

STATE OF MICHIGAN
COURT OF APPEALS

In re LILLIAN M. FAULHABER Trust.

JON BORMAN Trustee for the LILLIAN M.
FAULHABER Trust,

UNPUBLISHED
October 22, 2009

Petitioner-Appellee,

v

No. 283701
Mason Probate Court
LC No. 07-000160-TV

JEANNE CERISANO,

Respondent-Appellant,

and

ADRIENNE CUTSINGER-BORMAN,

Respondent.

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Respondent Jeanne Cerisano appeals as of right the probate court's order appointing petitioner Jon Borman as successor trustee of the Lillian M. Faulhaber Trust. We conclude that the trust document was ambiguous and, therefore, the probate court did not err in considering extrinsic evidence. Accordingly, we affirm.

In 1998, Lillian Faulhaber created the Lillian M. Faulhaber Trust (the Trust). The Trust agreement contained the following successor trustee provision:

The Grantor is the Primary Trustee hereunder and OLD KENT BANK, of Kalamazoo, Michigan, is the Successor Trustee. On the death, resignation, physical incapacity (as determined by the Primary Trustee) or mental incapacity or incompetency (as determined in writing by two physicians, one of whom shall be such Primary Trustee's personal physician, if possible), the Successor Trustee shall thereupon and without the requirement for any other act by the Primary Trustee or by the Grantor, become the sole acting Trustee. The title to the Trust Estate shall automatically, without the requirement of any further act whatsoever,

vest forthwith in Successor Trustee without any additional action or permission of any kind from the Grantor or from the Primary Trustee.

It is undisputed that Old Kent Bank and Fifth Third Bank merged and that Old Kent Bank is no longer in existence.

In July 2007, Borman moved the probate court to appoint him successor trustee of the Trust. He presented the trial court with a January 2006 letter from Fifth Third Bank, in which the bank informed the parties that it was unwilling to act as successor trustee. He also presented the trial court with letters from two physicians, both of which stated that Faulhaber suffered from Alzheimer's disease. Cerisano opposed Borman's motion. She presented the court with a July 2007 letter from Fifth Third Bank, in which the bank indicated its willingness to act as successor trustee as long as certain conditions were met, and she requested that the probate court appoint Fifth Third Bank as successor trustee.¹ According to Cerisano, the probate court was required to appoint Fifth Third Bank as successor trustee because the Trust agreement was unambiguous that Old Kent Bank, and thereby its successor Fifth Third Bank, was the successor trustee of the Trust.

The trial court held that the Trust agreement was ambiguous because Faulhaber wanted "Old Kent Bank, not Fifth Third" to be successor trustee. After considering the financial interests of the Trust, the trial court appointed Borman as successor trustee.

On appeal, Cerisano argues that the probate court erred in considering extrinsic evidence in appointing Borman successor trustee because the Trust agreement was unambiguous that Faulhaber intended Fifth Third Bank, as the corporate successor to Old Kent Bank, to be successor trustee. We disagree.

An appeal from a decision of the probate court is on the record, not de novo. MCL 600.866(1); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). Thus, we review a probate court's factual findings for clear error and its dispositional rulings for an abuse of discretion. *Id.* However, we review de novo as a question of law the language of a trust agreement. *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005); see also *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001).

"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." *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). Absent an ambiguity, the intention of the settlor is the intention derived from the plain language of the trust agreement. *In re Reisman Estate*, *supra* at 527; *In re*

¹ On appeal, Cerisano incorrectly asserts that the January 2006 and July 2007 letters sent by Fifth Third Bank were not part of the lower court record. The January 2006 declination letter was attached as an exhibit to Borman's motion to be appointed successor trustee. The July 2007 conditional acceptance letter was attached as an exhibit to Cerisano's motion to have Fifth Third Bank appointed successor trustee.

Woodworth Trust, 196 Mich App 326, 327; 492 NW2d 818 (1992). Where ambiguity in the trust agreement is found, a court must look outside the agreement in order to determine and carry out the settlor's intent. *In re Kostin Estate*, *supra* at 53.

There are two types of ambiguities, patent and latent. *In re Woodworth Trust*, *supra* at 327-328. "A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." *Id.* "A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning." *Id.* at 328. A court may consider extrinsic evidence in determining the existence of a latent ambiguity. *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995).

The Trust agreement contains no patent ambiguity; there is no defective, obscure, or insensible language. It unambiguously named Old Kent Bank as successor trustee. However, the extrinsic fact that Old Kent Bank is no longer in existence creates the possibility of more than one meaning: the named successor trustee, Old Kent Bank, is not available, or the successor trustee is Fifth Third Bank, the successor of Old Kent Bank. There is no language in the Trust agreement to establish that Faulhaber intended for a corporate successor of Old Kent Bank to be named successor trustee. The Trust agreement is simply silent as to what Faulhaber intended if Old Kent Bank was subsumed by another corporate entity. Accordingly, we agree with the trial court that the Trust agreement was ambiguous regarding whether Faulhaber intended Fifth Third Bank to be successor trustee.² Because the Trust agreement was ambiguous, the trial court did not err in considering extrinsic evidence in determining whether to appoint Borman or Fifth Third Bank as successor trustee. *In re Kostin Estate*, *supra* at 53.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

² We are not adopting a broad rule that "every time Bank A merges into Bank B that each Trust held by Bank A can be reviewed by the Court to appoint a new Trustee because there is an ambiguity in the Trust document" or that "every Trust agreement in the State which named 'Old Kent Bank' as a Trustee is now ambiguous." Before a trust agreement can be declared to be ambiguous, the language used in the agreement must be examined. We hold only that, after examining the particular language of the Trust agreement, the agreement establishing the Lillian M. Faulhaber Trust is ambiguous.

Several reasons exist for why a settlor may name a particular financial institution as trustee of a trust. By carefully drafting the trust agreement, the settlor can express his or her intent regarding who should be trustee if the financial institution falls out of existence after merging with another bank.