STATE OF MICHIGAN

COURT OF APPEALS

BARBARA SUE TRAXLER and NORMA JEAN CASTLE, Successor Co-Trustees of the NORMAN JOHN SINCLAIR TRUST DATED MARCH 27, 1996,

Plaintiffs/Counterdefendants-Appellees,

v

SHIRE ROTHBART,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
March 2, 2004

No. 243492
Oakland Circuit Court
LC No. 01-032868-CH

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Defendant/counterplaintiff ("defendant") appeals as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiffs/counterdefendants ("plaintiffs") for declaratory relief and a denial of defendant's motion for specific performance in this action involving a conveyance of real property. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party establishes that there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). We must consider all the evidence, including pleadings, affidavits, depositions, admissions, and view it in the light most favorable to the non-moving party. *Id*. Questions of statutory and contract interpretation are questions of law, which are also reviewed de novo on appeal. *Sands Appliance Services, Inc v Wilson,* 463 Mich 231, 238; 615 NW2d 241 (2000).

Plaintiffs Barbara Traxler and Norma Castle are the co-trustees of the Norman John Sinclair Trust. Traxler, as co-trustee, signed a purchase agreement to sell real property to defendant, on behalf of the trust. Castle, as co-trustee, was initially unaware of the transaction and refused to cooperate in conveyance of the property. Plaintiffs alleged the contract is void due to the failure to secure Castle's signature as co-trustee, as signatures of both co-trustees are required to bind the trust. Section 7.3 of the trust states, in part:

> Upon the Grantor's death, incapacity, or resignation from the office of Trustee, when I am unable to serve as Trustee or as a co-Trustee on account of incapacity as provided below, or if I fail to select in writing a successor Trustee within 30 days after receipt of knowledge of the then sole Trustee's resignation or refusal to act, the first two of the following, able and willing to act, shall become successor co-Trustees: First, my daughter above named, NORMA JEAN CASTLE. Second, my daughter, BARBARA SUE TRAXLER. If only one named successor is able and willing to act, that successor Trustee may serve as sole successor Trustee.

Defendant interprets the above language as authorizing Traxler to act as sole trustee.

When attempting to resolve conflicts pertaining to the meaning of a trust, a court's primary objective is to determine and give effect to the intent of the settlor. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). The intentions of the settlor are to be carried out as nearly as possible. Intent is ascertained and gauged from the trust document itself at the time of its creation unless there is ambiguity present. *Id.*

We find that the trust language is clear and unambiguous. It is apparent that the grantor intended for his two daughters to serve as co-trustees. Only if one was unwilling to accept the responsibility of a trustee or was or became legally unable to carry out such a responsibility is the other authorized to act as sole trustee. In other words, the grantor did not require that a replacement trustee be appointed. Castle's unwillingness to agree to convey the property to defendant does not equate to an unwillingness to act as a co-trustee.

The other sections of the trust do not support a contrary interpretation. Section 8.3[1] of the trust simply gave any successor trustee all the rights and powers of the first named trustee, which in this case was the grantor himself. This section mirrors the statutory provision to the same effect, MCL 700.7405. The use of the singular term "trustee" in section 8.3 of the trust and others is a stylistic convenience and cannot be read as indicative of the grantor's intent that a co-trustee could act unilaterally. A reviewing court must not confuse style with substance. See *In re Marin*, 198 Mich App 560, 563; 499 NW2d 400 (1993).

Defendant's contention that Castle relinquished her authority by silence and/or inaction, leaving Traxler to serve as sole trustee, also fails. No evidence was ever produced of Castle's written resignation as co-trustee, as required by the trust or in accordance with MCL 555.25, to release Castle from her responsibility. In fact, in her affidavit Castle asserts her initial and continuing ability to serve as co-trustee. And defendant fails to come forward with any documentary evidence to contradict plaintiffs' proofs. Further, the actions of Traxler, in the procurement of a checking account and acting as sole signatory on the account do not support defendant's position because these are merely ministerial acts. Michigan case law has recognized a distinction between the exercise of authority by a trustee from acts that merely

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[1] This section provides, "Any fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by any successor trustee."

facilitate administration and management of a trust. *Nichols v Pospiech,* 289 Mich 324, 334; 286 NW 633 (1939); see also 76 Am Jur 2d § 378, p 373. Because defendant presents no evidence to create a factual dispute regarding whether Traxler was authorized to act as sole trustee or whether Castle had affirmatively relinquished her authority, we find that the trial court properly concluded that the trust did not authorize Traxler to act unilaterally to bind the trust to the purchase agreement contract.

Therefore, because Traxler and Castle are co-trustees, they must act jointly to assert their authority on behalf of the trust. MCL 700.7406(4) states, in relevant part, "Subject to subsections (1) and (3), all other acts and duties shall be performed by both of the trustees if there are 2 or by a majority of the trustees if there are more than 2."[2] This restriction is emphasized in MCL 555.21, which provides, "When the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void." It is clear from the plain language of these statutes that when there are two trustees, both must agree on actions taken on behalf of the trust for any subsequent contract to be valid. This interpretation is supported by the affidavit of plaintiffs' expert.[3]

In addition to MCL 700.7406(4) and MCL 555.21, the validity of the purchase agreement must be construed within the confines of the statute of frauds, MCL 566.101 *et seq*., because the contract sought to convey real property. "[A] contract for the sale of land must, to survive a challenge under the statute of frauds, (1) be in writing and (2) be signed by the seller or someone lawfully authorized by the seller in writing." *Zurcher v Herveat,* 238 Mich App 267, 277; 605 NW2d 329 (1999). As noted above, MCL 700.7406(4) mandates co-trustees act jointly when performing any actions or duties on behalf of a trust. Thus, in order to satisfy the statute of frauds, the purchase agreement had to be signed by both Traxler and Castle, or, at a minimum, with Castle's consent. Accordingly, the purchase agreement is void because it does not meet the statute of frauds requirements or comply with MCL 555.21, as Traxler's unilateral actions are in "contravention" of the trust.

Defendant argues the later enactment of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., "trumps" the statute of frauds because of its more specific nature, and thus, supercedes the effect of any other statute regarding the interpretation of this purchase agreement. It is a well-recognized principle that the Legislature is presumed to be cognizant of all existing statutes when enacting new legislation. *Jenkins v Patel*, 256 Mich App 112, 126; 662 NW2d 453 (2003). Only when conflict exists between two statutes should the one that is more specific to the subject matter prevail. *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). If two statutes lend themselves to interpretations that do not conflict, that construction

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[2] Subsection (1) provides that if the trust expressly allows one trustee to act unilaterally, then that language governs. MCL.7406(1). Subsection (3) involves trustee voting, which is not an issue here. MCL 700.7406(3).

[3] Defendant's argument that plaintiffs' expert's affidavit is inadmissible is without merit. The expert's opinion at trial would be admissible under MRE 702.

should control. *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). The statute of frauds and the Estates and Protected Individuals Code are neither contradictory nor conflicting. MCL 566.106 and MCL 566.108 define the requirements for a conveyance in property. MCL 700.7406(4) merely defines who the party to be charged is when co-trustees are involved, while MCL 555.21 addresses the validity of an agreement if the formalities and requirements of a trust are not adhered to. As such, the statutes are quite capable of consistent and non-conflicting interpretation.

Defendant argues MCL 555.21 is not applicable, as sale of trust property was not outside the scope of the authority of the trustee. However, the trust is clear that Traxler and Castle are to act as co-trustees. The act of one trustee, without having obtained the specific approval or relinquishment of authority of the other, is contrary to the requirements of the trust, and thus, MCL 555.21 is applicable as a "sale, conveyance, or other act of the trustees, in contravention of the trust."

Defendant relies primarily upon MCL 700.7404 to enforce the purchase agreement. Defendant interprets this provision to read that he had no obligation to inquire as to Traxler's actual authority as a trustee and that he is fully protected from Traxler's misrepresentation or misunderstanding of her actual authority. Defendant's reliance is misplaced. The language of MCL 700.7404 indicates a third person is only protected if "the trustee is exceeding a trust power or improperly exercising it." Traxler did not merely exceed her authority as co-trustee. Traxler purported to exercise authority she did not have.

Even if Traxler's actions could be construed as an "improper exercise" of her authority, the protection of MCL 700.7404 only applies to third persons. "Third" is defined as "any outsider or person not a party to the affair or immediately concerned in it" and a "third party" is defined as, "One not a party to an agreement or to a transaction but who may have rights therein." Black's Law Dictionary (6th ed), p 1479. Defendant's status arises from a contractual dispute where defendant is a primary party to that contract. As such, defendant does not qualify as a third person and cannot avail himself of the statute's protection.

Finally, defendant contends the trial court erred in determining the contract was void due to the inability of the plaintiffs to deliver marketable title. We need not address the merits of this issue, having concluded that the purchase agreement is void pursuant to the application of the trust language itself and the dictates of MCL 700.7406(4), MCL 555.12, and the statute of frauds. The contract was unenforceable from its inception. Even if the court did err regarding the issue of marketable title, we affirm a court's correct decision even if it was for the wrong reason. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Accordingly, we find that the trial court properly denied defendant's motion for summary disposition and granted summary disposition in favor of plaintiffs.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly