

2012 IL App (2d) 111128-U  
No. 2-11-1128  
Order filed July 2, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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In re Estate of JEAN E. DESMARAIS, Deceased.	)	Appeal from the Circuit Court of Lake County.
	)	
LAURIE DEARLOVE, as trustee of the John H. Epstein Trust, dated April 16, 1987,	)	
	)	No. 07-P-1105
Cross-Petitioner/Appellant,	)	
	)	
v.	)	
	)	
HARMON BROWN, Independent Executor of the Estate of Jean E. DesMarais,	)	
KRISTIN DESMARAIS, and	)	
SUSAN EPSTEIN,	)	
	)	Honorable
Cross and Third-Party Respondents/ Appellees.	)	Diane E. Winter, Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

**ORDER**

*Held:* The trial court properly entered summary judgment, ordering the trustee to distribute the remaining assets of a trust.

¶ 1 Three sisters became beneficiaries of their father's trust. After two of the women passed away, representatives of their estates brought this action to compel the third sister, who is also the

trustee, to distribute the “remaining assets” of the trust. The trial court entered summary judgment, ordering the trustee to distribute the remaining assets, including real estate defined in the trust as a “special asset.” The trustee appeals, arguing that she has discretion to hold the special asset without distributing it. We hold that the term “remaining assets,” which must be distributed under the provisions of the trust, includes the special asset. Accordingly, we affirm the trial court’s decision to compel the distribution.

¶ 2

## I. FACTS

¶ 3 Many of the underlying facts are undisputed. On April 16, 1987, John H. Epstein executed the John H. Epstein Trust (the “Trust”). The Trust created an “Original Trust” for the benefit of John, and his spouse, Lucy, during John’s lifetime. John died on July 11, 1988, at which point the Trust directed that certain assets be distributed to a “Marital Trust” for Lucy’s benefit and a “Family Trust” for the benefit of the couple’s three daughters during Lucy’s lifetime. Lucy passed away on November 11, 1991.

¶ 4 The Trust directed that, upon Lucy’s death, the assets would be transferred to three separate “Descendants’ Trusts” for the benefit of each of John’s three living daughters: Jean DesMarais (then age 46), Susan Epstein (then age 45), and Laurie Dearlove (then age 39), who became trustee. Each was designated the primary beneficiary of a separate Descendant’s Trust.

¶ 5 As trustee, Laurie distributed some of the assets to the beneficiaries during their lifetimes. Now, the sole asset is an undivided one-half interest in real estate known as the Tamarack Property. Laurie personally owns the other one-half interest in the Tamarack Property.

¶ 6 Jean died on June 2, 2007. In 2008, Harmon Brown, the executor of Jean’s estate, began making repeated demands that Laurie execute deeds transferring a one-sixth interest in the Tamarack

Property allocable to Jean's Descendant's Trust. Jean's estate and Laurie began negotiating for Laurie to buy Jean's share, but those negotiations failed and Laurie took the position that the Trust gave her discretion not to distribute the Tamarack Property.

¶ 7 On June 11, 2010, Jean's estate filed a petition for a citation to discover and recover property against Laurie in her capacity as trustee. The petition sought an order declaring that Jean's estate was the rightful owner of a one-sixth share of the Tamarack Property that was held in Jean's Descendant's Trust.

¶ 8 On August 13, 2010, Laurie filed an answer to the petition and a cross-petition for instructions. Laurie alleged ambiguities in the Trust provisions regarding the proper distribution of the Tamarack Property. Laurie named Susan and Kristin DesMarais, Jean's daughter, as third-party respondents.

¶ 9 Susan died on October 16, 2010, and as a resident of Colorado, she appointed Melissa R. Schwartz, the public administrator for the City and County of Denver, as her personal representative. Schwartz has asserted that neither she nor Susan were served notice of the proceedings.

¶ 10 On June 28, 2011, the trial court granted Jean's estate summary judgment, pending a ruling on Kristin's affirmative defense of laches. The trial court determined that section 5.8 of the Trust, which requires distribution of "remaining assets," compelled the distribution of the Tamarack Property. Section 5.8 provides as follows:

"5.8 Retention of Special Assets. A principal purpose of this Trust is to obtain for my family the maximum value from Special Assets, and I intend that the Trustee have complete freedom and flexibility to take any action or inaction as to Special Assets which the Trustee believes advisable, in the Trustee's sole discretion, regarding the sale, retention,

development or any other use or disposition of Special Assets. Therefore, notwithstanding any other provision, I direct that no Descendant's Trust established under this Article shall terminate for a minimum period of seven years after the death of the survivor of myself and my spouse, and that no terminating distributions of principal under Sections 5.6 or 5.7 shall be made which, as determined in the absolute discretion of the Trustee, would materially jeopardize the above described purpose. The Trustee may in its absolute discretion, and I encourage the Trustee to the maximum extent possible, to make distributions of principal cash and liquid assets to the primary beneficiary pursuant to Sections 5.6 or 5.7 to the extent the Trustee believes such distributions can be made without materially jeopardizing the above described purpose. Any decisions made in good faith by the Trustee in attempting to carry out these directions shall not be subject to review, and the Trustee shall be held harmless from any cost or liability as to such decisions. *Remaining assets of each Descendant's Trust shall be distributed to any primary beneficiary who has attained the age of 28 no later than the end of the seven year period provided in this Section.*" (Emphasis added.)

¶ 11 On July 28, 2011, Laurie moved for reconsideration of the summary judgment awarded to Jean's estate. On August 1, 2011, Schwartz filed her appearance as Susan's representative. The trial court granted Susan's estate leave to file an answer to Laurie's cross-petition for instructions; a response to Laurie's motion to reconsider; and a cross-petition for breach of fiduciary duty, constructive fraud, and issuance of a citation to recover assets against Laurie.

¶ 12 On September, 27, 2011, the trial court denied Laurie's motion to reconsider. The court also struck with prejudice Kristin's affirmative defense of laches, which is not at issue in this appeal. The

court reiterated its grant of summary judgment, ordering Laurie to distribute the remaining assets of the Descendants' Trusts, including one-sixth shares of the Tamarack Property to the estates of Jean and Susan. Laurie, as trustee of the Trust, timely appeals.

¶ 13

## II. ANALYSIS

¶ 14 Laurie challenges the trial court's orders granting the beneficiaries summary judgment and ordering her to distribute the one-half undivided interest in the Tamarack Property to herself, Jean's estate, and Susan's estate. As owner of the other one-half interest in the Tamarack Property, Laurie wishes to leave the Descendants' Trusts' interest in the property undistributed. The estates of Jean and Susan argue that allowing Laurie to refuse to distribute the interest in the property would amount to a disinheritance.

¶ 15 The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of 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); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). If a party moving for summary

judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597.

¶ 16 The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007).

¶ 17 A court's primary concern in interpreting a trust instrument is to discover the intent of the grantor, which the court will effectuate if it is not contrary to law or public policy. *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 574 (2009). In determining the grantor's intent, the court must first consider the plain and ordinary meaning of the words used and must consider the entire document. *Citizens National Bank*, 235 Ill. 2d at 574. Where the trust contains language that is unambiguous and clear, the intent must be ascertained from that language; extrinsic evidence may be admitted to aid the interpretation only if the document is ambiguous. *Brown v. Ryan*, 338 Ill. App. 3d 864, 871 (2003). We review the trial court's construction of the trust instrument *de novo*.

¶ 18 Article V of the Trust governs the Descendants' Trusts and contains provisions for discretionary and mandatory distributions and for termination of the trusts. Pursuant to section 5.2, immediately following Lucy's death, Jean, Susan, and Laurie became the primary beneficiaries of the Trust, and the assets were transferred to the three Descendants' Trusts for their benefit. Section 5.9 defines the term "special assets" as, *inter alia*, any interest in real estate owned by the Trust at

the time of John's death. The parties agree that, as real estate, the Tamarack Property is a "special asset."

¶ 19 As each of the primary beneficiaries was over 21 years old when the Descendants' Trusts were created, section 5.4 required the distribution of all net income from each Descendant's Trust to the primary beneficiary of that trust. Section 5.5 authorized the distribution of the principal of each Descendant's Trust to the primary beneficiary and her descendants in the trustee's discretion.

¶ 20 Section 5.8 bars the trustee from terminating the Descendants' Trusts sooner than seven years after Lucy's death. However, section 5.8 also provides that the "[r]emaining assets of each Descendant's Trust shall be distributed to any primary beneficiary who has attained the age of 28 no later than the end of the seven year period." On November 11, 1998, which was exactly seven years after Lucy's death, each of the primary beneficiaries was over the age of 28.

¶ 21 The estates of Jean and Susan argue that their shares of the Tamarack Property are the "remaining assets of each Descendant's Trust," which Laurie should have distributed on the seventh anniversary of Lucy's passing. Laurie responds that a "special asset," like the Tamarack Property, is different from the "remaining assets" and may be retained in her discretion after the seven-year period expired. Thus, at issue is whether the Trust grants Laurie, as trustee, the discretion to retain the Descendants' Trusts' interest in the Tamarack Property as a "special asset" under section 5.9, notwithstanding the mandatory distribution of "remaining assets" under section 5.8. For the following reasons, we conclude that Trust granted the trustee discretion to manage the special assets during the seven-year period but mandated distribution of all assets — including special assets — on the seventh anniversary of Lucy's death.

¶ 22 As real estate, the Tamarack Property qualifies as a “special asset” under section 5.9 of the Trust. Section 5.9 expressly authorizes the trustee to “retain any special assets” without regard to the diversification that is ordinarily considered prudent for trust investments. Laurie argues that the Trust unambiguously excludes “special assets” from the definition of “remaining assets,” which must be distributed. Laurie alternatively argues that the terms’ definitions are ambiguous and that parole evidence is necessary to ascertain the grantor’s intent. Although the Trust does not define the term “remaining assets,” we conclude that the term unambiguously *includes* special assets.

¶ 23 The plain and ordinary meaning of “remain” is “to be a part not destroyed, taken away, or used up,” to be “still extant, present, or available,” and to be “left when the rest is gone.” Webster’s Third New International Dictionary at 1919 (1993). In the context of land, “remain” is also defined as “to stay or continue for the benefit of another than the grantor.” Webster’s Third New International Dictionary at 1919 (1993).

¶ 24 In this case, regardless of its label as a “special asset,” the Tamarack Property was an asset that was not destroyed, taken away, or used up at the end of the seven-year period following Lucy’s death. The undivided one-half interest in the Tamarack Property, having been set aside for the benefit of Jean, Susan, and Laurie, was available for distribution. “Remaining assets” means all Trust assets that were left seven years after Lucy’s death. The Tamarack Property was left on that date, and therefore is among those remaining assets that must be distributed under section 5.8. We conclude that the trial court correctly declined to consider parole evidence to ascertain the meaning of “remaining assets.”



¶ 25 Including “special assets” among the “remaining assets” is the best indication of John’s intent, especially where he easily could have explicitly excluded “special assets” from the mandatory distribution provision of section 5.8. We decline to read into the Trust a term that is not there.

¶ 26 In addition to the mandatory distribution provision of section 5.8, the modifier “remaining” is used in connection with “assets” elsewhere in the Trust document. Our interpretation of “remaining assets” in section 5.8 is consistent with that use. When Lucy died, the Tamarack Property was considered a remaining asset that was to be transferred into the Descendant’s Trusts under sections 3.4 and 4.3. Specifically, the Trust directed that, upon Lucy’s death, the Marital and Family Trusts would terminate. The “remaining Marital Trust assets” and the “remaining Family Trust assets” then were allocated to the Descendants’ Trusts. Our interpretation of section 5.8 is consistent with that transfer.

¶ 27 In entering summary judgment, the trial court determined that sections 5.6 and 5.7 are not relevant to the distribution of the Tamarack Property. Laurie contends that section 5.6 is the only means of terminating the Trust, and therefore, section 5.8 cannot be interpreted to compel distribution of the special assets. We disagree. Giving the words of sections 5.6, 5.7, and 5.8 their plain and ordinary meaning shows that these sections provide for three methods of distribution, depending on the circumstances.

¶ 28 Section 5.7 directs termination of a Descendant’s Trust *within* the seven year period if the primary beneficiary dies, and the section orders distribution of the remaining assets pursuant to a power of appointment. Section 5.7 provides as follows:

“5.7 Special Testamentary Power of Appointment. Notwithstanding any other provision of this Article (except Section 5.8 to which this Section is subject), upon the death

of the primary beneficiary of a Descendant's Trust, the Trustee shall distribute any part of all of such trust's assets, in trust or otherwise, to or for the benefit of one or more such beneficiary's descendants (whenever born), as such beneficiary may appoint by Will making specific reference to this power."

¶ 29 Section 5.7 granted the primary beneficiaries a power of appointment of their interest in the Trust. However, section 5.7 does not apply under the circumstances presented here, as Jean, Susan, and Laurie lived past the seven-year period.

¶ 30 We agree with Susan's interpretation of section 5.6 as a "catch-all" provision that directs the distribution of remaining assets when a primary beneficiary of a Descendant's Trust dies within the seven-year period and does not exercise the power of appointment granted in section 5.7. Section 5.6 provides as follows:

"5.6 Termination. This Section is without further reference subject to the provisions of Section 5.7 and no distributions shall be made under this Section 5.6 which the Trustee believes, in the Trustee's sole discretion, would materially jeopardize the purposes of Section 5.7. Upon the death of a primary beneficiary of a Descendant's Trust, the Trustee shall allocate the remaining assets of such trust, subject to the Descendant's Trust withholding provisions, in shares *per stirpes* for:

(a) Such beneficiary's then living descendants, or if none;

(b) The then living descendants of such beneficiary's nearest ancestor who has descendants then living and who was either my descendant or myself."

¶ 31 Like section 5.7, section 5.6 does not apply under the circumstances presented here because Jean, Susan, and Laurie lived beyond the seven-year period. Because all of the primary beneficiaries

were living and over the age of 28 on the seventh anniversary of Lucy's death, section 5.8 directed the distribution of the remaining assets on that date. In light of the three separate distribution scenarios, we conclude that the trial court correctly determined that section 5.8 compelled Laurie to distribute a one-sixth share of the Tamarack Property to Jean's Descendant's Trust and Susan's Descendant's Trust on the seventh anniversary of Lucy's death.

¶ 32 Designating the Tamarack Property as a special asset exempted the trustee from the prudent investor requirement of diversification with respect to those special assets while they were held in the Trust. Furthermore, section 5.8 provides that "A principal purpose of this Trust is to obtain for my family the maximum value from Special Assets, and I intend that the Trustee have complete freedom and flexibility to take any action or inaction as to Special Assets which the Trustee believes advisable, in the Trustee's sole discretion, regarding the sale, retention, development or any other use or disposition of Special Assets." However, granting Laurie, as trustee, the discretion to manage the special assets without regard to diversification while they are in the Descendants' Trusts does not exclude them from the "remaining assets" that must be distributed upon the seventh anniversary of Lucy's death. Section 5.9, which defines "special assets," does not mention distribution or refer to section 5.8. Instead, section 5.9 grants the trustee discretion only regarding the sale, retention, development or any other use of disposition of Special Assets, while they are held in trust. The trustee lost that discretion on the seventh anniversary of Lucy's death.

¶ 33 The mandatory distribution of the Tamarack Property does not render the provisions regarding special assets moot, as Laurie maintains. The mandatory distribution under section 5.8 and discretionary management of section 5.9 achieve the purpose of giving the trustee discretion to maximize the value of the special assets before the mandatory distribution date.

¶ 34 Under the circumstances of this case, section 5.8 operated in a way that both barred the trustee from distributing the assets in the Descendants' Trusts before the seventh anniversary of Lucy's death but mandated distribution once that day arrived. We reject Laurie's assertion that this is an "absurd" result. The seventh anniversary of Lucy's death is a triggering date, similar to a beneficiary reaching a certain age. The use of triggering dates in Trust documents is common. Rather, we view as absurd Laurie's interpretation of the Trust, which would create Descendants' Trusts where all the assets, except for the special assets, would be distributed on a specific date, while leaving the trustee with the discretion to hold the special assets indefinitely, subject only to the rule against perpetuities, which is cited in the Trust agreement.

¶ 35 In arguing that section 5.8 does not require distribution of the Tamarack Property, Laurie argues that section 5.6, which provides a means for terminating the Descendant's Trusts, contains a patent ambiguity. A patent ambiguity arises out of the words themselves. Section 5.6 provides, in part, that "no distributions shall be made under this Section 5.6 which the Trustee believes, in the Trustee's sole discretion, would materially jeopardize the purposes of Section 5.7."

¶ 36 The parties agree that, although section 5.6 refers to a purpose stated in section 5.7, the reference is a scrivener's error because section 5.7 contains no stated purpose. The only statement regarding the purpose of the Trust is in section 5.8, which states that the Trust's goal is to maximize value for the family: "[a] principal purpose of this Trust is to obtain for my family the maximum value from Special Assets, and I intend that the Trustee have complete freedom and flexibility to take any action or inaction as to Special Assets which the Trustee believes advisable, in the Trustee's sole discretion, regarding the sale, retention, development or any other use or disposition of Special Assets."

¶ 37 In entering summary judgment against Laurie, the trial court determined that the scrivener's error of section 5.6 does not change the interpretation of section 5.8. Without argument or citation to authority, Laurie argues that the scrivener's error renders the Trust ambiguous. We consider Laurie's conclusory argument forfeited. In any event, the existence of a scrivener's error does not necessarily render section 5.6 ambiguous, especially considering that the parties agree that the grantor's intent was to refer to the purpose stated in section 5.8.

¶ 38 Laurie also argues that the Trust contains a latent ambiguity regarding the definition of "remaining assets" such that parole evidence must be considered to ascertain John's intent. A latent ambiguity arises out of the results of a literal application of the words. As discussed, sections 5.6, 5.7, and 5.8 are reconciled easily to avoid rendering any provision meaningless. We disagree with Laurie that the terms "remaining assets" and "special assets" are reasonably and fairly susceptible to more than one interpretation.

¶ 39 Construing the pleadings, depositions, admissions, and affidavits strictly against Jean and Susan and liberally in favor of Laurie, we conclude that the trial court did not err in entering summary judgment against Laurie. Viewing the record in the light most favorable to Laurie shows that there is no genuine issue of material fact and that Jean and Susan are entitled to a judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010); *Klitzka*, 348 Ill. App. 3d at 597.

¶ 40 CONCLUSION

¶ 41 The Trust provided for distributions during the seven years that the Descendants' Trusts were required to be in existence. The Trust mandated that net income from the Descendants' Trusts be distributed to the beneficiaries, while the principal could be distributed at the trustee's discretion. What was left after the seven-year period are the "remaining assets." The plain and ordinary

meaning of the term “remaining assets” is the assets left in the Trust seven years after Lucy’s death. The Tamarack Property was an asset that was left seven years after Lucy’s death, and therefore, the trustee lacked discretion to retain it. We hold that the trial court correctly entered summary judgment, ordering Laurie to distribute the shares of the Tamarack Property.

¶ 42 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 43 Affirmed.