2014 IL App (1st) 132705-U

THIRD DIVISION
Order filed August 20, 2014
Modified upon denial of September 17, 2014

1-13-2705

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JPMORGAN CHASE BANK, N.A., not individually but as Trustee of the John E. Hale Sub-Trust No. 8 under the En Tout Cas Trust, dated July 16, 1952,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Nominal Appellee,	)	
v.	)	No. 12 CH 06545
JOHN A. FUJA, not individually, but as Personal Representative of the Estate of Ramona Jean Hale as sole Legatee of the Estate of Mary J. Hale, deceased	)	Honorable Kathleen M. Pantle, Judge Presiding.
Defendant-Appellant,	)	
and	)	
MARIAN HALE, HOWARD F. GILLETTE, JR., CORNELIA F. ZIMMERMAN, JONATHAN H. GILLETTE, MARY D. GILLETTE, MARGARET H. TEAFORD and EUNICE H. SHIELDS,	)	
Defendants-Appellees.	)	

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Decedent's appointment of income from sub-trust and default of appointment over the sub-trust's corpus became effective upon his death. Pursuant to the terms of the trust, surviving issue possessed a vested remainder interest in the sub-trust's corpus, the enjoyment of which was postponed to the termination of a life estate in the sub-trust's income.

¶ 2 In this trust construction case, John A. Fuja appeals the trial court's ruling denying his motion for summary judgment and granting certain other sub-trusts' beneficiaries' motion for summary judgment ultimately finding that Fuja was not the proper party to receive the distribution of a sub-trust's corpus. On appeal, Fuja contends the language of the trust, which created numerous other sub-trusts, is unambiguous and requires distribution of the sub-trust's corpus to him. We agree with Fuja and reverse and remand this matter with direction to enter summary judgment for Fuja on the vesting issue.

¶ 3 BACKGROUND

¶ 4 On July 16, 1952, Susan F. Hibbard, as settlor, executed a trust agreement creating a trust known as the En Tout Cas Trust. Upon Hibbard's death, the trustees were instructed to create 15 separate sub-trusts for the lifetime benefit of certain named individuals, which included Hibbard's: (i) nieces and nephews; (ii) deceased brothers' widows; (iii) friend; and (iv) cousin. A beneficiary of one of the sub-trusts was John E. Hale, Hibbard's nephew. For purposes of clarity, we will collectively refer to the sub-trust beneficiaries other than Hale as the "Gillette beneficiaries."

¶ 5 Relevant provisions of the trust for are contained in Article VIII and state in pertinent part:

"E. Each separate trust provided for in this article VIII shall terminate upon the death of the person for whom such trust is named and thereupon the then trust estate shall be paid to such of the following persons and in such shares and upon such trusts and conditions as such person may by his or her last will and testament direct and appoint, to-wit: the surviving spouse of such person, the issue of such person and the respective spouses of such issue; provided, however, that with respect to the spouse of any such person appointment shall be only for an interest in the income from such trust fund and shall not be for a longer period than the life of such spouse.

F. In default of appointment or to the extent that such appointment is ineffective, the then trust estate shall be distributed *per stirpes* to the *then surviving issue of the person for whom the trust is named* and if no such issue are then living it shall be allocated *pro rata* to the other trusts provided for under this article VIII, and thereafter dealt with and administered as if such addition had originally been a part of the principal of such trust. If any such trust has theretofore terminated the then trust estate shall be paid to those persons and in the same shares and interests who became entitled to share in such trust upon the termination thereof." (Emphasis added.)

¶ 6 Hibbard died testate on December 4, 1961. Upon her death, the trustees created the 15 separate sub-trusts as instructed by the trust. Hale survived Hibbard and thus became the named beneficiary of the "John E. Hale Trust," which was funded with his respective share of the residuary trust corpus.

¶ 7 Hale died testate on January 11, 1988, survived by his spouse, Ramona, and two adopted children, William and Mary. Pursuant to the first codicil to his will dated July 16, 1976, Hale exercised, in part, his testamentary power of appointment over his sub-trust as set forth in

paragraph E and provided the income from the sub-trust to Ramona for her life. Hale did not provide for the disposition of the sub-trust's corpus in his will.

¶ 8 Hale's adopted children, William and Mary, predeceased Ramona, who died testate on June 7, 2009. William died intestate on June 4, 1993, and his sole heirs were Mary and Ramona. Mary died testate on December 29, 2003, and her will named Ramona as her sole residuary legatee. Ramona's will named her brother, Fuja, as her sole residuary legatee.

¶ 9 On February 24, 2012, JP Morgan Chase Bank, N.A., as sole trustee, filed a complaint for construction of the Hale sub-trust. Named as defendants were "those parties who may be entitled to the remaining assets of the John E. Hale Trust, depending on how this Court resolves this Complaint for Construction of Trust." Those parties included Fuja and the Gillette beneficiaries, the latter claiming that the corpus of the Hale sub-trust should be distributed *pro* rata to them pursuant to the above-quoted provisions of article VIII, paragraph F.

¶ 10 The complaint sought clarification of what "then surviving issue" meant claiming the phrase was ambiguous because it was unclear if the relevant point in time to determine Hale's surviving issue was as of the date of death of Hale or Ramona. According to the complaint, there were two possible dates upon which Hale's "then surviving issue" could be determined: either (i) Hale's date of death when the sub-trust "terminated" pursuant to the trust's terms or (ii) Ramona's date of death because the sub-trust's corpus became distributable at that time. Chase asserted the requested determination was necessary because it dictated whether the sub-trust's corpus would be distributable to the Gillette beneficiaries or in equal shares to William's and Mary's estate and, thus, to Fuja.

¶ 11 On October 31, 2012, the Gillette beneficiaries filed a motion for summary judgment asserting only Hibbard's nieces and nephews and their lineal descendants may inherit a sub-

trust's corpus upon its termination. They also argued because Hale exercised his power of appointment and conveyed a life estate in the income from the sub-trust to Ramona, the sub-trust's corpus was not distributable upon his death.

¶ 12 On January 2, 2013, Fuja, as personal representative of Ramona's estate, filed a cross-motion for summary judgment. Fuja argued because Hale did not exercise the power of appointment over the sub-trust's corpus and only exercised his power of appointment over the sub-trust's income to Ramona for her life, William and Mary had a vested interest in the sub-trust's corpus upon Hale's death, the possession of which was postponed until Ramona's death.

¶ 13 On May 17, 2013, the trial court entered an order granting the Gillette beneficiaries' motion for summary judgment and denying Fuja's cross-motion for summary judgment. The trial court held the trust terminated upon Ramona's and not Hale's death. The trial court reasoned that because Hale conveyed a life estate in the trust income to Ramona, pursuant to article VIII, paragraph E, Hale's trust did not terminate until Ramona's life estate terminated upon her death, which was when the sub-trust's purpose was fulfilled. The trial court denied Fuja's motion to reconsider and he timely appealed.

¶ 14 ANALYSIS

¶ 15 Fuja claims the trial court erred in granting the Gillette beneficiaries' motion for summary judgment and denying his cross-motion for summary judgment because William and Mary became vested remaindermen in the sub-trust's corpus upon Hale's death. Fuja asserts Hale's failure to exercise his power of appointment over the sub-trust's corpus prior to the time of his death triggered the default appointment provided for in paragraph F resulting in William and Mary receiving a vested remainder interest in the sub-trust's corpus upon Hale's death. The Gillette beneficiaries claim the relevant time period triggering the default appointment over

Hale's sub-trust's corpus occurred at the end of Ramona's life estate interest, and because Hale had no "then surviving issue" (William and Mary having predeceased Ramona), the corpus of Hale's sub-trust reverted to the trust for distribution to the other sub-trusts.

¶ 16 Summary judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). We review a trial court's ruling on a motion for summary judgment *de novo*. *Hooker v. Retirement Board of the Fireman's Annuity & Benefit Fund*, 2013 IL 114811, ¶ 15.

¶ 17 In trust construction cases, a trust's language is analyzed to ascertain the settlor's intent based on the trust as a whole and giving effect to that intent provided it is not contrary to public policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991); *Harris Trust & Savings Bank v. Beach*, 118 Ill. 2d 1, 3 (1987). When interpreting a trust's language, words are given their plain and ordinary meaning and the trust's language should not be treated as surplusage, rendered void or insignificant. *Id.*

¶ 18 Where the settlor's intent in creating the trust is unclear, rules of construction are employed to determine the meaning of the language used in the document. *Beach*, 118 Ill. 2d at 4. The same rules of construction applied in construing a will are used to construe a trust. *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 513 (1981). Rules of construction are court created presumptions of what the settlor would have intended ambiguous terms to mean and are the court's own assessment of what the settler likely meant in drafting the provision. *Id.* Rules of construction, however, may not be used to subvert the settlor's intentions. *Id.*

¶ 19 Here, paragraph E's unambiguous language specifically states, in part: "Each separate trust *** shall terminate upon the death of the person for whom such trust is named." Those words expressly demonstrate Hibbard's intent as to when each sub-trust would terminate. Paragraph E also expressly states that "thereupon the then trust estate shall be paid," which establishes that the appointment of the sub-trust's corpus became effective upon the sub-trust's termination, or stated differently, upon the death of the sub-trust's named beneficiary. Applying that language to the facts of this case, Hale's sub-trust terminated when he died since he was "the person for whom such trust is named." Paragraph E provided Hale with the power to appoint to whom the now terminated trust should be distributed to as directed by his will, but limited to his spouse, his issue and the surviving spouse of his issue. Paragraph E further restricted Hale's power of appointment by allowing him to appoint only the income from the sub-trust to his spouse or the spouse of any of his issue for the spouse's life. In his will, Hale directed distribution of the sub-trust's income to Ramona for her life. Hale's will, though, provided no direction regarding the distribution or appointment of the sub-trust's corpus; thus, he defaulted on that appointment and that default became effective at the time of his death.

¶ 20 Article VIII, paragraph F unambiguously resolves what occurs in the event of a default of appointment and provides "the then trust estate shall be distributed *per stirpes* to the then surviving issue of the person for whom the trust is named and if no such issue are then living it shall be allocated *pro rata* to the other trusts." A trust agreement's provisions must be construed as a whole and, to the extent possible, all of the provisions should be harmonized with each other. *Mucci v. Stobbs*, 281 Ill. App. 3d 22, 29 (1996). Reading paragraphs E and F together, we know: (1) the sub-trust terminated upon Hale's death; (2) upon his death the trust estate "shall be paid;" (3) Hale possessed the power of appointment regarding the sub-trust's income and corpus;

(4) only the sub-trust's income may be distributed to spouses for their life; and (5) default of the power of appointment over the sub-trust's corpus resulted in a distribution *per stirpes* to the "then surviving issue," if any, and otherwise to the other sub-trusts created by the trust.

¶ 21 It is undisputed that Hale did not exercise his power of appointment over the sub-trust's corpus. Consequently, a default of appointment occurred as to the Hale sub-trust's corpus. It is also undisputed that Hale exercised his power of appointment regarding the sub-trust's income by providing in his will distribution of the sub-trust's income to Ramona for life. Because Hale defaulted on his power to appoint the sub-trust's corpus, paragraph F, by its terms, directed that the sub-trust's corpus be distributed *per stirpes* to Hale's then surviving issue, if any. Paragraph F applied at Hale's death because the appointment of the sub-trust's corpus or income from the sub-trust only became effective when the trust terminated, *i.e.*, on Hale's date of death.

¶ 22 Significantly, the default power of appointment applied only to the sub-trust's corpus because paragraph F states "the then trust estate" and does not separately address a default of appointment as to the sub-trust's income. From this, we know Hibbard intended to provide a mechanism for distribution of the sub-trust's corpus if the "person for whom such trust is named" (Hale) failed to exercise his power of appointment over the corpus. Based on the unambiguous language of paragraph F, upon Hale's death, if he had not exercised his power of appointment over the sub-trust's corpus, then the corpus must "be distributed *per stirpes* to [his] then surviving issue." Reading the trust's language in context, the phrase "then surviving issue" in paragraph F clearly refers to Hale's surviving issue at the time of his death because that phrase is used in the same sentence as the phrase "in default of appointment," which would only occur upon Hale's death, prior to which, according to paragraph E, he had the power to appoint both the sub-trust's corpus and income.

¶ 23 The Gillette beneficiaries claim Hale's sub-trust cannot terminate until the sub-trust's intended purpose was fulfilled, which only occurred after Ramona's life estate terminated, because Hibbard intended a sub-trust beneficiary to provide the sub-trust's income to spouses for life. We are not persuaded by this interpretation of Hibbard's intended purpose. While the interest of Hale's issue in the sub-trust corpus is certainly subject to Ramona's life estate in the sub-trust income, that does not mean, as the Gillette beneficiaries argue, that notwithstanding the clear language terminating the sub-trust on Hale's death, the sub-trust, in fact, did not terminate until Ramona's death. Paragraph F defeats this position because in that paragraph, Hibbard expressly dictated her intent that a sub-trust's corpus "shall be distributed" to the "then surviving issue of the person for whom the trust is named" upon that person's death. In the context of the Hale sub-trust, this means that Hibbard clearly intended to distribute the sub-trust's corpus to William and Mary upon Hale's death, even if Hale had not made provisions regarding distribution of the sub-trust's corpus. A spouse's receipt of the income generated from the sub-trust does not defeat Hibbard's intended purpose that the sub-trust's corpus be distributed to her nephew's "then surviving issue" upon his death because the trust expressly states the sub-trust "shall terminate upon the death of the person for whom such trust is named." Consequently, Hibbard's expressly stated duration of the sub-trust must be given effect and the sub-trust terminated upon Hale's death thereby invoking the default provisions regarding distribution of the corpus. *La Salle National Bank v. MacDonald*, 2 Ill. 2d 581, 587 (1954).

¶ 24 The Gillette beneficiaries argued and the trial court concluded that, based on the language of the Hale sub-trust, William and Mary were required to survive Ramona for their interest in the sub-trust's corpus to vest. Based on this conclusion, the trial court determined William and Mary received a contingent remainder interest in the sub-trust's corpus upon Hale's death. A remainder

interest is considered contingent if the remainderman's identity cannot be definitely ascertained or if the remainder interest is conditioned on the happening of an event not certain to happen. *In re Estate of Michalak*, 404 Ill. App. 3d 75, 84 (2010). In contrast, an individual possesses a vested remainder interest when the individual is ready to take possession of the interest upon the termination of the prior estate. *Id*. The main characteristic distinguishing a vested from a contingent remainder is the vested remainderman's present ability to take possession should possession become vacant with certainty the vacancy will occur; in contrast, with a contingent remainder interest, uncertainty exists that the event triggering the right to possession will occur or that possession will become available during the remainderman's lifetime. *Kost v. Foster*, 406 Ill. 565, 568-69 (1950). Stated differently, a vested remainder has a present right of future enjoyment that is not dependent upon any uncertain event or contingency, but a contingent remainder's right itself is uncertain and dependent upon future events. *Id.*

¶ 25 To reach the conclusion that William and Mary had a contingent remainder interest, the trial court relied on *Freudenstein v. Braden*, 397 Ill. 29 (1947); *Johnston v. Herrin*, 383 Ill. 598 (1943); and *Keefer v. McCloy*, 344 Ill. 454 (1931). We find each of these cases distinguishable.

¶ 26 In *Freudenstein*, the testator included the following provision for his two daughters in a will: "I hereby devise and bequeath to my *** daughter *** a life estate *** to hold and enjoy the same during the period of her natural life ***. *At her death* the remainder in said premises I devise in fee to the heirs on her body, or the descendants ***. Should my daughter *** at her death have or leave no children or descendents of children her surviving then the remainder in said tract of land is to be controlled by item number seven of this will." (Emphasis added.) 397 Ill. at 31-32. Our supreme court held that this provision created a contingent, and not a vested,

remainder and distribution of the assets could be determined only after the death of the testator's daughters. *Id.* at 36.

¶ 27 In *Johnston*, the relevant language stated: "*At the death of my said wife*" the remaining estate was to be distributed "equally divided among my surviving descendants in the same shares and portions." (Emphasis added.) 383 Ill. at 600. Our supreme court concluded the testator's surviving descendants received a contingent remainder interest because distribution would occur at a future time contingent upon the individual surviving the date of payment. *Id.* at 606. The court further explained that a contingent remainder interest is not an estate, but merely a chance of receiving one. *Id.* at 607.

¶ 28 Finally, in *Keefer*, the disputed language provided for final distribution of an estate to be made "after the death of both [testatrix's] children, after the death or remarriage of the surviving wife of her son, and after the arrival at the age of 30 years of her oldest living grandchild." 344 Ill. at 458. The *Keefer* court concluded a contingent interest was created because survival of all three conditions was a condition precedent to the estates of the grandchildren coming into existence. *Id.* at 459.

¶ 29 The foregoing cases are readily distinguishable from the circumstances presented here because in each of them the relevant language clearly specified that the remainder interest was not determined upon the testator's death, but upon the death of another individual, which created the beneficiary's survival of the life estate as a condition to receiving a distribution. Hibbard did not include a similar provision in the trust regarding distribution of the sub-trust's corpus. Nothing in the trust expressly requires Hale's issue to survive Ramona; instead, according to the express terms of the trust, Hale's issue were only required to survive him. ("[T]he then trust

estate [at Hale's death] shall be distributed *per stirpes* to the then surviving issue of the person for whom the trust is named.")

¶ 30 The only point of contention between the parties relates to the ownership of the sub-trust's corpus. According to the trust's plain language, Ramona was not expressly named as the measuring life for appointment and distribution purposes of the sub-trust's corpus to the "then surviving issue." While the trial court's decision that William and Mary possessed only a contingent remainder could be supported by a reading of article VIII, paragraph E in isolation, it cannot withstand a reading of paragraphs E and F together. When construing a trust, we must read and interpret the document in its entirety. *Stobbs*, 281 Ill. App. 3d at 29. The trust, when considered as a whole, revolves around Hale's and not Ramona's death as is evident from the trust's language providing that in the event of a default of appointment, the "then trust estate" determined "upon the death of the person for whom such trust is named" shall be distributed to "the then surviving issue of the person for whom the trust is named," which indisputably was Hale and not Ramona.

¶ 31 In *Dauer v. Butera*, 267 Ill. App. 3d 539, 542-43 (1994), this court addressed the issue of whether a decedent's children received a vested or contingent remainder interest. The *Butera* court relied on our supreme court's decision in *Barker v. Walker*, 403 Ill. 302, 307-08 (1949) and quoted the following from *Walker*: " 'Whenever the person who is to succeed to the estate in remainder is ascertained, and the event which by express limitation will terminate the preceding estate is certain to happen, the remainder is vested.' " *Id.* (quoting *Walker*, 403 Ill. at 307-08.) The *Butera* court recognized that Illinois courts have repeatedly held that "a bequest merely postponed until after the death of a life tenant is a vested remainder." *Id.* at 543 (and cases cited therein.)

¶ 32 In *Butera*, the decedent's will created a testamentary trust for the life of her son Thomas Butera and "[u]pon the death of my said son Thomas Butera, or in the event that my son Thomas Butera shall fail to survive me, then at my death, I give, devise and bequeath the residue of my estate to my daughters and sons." 267 Ill. App. 3d at 541. This court concluded the decedent's children became vested remaindermen at the time of decedent's death because the phrase "upon the death of my said son Thomas Butera" did not establish a requirement that the children survive the life tenant in order to inherit. *Id.* at 543. The *Butera* court further elaborated that "if the will left the trust to the children of decedent as a vested remainder at the time of decedent's death, it would belong to their estate. Decedent's children who predeceased the life tenant would pass on their bequests to their heirs." *Id.* at 542-43; see also *Whalen v. Whalen*, 217 Ill. App. 3d 557, 559 (1991) (stating a vested remainder's interest in the residue of a trust, subject only to a life estate interest, is not defeated even though he may predecease the life tenant.)

¶ 33 Here, William and Mary received a vested remainder interest in the sub-trust's corpus at the time of Hale's death. Both William and Mary were persons "in being ascertained and ready to take" who have "a present right of future enjoyment, one which is not dependent upon any uncertain event or contingency" because Ramona's death was an event certain to occur. *Butera*, 267 Ill. App. 3d at 543. Applying *Butera's* holding, because William and Mary had a vested remainder interest in the sub-trust's corpus at the time of Hale's death, that interest belonged to their estate. Consequently, through devises and intestate succession, both William's and Mary's remainder interest passed to Ramona and then to Fuja as sole residuary legatee of Ramona's estate.

¶ 34 The Gillette beneficiaries claim that Hibbard's apparent intent was to distribute the sub-trust's assets only to her lineal descendants and for the benefit of her nieces, nephews and their

children. The distributions provided for in the trust, however, refute this assertion because Hibbard provided for distributions to her friend, as well as to her sisters-in-law and a cousin. Moreover, the trust imposes no restrictions or limitations upon "the then surviving issue of the person for whom the trust is named" regarding future distribution of the sub-trust that they would receive upon the death of the sub-trust beneficiary. Importantly, the trust did not restrict future distribution of the "then surviving issue's" interest in the sub-trust to their own surviving issue. Therefore, the "then surviving issue" could bequeath the sub-trust corpus to anyone they chose—relative or not. Based on the absence of restrictions on future distribution of the sub-trust's corpus, the trust's purpose (with the exception of the distributions to non-lineal descendants) was to benefit Hibbard's nieces and nephews and their children. Thus, concluding that William's and Mary's interest in the sub-trust's corpus should be included in their estate and distributed accordingly is not contrary to Hibbard's intent.

¶ 35 Consequently, based on our construction of the provisions of Hibbard's trust, the trial court erred in granting summary judgment in Gillette beneficiaries' favor and denying Fuja's cross-motion for summary judgment, as there is no genuine issue of material fact regarding ownership of the sub-trust's corpus, and Fuja is entitled to judgment as a matter of law.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we reverse the trial court's order granting summary judgment in favor of the Gillette beneficiaries and denying Fuja's cross-motion for summary judgment and remand this matter with directions to enter summary judgment for Fuja on the vesting issue. We do not address (because Fuja has not raised any other issue on appeal) other arguments advanced by the Gillette beneficiaries, which have not yet been addressed by the trial court.

¶ 38 Reversed and remanded.