the Trust termination till April 18, 2012, restructure the Trust to make Martha Hornbostel the Sole Trustee, and modify the Trust terms so that Adam van Tubergen became the primary beneficiary. Also on April 9, 2007, Martha Hornbostel and Peter M. Martin, Jr. executed a Warranty Deed purporting to convey the Property to Martha Hornbostel as Trustee ("2007 Warranty") under the authority of the amended trust.

Conclusions of Law

I. Motion to Reconsider

The parties contend that the Court's March 27, 2009, Order should be reconsidered because the factual dispute underlying the Trust's date of enactment has been resolved by the parties' Joint Stipulation of Uncontested Facts. The Court agrees.

II. Summary Judgment

Plaintiff asserts that the Court's previous denial of her Partial Motion for Summary Judgment should no longer stand. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). Based upon the evidence submitted, the Court finds there is no genuine issue of material fact in regards to the date the Trust was created, the date the Trust terminated, the Trustees' power to amend the Trust, the validity of the 2007 amendment, and the legitimacy of the 2007 Warranty Deed.

a) Creation of the Trust

In Vermont, trusts concerning real property must be evidenced by a signed writing. 27 V.S.A. § 303. Although the statute does not specify what form of writing is adequate, the Court has held that "[a]ny instrument, which sufficiently defines the object and terms of the trust, signed by either the person who creates the trust or the person who declares it, meets the [statutory] requirements" *Straw v. Mower,* 99 Vt. 56, 59 (1925). According to Defendant, the Trust was created on January 23, 1989. In support of this assertion, Defendant points to the 1989 Warranty Deed, the 1989 Option, and the 1989 Amendment, all of which are signed by Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel) as Trustees on January 23, 1989. These documents make references to a Trust and to Trustees. Although these documents evidence an intent to create a trust and the acquisition of corpus, these documents fail to outline the nature of the purported trust. See *Smith v. Deshaw*, 116 Vt. 441, 444 (1951); *O'Brien v. Holden*, 104 Vt. 338, 341 (1932). The Court therefore finds that these documents are insufficient to establish a trust over real property.

The first document which sufficiently describes the object and nature of the Trust is the Declaration of Trust. In order to determine when the Trust was created, the Court must examine the intent of the parties as evidenced by this document. *Destitute of Bennington County by VanSantvoord v. Henry W. Putnam*, 125 Vt. 289, 293 (1965). However, if the intent is unclear from the instrument, the Court may examine evidence outside the four corners of the document to discern the parties' intent at the time of construction. *O'Brien v. Holden*, 104 Vt. 338, 341 (1932). Although indicated in type print as signed on January 23, 1989, the document bears the

handwritten notary acknowledgment that the document was signed by the parties on April 18, 1989. Due to the discrepancies regarding these dates, the Court finds extrinsic evidence is admissible to resolve this inconsistency evident on the document's face. *Mahoney v. U.S.*, 831 F.2d 641, 648 (6th Cir. 1987) (finding that when the language is ambiguous or conflicting, the court may consider extrinsic evidence to resolve the inconsistency); *O'Brien v. Holden*, 104 Vt. 338, 341 (1932) (stating that in Vermont, the parol evidence rule applies to trust instruments).

The Court finds that the letter dated January 25, 1989, sent to the parties' by their then attorney, John G. Hutton, Jr. is the most persuasive extrinsic evidence regarding the intended date of creation. In this letter, the trust agreement is referred to as the proposed trust agreement and a copy of the unsigned trust agreement was included with the letter. Moreover, the letter refers to the executed Option. Together, these references indicate the parties' understanding that the Option came before the execution of the trust agreement rather than contemporaneously and that the Trust remained unexecuted on January 25, 1989. The Court finds this evidence sufficient to support a finding that the Trust was intended by the parties to be created on April 18, 1989, as evidenced by the handwritten date and signatures, rather than on January 23, 1989, as indicated by the typed date. The Court further finds Defendant has provided insufficient evidence to justify a finding that Plaintiff is estopped from asserting that the Trust was effective on any other date than January 23, 1989.

b) Power to Amend the Trust

Generally, a trust will not terminate prior to the expiration of time fixed by the trust. *Lynch v. Lynch*, 147 Vt. 574 (1987). However, if the settlor retains the power to revoke, the settlor may do so at anytime in the manner and to the extent to which the power was reserved. *Id*. Like the power to revoke, if the settlor reserves the power to modify the trust, he may do so in accordance with that reservation. *Restatement (Second) of Trusts*, § 331, sec (1). In the Trust created on April 18, 1989, the Settlors specifically reserved the right to amend or revoke the Trust in paragraph seven of the Declaration of Trust ("paragraph seven"). The language in paragraph seven provides:

> The Trustees reserve the power to revoke the trust herein provided for, at any time and in their sole and absolute discretion, the principal and any accumulated undistributed income thereon upon such liquidation to revert to and vest in the undersigned, Peter M. Martin and Martha van Tubergen [Hornbostel], in equal shares and proportions, one-half thereof to each, or in the same proportion to their heirs, executors, administrators or assigns, as the case may be. Further, the undersigned reserve the power to amend this Declaration at any time prior to the termination of the trust, in any manner whatsoever, and to amend or modify any provision of this Declaration in any way, including specifically but not limited to, the power to postpone or accelerate the date of termination of the trust.

As noted by both parties, the controlling factor in the construction of trusts is the expressed intent of the settlors as evidenced by the language of the trust instrument itself. *Proctor v. Woodhouse*, 127 Vt. 148 (1968). Since there are no discrepancies in the terms of paragraph seven, the Court finds that the expressed intent of the Settlors is unambiguous. As a result, any use of parol evidence to contradict or explain the language is improper. *Destitute of Bennington County by VanSantvoord v. Henry W. Putnam*, 125 Vt. 289, 293 (1965). In paragraph seven, the Settlors use the pluralized pronoun "their" and the term "undersigned" to reserve the powers to revoke or amend the Trust. Undersigned is defined in paragraph seven as including both Peter M. Martin, Sr. and Martha van Tubergen (Hornbostel). This "undersigned" term is also used to describe the power to amend the Trust. As a defined term within the same paragraph, the definition provided by the parties will control. *Id*. The use of the term "undersigned" clearly denotes the Settlors' intent that the power to amend was reserved but that it must be exercised jointly. *Id*.

Despite the pluralized pronouns and undersigned definition, Plaintiff asserts that the language within paragraph seven providing for the distribution of the assets indicates the parties' intent that the powers could be unilaterally exercised. The Court disagrees. Contrary to Plaintiff's assertion, the provision that upon revocation of the Trust the corpus would pass to their heirs, executors, administrators or assigns can be interpreted consistently with the pluralized terms within the paragraph. Construed within its plain meaning, such language could evidence the parties' intention to insure where the proceeds would go if the two parties agreed to dissolve the Trust prematurely but the actual dissolution did not occur until one or both parties were deceased. Since such an interpretation is reasonable and consistent with the intent evidenced by the other language describing the authority, the Court will adopt this interpretation over any

other which would be inconsistent with the Trust's other terms. See *Town of Lyndon v. Burnett's Contracting Co*., 138 Vt. 102, 106 (1980) (stating that if possible "a contract must be construed to give effect to every part, and therefore this Court will avoid construction that render ineffectual any part of the language of a contract.").

Moreover, based upon the clear statement that "the parties desire to utilize said option and the premises covered thereunder in a manner which will benefit their descendants" the Court finds that the parties' intent in enacting the Trust was to benefit all of the beneficiaries. Ex. A. Such a finding is further supported by the long list of beneficiaries provided for within the Trust and the parties' efforts to provide in detail how the corpus would be distributed among the beneficiaries. To interpret the power to amend as to allow one party to unilaterally restructure the entire Trust is not only contrary to the Trust's expressed language but also contravenes the Settlors' intention expressed by the Trust as a whole. See *Procter v. Woodhouse*, 127 Vt. 148, 154 (1967) (stating that "[c]ourts are called upon to construe the instrument in its entirety in searching for the true intent of its authors). As a result, the Court finds that this language evidences that the powers reserved in paragraph seven were intended by the parties to be jointly exercised.

Furthermore, there is no indication in the Trust that either reserved power of the Settlors was to pass to a successor. Although the Trust does specifically provide who the successor trustees would be and how alternate successors would be appointed, there is no indication that the powers reserved to the undersigned by paragraph seven would pass to the successor trustee. Notably, the power to amend is reserved for the undersigned not the trustees. Therefore, the Court finds that the parties did not intend to pass the powers reserved in paragraph seven to either Trustee's successor.

c) 2007 Amendment

Peter M. Martin, Sr. died in 1995. As a result of the Court's finding that the reserved power to amend the trust was intended by the parties to be jointly exercised, the Court finds that this power terminated when one of the Settlors passed away. Therefore, Martha Hornbostel was unable to unilaterally amend the Trust under the joint powers reserved to her and Peter M.

Martin, Sr. once Peter M. Martin, Sr. passed. Moreover, since there is insufficient evidence to find that the Settlors intended any successor to inherit this reserved power, any successive co-trustee was powerless to amend the original Trust agreement. As a result, even assuming Peter M. Martin Jr. was the co-trustee, the 2007 Amendment executed by him and Martha Hornbostel was ineffective since the parties did not have the authority to create the amendment.

d) Appointment of Sole Trustee, Modification of Beneficiaries, and 2007 Warranty Deed

According to its terms, the April 18, 1989, Trust expressly requires two trustees at all times. Since it is derived from the invalid 2007 Amendment, the Court finds that Martha Hornbostel's appointment as Sole Trustee and the modification of the beneficiaries' interest in the corpus are ineffective. Moreover, since it was executed under the authority of the 2007 Amendment, the Court further finds that the 2007 Warranty Deed is invalid.

e) Trust Termination

According to its terms, the Trust was to expire 18 years after its creation. Since the Trust was not successfully amended, the Court finds the Trust terminated according to its terms on April 18, 2007.

f) Breach of Fiduciary Duty

The Court finds that a genuine issue of material fact remains regarding whether Plaintiff's attempts to restructure the Trust were in the best interest of the Trust or a breach of her fiduciary obligations. This issue and the rest of the parties' claims shall be addressed by the Court during a hearing on the merits.

Order

Based on the foregoing,

The parties' Motions for Reconsideration are hereby **GRANTED**.

The Court finds that the April 9, 2007 Amendment and its purported terms are **INVALID**. The Court finds that the 2007 Warranty Deed is **INVALID**.

The Court finds that the Trust **TERMINATED on April 18, 2007**. Therefore the Trust proceeds are hereby **ORDERED** to be distributed pursuant to the terms of the April 18, 1989 instrument after resolution of the remaining issues between the parties.

The remaining issue between the parties will be resolved at a merits hearing to be scheduled by the Court.

SO ORDERED, this ___day of October, 2009, North Hero, Vermont.

_____
Honorable A. Gregory Rainville
Presiding Judge
Grand Isle Superior Court