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2015 IL App (3d) 140098-U

Order filed February 25, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

MARTIN MILLER,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois.
	)	
v.	)	Appeal No. 3-14-0098
	)	Circuit No. 11-CH-172
THOMAS MILLER, individually and	)	
as Trustee, and MICHAEL MILLER,	)	Honorable
	)	Ronald J. Gerts,
Defendants-Appellants.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err in granting summary judgment in favor of beneficiary who had been removed from a joint living trust by the surviving grantor. Surviving grantor did not have the power to unilaterally amend the trust agreement where the method of amendment described in the agreement provided that the grantors could only jointly amend the trust.

¶ 2 Plaintiff, Martin Miller, filed a complaint against defendants, Thomas Miller, as a named beneficiary and trustee of the John J. Toscano and Jacqueline S. Toscano Joint Living Trust, and Michael Miller, as a named beneficiary of the trust, seeking a declaration that the amendment

Jacqueline executed after John's death was void. The trial court granted summary judgment in plaintiff's favor. We affirm.

¶ 3

### FACTS

¶ 4

On October 26, 2001, John and Jacqueline Toscano, husband and wife, created a joint living trust. The trust named John and Jacqueline as the "grantors" and lifetime beneficiaries and designated both grantors, collectively, as the "trustee." Upon the death of the first grantor, the trust was to become irrevocable and was to continue for the benefit of the surviving grantor. Upon the death of the second grantor, the trust assets were to be distributed in equal percentages to Michael Miller, Thomas Miller and Martin Miller. Specifically, the trust included the following articles and provisions:

"I. PURPOSE. The purpose of this Agreement is to establish a Trust to receive and manage assets for the benefit of the Grantors during the Grantors' lifetimes, and to further manage and distribute the assets of the Trust upon the death of the surviving Grantor.

\*\*\*

V. DEATH OF A GRANTOR. Upon the death of the first of the Grantors to die (the 'decedent'), the Trust shall become irrevocable with respect to the property contributed to the Trust by the Decedent (including accumulated income on that property, but excluding trust property given to the surviving Grantor) and shall continue for the benefit of the surviving Grantor (the 'Surviving Grantor'), subject to distributions (if any) that may be required (i) by this Agreement, or (ii) to pay the just debts, funeral expenses, and expenses of last illness of the Decedent."

Article V also provided that upon the death of John, whether as first decedent or surviving spouse, distribution was to be made as follows: (1) \$1,000 to John's son, Allan Toscano; (2) \$1,000 to John's daughter, Susan Yarbrough; and (3) the residential home and real property at 331 S. Evanston, Arlington Heights, Illinois, to John's daughters, Lorrell Toscano and Annette Eichorst.

¶ 5 Further distribution of the trust assets were described in Article VI, entitled "Distribution of Residuary Trust Assets Upon the Surviving Grantor's Death." According to the conditions of that article, upon the death of the surviving grantor, the residuary assets of the trust were to be distributed 33% to Michael Miller, 33% to Thomas Miller and 33% to Martin Miller.

¶ 6 At the end of the trust agreement, the parties included a provision regarding revocation and amendment:

"X: REVOCATION OR AMENDMENT. Either Grantor may revoke at any time and/or the Grantors may jointly amend, this Agreement by delivering to the Trustee an appropriate written revocation or amendment, signed by the necessary Grantor or Grantors, respectively. \*\*\* If the Trust is revoked, the Trustee shall distribute the Trust assets to the Grantors in the same manner and amount as the Grantors contributed the property."

The trust was signed and executed by John and Jacqueline on December 12, 2001.

¶ 7 On the same day, Jacqueline executed a pour-over will. The will stated that all of the property she owned at her death and any property she had the power to dispose of under the will would be distributed to the trustee of the joint living trust and administered and distributed as provided under the trust.

¶ 8 John died on May 5, 2002, leaving the remainder of his testate estate to the trust. Upon the closing of John's probate estate, Jacqueline, acting as trustee of the trust, conveyed John's real estate to Lorrell and Annette, and paid Allan and Susan \$1,000 each. The remainder of John's probate estate, \$110,311, was distributed to Jacqueline, as beneficiary of the trust, and deposited into her individual savings account.

¶ 9 Sometime after John's death, Jacqueline and her brother, Martin, a beneficiary named in the trust, had a disagreement. In October 2007, Jacqueline executed an amendment to the joint living trust stating, in part:

"I, Jacqueline S. Toscano, of Manteno, Illinois, hereby amend The John J. Toscano and Jacqueline S. Toscano Joint Living Trust, dated October 26, 2001 and executed December 12, 2001 (the 'Trust') as follows:

The following is added to/as Section Page 3, Section VI of the Trust:

Remove all references listed for Martin Miller of Plano, Texas as beneficiary.

The percentage previously listed for Martin Miller of Plano, Texas is to be equally divided between the two remaining beneficiaries stated in this provision.

The following is added to/as Section Page 4, Section VI Continued, of the Trust:

add the following as the last provision (top of page 4): 'The Surviving Grantor has intentionally excluded: Anthony Miller of Illinois, Theresa Miller of Illinois and Martin Miller of Plano, Texas as well as their descendants from this trust and all it's [sic] provisions as having no beneficial interest implied or otherwise granted.' "

At the time of the amendment, no funds were held in the trust. All of John's residuary estate and Jacqueline's individual property were held by Jacqueline in her individual name.

¶ 10 Jacqueline died on January 11, 2008. Her will was admitted to probate and the remainder of her estate, in the amount of \$259,224.11, was dispersed to the trust on March 5, 2010. The funds were then distributed in equal shares to Thomas Miller and Michael Miller as the only beneficiaries of the residuary trust assets.

¶ 11 Martin filed a complaint in circuit court, seeking a declaration that Jacqueline's amendment to the trust after John's death was void and asking the court to order that the trust assets be returned and redistributed in compliance with the original trust agreement. A hearing was held on Martin's motion for summary judgment. The trial court granted the motion and ordered that the funds be redistributed to all three beneficiaries as provided in the trust.

¶ 12 ANALYSIS

¶ 13 Summary judgment is proper if, when viewed in a light most favorable to the nonmoving party, the pleadings, depositions, admissions and any affidavits on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review the trial court's grant of summary judgment *de novo*. *Peck v. Froehlich*, 367 Ill. App. 3d 225, 228 (2006). We also review the trial court's construction of a trust agreement *de novo*. *Id.*

¶ 14 On appeal, defendants argue that the trial court erred in granting summary judgment because the joint trust agreement gave Jacqueline, as the sole surviving grantor, the power to unilaterally amend or revoke the trust.

¶ 15 In construing a trust, a trial court's first concern is to determine the settlors' intent and give effect to that intent if it is not contrary to public policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). Intent is found by analyzing the specific words used in conjunction with the circumstances under which they were drafted. *Warren-Boynton State Bank v. Wallbaum*, 123 Ill. 2d 429, 436 (1988). The entire document must be considered. *Id.* In reviewing the trust language, the court's function is not to modify the trust or create new terms different from those to which the parties have agreed. *Williams v. Springfield Marine Bank*, 131 Ill. App. 3d 417, 420 (1985).

¶ 16 Generally, a settlor cannot modify or revoke a trust unless he has reserved the power to do so in the trust agreement. *Williams*, 131 Ill. App. 3d at 419. When a method of exercising a power to modify is described in the trust agreement, the power may be asserted only in that manner. *Parish v. Parish*, 29 Ill. 2d 141, 149 (1963).

¶ 17 Here, John and Jacqueline did not reserve the power to modify the trust unilaterally after the death of the first grantor. Article X of the joint trust agreement states that "[e]ither grantor may revoke at any time and/or the Grantors may jointly amend this agreement by delivering to the Trustee an appropriate written revocation or amendment." The plain language of Article X differentiates between amendments and revocations and states that the grantors may jointly amend the trust agreement. John and Jacqueline reserved the power to revoke the trust unilaterally by specifically stating that either grantor may revoke the trust at any time. However, they did not reserve the power to unilaterally amend the trust after the first grantor's death.

¶ 18 In an attempt to remove Martin as a beneficiary of the trust, Jacqueline executed a document entitled "*Amendment to the John J. Toscano and Jacqueline S. Toscano Living Trust*" after John's death. The document removed specific provisions of the trust as noted by paragraph

and page number and replaced those provisions with quoted language. The intent of that document was to amend the joint trust agreement. Nothing in the language of that document indicates an intent to revoke the joint trust. Although Jacqueline had the power to revoke the trust after John's death, she did not have the power to amend the trust to eliminate Martin as a beneficiary. Thus, the trial court properly granted summary judgment in his favor.

¶ 19

#### CONCLUSION

¶ 20

The judgment of the circuit court of Kankakee County is affirmed.

¶ 21

Affirmed.