STATE OF MICHIGAN

COURT OF APPEALS

In re NATHAN GREENBERG TRUST.

ASHLEY TECHNER,

Petitioner-Appellant,

v

EDWARD ROSENBAUM, BARRY GREENBERG, and HELEN GREENBERG,

Respondents-Appellees.

UNPUBLISHED
October 21, 2010

No. 292511
Oakland Probate Court
LC No. 2008-315283-TV

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this probate action, petitioner, Ashley Techner, appeals as of right the trial court's order granting summary disposition for respondents, Edward Rosenbaum, Barry Greenberg, and Helen Greenberg. We affirm.

I. BASIC FACTS

This litigation concerns the meaning of a trust created by Nathan Greenberg (hereinafter, the settlor). The settlor created the trust in 1974 and he amended it numerous times over the years, the final amendment occurring on April 3, 1989. On May 22, 1992, the settlor died. At the time, petitioner, who is the settlor's granddaughter, was twelve years of age.

Upon the settlor's death, the trust called for a division of assets into two separate shares, one a "marital portion" and another a "family portion." The family portion, which is at issue in this appeal, was to include certain assets to be distributed in a manner outlined by the trust. Petitioner was listed in the trust as a beneficiary of the family portion. However, she received no funds at the time of the settlor's death and allegedly was not provided with an accounting.

In 2008, petitioner filed a petition for accounting and alleged that respondents had breached their fiduciary duty to account for the funds. Subsequently, respondents filed a petition of accounting indicating that no funds remained in the family portion to be distributed. Petitioner objected to this accounting, arguing that respondents failed to provide proper documentation. In response, respondents moved for summary disposition under MCR

2.116(C)(8) and (C)(10), arguing that the family portion of the trust had been distributed consistent with terms of the trust, that the family portion was depleted and their accounting was accurate, and asking the trial court to enter an order allowing their accounting. At the motion hearing, the trial court ruled in respondents' favor. It determined that the language of the trust was unambiguous and that the settlor's intent was clear. This appeal followed.

II. STANDARDS OF REVIEW

We review "de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). Although respondents brought their motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), the trial court relied on evidence outside the pleadings and, thus, we consider respondents' motion as based on MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). A motion for summary disposition based on MCR 2.116(C)(10) is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In determining whether the trial court properly granted respondents summary disposition under this subrule, we must consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.*

Further, we review "de novo the language used in wills and trusts as a question of law." *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005). Our review is governed by several well-established principles, which this Court recognized in *In re Estate of Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008):

> In resolving a dispute concerning the meaning of a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor. The intent of the settlor is to be carried out as nearly as possible. This intent is gauged from the trust document itself, unless there is ambiguity. If ambiguity exists, the court must look outside the document in order to carry out the settlor's intent, and may consider the circumstances surrounding the creation of the document and the general rules of construction. The powers and duties of the trustees, and the settlor's intent regarding the purpose of the trust's creation and its operation, are determined by examining the trust instrument. This Court must attempt to construe the instrument so that each word has meaning. [Citations omitted.]

To carry out the drafter's intent, this Court "must read the [trust] as a whole and harmonize all the provisions, if possible, to that intent. Given the complexity of some [trusts], it would be counterproductive for this Court to hyperanalyze and overscrutinize clear, plain language the testator used." *In re Estate of Bem*, 247 Mich App 427, 434; 637 NW2d 506 (2001) (quotation marks omitted).

III. ANALYSIS

At the outset, we reject petitioner's argument that the trial court acted outside its authority in reviewing respondents' motion for summary disposition because it allegedly ignored the standard of review by impermissibly making factual findings and by improperly relying on

extrinsic evidence in interpreting the trust. These arguments are without support in the record and do not provide grounds for reversal. Nothing in the record suggests that the trial court relied on parol evidence in interpreting the settlor's trust. Nor is there any indication in the trial court's ruling that it engaged in impermissible fact finding. Rather, it merely interpreted the language of the trust, which it viewed as unambiguous. "When it is unnecessary to consider extrinsic evidence to interpret a will, as is almost always the case, a probate court's findings are not factual in nature." *In re Estate of Bem*, 247 Mich App at 432-433.

Turning to the language of the settlor's trust, we also disagree with petitioner's contention that the trial court's interpretation was erroneous. Here, Article V of the trust controls the "distribution of income and corpus of the trust estate subsequent to the settlor's death." Section (a) of Article V provides for the "allocation of the trust estate." Pertinent to this appeal is section (a)(2) of Article V, which mandates that the settlor's estate be divided into two separate shares, a family portion and a marital portion. Section (a)(2) then articulates what the family portion shall consist of. It states:

> *The Family Portion shall consist of such amounts of cash or other assets of the Trust Estate* which are includable in the Settlor's gross estate for Federal Estate Tax purposes, and which, when added to the value of all Non-qualifying Property includable in the Settlor's gross estate passing other than by the terms of this Section (a)(2) of Article V, *shall have a value equal to the maximum amount which*, considering the unified credit and any other credits allowable on the Federal Estate Tax return of the settlor's estate pursuant to the provisions of the Internal Revenue Code in effect at the date of the Settlor's death, *will result in no Federal Estate Tax payable by reason of the death of the settlor*. . . . [Emphasis added.]

In other words, the family portion is to include an amount of "cash and assets" that is equal to a value, the maximum amount of which, will not result in the levying of a Federal Estate Tax at the time of the settlor's death. The parties do not dispute that when the settlor passed away in 1992, the maximum allowable amount not subject to taxation under Federal Estate Tax scheme was $600,000. Thus, consistent with the plain language of section (a)(2) of Article V, the family portion could not include an amount more than $600,000.

Section (a)(2) of Article V also designates the particular types of "cash and assets" that shall make-up the family portion, including "non-qualifying property" remaining after the settlor's funeral expenses and other debts are paid, assets not included in the gross estate for tax purposes, and any ownership interest in A. J. Marshall Company (AJM), a Michigan corporation. It provides:

> In allocating such property to the Family Portion, there shall first be allocated thereto any non-qualifying property remaining after payment of the obligations set forth in section (a)(1) of this article V [addressing administration and funeral expenses]. In addition, there shall be included in the Family Portion assets of the Trust Estate which are not included in the gross estate for such tax purposes, if any. *There shall also be included in the family portion all ownership interest, if any, in [AJM], a Michigan Corporation, or successor.* All of the property allocated to or included in the family portion pursuant to the provisions of this

> Section . . . shall be held, managed and disposed of in accordance with the provisions of Section (c) of this Article V. [Emphasis added.]

This section does not designate an order of priority by which these assets must be included in the family portion. However, section (c) of Article (V), titled, "Family Portion," controls how the family portion shall be held, managed, and disposed of and provides in relevant part:

> (c)(1) The Trustees *shall distribute to the Settlor's son*, BARRY S. GREENBERG, *all ownership interests, if any in [AJM]*, or successor, free and discharged from the Trusts thereof. . . .
>
> (c)(2) The *balance of the property of the Trust Estate* required to be held, managed and disposed of pursuant to this Section shall be divided into equal shares, five (5) for the Settlor's son, BARRY S. GREENBERG, five (5) for the Settlor's daugher, ESTHER S. KAPLAN, four (4) for the Settlor's granddaughter, ASHLEY L. GREENBERG, four (4) for the Settlor's granddaughter, RACHEL N. GREENBERG, and two (2) for the Settlor's grandson, STEVEN GRANITZ. . . . [Emphasis added.]

Sections (c)(1) and (c)(2) imply that AJM must be included in the family portion before other assets are included because it mandates that AJM be distributed to respondent Barry, with the "balance of the property" to be disposed of in five equal shares. Further, reading sections (c)(1) and (c)(2) in conjunction with section (a)(2), reveals that the Settlor intended to fund the family portion first with the AJM ownership interest, and then with cash and remaining assets, up to the maximum amount that would not result in a levying of a federal estate tax at the time of the settlor's death. Thus, consistent with the trial court's interpretation, we are of the opinion that the settlor intended the trustees to fund the family portion first with the settlor's interest in AJM and then with other cash and assets, which in sum shall not consist of more than $600,000. The trial court did not err in its interpretation of the trust.

Petitioner, however, argues that the trust instructs that the family portion "shall also include" the AJM ownership interest, only *after* $600,000 of cash or other assets were allocated to the family portion. In support of this argument, petitioner asserts that the trial court conflated the meaning of the words "allocated" and "included," and that the trial court's interpretation renders nugatory the trust's provisions that create individual beneficiary trusts. These arguments are unavailing.

First, the distinction between the definition of "allocate" and the definition of "include" as petitioner defines them, does not suggest that petitioner's interpretation of the trust is correct. Those words simply have no relevance to the issue of the order in which assets must be included in the family portion. Neither term denotes a sequential relationship.

Second, petitioner's related argument, that the trial court's interpretation renders nugatory the trust's provisions related to the creation of individual beneficiary trusts, is simply untrue. The language of the trust, when read as a whole, indicates that the creation of individual beneficiary trusts funded by the family portion, was contingent upon a "balance" remaining in the family portion after distribution of AJM to respondent Barry. Thus, because at the time of the settlor's death, the value of AJM was such that it completely filled the family portion, all

funds were distributed to respondent Barry and no other individual beneficiary trusts were created. Thus, the individual trust provisions, at the time of the settlor's death, remained inoperative. Petitioner fails to recognize that her interest in the family portion was a contingent interest. Thus, the language creating individual trusts is not meaningless; rather, it was simply rendered ineffective due to the factual circumstances at the time of the settlor's death.[1]

Finally, in light of the trial court's correct interpretation of the settlor's trust, we are also of the view that the trial court did not err by allowing respondents' petition of accounting. As noted, under the circumstances, the family portion was depleted after distribution of AJM to respondent Barry and no funds from the family portion were available to fund individual trusts. No evidence has been presented showing otherwise and, indeed, the parties do not dispute the value of AJM at the time of the settlor's death. The trial court did not err by granting summary disposition in respondents' favor.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

[1] Moreover, we note that subsequent distributions may still be made consistent with section (c) of Article V. Section (a)(3) of Article V provides that all remaining property not included in the family portion shall be allocated to the marital portion and "shall be held, managed, and disposed of in accordance with the provisions of section (b) of this Article V. . . ." Section (b) of Article V indicates that upon the settlor's wife's death, a portion of her marital share shall be allocated to the family portion and disposed of in accordance with section (c) of Article V. Thus, distributions consistent with section (c) of Article V may occur upon the death of the settlor's wife.