STATE OF MICHIGAN

COURT OF APPEALS

In re LAKESIDE TRUST NUMBER 1.

JEFFREY L. ALEXANDER,

Appellant,

v

LORI E. ALEXANDER, trustee of LAKESIDE TRUST NUMBER 1,

Appellee.

UNPUBLISHED
October 15, 2020

No. 351047
Emmet Probate Court
LC No. 19-013876-TV

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Appellant, Jeffrey L. Alexander, appeals by right the probate court's order denying his motion for reconsideration of the trial court's order granting summary disposition under MCR 2.116(C)(8) to appellee, Lori Alexander, and granting sanctions against appellant. We affirm.

I. PERTINENT FACTS

This case concerns a dispute regarding the disbursement of Lakeside Trust Number 1 ("Lakeside Trust"), a trust created by appellee in relation to her mother's trust, the Ethelwyn Jean Alexander Revocable Trust ("EJA Trust"). Ethelwyn Jean Alexander, grantor and settlor of the EJA Trust, in Article Fourteen of the Fifth Amendment to the EJA Trust, identified Fifth Third Bank & Trust Company (Fifth Third) as Ethelwyn's successor trustee. Ethelwyn amended her trust in 2012. In the Sixth Amendment to the EJA Trust, she directed her successor trustee upon her death to divide the balance of the EJA Trust estate into equal shares to be distributed to her children: appellant, appellee, Jon A. Alexander, Jerrold C. Alexander, and Mari A. Pettis. Ethelwyn further directed the successor trustee to place Jerrold's share, if he survived Ethelwyn, into a separate trust for his benefit. The EJA amendment in relevant part directed:

> The Trustee of Jerrold's trust shall invest all the trust assets in a federally insured financial institution and disburse to Jerrold such portions of interest and principal as the Trustee, in their sole and absolute discretion, determines. The Trustee is further authorized to distribute nothing to Jerrold if the Trustee determines, in their sole and absolute discretion, that it is not in Jerrold's best interest to receive any such funds, and in such case, the Trustee is authorized to terminate the trust and disburse all trust assets, whether it be principal, interest, or income, to my surviving children at the time Jerrold's trust is terminated, share and share alike.
>
> In the event there are assets in Jerrold's trust at the time of Jerrold's death, the Trustee shall disburse all remaining assets held in trust to my surviving children at the time of Jerrold's death, share and share alike. I nominate and appoint my daughter, Lori E. Alexander, as the Trustee of Jerrold's trust and in the event that she is unable or unwilling to accept such appointment, or resigns after having accepted such appointment, I nominate my daughter, Mari A. Pettis, to act as the Trustee.
>
> I hereby grant to the Trustee all the authority available to Trustee as permitted by the Michigan Estate and Protected Individuals Code or any subsequent amendment thereto, specifically including the right to convey, transfer or sell assets, including real estate.

Ethelwyn died in March 2013. The record is not clear whether Fifth Third served as Ethelwyn's successor trustee. In June 2013, however, appellee created the Lakeside Trust for the benefit of Jerrold, identifying herself as grantor, settlor, and trustee. The Lakeside Trust generally complied with Ethelwyn's directive to create the beneficiary trust for Jerrold. Appellee amended the Lakeside Trust in November 2017 to provide:

> Upon the death of JERROLD C. ALEXANDER, this trust is to be terminated and distributed to surviving children of ETHELWYN JEAN ALEXANDER. It is JERROLD C. ALEXANDER'S desire that the trust's 1/3 interest in Petett, LLC, go to LORI E. ALEXANDER and MARI A. PETTIS. JON A. ALEXANDER and JEFFREY L. ALEXANDER shall receive an equal cash value of the interest of Petett, LLC. The value of assets of Petett, LLC shall be determined by an appraisal of the business prior to distribution. If any beneficiary disagrees with the appraised value, that beneficiary can do his or her own appraisal at his or her expense. They shall not receive the shares themselves, only the equivalent cash amount of the interest in Petett, LLC. The remaining assets shall be distributed equally among the surviving children of ETHELWYN JEAN ALEXANDER.

Petett, LLC had been formed in September 2015 by appellee and Pettis. The record does not reveal when or how the Lakeside Trust obtained a 1/3 interest in Petett, LLC. Jerrold died in January 2018.

In May 2019, appellant petitioned the trial court to: (a) remove appellee as successor trustee, (b) supervise the administration of the trust, (c) order an accounting, (d) appoint an

independent successor trustee, (e) order payment of appellant's costs and attorney fees, and (f) grant legal and equitable relief. In his petition, appellant alleged that appellee had failed to follow the terms of the EJA Trust and Lakeside Trust regarding disbursement. Appellant asserted that he received $66,878.67, but remained entitled to receive an additional $50,783.53.

Appellee moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief may be granted) on the grounds that the law did not support appellant's claims because the Lakeside Trust remained revocable and her sole duty as trustee was owed exclusively to the settlor, herself, under MCL 700.7603(1). Appellee asserted that the Lakeside Trust would become irrevocable only upon the death of appellee. Appellee argued that the Lakeside Trust amendment was the "desire" of Jerrold C. Alexander, but that such language relied upon by appellant did not create an enforceable "bequest" and that appellant's claims failed as a matter of law. Appellee also argued that MCL 700.7814 did not require her to provide appellant with documentation of the trust's income and expenses because MCL 700.7603(1) does not apply to revocable trusts. In response, appellant argued that both the Lakeside Trust and the EJA Trust were irrevocable. Appellant argued that appellee had to follow the terms of the trusts and that MCL 700.7603 was inapplicable.

The trial court found that "no factual development could possibly justify recovery" and granted appellee's motion for summary disposition. The trial court found that, if appellee as the trustee had the authority to amend the Lakeside Trust, then she had the "inherent authority of the settlor to distribute trust assets contrary to their terms as set forth in [MCL 700.7808]." The trial court also found that appellee made the distribution appropriately under both the EJA Trust and the Lakeside Trust and concluded:

> As I indicated whether we follow the strict compliance with Ethelwyn's trust that gets us to a quarter—a 25% distribution to each of the surviving siblings or whether we follow [appellee's] argument that—that [appellee] is the settlor and therefore had authority to distribute contrary to the specific terms of the trust amendment, her proposed final distribution of the trust is the same as Ethelwyn's which could be a quarter percent—I'm sorry, 25% interest to each of the four children.

Appellant sought reconsideration and argued that, although the trial court found that the trustee was bound to follow the instructions of the EJA Trust and distribute the Lakeside Trust equally, appellee had not equally distributed the Lakeside Trust. Appellee responded that appellant had not established his entitlement to reconsideration because appellant had not demonstrated that the court or the partiers were misled by a palpable error and that a different disposition of the motion must result from such error. Appellee also argued that under MCR 1.109(E)(6) she was entitled to reasonable expenses incurred for responding to the motion for reconsideration because the motion did not demonstrate palpable error. The trial court concluded that appellant's motion for reconsideration was not well-grounded in fact or law and failed to meet the requirements of MCR 2.119(F). Consequently, the trial court awarded appellee $375 in attorney fees. The trial court ruled that appellant's receipt of $66,878.67, amounted to all to which appellant was entitled.

II. STANDARDS OF REVIEW

We review de novo a trial court's grant of a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). In reviewing a motion under MCR 2.116(C)(8), the trial court must accept all factual allegations in the complaint as true and decide the motion on the pleadings alone. *Id*. at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. We also review de novo a trial court's interpretation of a trust agreement. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 693; 880 NW2d 269 (2015).

III. ANALYSIS

Appellant argues that the trial court erred when it granted summary disposition in favor of appellee. We disagree.

"A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust." *In re Estate of Herbert Trust*, 303 Mich App 456, 458; 844 NW2d 163 (2013). In *Bill & Dena Brown Trust*, 312 Mich App at 693-694 (citations omitted), this Court explained:

> The settlor's intent is ascertained by looking to the words of the trust itself. If the trust's terms are ambiguous, a court must look outside the document to determine the settlor's intent, and it may consider the circumstances surrounding the creation of the trust and the general rules of construction. The fact that litigants disagree regarding the meaning of a trust, however, does not mean that it is ambiguous. A court must also read a trust as a whole, harmonizing its terms with the intent expressed, if possible. In sum, a court must enforce the plain and unambiguous terms of a trust as they are written.

The Sixth Amendment to the EJA Trust required that Ethelwyn's successor trustee create a trust for the benefit of Jerrold with the amount of his share in the EJA Trust to serve as the corpus of that trust to be invested in a federally insured financial institution to be disbursed to him in the discretion of the trustee. The Sixth Amendment to the EJA Trust further directed that, at the time of Jerrold's death, the trustee of the trust created for Jerrold's benefit "shall disburse all remaining assets held in trust to [Ethelwyn's] surviving children at the time of Jerrold's death, share and share alike."

The record reflects that appellee created the Lakeside Trust on June 19, 2013, to fulfill the directive set forth in the EJA Trust. She identified herself as the grantor and settlor of the Lakeside Trust, appointed herself as trustee, and reserved for herself broad discretionary rights to control the Lakeside Trust's assets and to revoke the trust in her sole discretion. Paragraph 4 specified the purpose of the trust which language mirrored the provisions of the EJA Trust that directed Jerrold's trust's trustee to make discretionary disbursement of trust assets to Jerrold during his lifetime, and

upon his death that the trust would terminate, whereupon the trust's assets would be disbursed equally to Ethelwyn's surviving children.

For reasons undisclosed in the record, about two months before Jerrold's death, appellee amended the Lakeside Trust on November 9, 2017, to provide:

> Upon the death of JERROLD C. ALEXANDER, this trust is to be terminated and distributed to surviving children of ETHELWYN JEAN ALEXANDER. It is JERROLD C. ALEXANDER'S desire that the trust's 1/3 interest in Petett, LLC, go to LORI E. ALEXANDER and MARI A. PETTIS. JON A. ALEXANDER and JEFFREY L. ALEXANDER shall receive an equal cash value of the interest of Petett, LLC. The value of assets of Petett, LLC shall be determined by an appraisal of the business prior to distribution. If any beneficiary disagrees with the appraised value, that beneficiary can do his or her own appraisal at his or her expense. They shall not receive the shares themselves, only the equivalent cash amount of the interest in Petett, LLC. The remaining assets shall be distributed equally among the surviving children of ETHELWYN JEAN ALEXANDER.

The record does not indicate when and how the Lakeside Trust obtained a 1/3 interest in Petett, LLC. Nevertheless, the amendment changed the terms of the Lakeside Trust respecting how and what the contingent beneficiaries would receive upon termination of the Lakeside Trust in the event of Jerrold's death.

The terms of the trust prevail over any provision of the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., with certain enumerated exceptions. MCL 700.7105. "When interpreting the meaning of a trust, this Court must ascertain and abide by the intent of the settlor. We must look to the words of the trust itself." *In re Miller Osborne Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013) (citation omitted). "[A] court must enforce the plain and unambiguous terms of a trust as they are written." *Bill & Dena Brown Trust*, 312 Mich App at 694.

MCL 700.7603(1) provides in relevant part:

> while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. This subsection does not apply to either of the following:
>
> (a) A trust created by the exercise of a power described in section 7820a.

MCL 700.7820a which governs irrevocable trusts that include discretionary trust provisions states in relevant part:

> (1) If an irrevocable trust includes a discretionary trust provision, the trustee of the trust may, unless the terms of the first trust expressly provide otherwise, distribute by written instrument all or part of the property subject to that provision to the trustee of a second trust, provided that both of the following conditions are satisfied:

(a) The terms of the second trust do not materially change the beneficial interests of the beneficiaries of the first trust.

* * *

(5) The trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be created by the trustee of the first trust, and the governing instrument may be the instrument that exercises the power described in subsection (1).

* * *

(9) This section shall not abridge the right of a trustee who has a power to distribute trust property in further trust under the terms of a trust instrument, any other statute, or the common law. The provisions of this section shall not abridge any right of a trustee who has a power to amend or terminate a trust.

(10) As used in this section:

(a) "First trust" means an irrevocable trust that has a discretionary trust provision that is exercised as described in subsection (1).

The EJA Trust became irrevocable upon Ethelwyn's death in March 2013. Under the Sixth Amendment to the EJA Trust, Ethelwyn's successor trustee was required to place Jerrold's share of her trust into a separate trust for his benefit, and she appointed appellee as the trustee of Jerrold's trust. The plain language of the EJA Trust directed the creation of a beneficiary trust subject to the EJA Trust's provisions. The initial Lakeside Trust document respecting distribution upon Jerrold's death provided as directed by the EJA Trust that Ethelwyn's surviving children would receive equal distributions of the assets of the Lakeside Trust.

The Account of Fiduciary prepared by appellee, as the trustee for the Lakeside Trust, for the period from January 19, 2018 to July 31, 2018, stated that the remaining assets in the Lakeside Trust amounted to $277,514.69. The record indicates that appellee, as the trustee for the Lakeside Trust, also prepared an Inventory dated August 24, 2018, that specified the assets of the Lakeside Trust and their values as of that date. The inventory described the Petett, LLC's assets as consisting of personal and real property having an average value of $540,000, plus deposited funds in bank checking and savings accounts as of January 31, 2018, totaling $19,761.18, for a total asset value of $559,761.18. The inventory specified that the Lakeside Trust held a 1/3 interest in the listed assets of the Petett, LLC in the amount of $186,587.06. The inventory further identified the assets of the Lakeside Trust, other than its 1/3 interest in the Petett, LLC, consisting of bank checking and savings accounts plus a certificate of deposit totaling $90,308.18 as of January 19, 2018. The total assets held by the Lakeside Trust, therefore, equaled $276,895.24 as of August 24, 2018.

Four of Ethelwyn's children remained alive at the time of Jerrold's death which terminated the Lakeside Trust requiring the distribution of its assets. According to the terms of the EJA Trust, the assets of the Lakeside Trust were to be disbursed in equal amounts to Ethelwyn's four surviving

children. Distribution of the Lakeside Trust's assets totaling $276,895.24 equally between Ethelwyn's four surviving children would have required that each child receive $69,223.81.

Appellee, as the trustee for the Lakeside Trust, however, amended the Lakeside Trust to provide for a different distribution of the Lakeside Trust's assets from that specified under the terms of the EJA Trust. The amended terms of the Lakeside Trust stated that the Lakeside Trust's 1/3 interest in Petett, LLC must go to appellee and Pettis, but directed further that appellant and Jon "shall receive an equal cash value of the interest of Petett, LLC" to be determined by an appraisal of the value of its assets.[1] The amendment additionally provided: "They shall not receive the shares themselves, only the equivalent cash amount of the interest in Petett, LLC." The amendment concluded by specifying that the remaining assets of the Lakeside Trust "shall be distributed equally among the surviving children of" Ethelwyn.

The plain language of the amendment to the Lakeside Trust requires that the Lakeside Trust's 1/3 interest in Petett, LLC be conveyed to appellee and Pettis. The amendment, however, requires payment to appellant and Jon in equal amounts the cash equivalent of the value of that Lakeside Trust asset. The formula specified by the amendment implies that, upon the termination of the Lakeside Trust, appellee and Pettis obtain full ownership of all of Petett, LLC's assets including the 1/3 interest held by the Lakeside Trust upon payment of the cash equivalent of the Lakeside Trust's 1/3 interest in Petett, LLC to appellant and Jon. Thus, plain language of the amendment to the Lakeside Trust states that the Lakeside Trust's 1/3 interest in the Petett, LLC in the amount of $186,587.06 be divided equally between appellant and Jon. Division by two of that amount would equal $93,293.53 each. Under the terms of the amendment, the remaining assets of the Lakeside Trust which equaled $90,308.18, would be distributed equally to Ethelwyn's four surviving children. Division of the remaining assets of the Lakeside Trust by four equals $22,577.04 to be distributed to each surviving child. Therefore, under the terms of the Lakeside Trust as amended by appellee, appellant and Jon would receive distributions of $115,870.58 each upon termination of the Lakeside Trust. Under the terms of the Lakeside Trust as amended by appellee, appellee and Pettis were entitled to obtain the Lakeside Trust's 1/3 interest in the real and personal property and bank holdings of the Petett, LLC, and thereby own the LLC free and clear of any interest of the Lakeside Trust in the LLC's assets, plus distribution of $22,577.04 each from the remaining assets of the Lakeside Trust.

Appellant argues that the trial court erred by not strictly enforcing the terms of the amended Lakeside Trust which he concludes entitled him to receive about $117,000. Appellee argues that as the trustee of the Lakeside Trust, a revocable trust during her lifetime because she constitutes the settlor of the trust, she could follow the settlor's direction contrary to the terms of the trust's distribution provisions. In other words, despite the Lakeside Trust's amendment's requirements for distribution, she could distribute the trusts assets in the manor that she as settlor decided.

[1] Although the record contains the Account of Fiduciary and the Inventory prepared by appellee, as the trustee for the Lakeside Trust, the record does not indicate that an appraisal was performed to determine the value of the Petett, LLC before the distribution. Nevertheless, appellant does not appear to dispute the values ascribed to the LLC as determined by appellee and set forth in the Account of Fiduciary and the Inventory.

The record reflects that, under appellee's calculation of the distribution of the Lakeside Trust's assets, appellant and Jon received distributions each of $66,878.67, and appellee and Pettis receive $90,000 minus cash payments of $23,121.33 to appellant and Jon which results in appellee and Pettis each receiving $66,878.67.

The trial court declined to apply and enforce the amendment to the Lakeside Trust. Although the trial court did not fully articulate its rationale, the record reflects that it correctly understood that the EJA Trust, as the primary trust instrument that specified the equal distribution of the trust assets to each of Ethelwyn's surviving children and required the creation of a beneficiary trust with the same specific distribution terms, controlled the beneficiary trust as required under MCL 700.7820a(1)(a) which prohibits the terms of the second trust, the beneficiary trust, from materially changing the beneficial interests of the beneficiaries of the first trust. The trial court recognized that the Lakeside Trust held assets with a determinable total value. The trial court also correctly applied that law which required enforcement of the terms of the EJA Trust which required distribution of the value of the Lakeside Trust in equal amounts to Ethelwyn's surviving children. The trial court explained that the undisputed value of the Lakeside Trust at the time of its termination amounted to approximately $277,000, which when divided by four approximately equaled the amount appellee distributed minus the $10,000 certificate of deposit that remained deposited until its maturity date. The trial court confirmed that, upon maturity of the certificate of deposit, each of Ethelwyn's surviving children will receive an additional equal distribution of the proceeds which amounts to $2,500. When added to the amount already distributed to each of Ethelwyn's surviving children, each child will receive a total of $69,378.67. That amount comports with the directive of the EJA Trust.

Appellant's argument lacks merit because application and enforcement of the amendment to the Lakeside Trust would have violated MCL 700.1820a by materially changing the beneficial interests of the beneficiaries of the EJA Trust, the terms of which controlled the final distribution. Appellant and Jon are simply not entitled to each receive $117,000, i.e., $234,000 of the Lakeside Trust's assets totaling $276,895.24. Similarly, we find no merit to appellee's arguments because she had the obligation to comply with the terms of the EJA Trust which controlled the beneficiary trust and established the beneficial interests of the beneficiaries which could not be materially changed by the Lakeside Trust in the manner of her amendment to it. Nevertheless, appellee correctly distributed the assets of the Lakeside Trust. The trial court, therefore, did not err by granting appellee summary disposition. Appellant failed to state a claim upon which relief may be granted. Further, the trial court did not err by denying appellant's motion for reconsideration which made a legally defective argument and failed to demonstrate that the trial court committed a palpable error requiring a different disposition of the case. Because appellant's motion for reconsideration lacked merit, the trial court did not clearly err by awarding appellee costs and attorney fees.

Affirmed.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford