

STATE OF MICHIGAN
COURT OF APPEALS

In re LUIN GYLE ATTERBERRY REVOCABLE TRUST.

LISA ATTERBERRY,

Appellant,

UNPUBLISHED
October 11, 2012

v

No. 307850
Isabella Probate Court
LC No. 2011-024344-TV

ISABELLA BANK, Trustee, f/k/a ISABELLA BANK AND TRUST, DENNIS ATTERBERRY, and KENNETH ATTERBERRY,

Appellees.

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Appellant Lisa Atterberry appeals by right the probate court's order distributing the proceeds of a Lexus automobile and a Cardinal trailer among beneficiaries under Paragraph 5.4 of the Luin Gyle Atterberry Revocable Trust (the Trust). Because we conclude there was sufficient evidence supporting the probate court's finding, we affirm.

I. BASIC FACTS

In 2006, Luin Atterberry created the Trust with the assistance of his lawyer, William McClintic. In order to avoid probate, McClintic transferred Luin Atterberry's personal property and assets to the Trust. Included among the transfer were Luin Atterberry's shares of his accounting corporation, Atterberry Consulting. When Luin Atterberry died in 2011, a 2004 Lexus automobile and a 2008 Cardinal Trailer were registered to Atterberry Consulting. The beneficiaries disputed the proper interpretation of the terms and conditions of the Trust as it related to the disposition of the Lexus and Cardinal trailer. The disputed Paragraphs provided:

5.3 Remaining tangible personal property. Trustee shall distribute all remaining tangible personal property to Lisa Atterberry. If Lisa Atterberry does not survive me, I give my tangible personal property not effectively disposed of above to Virginia Atterberry, Kenneth Atterberry and Dennis Atterberry, in as

nearly equal shares as possible, or to the survivors thereof if any of said beneficiaries should precede me in death.

5.4 Balance of the trust property. Trustee shall divide all other remaining trust assets into shares, one share each to Lisa Atterberry, Virginia Atterberry, Kenneth Atterberry and Dennis Atterberry, who survive me in as nearly equal shares as possible, or to the survivors thereof if any of said beneficiaries should precede me in death.

The beneficiaries of the Trust were unable to reach an agreement as to the proper interpretation of the Trust. For that reason, appellee Isabella Bank and Trust, acting as the Trust's trustee, petitioned the probate court for assistance. At the hearing on the petition, appellant Lisa Atterberry argued that, because the Lexus and Cardinal trailer were personal property, the Lexus and trailer should be distributed to her under Paragraph 5.3. Appellees, Kenneth Atterberry and Dennis Atterberry, argued that the Lexus and trailer should be distributed in nearly equal shares under Paragraph 5.4.

The probate court examined Luin Atterberry's will, which provided that Luin Atterberry's tangible personal property, including motor vehicles, was to be left to Lisa Atterberry. The probate court also heard from Luin Atterberry's close friend, Cherrie Gasper, who testified that Luin Atterberry intended to leave Lisa Atterberry his 2004 Lexus. Additionally, the court heard from William McClintic, Luin Atterberry's lawyer, who testified, based on his routine practice, that he likely informed Luin Atterberry to change his vehicles' registration from Atterberry Consulting to his own name. At the conclusion of the hearing, the probate court determined there was not clear and convincing evidence that Luin Atterberry intended to convey his Lexus and Cardinal trailer to Lisa Atterberry according to terms of Paragraph 5.3. The probate court ordered the proceeds of the Lexus and Cardinal trailer to be divided among the beneficiaries with the shares of Atterberry Consulting under Paragraph 5.4.

II. REFORMING TRUSTS

A. STANDARDS OF REVIEW

On appeal, Lisa Atterberry argues that the trial court erred when it refused to reform the Trust under MCL 700.7415. We review the proper interpretation of a statute *de novo*. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, we review the probate court's underlying findings for clear error. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1, 4 (2009). A finding of fact is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *In re Matter of Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492, 497 (1988).

B. ANALYSIS

When parties disagree over trust terms, "a court's sole objective is to ascertain and give effect to the intent of the settlor" and "[t]he 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 gauged from the trust document itself, unless there is ambiguity." *Id.* If, however, a court finds "by clear and convincing evidence that both the settlor's intent and the terms of the trust were

affected by a mistake of fact or law” in the expression or the inducement, “[t]he court may reform the terms of the trust, even if unambiguous, to conform to the settlor’s intent[.]” MCL 700.7415. Clear and convincing evidence is evidence that is “so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009), quoting *In re Martin*, 450 Mich 204, 227; 538 NW2d 265 (2008). A mistake of law is a mistake by one side or the other regarding the legal effect of an agreement. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). A mistake in fact is “a misunderstanding, misapprehension, error, fault, or ignorance of a material fact.” *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951).

Because the Trust was ambiguous as to whether the Lexus and trailer are assets subject to distribution under Paragraph 5.4 of the Trust or tangible personal property subject to Paragraph 5.3 of the Trust, the probate court looked outside the Trust document to ascertain Luin Atterberry’s intent. In ascertaining Luin Atterberry’s intent, the probate court found that there was not clear and convincing evidence that he intended the Lexus and Cardinal trailer to be distributed according to Paragraph 5.3 of the Trust. Additionally, the probate court found that there was not clear and convincing evidence that Luin Atterberry’s intent and the terms of the Trust were affected by a mistake of fact or law. Thus, the probate court did not find it necessary to reform the terms of the Trust.

Even though the record suggests that Luin Atterberry may have intended to leave his Lexus and Cardinal trailer to Lisa Atterberry, we cannot conclude that the trial court clearly erred in its findings. Luin Atterberry created his Trust in 2006 and died in 2011. Evidence showed that he was an intelligent accountant and businessman. Yet, during that time period, he failed to change the title to the Lexus or Cardinal trailer to his own name. Nevertheless, he did update his will with a supplement that left specific items of personal property to specific persons. Thus, the evidence supports the probate court’s finding that there was not clear and convincing evidence indicating either Luin Atterberry’s true intention or that a mistake was made.

C. CONCLUSION

Given the record evidence, we cannot conclude that the trial court clearly erred when it found that there was not clear and convincing evidence to warrant reforming the trust. Therefore, the trial court did not err when it ordered the distribution of the car and trailer under Paragraph 5.4.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly