

STATE OF MICHIGAN
COURT OF APPEALS

In re CLARENCE W. TEMPLE and FLORENCE
A. TEMPLE MARITAL TRUST.

WALLACE TEMPLE,

Petitioner-Appellant,

UNPUBLISHED
August 9, 2005

v

RALPH TEMPLE and DEAN TEMPLE,

Respondents-Appellees.

No. 261000
Clinton Probate Court
LC No. 04-025529-TV

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Petitioner appeals as of right from a probate court order construing a joint trust as allowing the surviving settlor to amend the trust after the death of the other joint settlor. We reverse and remand for further proceedings.

Petitioner and respondents are brothers and beneficiaries of a trust created by their parents, Clarence and Florence Temple (“the settlors”). The trust, as originally created in 1998, stated that two parcels of property that comprised the settlors’ farm would be divided and distributed equally to petitioner, respondents, and a fourth brother (since deceased) after the settlors’ deaths. The trust provided, in part:

Rights Reserved. We reserve the right to amend or revoke this Agreement, wholly or partly, and add assets to, or withdraw assets from, the TRUST by a writing signed by us or on our behalf and delivered to Trustee during our lives. However, we cannot change materially the duties or compensation of Trustee without its written approval.

After Florence Temple died, Clarence Temple executed an amendment to the trust that distributed one parcel of the farm to respondent Dean Temple and the other to respondent Ralph Temple. Respondents testified that they verbally assured Clarence that Ralph would divide his property with petitioner and that the trust amendment would enable petitioner to gain his share of the land without having to deal with respondent Dean Temple, with whom he had a longstanding

feud. When Clarence died, Ralph attempted to work out a division of the property with petitioner, but they failed to reach an agreement.

Petitioner petitioned the probate court to construe the trust as not allowing Clarence to amend it after Florence's death. Petitioner argued that the trust instrument required both settlors to authorize any amendment to the trust and that, therefore, the surviving settlor could not amend the trust after the other settlor died. The probate court concluded that the trust contained a latent ambiguity regarding the surviving settlor's power to amend and held an evidentiary hearing to consider extrinsic evidence of the settlors' intent. The probate court found that the settlors intended for the surviving settlor to retain the power to amend, and the court thus construed the trust as allowing Clarence's amendment.

While the petition for construction of the trust was pending, petitioner filed a second petition that asserted claims of fraud, misrepresentation, and undue influence and that argued for the imposition of a constructive trust. The parties filed cross-motions for summary disposition of these claims under MCR 2.116(C)(10). In the same order that resolved the petition for construction of the trust, the probate court denied petitioner's motion for summary disposition of these additional claims, granted respondents' motion with respect to the fraud and misrepresentation claims, and denied respondents' motion with respect to the undue influence claim. In this appeal by right, petitioner challenges the probate court's order construing the trust in respondents' favor, i.e., construing it as allowing Clarence to amend the trust after Florence's death. Petitioner also raises issues pertaining to the probate court's decision that partially granted respondents' motion for summary disposition.

As an initial matter, respondents assert that this Court lacks jurisdiction over petitioner's appeal because the probate court's order did not resolve all the outstanding claims in the case. We disagree that we lack jurisdiction. Indeed, MCR 5.801(B)(1)(c) explicitly provides that an appeal as of right exists from an order "interpreting or construing a testamentary instrument or inter vivos trust." However, an appeal under MCR 5.801(B) is limited to the portion of the order for which an appeal as of right exists. If an order entered by the probate court partially falls within one of the categories enumerated in the rule and partially does not, the appeal is limited to that part of the order for which this Court has jurisdiction. See, generally, *In re Butterfield Estate*, 100 Mich App 657, 667-668; 300 NW2d 359 (1980), and *Comerica Bank v City of Adrian*, 179 Mich App 712, 729-730; 446 NW2d 553 (1989). In this case, therefore, this Court has jurisdiction with respect to the portion of the probate court's order that construed the trust in respondents' favor. However, petitioner's Issues II and III on appeal relate to the parties' respective summary disposition motions concerning the independent claims for fraud, misrepresentation, undue influence, and a constructive trust, and the probate court did not fully resolve those claims. The additional issues are outside the scope of MCR 5.801(B), and, therefore, they are not properly before this Court. Rather, this Court's jurisdiction is limited to the portion of the probate court's order construing the trust in respondents' favor.¹

¹ We note that this case was assigned to the expedited summary disposition track under Supreme Court Administrative Order 2004-5. This administrative order provides that it applies to appeals arising solely from orders granting or denying motions for summary disposition. The instant
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We review a probate court’s interpretation of a trust instrument for clear error. *Miller v Dep’t of Mental Health*, 432 Mich 426, 434; 442 NW2d 617 (1989); *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). A finding is clearly erroneous when “the reviewing court is left with the definite and firm conviction that a mistake has been committed,” although there may be some evidence to support the finding. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994).

Generally, the court’s sole objective in resolving a dispute over the meaning of a trust is to ascertain and give effect to the settlor’s intent. *In re Nowels Estate*, 128 Mich App 174, 177; 339 NW2d 861 (1983). The trust instrument must be considered to determine the settlor’s intent, and each word in the trust document should be given meaning, if possible. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 268-269; 289 NW2d 898 (1980). If the language of a trust is not ambiguous, the settlor’s intent must be gleaned from the four corners of the document. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). If a trust evidences a patent or latent ambiguity, however, “a court may establish [the settlor’s] intent by considering two outside sources: (1) surrounding circumstances, and (2) rule[s] of construction.” *Id.*, quoting *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). “A latent ambiguity exists where the language and its meaning is [sic] clear, but some extrinsic fact creates the possibility of more than one meaning.” *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). Thus, the existence of a latent ambiguity may be proved by facts extrinsic to the trust instrument. *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995).

We agree with petitioner that the probate court erred in finding that the “Rights Reserved” provision of the trust contained a latent ambiguity. The statement indicating that “[w]e reserve the right to amend or revoke this Agreement . . . by a writing signed by us . . . during *our lives*” (emphasis added) clearly provided a method of amendment that required the approval of both settlors, thus extinguishing the power to amend after one of the settlors died. Further, we do not detect any extrinsic fact that created the possibility that more than one meaning could be ascribed to the above language. The fact that Clarence decided to amend the trust after Florence died and the fact that an attorney agreed to draft the amendment did not create the possibility of more than one meaning. Indeed, we cannot see how a settlor’s attempt – five years after the trust’s execution – to exercise a power not provided for in the trust instrument would indicate that the language of the trust contains more than one meaning. At best, it means

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appeal is not an appeal that arose solely from an order granting or denying a motion for summary disposition, and, further, the only portion of the appeal for which this Court properly has jurisdiction did not arise from a summary disposition motion but rather from a decision following an evidentiary hearing on a contested petition. Under paragraph 7(f) of the administrative order, this Court may remove a case from the summary disposition track on its own motion if it appears that the case is not an appropriate candidate for processing under the administrative order. The language is permissive, so removal is elective, not obligatory. Because this case was assigned to the summary disposition track initially, neither party sought to remove it, and the case has been fully briefed and is ready to be heard, we elect not to remove it from the summary disposition track to avoid administrative inefficiencies.

that the settlor subjectively misunderstood the unambiguous language at the time of the attempted amendment.

The probate court found that the plural terminology in the “Rights Reserved” clause of the trust was ambiguous because the “Distribution During Lifetime” provision of the trust employed plural terminology to refer to rights that the survivor would clearly retain after the other settlor’s death. We disagree with this reasoning, because it was the “All Remaining Assets” provision – not the “Distribution During Lifetime” provision – that continued the trust for the surviving settlor. The probate court erred in finding that the plural language in the “Distribution During Lifetime” provision would create an untenable result unless it were construed as referring to both of the settlors during their joint lifetimes and also to the surviving settlor after one dies. Accordingly, there was no inconsistency in the trust that would suggest an ambiguous use of plural terminology.

Our analysis is consistent with the Restatement provisions discussing a settlor’s power to modify a trust. 2 Restatement Trusts, 3d, § 63, provides:

(1) The settlor of an inter vivos trust has power to revoke or modify the trust to the extent the terms of the trust (§ 4) so provide.

(2) If the settlor has failed expressly to provide whether the trust is subject to a retained power of revocation or amendment, the question is one of interpretation. . . .

(3) Absent contrary provision in the terms of the trust, the settlor’s power to revoke or modify the trust can be exercised in any way that provides clear and convincing evidence of the settlor’s intention to do so.

Under paragraph (1), a settlor’s power to modify a trust is determined by the terms of the trust. 2 Restatement Trusts 3d, § 4, states, “The phrase ‘terms of the trust’ means ‘the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings.’” As discussed previously, there was no patent or latent ambiguity in the trust instrument with respect to the settlors’ power to modify it, and, therefore, this Court’s interpretation must be based on the four corners of the document. Thus, the settlors’ power to modify the trust was restricted by the requirement that both sign the amendment during their joint lives. Paragraph (2) of the Restatement does not subject the matter to further interpretation. Indeed, the settlors did not fail to provide whether the trust was subject to a retained power of amendment; they provided that it was subject to amendment, provided both settlors approved the amendment. Similarly, paragraph (3) of the Restatement does not apply here because the condition set forth in paragraph (3) – “[a]bsent [a] contrary provision in the terms of the trust” – is not satisfied. The trust expressly provides a means for exercising the power to modify the trust, i.e., with a “writing signed by us or on our behalf and delivered to Trustee during our lives.”

We have not found, nor do the parties cite, other authority providing that, when a trust instrument requires both settlors to approve an amendment, the power to amend a joint trust remains with a surviving settlor after the other settlor has died. In fact, Bogert, Trusts and

Trustees (2d ed), § 993, pp 241-242, states, “If the power to amend is reserved to two settlors, it must be exercised by both, and the survivor cannot use the power.”

Additionally, other states have held, in analogous cases, that if the language of a trust instrument requires both settlors to authorize amendments, the surviving spouse cannot modify the trust. In *L’Argent v Barnett Bank, NA*, 730 So 2d 395, 396 (Fla App, 1999), a trust contained an amendment provision that used plural terminology and was substantively similar to the trust language at issue in the instant case.² The Florida Court of Appeals held that the provision unambiguously required both settlors to authorize amendments and therefore “mandate[d] that the power to amend the trust be exercised while both settlors were living.” *Id.* at 396-397. In *Williams v Springfield Marine Bank*, 131 Ill App 3d 417, 421; 475 NE2d 1122 (1985), the Illinois Court of Appeals also concluded that a surviving settlor’s attempted amendment of a trust with similar language was invalid.³

It is clear from these authorities that a provision in a joint trust that reserves the power of amendment for the settlors and that requires amendments to be signed by the settlors during *their* lifetimes unambiguously requires both settlors to authorize amendments and effectively terminates the power to amend after one of the settlors dies. When the trust document contains such a provision, any attempt by the surviving settlor to amend the trust after the other settlor’s death is ineffective. Consequently, the probate court erred in finding that the settlors’ trust in this case contained a latent ambiguity and in looking beyond the four corners of the document for evidence of the settlors’ intent. We therefore reverse the probate court’s order construing the trust in a manner that allowed Clarence to amend the trust after Florence’s death.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens

² The trust stated that during “the life of the Settlers, this trust may be amended, altered, revoked, or terminated, in whole or in part, or any provision hereof, by an instrument in writing signed by the Settlers and delivered to the trustees.” *Id.* at 396.

³ The trust stated, “The Settlers may at any time or times during their lifetime by instrument in writing delivered to the trustee amend or revoke this agreement in whole or in part.” *Id.* at 419.