

STATE OF MICHIGAN
COURT OF APPEALS

In re JOHN B. GORDON TRUSTS.

BRITTON L. GORDON, JR., and ANN
TAGGART GORDON, Trustees,

UNPUBLISHED
June 25, 2013

Plaintiffs-Appellees,

v

No. 308008
Wayne County Probate Court
LC No. 2010-753162-TV

JOHN B. GORDON,

Defendant-Appellee,

and

CLAIRE S. GORDON,

Defendant-Appellant.

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Claire Gordon appeals as of right from an order of the probate court dismissing a petition in which she sought a declaration that she could invade certain trusts established by John Gordon, her ex-husband. We affirm.

Before marrying Claire, John established, on December 28, 1996, an irrevocable trust of which he is the trustor and income beneficiary; the trust contains various provisions concerning payments to his possible future widow and possible future children. Later, during his marriage to Claire and when his four children were born, he established trusts for each of them. In October 2009, John filed for divorce in circuit court. While that action was pending, the trustees Britton L. Gordon, Jr., and Ann Taggart Gordon filed a petition in probate court requesting that the probate court declare the trusts to be outside the jurisdiction of the circuit court in the divorce action. Claire also filed a petition in the probate court—titled “Petition to Determine Types of Trusts Involved in Litigation”—and argued that the trusts should be deemed property reachable by her for purposes of supporting herself and the parties’ children. She specifically asked the probate court to determine that the principal of and income from the trusts should be used to “provide a home and the necessities of life” for herself and the four minor children.

Meanwhile, in the divorce action, the circuit court ruled that the trusts were not marital property subject to distribution in the divorce proceedings and not subject to the jurisdiction of the circuit court.¹

The parties agreed to allow the probate court to rule on the two pending petitions based on the pleadings and other documents submitted. The probate court, citing *res judicata* and collateral estoppel, dismissed the trustees' original petition as moot. The court then considered Claire's petition. The court stated, in part:

The dismissal of the Trustees' original Petition for Supervision of Trust/Complaint for Declaratory Judgment does not however resolve all the issues in this case. . . . Claire . . . filed a separate Petition to Determine Types of Trusts Involved in Litigation. This Petition requested in its prayer for relief that this Court . . . determine that her ex-husband John B. Gordon's pre-marital Trust, commonly referred to as the 1996 JBG Irrevocable Trust, and the four (4) Irrevocable Trusts established for the benefit of the Gordon's [sic] minor children born during their marriage, all be considered support trusts, rather than discretionary ones. In addition, this Petition further requested a ruling from this Court that the principal and income from these Irrevocable Trusts could be utilized to support the Co-Defendant Claire Gordon and the minor children, as well as[] provide a home and the necessities of life to her and these children.

The Respondent Claire S. Gordon's subsequent Petition to Determine Types of Trusts in this case certainly requests additional determinations and relief not sought or ruled upon by the Circuit Court in this case. . . . Judge Levy's decision, while determining these Trusts, except for one narrow exception, to be separate trust property and not marital property, stopped short of determining or characterizing whether or not these Trusts were support or discretionary Trusts. This issue must still be determined by this Court.

The probate court then decided that Claire had standing to bring her petition, despite not being a grantor, trustee, or beneficiary of any of the trusts, because the trustees, in their original petition, named her as a party and compelled her to answer. The court stated that it would exercise discretion under MCR 5.125(E) and grant Claire standing.

The court noted that Claire sought to invade the trusts under MCL 552.23² as "support" trusts and alternatively sought to invade the trusts under an exception set forth in *In re Hertsberg*

¹ The circuit court found one relatively minor exception (involving a transfer into the 1996 trust) that is not a subject of this appeal.

² MCL 552.23(1) states:

Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed

Inter Vivos Trust, 457 Mich 430; 578 NW2d 289 (1998). The court found that the language of the trusts clearly established that they were “discretionary”—not support—trusts. The court then found that *Hertsberg* did not apply to the present case because, among other things, the trusts at issue did not involve “the facts and public policy which underlie the creation of the *Hertsberg* exception to the non-invasion of discretionary trusts” The court ordered that “the Irrevocable Trusts in this case are found to be Discretionary Trusts and not Support Trusts for the benefit of [Claire] and her children.”

The interpretation of a trust is a question of law reviewed de novo. *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005). However, we review for clear error the probate court’s findings of fact. *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988).

In general, there are three types of trusts. See *Miller v Dep’t of Mental Health*, 432 Mich 426, 429; 442 NW2d 617 (1989).

Firstly, a trust vesting in the beneficiary the right to receive some ascertainable portion of the income or principal. Secondly, a trust providing that the trustee shall pay so much of the income or principal as is necessary for the education or support of the beneficiary, called a support trust. Thirdly, a trust providing that the trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines, called a discretionary trust. [*Id.* (footnotes omitted).]

Claire sought a determination that the trusts at issue were support trusts as opposed to discretionary trusts. Claire sought this determination because, in general, beneficiaries of discretionary trusts have no ascertainable interest in the assets of the trust, see *Miller, id.* at 430-431, and she sought to obtain money from the trusts on behalf of her children.

The December 28, 1996, trust states, in part:

As of the date of execution of this instrument, the trustee shall distribute to me [John] during my lifetime in convenient installments, at least as frequently as quarter annual payments, such amounts of the net income of the trust as I request.

* * *

4. Upon the death of my widow, such part or all of the principal of the trust remaining after the payments, if any, required by paragraph 3 immediately above [dealing with taxes] shall be distributed to my issue.

to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

* * *

6. Despite the preceding provisions of this instrument, the trustee may elect to withhold any property, e.g., income, otherwise distributable under this trust to a beneficiary who is my issue who has not reached the age of fifty-five years and may retain the property for that beneficiary in a separate trust named for the beneficiary, to be distributed to the beneficiary when he or she reaches the age of fifty-five years, or before then if the trustee so elects in the trustee's sole discretion, subject to the limitations of this Article. The trustee shall apply as much of the net income and principal of the trust so retained as the trustee believes desirable for the health, support in reasonable comfort, education, best interests, and welfare of the beneficiary for whom the trust is named, considering all the circumstances and factors deemed pertinent by and in the sole discretion of the trustee. Any undistributed net income shall be accumulated and added to principal, as from time to time determined by the trustee. If the principal beneficiary (other than me) for whom the trust is named dies before complete principal distribution of the trust, the remaining net income and principal of the trust shall be distributed to the beneficiary's estate.

7. My primary concern during the life of my child (or children) is for the child's health, support in reasonable comfort, education, best interests, and welfare rather than for the preservation of trust principal for ultimate distribution to the child or the child's descendants.

The four additional trusts state, in part:

Commencing as of the date of this instrument and until (i) the withdrawal of the entire balance or complete distribution of the trust or (ii) the prior death of [the child], the trustee shall distribute to or apply for the benefit of my Child such amounts of net income and principal, even to the extent of exhausting principal, as the trustee believes desirable from time to time for the health, support in reasonable comfort, education, best interests, and welfare of my Child, considering all circumstances and factors deemed pertinent by the trustee.

Claire cites the above paragraphs in arguing that the trusts are support trusts and not discretionary trusts. As noted in *Hertsberg*, 457 Mich at 433, “[a] discretionary trust provides that a trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines” (Internal citation and quotation marks omitted). As applied to the minor children (the only beneficiaries at issue for purposes of Claire's motion),³ paragraph 6 of the 1996 trust, as cited above, clearly vests discretion in the trustee concerning amounts to be

³ Indeed, it is only through the children that Claire could even potentially invade the trusts, seeing as the circuit court's ruling essentially mandates that money John receives is *not* marital property subject to distribution.

distributed.⁴ The children's trusts contain similar language, as evidenced in the paragraph cited by Claire herself ("the trustee shall distribute . . . amounts . . . as the trustee believes desirable"). The children's trusts also contain a paragraph similar to paragraph 6 of the 1996 trust as cited above (but employing the age of 21 instead of 55). In addition, the trusts all contain the following language:

Among the circumstances and factors to be considered by the trustee in determining whether to make discretionary distributions of income or principal to a beneficiary are the other income and assets known to the trustee to be available to that beneficiary and the advisability of supplementing such income or assets.

The pertinent language indicates that for the purposes of Claire's current attempt to obtain support for her minor children and herself,⁵ the trusts are discretionary trusts.⁶ See, e.g., *In re Sykes Estate*, 131 Mich App 49, 55-56; 345 NW2d 642 (1983) (beneficiary's true interest in trust was unascertainable).⁷ The simple fact is that distributions from the trusts to the minor

⁴ At any rate, it is unclear how the 1996 trust applies at all at the present time, because, regarding payments to the children, it deals with a situation involving the death of John and John's spouse. John is still alive and Claire is no longer John's spouse.

⁵ Among other relief, Claire is specifically asking for the trusts to be used "to support" herself and the children, to pay off a mortgage, and to pay certain taxes.

⁶ While the 1996 could be deemed a non-discretionary trust for John himself, given that he is entitled under that trust to withdraw money at any time, it is discretionary as applied to the minor children. Despite John's ability to withdraw money from the trust, we reiterate that the circuit court found that the trusts (with an exception not applicable here) were *not* marital property subject to distribution in the divorce proceedings. Claire has not appealed the circuit court ruling.

⁷ In *Miller*, 432 Mich at 431-433, the Court noted that the use of the words "such amounts . . . as the Trustee deems proper for the support, maintenance and welfare" of the beneficiary were ambiguous in terms of distinguishing a support trust from a discretionary trust. The present case is different. Indeed, the trusts here contain additional language, such as the "sole discretion of the trustee" language from paragraph 6 of the 1996 trust as cited above and the language in the children's trusts stating that the trustee should distribute income only "from time to time" and "considering all circumstances and factors deemed pertinent by the trustee." In addition, as noted, the trusts contain the following language:

Among the circumstances and factors to be considered by the trustee in determining whether to make discretionary distributions of income or principal to a beneficiary are the other income and assets known to the trustee to be available to that beneficiary *and the advisability of supplementing such income or assets.*
[Emphasis added.]

The trusts did not "establish[] an entitlement on the part of the beneficiary to enforce payments of such amount as the trustee determines should be paid for support in the exercise of a

children shall be based on the trustees' discretion; Claire may not decide for herself to take money from the trusts. Claire cites *Coverston v Kellogg*, 136 Mich App 504, 508-510; 357 NW2d 705 (1984), for the proposition that the trusts cannot be deemed discretionary trusts because the trustees allegedly cannot refuse to apply funds for the benefit of the beneficiaries and because the beneficiaries will eventually receive the whole of the principal.⁸ However, what Claire fails to point out is that *Coverston* involved the invasion of a trust *for purposes of satisfying a previously ordered alimony payment*. See *id.* at 506-508. No such unsatisfied judgment has been presented in the case at bar and we thus refuse to rely on *Coverston* to allow Claire to invade the trusts.⁹

Claire argues that even if the trusts are deemed discretionary trusts for purposes of the instant case, she can invade the 1996 trust because John was both the settlor and the beneficiary of that trust. In making this argument, Claire relies on *Hertsberg*, 457 Mich at 434-435. In *Hertsberg*, *id.* 434, the Michigan Supreme Court stated that “it would be contrary to public policy to allow a person to shelter assets from creditors in a trust of which he is the beneficiary.” Even assuming that the 1996 trust otherwise applied to Claire’s current situation, Claire’s reliance on *Hertsberg* is untenable because there are no “creditors” at issue in the present case. To the extent Claire might be arguing that the 1996 trust should be invaded as part of the divorce proceedings, we again note that the circuit court found the 1996 trust to be non-marital property and that Claire has not appealed that ruling.¹⁰

Affirmed.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

discretion that is judicially reviewable for abuse of discretion. See *Miller*, 432 Mich at 432-433 (explaining a characteristic of a support trust).

⁸ Claire’s first assertion is at least debatable, as applied to her minor children, because the trustees have been given broad discretion concerning whether to distribute funds to them, under all five of the trusts. However, the second assertion is accurate, at least with regard to the children’s trusts, because those trusts specify that the children may withdraw the principal at age 45.

⁹ We also note that *Coverston*, issued in 1984, is not strictly binding on us under MCR 7.215(J)(1). Claire also cites *In re Ferguson (On Remand)*, 186 Mich App 409; 465 NW2d 357 (1990). This opinion has been reversed. 439 Mich 963 (1992).

¹⁰ In her appellate brief, Claire makes other assertions of error, which are intertwined with her main arguments. Our present resolution of the appeal renders a discussion of these claims unnecessary. We also note that Claire provides no authority for several of her arguments, specifically the arguments in part III of her brief. Finally, we decline the request to assess sanctions against Claire for a vexatious appeal; although Claire’s appeal has not been successful, we do not find it frivolous to the point of warranting sanctions.