# STATE OF MICHIGAN

# COURT OF APPEALS

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In re WILLIAM J. and MARIAN A. DUDLEY TRUST.

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| JAMES P. DUDLEY,<br><br>Petitioner-Appellee, | UNPUBLISHED<br>March 16, 2010 |
| v<br><br>JEAN DUDLEY and JANET FOSTER,<br><br>Respondents-Appellants,<br><br>and<br><br>GAIL MARTIN, GERALD BOOZA, KATHERINE ROBBINS and BRIAN BOOZA,<br><br>Appellees. | No. 287918<br>Macomb Probate Court<br>LC No. 2008-194132-TV |

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Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Respondents Jean Dudley and Janet Foster appeal as of right a probate court order granting petitioner James P. Dudley's petition for (1) partial supervision of the William J. and Marian A. Dudley Trust, and (2) distribution of trust assets in accordance with the percentages set forth in the trust agreement. We reverse and remand for further proceedings. We have decided this appeal without oral argument pursuant to MCR 7.214(E).

Respondents, sisters of trust settlor William Dudley, argue on appeal that the probate court erred in enforcing the trust according to its terms and refusing to permit discovery to clarify a patent or latent ambiguity concerning trust asset percentage allocations to the named beneficiaries. The trust language dictated that after the first settlor's death, the trust assets would be divided into a Marital Trust and a Credit Trust. Section VI, governing the Marital Trust, contains the following distribution scheme:

(d) Upon the death of the Surviving Settlor, and after the payment of or provision for any taxes or expenses payable pursuant to subsection (c) above, Trustee shall distribute the balance of the Marital Trust as follows:

(1) Trustee shall first pay over a sum equal to .142857% of the Marital Trust to the Trustee of THE JEAN M. DUDLEY DISCRETIONARY TRUST.[1]

(2) Trustee shall then pay over a sum equal to .142857% of the Marital Trust to Janet M. Foster.

(3) Trustee shall then pay over a sum equal to .0035714% of the Marital Trust to each of the following: "Leader Dogs for the Blind" located in Rochester Hills, MI; "WTVS Channel 56" located in Detroit, MI; and "Paws With A Cause" located in Wayland, MI.

Subsection (4) directs that "the remaining balance of the Marital Trust" would go in equal shares to 23 named individuals. Section VII, which pertains to the Credit Trust, envisions identical allocations.

William Dudley died on February 13, 2007, and Marian Dudley died on October 3, 2007. On June 27, 2008, petitioner, as trustee of the William J. and Marian A. Dudley Trust, petitioned the probate court for partial supervision of the trust and instructions concerning distribution of the trust assets. The petition estimated the value of trust assets at $941,903.12 and noted that no trust assets had been distributed to any trust beneficiary. Petitioner calculated that if he distributed the trust assets in conformity with the percentage allocations in the trust document, Jean Dudley and Janet Foster would each take $1,345.57, the three charities would each get $33.64, and the remaining 23 individuals would each receive $40,830.92.

At a hearing on the petition, respondents averred that the drafting attorney made "a mathematical error" whereby she first stated "the percentages in numerical number and then followed it with a percentage sign which essentially had the effect of moving the decimal over two points." Respondents noted that the drafting attorney was now serving in the army out of the country, and that they had received a letter from her indicating that she still had the case file. Respondents requested that the probate court review the drafting attorney's file for any light it might shed on William Dudley's intent with regard to the percentages because "William passed away thinking that this trust was going to provide for his sister, and you know, and now that's not happening."

Petitioner presented testimony by Joseph Bonventre, an attorney who represented Marian Dudley after William Dudley's death. Bonventre recalled that he had apprised Marian Dudley of the unusual distribution percentages in the trust agreement, but she emphatically replied that "she didn't want to make any changes." Bonventre denied that Marian Dudley offered any rationale

[1] On March 9, 2000, the same day that the settlors executed the William J. and Marian A. Dudley Trust, they also executed the Jean M. Dudley Discretionary Trust on behalf of William Dudley's disabled sister.

for the stated percentages. According to Bonventre, Marian Dudley was preparing "additional estate planning documents on her own" after William Dudley's death, and she expressed to Bonventre that the percentages applicable to the charities were not correct because "she wanted the charities [sic] net portion of it to each receive in her trust $500 each in addition to whatever they were receiving in the William and Marian Dudley Trust." Marian Dudley also "indicated in her own writing that she did not want Janet to receive any additional property, in effect, and she listed three other beneficiaries by name that she did not want those three beneficiaries to receive any additional property."

The probate court denied respondents' request for further discovery and ruled that petitioner had to distribute the trust assets as set forth in the trust agreement:

> [T]o be honest, if I didn't have the benefit of the testimony of Mr. Bonventre, I may have been inclined to ask for even an affidavit of counsel because of her—the condition or the fact that she's not in the country. But I'm satisfied that any concerns as to the validity of those percentages of distribution had been addressed by Mr. Bonventre and had been explained to his satisfaction and that there would be no reason for this Court to deviate from the four corners of this document or find that the terms and conditions of this trust are not, in fact, the intent of the settlor. . . .

"[T]his Court reviews de novo the language used in wills and trusts as a question of law." *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). We review for clear error the probate court's findings of fact. *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). We review for an abuse of discretion a lower court's decision regarding discovery. *VanVorous v Burmeister,* 262 Mich App 467, 476; 687 NW2d 132 (2004).

"The rules of construction applicable to wills also apply to the interpretation of trust documents." *In re Reisman Estate*, 266 Mich App at 527. "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). Unless an ambiguity exists, a court should glean the testator's intent from the document itself. *Id.* If a will evinces an ambiguity, "a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction." *Id.*

> A patent ambiguity exists if the uncertainty as to meaning "appears on the face of the instrument, and arises from the defective, obscure, or insensible language used." A latent ambiguity, on the other hand, arises "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates" the possibility of more than one meaning. [*Id.*, quoting *In re Butterfield Estate,* 405 Mich 702, 711; 275 NW2d 262 (1979).]

"[I]n interpreting contracts where an ambiguity *may exist*, extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the actual intent of the parties; and (3) to indicate the actual intent of the parties as an aid in construction." *In re Kremlick Estate*, 417 Mich at 241 (emphasis in original). However, "[t]he law is loath to supplement the language of

[testamentary] documents with extrinsic information . . . . because the maker is not available to provide additional facts or insight." *Id*. at 240.

Concerning the presence of a patent ambiguity, our review of the trust terms reveals nothing inherently unclear about the allocation percentages in the trust document. The document plainly states that each respondent would receive .142857 percent of the trust assets, and that each charity would receive .0035714 percent of the assets. As reflected in petitioner's proposed distribution table, the trust assets were capable of being distributed in conformity with the actual terms of the trust. Thus, these distribution provisions do not qualify as patently ambiguous, and the probate court correctly so held.

We conclude, however, that respondents have demonstrated the potential existence of a latent ambiguity with respect to the trust agreement's allocation percentages. The probate court apparently found that the trust document contained a latent ambiguity because it resorted to extrinsic evidence, Bonventre's testimony, to ascertain the intended allocation percentages. The presence of a latent ambiguity finds additional support in the probate court's observation that the trust had an "unusual" percentage distribution to a discretionary trust for the benefit of respondent Jean Dudley, which was to receive a relatively nominal amount under the terms of the William J. and Marian A. Dudley Trust, whereas each of the 23 remainder beneficiaries would receive much greater amounts. Moreover, the evidence showed that the settlors created the separate, rather complex discretionary trust at the same time they created the William J. and Marian A. Dudley Trust, which would have made little sense if the settlors intended the discretionary trust to receive only the nominal amount set forth in the settlors' trust. As observed by respondents, the cost of preparing the Jean M. Dudley Discretionary Trust likely exceeded the amount it was to receive under the distribution scheme in the William J. and Marian A. Dudley Trust. These circumstances together reasonably give rise to a latent ambiguity.

We emphasize that the probate court clearly erred to the extent that it relied on Bonventre's testimony to resolve the latent ambiguity. In resolving an ambiguity in a trust document, the primary goal is to determine and enforce the settlors' intent as nearly as possible. *In re Kremlick Estate*, 417 Mich at 240. But Bonventre did not draft the settlors' trust, and the record contains no indication that he represented either of the settlors at the time the trust was drafted or that he ever represented William Dudley. Because Bonventre's testimony concerned events that occurred after William Dudley died, when Marian Dudley was making "additional estate planning documents on her own," Bonventre's testimony was not probative of even Marian Dudley's intent *at the time that the William J. and Marian A. Dudley Trust was executed*.

A better source of the settlors' intent at the time they created their trust was the attorney who drafted the trust documents, who was in the armed services and stationed out of the country at the time of the hearing. However, respondents contacted the drafting attorney and confirmed that she still had her file in this case, so further discovery likely would yield evidence relevant to the settlors' intent at the time the trust was created; indeed, the probate court acknowledged that it had considered asking for an affidavit from the drafting attorney, but ultimately relied on Bonventre's testimony instead. But as previously explained, the probate court erred in relying on Bonventre's testimony to resolve the latent ambiguity with respect to the allocation percentages because his testimony had no relevance to William Dudley's or Marian Dudley's intent in 2000, when they created their trust.

Consequently, we reverse the probate court's September 2008 order granting partial supervision and remand for further proceedings regarding ascertainment of the settlors' intent at the time they created the William J. and Marian A. Dudley Trust.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder