S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

In Re Estate of ISABELLE SKAFF.

STATE OF MICHIGAN TREASURER,

Appellant,

v

ISABELLE SKAFF TRUST, THOMAS MARTIN, and JP MORGAN CHASE BANK, N.A.,

Appellees.

UNPUBLISHED
January 4, 2011

No. 291306
Oakland Probate Court
LC No. 2008-316701-TV

STATE TREASURER,

Plaintiff-Appellant,

v

TOM D. MARTIN a/k/a THOMAS DOUGLAS MARTIN #189334, JP MORGAN CHASE BANK, N.A., TRUSTEE, and CAMIE RIGG,

Defendants-Appellees.

No. 294072
Wayne Circuit Court
LC No. 08-104154-CZ

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

In Docket No. 291306, the Treasurer of the State of Michigan ("the Treasurer") appeals as of right the Oakland Probate Court's determination that the Treasurer could not invade a trust, which was set up for the benefit of Thomas Martin, because it was a discretionary trust. Pursuant to the State Correctional Facility Reimbursement Act ("SCFRA"), MCL 800.401, *et seq.*, the Treasurer was attempting to gain access to the trust's assets in order to satisfy the costs incurred for the incarceration of Martin.

In Docket No. 294072, the Treasurer appeals as of right an order from the Wayne Circuit Court that essentially adopted the Oakland Probate Court's prior determinations, primarily that the Treasurer could not invade the trust's assets because Martin had no ascertainable interest in the trust while he was incarcerated, on probation, or on parole.

We affirm in both instances.

I. DOCKET NO. 291306

The Treasurer argues that the trust was not a discretionary trust. We disagree. The construction of a trust is a question of law that is reviewed de novo. *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

Under the SCFRA, the state is entitled to attach a prisoner's assets in order to reimburse the state for the cost of imprisonment. MCL 800.403; *State Treasurer v Sprague*, 284 Mich App 235, 237; 772 NW2d 452 (2009). Where the beneficiary of a trust is entitled to receive an ascertainable portion of the income or principal, creditors can, in general, reach the beneficiary's interest.[1] *Miller v Dep't of Mental Health*, 432 Mich 426, 430; 442 NW2d 617 (1989). Likewise, "creditors cannot reach a beneficiary's interest in a discretionary trust because of the nature of the beneficiary's interest." *Id.* The Supreme Court explained that, since the beneficiary's receipt of any funds is dependent upon the trustee's exercise of discretion, the beneficiary has no ascertainable interest in the trust's assets. *Id.* at 430-431.

Here, the trust describes the duties of the trustee as follows:

> The Trustee may distribute such amounts of the income and principal from the trust property and estate as the Trustee, in its sole and uncontrolled discretion may deem to be in the best interest of the beneficiary, for his support, maintenance, education, or in the event of any emergency such as illness or financial distress.

Nothing in this section requires the trustee to make any distributions to the beneficiary. Clearly, the text purports to establish a discretionary trust through the use of the words, "sole and uncontrolled discretion" and "may."

However, even though a trust uses verbiage seemingly vesting the trustee with absolute, unfettered discretion, if the remainder of the trust establishes that either (1) the trustee does not have the power to refuse to apply the trust funds for the benefit of the beneficiary or (2) the beneficiary is ultimately entitled to the whole or part of the corpus, then the trust cannot be considered a discretionary trust. *Coverston v Kellogg*, 136 Mich App 504, 509; 357 NW2d 705 (1984).

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[1] The exception is when the trust is subject to a spendthrift clause, but when the United States or a state is the creditor, this exception does not apply. *Miller*, 432 Mich at 431. Thus, because the State of Michigan is the one seeking the trust's assets, the fact that there is a spendthrift clause in the instant trust is of no consequence.

The Treasurer argues that, because the settlor gave Martin a right to withdrawals once he reached 35 years of age, the trustee cannot be said to have "sole and uncontrolled discretion," thereby destroying the notion that the trust is a discretionary trust. This argument, however, fails to adequately address the suspension clause that exists:

> However, if THOMAS MARTIN should be incarcerated during the time of his right to withdraw from the trust, his right to withdraw shall be suspended until he is no longer incarcerated and no longer on probation.

Clearly, while Martin is incarcerated, he has no right to any of the trust's assets. The trustee has absolute discretion in providing funds for Martin's benefit and Martin, himself, is prohibited from withdrawing any funds.

The Treasurer further argues that, similar to *Coverston*, Martin has an "ultimate right" to the trust assets because of his ability to withdraw funds after reaching an age of 35 years. This argument is not persuasive. The *Coverston* Court found that the *Coverston* beneficiary "will ultimately receive the whole of the trust property," with "only the manner of distribution and time for distribution" being left to the trustees' discretion. *Id*. at 510. That scenario is easily distinguishable from the instant case. Here, Martin is not guaranteed to receive the whole of the trust or any portion of it. Martin could have died while incarcerated, which means he never would have been able to invoke the trust's distribution clause. As further support that Martin had no ascertainable rights to the trust's assets, Martin had no power over how the trust's assets were to be distributed after his death.[2] The trust provides that, in the event of Martin's death, the assets will go to any surviving issue of Martin, and if there is none, then to two other named individuals. Thus, it is clear that, unlike the beneficiary in *Coverston*, Martin is not guaranteed to ultimately receive any portion of the trust's assets.

Therefore, at the time of the probate court hearing, Martin did not have an ascertainable interest in the trust. The trustee had unfettered discretion to pay on behalf of Martin's benefit, and Martin had no ultimate right to any of the trust's funds. Accordingly, the trust can be categorized as a discretionary trust, and the probate court did not err when it made the same determination.

The Treasurer next argues that the trust's suspension clause is void because it is against public policy. We disagree. Whether a clause in a trust is against public policy is a question of law that is reviewed de novo. See *In re Griffin Trust*, 281 Mich App 532, 536-539; 760 NW2d 318 (2008), rev'd on other grounds 483 Mich 1031 (2009).

Clauses of trust agreements are not enforceable if they are against public policy. *Id*. at 536. "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." *Skutt v City of Grand Rapids*, 275 Mich 258, 265; 266 NW 344 (1936). There is no statute regarding the enforceability of clauses that suspend a beneficiary's ability to withdraw

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[2] This, again, is distinguishable from *Coverston*, where the beneficiary was expressly given the power to dispose of the trust's remaining balance via will. *Coverston*, 136 Mich App at 510.

assets from a trust while incarcerated, nor is there any case law addressing this particular issue. Instead, the Treasurer argues that, since the SCFRA mandates that a prisoner who has assets pay for the costs of his incarceration, any attempt to circumvent this reimbursement is violative of the statute and, consequently, against public policy.

The Treasurer's argument is flawed. First, the Treasurer's reliance upon *In re Griffin Trust* is misplaced. In *In re Griffin Trust*, this Court decided that, because a statute, MCL 700.2518, prohibited *in terrorem* clauses in wills, an *in terrorem* clause in a trust was necessarily against public policy. *In re Griffin Trust*, 281 Mich App at 539. However, after the Treasurer submitted its brief to this Court in this case, the Supreme Court reversed *In re Griffin Trust*, adopting the dissenting judge's opinion, which read in part, "[C]ourts must proceed with caution in determining what exactly constitutes Michigan's public policy and not merely impose its [sic] belief of what public policy should be." *Id*. at 543 (Zahra, J., dissenting), citing *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 722; 706 NW2d 426 (2005). The dissenting Court of Appeals judge and the Supreme Court agreed that, because the statute only addressed *in terrorem* clauses in wills, the public policy of Michigan cannot be said to prohibit such clauses in trusts. *In re Griffin Trust*, 281 Mich App at 543 (Zahra, J., dissenting), adopted by 483 Mich 1031 (2009). Thus, *In re Griffin Trust* stands for the proposition that if the case law does not establish a public policy violation, then a statute must explicitly prohibit the challenged clause. And, as noted earlier, there is no statute expressly prohibiting suspension clauses related to a beneficiary's incarceration.

Thus, unless there is a statute expressly prohibiting such clauses, the suspension clause cannot be against public policy. Here, the SCFRA simply permits the State to seek reimbursement for the costs associated with imprisoning an inmate. MCL 800.403; *Sprague*, 284 Mich App at 237. Nowhere in the SCFRA does it prohibit the creation of trusts with conditions that effectively divest a prisoner-beneficiary's interest in a trust. Accordingly, because there is no case law addressing the type of suspension clause in the trust and there is no statute prohibiting such a clause, the clause does not violate public policy.

In its simplest form, the Treasurer's argument is that, because the Legislature provided a means for the state to obtain reimbursement for a prisoner's incarceration, prisoners should not be allowed to circumvent the system. We agree with this basic premise; however, the key is that, as discussed earlier, Martin never had an ascertainable interest in the trust's assets. It is one thing to not allow prisoners to shield their property in order to avoid reimbursing the State, but it is altogether another thing to allow the state to invade property that *the prisoner has no right to* simply because the prisoner might someday gain access to the property.

We further note that some of the state's underlying concerns are already addressed in existing public policy and case law – just not to the extent the state wishes in this case. For instance, normally, when a beneficiary has an ascertainable interest in a trust, creditors cannot reach that interest if there is a spendthrift clause. *Miller*, 432 Mich at 430. However, public policy allows states to ignore spendthrift restrictions and gain access to the assets. *Id*. Hence, this existing public policy addresses the desire to facilitate the state in being able to collect assets that beneficiaries *actually own*. It would be a tremendous leap to expand the existing public policy to now allow states to gain access to assets that beneficiaries have no ascertainable interest in.

The Treasurer next argues that the suspension clause is not applicable when Martin is released on parole. We disagree.

At the outset, this particular issue was only referenced in the argument section in the Treasurer's brief on appeal. This issue is outside the scope of the statement of the question presented, which relates to the suspension clause being violative of public policy. However, despite the noncompliance with MCR 7.212(C)(5), we can consider the merits of the issue if the issue is a question of law and all of the facts are available. *Health Care Ass'n Workers Comp Fund v Bureau of Worker's Comp*, 265 Mich App 236, 243; 694 NW2d 761 (2005). In fact, because the issue is one of law and is of paramount importance[3] we will review the issue.

"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." *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The settlor's intent is determined from the four corners of the trust itself, unless there is an ambiguity. *Id*. "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." *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992). If an ambiguity exists, then the court must look outside the document in order to ascertain and carry out the settlor's intent. *In re Kostin*, 278 Mich App at 53.

The suspension language in question provides as follows:

> However, if THOMAS MARTIN should be incarcerated during the time of his right to withdraw from the trust, his right to withdraw shall be suspended until he is no longer incarcerated and no longer on probation.

Reviewing the entire clause reveals that the settlor set up (1) an initial condition that triggers (2) an effect, (3) which lasts until a second condition occurs. The initial triggering condition is that Martin "be incarcerated during the time of his right to withdraw from the trust." Hence, being incarcerated is the only event that acts as a trigger. The text following this condition is the effect that takes place, "his right to withdraw shall be suspended." Then finally, there is another condition, which lifts the suspension, "until he is no longer incarcerated and no longer on probation."

For both the initial condition and the suspension effect itself, there are no ambiguities. The suspension triggers only upon Martin being incarcerated. However, the last condition that removes the suspension does introduce a patent ambiguity. The first half of the condition, "until he is no longer incarcerated" introduces no ambiguity; but an ambiguity is introduced with the phrase, "no longer on probation." Probation is an *alternative* to being incarcerated. Michigan Department of Corrections, Definitions/Glossary, http://www.michigan.gov/corrections/0,1607,7-119--17490--,00.html; see, also, *People v Kern*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289478, issued May 25, 2010), slip op, p 5. Thus, in the normal course of events, a prisoner does not transition from being incarcerated to

[3] It is important because Martin is currently on parole following his incarceration.

being on probation. As a result, the settlor creating the condition, "no longer on probation," in the context of occurring *after* one is incarcerated is nonsensical. It appears clear that the word that the settlor meant, which would make sense in this situation, is *parole* instead of *probation*. Parole is a conditioned release from imprisonment. *Kern*, slip op, at 5. In fact, the attorney who drafted the trust stated at the probate court hearing[4] that, not being a criminal attorney, he was not aware of a difference between parole and probation. His intention was to convey the situation in which Martin continued to be under the supervision of the Department of Corrections after being released from prison. Therefore, to give full effect to the settlor's intent, the suspension clause must be interpreted to be, "should Martin be incarcerated during the time of his right to withdraw from the trust, his right to withdraw shall be suspended until he is no longer under the supervision or jurisdiction of the Department of Corrections."

We note that the drafting attorney also mentioned that it was the settlor's intent to not have any of the trust funds go to the state for the reimbursement of any costs associated with Martin's incarceration. However, this far-reaching intent exceeds the ambiguity that needs resolving in the trust. The language of the trust clearly illustrates an intent to lift the suspension when Martin is no longer under the jurisdiction of the Department of Corrections. To interpret the trust, such that the suspension language would remain in effect so long as the State could recover its costs, would directly contravene the express language of the trust, which is not permissible. See *In re Kramek Estate*, 268 Mich App 565, 573-574; 710 NW2d 753 (2005) (stating that parol evidence is not allowed to vary or contradict the plainly expressed terms of a writing). In other words, to the extent that the trustee suggests that the suspension clause is operable simply because the state could conceivably still gain access to the funds, *regardless of Martin's status with the Department of Corrections*, is plainly counter to the clear intent of the settlor that the suspension would be lifted once Martin was no longer under the jurisdiction of the Department of Corrections. Thus, the extrinsic evidence of the drafting attorney's statements can be used to clarify the patent ambiguity, but it cannot be used to contradict the areas of the trust that are not ambiguous.

In sum, the trust's suspension clause has a patent ambiguity because it is nonsensical to connect "no longer being on probation" with being incarcerated. The intent of the settlor was to allow Martin to have access to the funds once he was no longer under the supervision or jurisdiction of the Department of Corrections, which would cover his time while on parole. Accordingly, the Treasurer's claim fails.

II. DOCKET NO. 294072

The Treasurer argues that the circuit court should have ordered the trustee to transfer the trust's assets to the State. We disagree.

While the Treasurer stated that a de novo review was appropriate because the issue deals with statutory construction, we disagree. More accurately, the issue involves whether the circuit

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[4] Since an ambiguity exists in the document, it is not only permissible, it is mandatory for this Court to look outside the document in order to ascertain and carry out the settlor's intent. *In re Kostin*, 278 Mich App at 53.

court acted appropriately when it issued its order. Thus, without any case law addressing this particular issue, we will utilize the "default" standard of review applicable for trial judges, which is an abuse of discretion standard. See *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The SCFRA provides, in pertinent part, that

> [a]t the time of the hearing . . . , the court shall issue an order requiring any person, corporation, or other legal entity possessed or having custody of [the prisoner's] assets to appropriate and apply the assets or a portion thereof toward reimbursing the state as provided for under this act. [MCL 800.404(3).]

The probate court, which had exclusive jurisdiction over the trust's construction, MCL 700.1302, determined that Martin had no ascertainable interest in the trust while he was incarcerated, on probation, or on parole. Thus, the circuit court had no power to alter or deviate from this determination.

The Treasurer's argument, that the probate court found that Martin had an ascertainable interest in the trust, is baffling. The probate court made abundantly clear that Martin had no present ascertainable interest in the trust because of the suspension clause.[5] Therefore, because the circuit court was bound by the finding that the state could not reach the trust's assets, it is axiomatic that the circuit court did not err when it failed to order the trustee to disburse any trust assets to the state, and the Treasurer's claim fails.

Additionally, the Treasurer argues that the circuit court should have ordered the trustee to pay the state at any time in the future when either (1) Martin was released from parole or (2) when it would have paid Martin. Because this particular issue was not specifically raised in either of the Treasurer's statement of questions presented, as required by MCR 7.212(C)(5), we deem this particular issue abandoned on appeal. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008). Regardless, even if the issue is reviewed, the circuit court did not abuse its discretion. The SCFRA requires a circuit court to order "any person, corporation, or other legal entity possessed or having custody of [the prisoner's] assets to appropriate and apply the assets or a portion thereof toward reimbursing the state." MCL 800.404(3). The plain language of the statute only requires that any assets that are *presently* held by these third parties to be diverted to the state. Thus, the state's request, that the circuit court order the trustee to pay any *future* assets in which Martin acquires an ascertainable interest, is not

[5] The probate court's opinion stated, "The Court finds that Thomas Martin has no more than the possibility of receiving discretionary payments from the Trustee because he is in fact incarcerated."

directly addressed by the statute. Accordingly, the circuit court did not abuse its discretion when it failed to provide the requested order.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald