

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF VIOLET
NELSON, DECEASED.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET No. BER-P-001-15
CIVIL ACTION
OPINION ON MOTION FOR
RECONSIDERATION

Argued: February 19, 2016
Decided: February 22, 2016

Honorable Robert P. Contillo, P.J.Ch.

Joseph H. Neiman, Esq. appearing on behalf of the plaintiffs, Jacob Nelson, et al.

Lorraine Teleky-Petrella, Esq. appearing on behalf of the defendant, Jared Lina.

OPINION

By letter-decision and orders entered on January 27, 2016, the court denied the plaintiffs' motion for summary judgment and granted the defendant's motion for partial summary judgment. A corrected decision issued February 2, 2016.

On February 8, 2016, the plaintiffs filed a motion for reconsideration. Defendant filed in opposition on February 11, 2016. Plaintiffs replied on February 16, 2016. The motion was argued February 19, 2016.

In essence, the court determined as a matter of law that all six (6) of a deceased trust settlor's grandchildren were beneficiaries of a trust unambiguously benefitting "...Settlor's grandchildren", and that the court was not empowered to determine to exclude from the trust two (2) of Settlor's grandchildren who were in existence at the time of the creation of the trust and who were known to Settlor to be in existence at the time of the creation of the trust. In the court's view, extrinsic evidence could not be used to support a finding the Settlor actually intended to deny those two (2) grandchildren beneficiary status under the trust. (Order and Decision of January 27, 2016; corrected Decision dated February 2, 2016).

After oral argument (January 15, 2016) and before the court's decision (January 27, 2016), New Jersey adopted the Uniform Trust Code on January 19, 2016 (P.L. 2015, C 276). Among the provisions in the new law is the following, entitled "Reformation to Correct Mistakes": "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement." N.J.S.A. 3B:31-31. In addition, new N.J.S.A. 3B:31-32, entitled "Construction to Conform Trust Terms to Probate Intent of Settlor", provides as follows: "Nothing in this act shall prevent the court from construing the terms of a trust, even if unambiguous, to conform to the settlor's probable intent".

Plaintiffs ask the court to reconsider its decision based on the argument that the Uniform Trust Code "...has altered the foundational premises which were relied upon by the court in its decision filed January 27, 2016". Specifically, plaintiffs argue in their moving papers as follows:

5. Specifically, the provisions of the Act (as it relates to this issue) are as follows; Section 3B:31-31, entitled "Reformation to Correct Mistakes", specifically provides that, "The court may reform the terms of a trust, **even if unambiguous**, to conform the terms

to the settlor's probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement". [Emphasis added]. Section 3B:31-32, entitled "Construction to Conform Trust Terms to Probable Intent of Settlor", states that, "The court may construe the terms of a trust, **even if unambiguous**, to conform to the settlor's probable intent". [Emphasis added].

6. These two sections of the Uniform Trust Code, 3B:31-31 and 31-32, echo the Restatement of Law 2d. "A court may modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, modification or termination would further the purposes of the trust. To the extent practicable, any such modification should be made in accordance with the settlor's probable intent. The court may also reform a trust, even if unambiguous, to conform to the settlor's probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement". (See Senate Judiciary Committee, Statement to Assembly no. 2915 dated December 17, 2015 – relevant portions annexed hereto as Exhibit B)."

Based on this new law, the plaintiffs ask the court to reconsider its decision and deny defendant's motion for partial summary judgment.

Defendant objects, noting that the new law by its express terms does not take effect until the 180th day following enactment, i.e., July 17, 2016. Moreover, the defendant contends that the new law specifically provides that it does not apply to judicial proceedings commenced before its effective date. N.J.S.A. 3B: 31-84a(2). The within action was commenced on January 2, 2015.

Plaintiffs refine their legal argument in their reply papers via a certification from trustee Jacob Nelson. Here, it is argued that the text of the new law does not, in fact, bar its current application, and that the court can and should, perhaps must, apply it. The trustee points to N.J.S.A. 3B:31-84(a) "Application to Existing Relationships", which provides as follows:

- a. Except as otherwise provided in this act:
 - (1) this act applies to all trust created before, on, or after its effective date;
 - (2) this act applies to all judicial proceedings concerning trusts commenced on or after its effective date;
 - (3) this act applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the

- judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;
- (4) any rule of construction or presumption provided in this act applies to trust instruments executed before the effective date of the act unless there is clear indication of a contrary intent in the terms of the trust; and
 - (5) an act done before the effective date is not affected by this act.

Decision of the Court

In pertinent part, R. 4:49-2 provides:

[A] motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. Id.

I do not recall either counsel referring to the Uniform Trust Code in the summary judgment motion papers or at oral argument, held January 15, 2016. It is not referenced in the court's decision of January 27, 2016 or corrected decision of February 2, 2016. The Uniform Trust Code was adopted into law on January 19, 2016. Its existence was not known to the court at the time of the argument or decision. Had it been known, the court would have addressed it. While that reality prompts the court to reconsider its decision, the result is the same: plaintiffs' motion for summary judgment can not be granted, and defendant's motion for partial summary judgment must be granted, for the reasons set forth in the court's decision under reconsideration.

The new law expressly provides that it "shall take effect on the 180th day following enactment". 180 days following enactment is July 17, 2016, a date yet to occur.

When the new act takes effect, its provisions will bind all with the force of law. Upon that date, "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property". N.J.S.A. 3B:31:12, "Rules of Construction".

When, in the near future, the Act goes into effect, it “...applies to all trusts created before, on or after its effective date”. N.J.S.A. 3B:31-84(a)(1). That has no impact on judicial decisions made prior to the effective date of the Act.

Likewise, upon its effective date, “this act applies to all judicial proceedings concerning trusts commenced on or after its effective date”. N.J.S.A. 3B:31-84(a)(2). By its terms, then, the Act will not apply to judicial proceedings commenced and concluded prior to its effective date.

Judicial proceedings that are ongoing at the time the Act goes into effect will be determined under the Act “...unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings, in which case the particular provision of this act does not apply and the superseded law applies”. N.J.S.A. 3B:31-84(a)(3). Again, this provision of the Act is not and will not be applicable to judicial proceedings commenced and concluded prior to its effective date.

Trust instruments executed before the effective date of the Act will be governed by the rules and presumptions of the Act unless there is clear indication of a contrary intent in the terms of the trust. N.J.S.A. 3B:31-84(a)(4), a provision wholly inapplicable to judicial proceedings commenced and concluded prior to the effective date of the Act.

Lastly, N.J.S.A. 3B:31-84(a)(5) – “an act done before the effective date is not affected by this act” – provides the court no discernible basis upon which to revisit the determinations of January 27 and February 2, 2016 on the cross-motions for summary judgment.

The court is compelled to apply the law as it exists in deciding disputes presented to it. Under the law as it exists today, and as it existed at the time of decision on the eve-of-trial cross-motions for summary judgment, resort to extrinsic evidence can not work to cut-off from the trust two (2) of the settlor’s six (6) grandchildren.

For the foregoing reasons, plaintiffs' motion for reconsideration is denied.¹

The court has affirmed its grant of partial summary judgment in favor of the defendant. The remaining claim for relief is the defendant's demand for an accounting of the trust. Defendant now has judicially — confirmed standing to demand such an accounting. Had a formal accounting, to be audited by the Surrogate, been insisted upon, the court would order it to be done. That would lead to the eventual filing of a new Probate action by the Trustee, on notice to all beneficiaries of the trust, seeking approval of a formal accounting. Exceptions, if any, could then be filed, and the new action would go forward with discovery and perhaps a trial. At our February 19, 2016 hearing, defense counsel stated that it would be sufficient for the trustee to provide the beneficiaries with an informal, documented, sworn-to accounting. Same will be ordered. Any beneficiary of the trust dissatisfied with the informal accounting will remain at liberty to file an action in the Probate Part seeking to compel a formal accounting.

An Order accompanies this decision.

¹ Were the summary motions to have been decided under the Uniform Trust Code, the court would very likely have denied both applications and proceeded to trial on the issue of whether the facts, as the fact finder might find them to be, justify interpreting the instrument as plaintiffs argue it should be interpreted, or not.