In the Matter of the JAMES G. STULL Living Trust and Wilmington Trust.. RACHEL E. STULL, Respondent, v. JAMES C. STULL, et al., Appellants.

No. B197564

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

2008 Cal. App. Unpub. LEXIS 697

January 28, 2008, Filed

PRIOR HISTORY: [*1]
Superior Court of Santa Barbara County, No. 01221065. J. William McLafferty, Judge.

COUNSEL: Law Offices of Julian A. Pollok, Julian A. Pollok. Greines, Martin, Stein & Richland; Marc J. Poster and Kent J. Bullard, for Appellants.

Fell, Marking, Abkin, Montgomery, Granet & Rane; Michael D. Hellman and Stephen N. Yungling, for Reaspondent.

JUDGES: YEGAN, J.; GILBERT, P.J., COFFEE, J. concurred.

OPINION

In September 2004, James G. Stull (trustor) executed a declaration establishing the James G. Stull Living Trust (the trust). Trustor died on December 2, 2004. He was survived by his wife, Rachel E. Stull (respondent) and three children from previous marriages: James C. Stull (James), John H. Stull (John), and Angela G. Conlee (Angela), hereafter collectively referred to as appellants.

The order appealed from is entitled: "ORDER RE FIRST AND FINAL ACCOUNT AND REPORT OF WILMINGT9N TRUST AND PETITION FOR ITS SETTLEMENT, FOR DELIVERY OF ASSETS TO SUCCESSOR TRUSTEE AND DISCHARGE OF WILMINGTON TRUST, FSB AS PART OF TRANSITION OF TRUSTEES OF NON-COURT SUPERVISED TRUSTS" (hereafter the order). Appellants contend that the trial court erred in its interpretation of a provision in the declaration of trust (declaration) concerning [*2] the allocation of trust expenses. We conclude that, insofar as the order pertains to the allocation of trust expenses, it must be reversed because the trial court erroneously excluded relevant extrinsic evidence on the circumstances surrounding the execution of the declaration.

Factual and Procedural Background

Pursuant to the declaration, upon trustor's death the trust estate was divided into two subtrusts designated as the Marital Trust and the Exemption Trust. During respondent's lifetime, respondent is the sole beneficiary of the Marital Trust. All of the appellants are remainder beneficiaries of the Marital Trust.

Only appellants John and Angela are beneficiaries of the Exemption Trust. Separate arrangements were made for the trustor's other child, James.

The declaration provides: "The Marital Trust shall consist of the minimum pecuniary amount from the Trustor's estate which is necessary as a marital deduction to entirely eliminate (or to reduce to the maximum extent possible) any federal estate tax on the death of the Trustor . . . ." "The Exemption Trust shall consist of the balance of the trust estate."

The declaration further provides that the Marital Trust shall be divided into [*3] two "separate trusts, designated the Marital Real Property/AAA Trust and the Marital Residuary Trust." With the exception of two business properties, the Marital Real Property/AAA Trust "shall consist of all real property in the trust estate, ,, ." "The Marital Residuary Trust shall consist of the balance of the trust estate of the Marital Trust . . . ."

The Exemption Trust was funded with assets having a value of $ 1,500,000, the federal estate tax exemption amount when the trustor died. Pursuant to the declaration, $ 60,000 of this amount was deposited in a separate account to defray Angela's wedding expenses. The federal estate tax return shows that the Marital Real Property/AAA Trust and the Marital Residuary Trust were funded with assets having values, respectively, of $ 5,126,192 and $ 4,803,897.

Wilmington Trust FSB (Wilmington) was appointed trustee of the Marital Residuary Trust and the Exemption Trust. Respondent was appointed trustee of the Marital Real Property/AAA Trust.

On July 17, 2006, Wilmington filed a "First and Final Account and Report," as well as a "Petition for Its Settlement." Wilmington's account showed that, as of June 30, 2006, the combined balance of the Marital [*4] Residuary Trust was $ 4,800,353.21. The combined balance of the Exemption Trust, less the $ 60,000 deposited to defray Angela's wedding expenses, was $ 1,455,714.62. The account also showed that the Marital Residuary Trust had been charged administration expenses of $ 42,600 and fees and commissions of $ 73,973.99. The Exemption Trust had been charged administration expenses of $ 14,435.98 and fees and commissions of $ 12,081.70.

Respondent objected to the allocation of expenses and attorney fees between the two subtrusts. She requested that expenses and attorney fees of $ 69,603.63, which had been allocated to the Marital Residuary Trust, be reallocated to the Exemption Trust. Respondent argued that the trustor had "intended that all administrative expenses and attorney's fees be allocated to the Exemption Trust." She relied on the following provision (hereafter the allocation provision) in the declaration: "The Trustor's last illness and funeral expenses, any attorneys' fees and other probate expenses and administrative costs, and other obligations incurred for the support of the Trustor to the extent paid from the trust, shall be charged to the Exemption Trust." [1] This is the only [*5] provision in the declaration that allocates expenses or attorney's fees to a subtrust.

1 This provision is found in paragraph 6 of Article I of the declaration. In its entirety, paragraph 6 reads as follows: "All estate, inheritance, or other death taxes payable by reason of the death of the Trustor shall be charged to and paid from the Exemption Trust without apportionment or charge against any beneficiary of the trust estate or transferee of property passing outside of the trust estate; provided, however, that the foregoing provision shall not apply to any property for which the federal marital deduction would have been allowed but for disclaimer by the surviving spouse or non-election by the executor of the Trustor (or the Trustee of this trust), and these properties shall bear any inheritance taxes imposed thereon and their proportionate share of estate or other death taxes that are not allocable to particular property. *The Trustor's last illness and funeral expenses, any attorneys' fees and other probate expenses and administrative costs, and other obligations incurred for the support of the Trustor to the extent paid from the trust, shall be charged to the Ex-*

emption Trust. Payment [*6] of any of the Trustor's debts shall be charged against the Exemption Trust." (Italics added.)

Respondent further alleged that, since the end of the accounting period on June 30, 2006, Wilmington had charged the Marital Residuary Trust additional attorney's fees of approximately $ 37,600. Respondent requested that these fees "also be reallocated entirely to the Exemption Trust."

On February 1, 2007, appellants filed a memorandum urging the trial court to approve Wilmington's allocation of expenses and fees. Appellants interpreted the allocation provision as being limited by the phrase, "other probate expenses." They argued that, pursuant to this limitation, only attorney's fees and administrative costs incurred in probating the estate were chargeable to the Exemption Trust. Appellants asserted, "Since there was no probate proceeding initiated after the death of [trustor], there were no 'attorney's fees and *other probate expenses and administrative costs*' incurred by the Trustee that would be appropriately charged to the Exemption Trust . . . ."

Appellants attached to their memorandum an email from Thomas B. Garrett, the attorney who had prepared the declaration. In the email, Garrett [*7] said, "The phrase 'any attorneys' fees and other probate expenses and administrative costs' does not refer to trust administration expenses of all of the subtrusts being charged to the Exemption Trust." Appellants declared "that discovery is necessary in order to make a full evidentiary presentation of the Trustor's intent concerning the issues raised by [respondent's] [o]bjection . . . ." Appellants further stated that, at the next hearing scheduled on February 8, 2007, they would request a continuance to allow them "time to obtain this necessary discovery and present their position."

On February 8, 2007, appellants filed a trial brief in support of Wilmington's petition to approve its account. Appellants contended that attorney's fees and other expenses incurred for the benefit of the Marital Residuary Trust should be chargeable to that trust, not the Exemption Trust. Appellants alleged that, at the trial of this matter, they would present testimony by Garrett "that (i) [trustor] never intended his bequest to his two children in the Exemption Trust to be diluted by charging attorneys fees and other expenses incurred for the benefit of the Marital Trust to the Exemption Trust, (ii) [*8] [trustor] wanted his estate to achieve the maximum tax benefits possible, by maximizing the allocation of assets, not expenses, to the Exemption Trust, and (iii) Mr. Garrett allocated the attorney fees and other expenses that are reflected in the Wilmington accounting and are the subject of [respondent's] [o]bjection in the manner that [trustor] intended." Appellants further alleged: "As will also be shown by Mr. Garrett's testimony, a significant portion of the attorneys fees and other related expenses incurred by the Marital Trust were as a result of the actions and inactions of [respondent], questioning and effectively challenging the Trustor's decisions, and her refusal to timely cooperate with Wilmington, the Trustee."

On February 8, 2007, a hearing was conducted on respondent's objection to Wilmington's final account. Appellants' counsel argued that the allocation provision unambiguously "applies to probate expenses[,] not to other expenses." But if the court disagreed, counsel stated that appellants were prepared to present testimony by Garrett showing that the trustor "wanted to benefit his two children who are the beneficiaries of the exemption trust, to the greatest extent [*9] possible and not allow the . . . [exemption] trust base to be diluted in the manner that is being asserted [by respondent]." Counsel declared, "[T]he Court needs to hear the extrinsic evidence in order to consider the overall circumstances and intent of the . . . trustor . . . ."

Respondent's counsel replied that there were two problems with appellants' argument. The first was that the language of the allocation provision clearly indicated that the expenses and fees in question were to be charged to the Exemption Trust. The second problem was that the Marital Trust "is a pecuniary marital trust, which by definition . . . requires that the expenses be paid from the exemption share."

Appellants' counsel protested: "We . . . will address that through testimony, your Honor." The trial court responded: "[W]e don't need testimony if this -- it's not ambiguous to me. The exemption trust was

what was intended and that's what I'll find. [P] All right. [P] Prepare an order, I'll sign it." With that, the hearing concluded.

On February 27, 2007, the order signed by the trial court was filed. The court approved Wilmington's final account, except that it ordered the sum of $ 69,606.63 to be transferred [*10] from the Exemption Trust to the Marital Residuary Trust, "that sum being the amount inappropriately allocated to the Marital Residuary Trust in the Accounting Petition." The court further ordered: "Any additional attorneys' fees and administrative costs charged to the Marital Residuary Trust by Wilmington" for the period after June 30, 2006, "be reallocated and transferred" to the Exemption Trust.

Discussion

"[T]he primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor. [Citations.]" (*Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 834.) Here the trial court concluded that the allocation provision manifested an unambiguous intent to burden the Exemption Trust with attorney's fees and administrative costs incurred by both that subtrust and the Marital Residuary Trust. The court therefore excluded extrinsic evidence tending to show a contrary intent.

In *Estate of Russell* (1968) 69 Cal.2d 200, our Supreme Court considered rules governing the admission of extrinsic evidence in the construction of wills. "The same rules of construction apply to a trust as to a will. ([Prob. Code,] § 21101.)" (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1450.) [*11] Our Supreme Court noted: "When the language of a will is ambiguous or uncertain[,] resort may be had to extrinsic evidence in order to ascertain the intention of the testator." (*Estate of Russell, supra,* 69 Cal.2d at p. 206.) The court went on to state as follows: "In order to determine initially whether the terms of *any written instrument* are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surrounding[] its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous. 'Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.' [Citation.]" (*Id.*, at pp. 208-209.)

"Accordingly," [*12] the Supreme Court declared, "we think it is self-evident that in the interpretation of a will, a court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made so that the judge may be placed in the position of the testator whose language he is interpreting. [Citation.] Failure to enter upon such an inquiry is failure to recognize that the 'ordinary standard or "plain meaning," is simply the meaning of the people who did *not* write the document.' [Citation.]" (*Estate of Russell, supra,* 69 Cal.2d at pp. 210-211, fn. omitted.) Thus, "extrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute) may be considered by the court in ascertaining what the testator meant by the words used in the will. If in the light of such extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, 'an uncertainty arises upon the face of a will [citation] and extrinsic evidence relevant to prove any of such meanings is admissible [citation], subject to the restrictions imposed [*13] by statute [citation]. If, on the other hand, in the light of such extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the face of the will [citations] and any proffered evidence attempting to show an intention *different* from that expressed by the words therein, giving them the only meaning to which they are reasonably susceptible, is inadmissible." (*Id.*, at p. 212, fns. omitted; see

also *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1133, 1135; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

Pursuant to the above rules set forth in *Russell*, the trial court erroneously excluded extrinsic evidence, in the form of testimony by the drafter of the declaration, concerning the circumstances surrounding the execution of the declaration. The court was not entitled to exclude such extrinsic evidence because, in its opinion, the meaning of the language in question was clearly unambiguous. " '[W]hen a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence [*14] of his own personal education and experience.' " (*Estate of Russell, supra*, 69 Cal.2d at p. 209, quoting from Corbin, *The Interpretation of Words and the Parol Evidence Rule* (1965) 50 Cornell L.Q. 161, 164; see also *Burch v. George* (1994) 7 Cal.4th 246, 258-259 [in construing trust instrument, Supreme Court considered "declaration submitted by the attorney who [had] implemented [trustor's] estate plan"]; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 79 [extrinsic evidence, including testimony of the drafter of the trust instrument, showed that the drafter had committed "multiple drafting errors"]; *Hoover v. Hartman* (1982) 136 Cal.App.3d 1019, 1026 ["the court must accept extrinsic and parol evidence of the circumstances surrounding the execution of the instrument to determine whether a seemingly clear instrument or term is actually ambiguous"].)

Respondent contends that, because the "Trust contains a pecuniary marital/residual credit formula[,] . . . the administrative expenses of the . . . Trust 'must' be paid from the Exemption Trust, not the Marital Trust." As authority for this contention, respondent relies upon the following excerpt from 2 California Trust Administration (Contl. Ed.Bar [*15] 2d ed. 2001, Feb. 2007 update) § 14.37, p. 979: "If the trust contains a pecuniary marital/residuary credit formula, by its terms these administration expenses must be paid from the credit share [Exemption Trust], not the marital share [Marital Trust]." The publication explains that a pecuniary marital/residuary credit formula "calculates the optimum marital deduction gift in terms of a dollar amount based on date-of-death (federal estate tax) values. The marital gift is the lead gift, with the credit share consisting of the residue of the deceased spouse's trust estate." (*Id*., § 14.29, p. 973.) By this definition, the trust here contains a pecuniary marital/residuary credit formula because the gift to the Marital Trust is the lead gift. The declaration provides that "[t]he Exemption Trust shall consist of the balance of the trust estate."

Respondent also relies upon a similar excerpt from Gaw, Action Guide: Marital Deduction Subtrust Funding (Cont. Ed. Bar April 2007) p. 23: "If the trust contains a pecuniary marital/residuary credit formula, administration expenses must be paid from the credit share, not the marital share." Gaw was also the author of the above quoted excerpt from [*16] California Trust Administration.

The excerpts in question cite no authority in support of their pronouncement that, where a pecuniary marital/residuary credit formula is used, administrative expenses *must* be paid from the credit share, not the marital share. Nor do the excerpts explain why such payment is mandatory. In the absence of supporting authority or explanation, these excerpts provide no assistance in ascertaining the trustor's intent. The intent issue can be resolved only by considering the specific facts of each case, not by resort to ipse dixit statements in legal publications. "Particularly in the field of interpreting trusts and wills, each case depends upon its own peculiar facts, and ' ". . . precedents have comparatively small value . . . ." ' [Citations.]" (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.)

In *Hoover v. Hartman, supra*, 136 Cal.App.3d at p. 1026, the appellate court concluded that, in ascertaining the trustor's intent, the trial court had prejudicially erred by excluding "extrinsic evidence including the proffered declaration of the draftsman of the will and declaration of trust." The appellate court accepted the observation of respondent's [*17] trial counsel "that the [opposing] arguments of counsel were 'like two trains passing in the night.' " (*Id*., at p. 1030.) The appellate court declared: "In our view there is

no need for a trial court to gamble on the destination of one passing train over another when relevant evidence will aid in selecting the proper destination." (*Ibid*.)

The rationale of *Hoover v. Hartman* applies here. Accordingly, we reverse and remand the matter to the trial court with directions to conduct a new hearing at which the parties may present relevant extrinsic evidence on the circumstances surrounding the execution of the declaration. If Mr. Garrett testifies, the trial court should keep in mind that "[i]t is the intention of the trustor, not the trustor's lawyer, which is the focus of the court's inquiry. [Citation.]" (*Wells Fargo Bank v. Marshall, supra,* 20 Cal.App.4th at p. 453.)

Disposition

The order is reversed insofar as it requires (1) the transfer of the sum of $ 69,606.63 from the Exemption Trust to the Marital Residuary Trust, and (2) the reallocation from the Marital Residuary Trust to the Exemption Trust of any additional attorney fees and administrative costs charged to the Marital Residuary [*18] Trust by Wilmington for the period after June 30, 2006. The matter is remanded to the trial court for a new hearing on these issues consistent with the views expressed in this opinion. In all other respects, the order is affirmed. Appellants shall recover from respondent their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.