

No. 95,053.

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Susan M. ROYD-SYKES,

Appellant,

v.

Anna Ruth DICKEN,

individually and in her capacity as trustee of the

C. Wayne Dicken Trust dated 10/21/97,

Appellees.

Appeal from Johnson District Court; Lawrence E. Sheppard, judge. Opinion filed September 15, 2006. Reversed and remanded.

B.J. Hickert, of Newbery, Ungerer & Hickert LLP, of Topeka, for appellant.

Allan E. Coon and L. Franklin Taylor, of Norton, Hubbard, Ruzicka & Kreamer L.C., of Olathe, for appellees.

Before MARQUARDT, P.J., PIERRON, J., and LARSON, S.J.

Per Curiam.

Susan M. Royd-Sykes, a beneficiary of the C. Wayne Dicken Trust, appeals the trial court's decision denying her claim that Anna Ruth Dicken, a trustee-beneficiary of the Trust, breached her fiduciary duties when she sold real property in which she had only a life estate. We reverse and remand.

In October 1997, C. Wayne Dicken created the C. Wayne Dicken Trust (Trust). Wayne died on January 19, 1999, and his surviving wife, Anna Ruth Dicken (Dicken), became the successor trustee/beneficiary.

Wayne gave Dicken, "to have and to hold during her lifetime," certain land in Johnson County, Kansas, (hereinafter referred to as the Osborne property) which he had inherited from Clarice Osborne. Dicken was granted the power to lease and develop the Osborne property. Upon the death of Dicken, the property was to pass according to the residuary clause of the Trust. The residuary clause specifically states that the Osborne property "shall pass to my heirs at law." The trust also states that it is Wayne's "intention that the real estate conveyed pursuant to this residuary article remain in my family."

The problem in this case arose because the Trust article dealing with the Osborne property also included a statement which included the broad powers given to the trustee. The article is entitled "Trustee's Powers" and states, in pertinent part:

"2. to sell at public or private sale, wholly or partly for cash or on credit, contract to sell, grant or exercise options to buy, convey, transfer, exchange, or lease (for a term within or extending beyond the term of the trust) any real or personal property of the trust, and to partition, dedicate, grant easements in or over, subdivide, improve ... any real property of the trust, and in general to deal otherwise with the trust property in such manner, for such prices, and on such terms and conditions as any individual might do as outright owner of the property."

In February 2003, Dicken sold some of the Osborne property. In April 2004,

Dicken sold another part of the Osborne property. Dicken sent a letter to Royd-Sykes explaining that the land was sold to Johnson County for parkland. Royd-Sykes, who is Dicken's daughter, is a beneficiary of the Trust.

Royd-Sykes filed a petition alleging that as a beneficiary, she was entitled to a complete accounting of Trust receipts, disbursements, and assets pursuant to K.S.A. 58a-813. She also alleged that Dicken had improperly sold Trust property. She requested an order directing Dicken to provide her with a complete accounting of Trust receipts, disbursements, and assets, and verification that all Trust assets were held in the name of the Trust. She also requested an order restraining Dicken from using, transferring, or disposing of any Trust assets until an accounting was provided.

Dicken responded to Royd-Sykes' petition, stating that she had already provided a significant amount of accounting information, including a formal accounting, which she attached to her response. She also explained the accounting reflected that she had distributed \$239,136.21 to her children, including Royd-Sykes, and retained a balance of \$691,994.77 in her capacity as trustee.

The trial court held a hearing and denied Royd-Sykes' request for a restraining order, finding there was no appearance of imminent danger. The trial court granted Royd-Sykes leave to amend her original petition.

The same day, Royd-Sykes filed an amended petition claiming that Dicken had breached her fiduciary duties to the Trust and its beneficiaries when she sold the Osborne property. Royd-Sykes also filed a motion for a temporary injunction to prohibit Dicken from disbursing, using, transferring, or disposing of any Trust assets without the

prior approval of the court.

Royd-Sykes then filed a motion for partial summary judgment, reiterating her claim regarding the sale of the Osborne property that was added as part of her amended petition. She claimed the sale of the property was prohibited by the Trust and violated a duty owed to the beneficiaries of the Trust pursuant to K.S.A. 58a-801 and K.S. A. 58a-802.

In Dicken's response, she maintained that the Trust authorized her to sell the Osborne property. She also requested summary judgment be granted in her favor confirming the lawfulness of her conduct in regard to these sales.

The trial court heard oral arguments on Royd-Sykes' motion for partial summary judgment with respect to the count added in her amended petition. The trial court also heard arguments regarding Royd-Sykes' motion for a temporary injunction. At the conclusion of the hearing, the trial court denied Royd-Sykes' motions for partial summary judgment and temporary injunction.

On June 6, 2005, the trial court filed a journal entry which determined that "[t]he Trust instrument in clear and unambiguous terms authorize[d] the trustee to sell real estate, including the real estate inherited by the decedent from Clarice Osborne...." It concluded the sale of the property did not violate the terms of the Trust. The trial court held that "[t]he proceeds of real estate sales, to the extent not previously distributed to the decedent's children as beneficiaries of the Trust, ... should be maintained as a Trust asset not subject to distribution in the absence of further order of this Court." The trial court also held that Dicken, "in her individual capacity as beneficiary of the Trust, is entitled to

the distribution of the trust income during her lifetime." Furthermore, Dicken, "in her capacity as trustee, has submitted accountings for Trust receipts and disbursements ..., and the said accountings should be approved." Finally, the trial court commented:

"The accountings reflect that [Dicken], in her capacity as trustee, paid some personal expenses from the Trust which were not authorized to be paid directly for her benefit. However, the amounts paid were less than Trust income to which she was entitled. ([Royd-Sykes'] counsel advised the Court at oral argument that although [Royd-Sykes] found [Dicken's] accountings conflicting and inaccurate, she would not pursue damages against [her] based on such accountings.)"

Royd-Sykes filed a motion to reconsider or amend the judgment, arguing that the trial court made misstatements of fact in its journal entry. More specifically, Royd-Sykes maintained the trial court erred in identifying those present at the hearing. She also maintained the trial court misstated her position on issues related to the review of prior distributions of income and principal from the Trust, and the accuracy of Dicken's accountings.

Royd-Sykes filed a supplemental memorandum in response to a letter from the trial court requesting her "attorney make his Motion to Reconsider or Amend Judgment 'more definite by [quoting] portions of the transcript that he contends support his arguments that the court has misstated matters." ' On July 27, 2005, the trial court reviewed the briefs pertaining to the motion, including the supplemental memorandum, and affirmed its earlier findings and conclusions, except to correct the identification of those present at the hearing.

Royd-Sykes filed a timely notice of appeal challenging the June 6, 2005, and July 27, 2005, journal entries.

On appeal, Royd-Sykes argues that the trial court erred in denying her motion for partial summary judgment. She claims Dicken violated her fiduciary duties as a trustee when she sold the Osborne property, which violated the terms of the Trust. As here, where there is no factual dispute, this court's review of a trial court's order regarding summary judgment is *de novo*. *Godley v. Valley View State Bank*, 277 Kan. 736, 741, 89 P.3d 595 (2004). Furthermore, "determining the nature, construction, and legal effect of a trust is a question of law over which [this court has] unlimited review." 277 Kan. at 741.

The interpretation of a trust instrument is "governed by the recognition that the primary objective of trust law is to carry out the settlor's intent." 277 Kan. at 741.

" [I]f the text of the trust indenture is plain and unambiguous, the intent of the trustor (settlor) can be ascertained from the language used. [Citation omitted.] Where construction is necessary [however] the court must put itself in the situation of the trustor when the trustor made the trust instrument and, from consideration of the language used in the entire instrument determine the intention of the trustor. [Citations omitted.] The cardinal rule is that the intention of the trustor as gathered from the whole instrument must control unless contrary to settled principles of law.' [Citation omitted.]" 277 Kan. at 741-42.

Neither Royd-Sykes nor Dicken assert the Trust is unclear or ambiguous. To the contrary, Royd-Sykes maintains that Wayne's intention was to have the Osborne property remain in the family. Dicken, on the other hand, claims that Wayne clearly

authorized her, as trustee, to sell the Osborne property.

Royd-Sykes points to the following provisions within the Declaration of Trust to support her argument that the settlor intended the Osborne land to remain in the family:

"ARTICLE III

"SPECIFIC DISTRIBUTIONS AT DEATH

"F. The real property located in Sections 19-12-22, Johnson County, Kansas (71 acres), and 30-12-22, Johnson County, Kansas (221 .35 acres), that I inherited from Clarice Osborne, I give as follows:

"1. If my wife survives me, I give that real property to my wife *to have and to hold during her lifetime.*

"2. *During the period of time that my wife survives me and holds title to the property as provided in paragraph 1 above,* in addition to the powers given to my wife under that section, she is authorized as follows with respect to said real property:

a. To make such arrangements as she deems appropriate for the operation of said real property....

b. To make such arrangements as she deems appropriate with respect to the development of said property....

c. To have the same powers with respect to this property as are vested in my

trustee hereafter in Article VI with respect to assets being administered by trustees under other provisions of my Trust.

"3. On the death of my wife, the property shall pass with my residuary estate as provided in Article IV hereafter.

"ARTICLE IV

RESIDUARY ESTATE

"All the rest, residue and remainder of my property, of whatever kind or nature, real and personal, and wherever the same may be situated, including any of the foregoing gifts in this Will which may for any reason fail to take effect, all of which is herein referred to as my residuary estate, I give, devise and bequeath as follows:

"B. To the extent that any property remains undisposed of by the above provisions, the property *exclusive of the property that I inherited from Clarice Osborne (described in Paragraph F of Article III above)* shall be divided into two equal shares. One share shall pass to my wife's heirs at law, determined as if she died without a Will at the time this gift becomes possessory, without my having survived her, a resident of Kansas. The other one-half, *together with the property inherited from Clarice Osborne*, shall pass to my heirs at law, determined as if I had died without a Will at the time this gift becomes possessory, without my wife

having survived me, a resident of Kansas.

"E. *It is my intention that the real estate conveyed pursuant to this residuary article remain in my family.* Accordingly, the trustee is directed to convey undivided interests in such real estate to my daughters subject to a right of first refusal that would permit my son, ROBERT WAYNE DICKEN, to purchase their respective interests on the terms and conditions offered by any third party purchaser by stating his intention to do so in writing within thirty (30) days of his receipt of written notice of any such offer to purchase." (Emphasis added.)

Royd-Sykes focuses on the statement in Article IV(E) that states Wayne's intentions to have the Osborne property remain within his family. She argues that this statement, read in conjunction with Wayne's instructions that the Osborne property pass into his residuary estate upon his wife's death, clearly shows an intention on his part to keep the Osborne property within his family.

Dicken, on the other hand, contends Royd-Sykes' argument focuses exclusively upon a single statement within the article related to the residuary estate and ignores language specifically referring to the Osborne property. Dicken notes that when Article VI is read in conjunction with Article III(F), the Trust clearly and unambiguously grants her, as trustee, the authority to sell the Osborne property. She notes that Article III(F)(2)(c) grants her a number of powers with respect to the Osborne property, including the power to sell the property. She also notes that the language of Article VI granting her these powers "does not except the Osborne Property from its provisions in any fashion, nor does it contain a more limited delineation of [her] powers when dealing

with the Osborne" property. Instead, Article III(F) specifically incorporates those powers in reference to the Osborne property.

K.S.A. 58a-112 requires that 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." Reviewing the Trust as a whole, Royd-Sykes' interpretation is in line with Wayne's intentions. Wayne's statement expressing his intention that real estate remain in his family is specific to the Osborne property. "Where there is a conflict between a specific provision and a general provision, preference is given to the specific provision." *Amoco Production Co. v. Wilson, Inc.*, 266 Kan. 1084, 1089, 976 P.2d 941 (1999).

Dicken was given a life estate which would only prohibit the sale of land. Royd-Sykes argues that even if Dicken had the power to sell the property, she did not have the right to sell it, since the Trust only gave her a life estate in the property.

A trustee must administer a trust in good faith according to its terms and purposes and in the interests of the beneficiaries. K.S.A. 58a-801; K.S.A. 58a-802. Furthermore, a trustee's exercise of power over trust property is subject to fiduciary duties. K.S.A. 58a-815(b). Dicken has not handled the Osborne property according to the terms of the Trust and in the interest of the beneficiaries. Dicken violated her fiduciary duties by selling the Osborne property. Because of that violation and the fact that the property cannot be restored to the Trust, Dicken is not entitled to any of the interest on the proceeds from the sale of the Osborne property. The beneficiaries are entitled to a complete accounting of the proceeds of the two sales. Any proceeds from the Osborne

property that have been distributed to Dicken should be restored to the Trust. Royd-Sykes' request for a permanent injunction should be granted.

Reversed and remanded.

LARSON, J.: I concur in part and respectfully dissent in part from the majority opinion and decision herein.

LARSON, Judge.

The appellee, Anna Ruth Dicken (Dicken), has duties and obligations as trustee of the C. Wayne Dicken Trust (Trust) dated October 21, 1997. She is also a beneficiary individually of the Osborne property in issue herein as it was given to her "to have and to hold during her lifetime" pursuant to Article III, paragraph F, of the Trust. By this language, a classic life estate subject to trust directions in the Osborne property was created.

The appellant, Susan M. Royd-Sykes, is currently a remainderman of the life estate interest and is a qualified beneficiary of the Trust under the terms of the Kansas Uniform Trust Code (KUTA), K.S.A. 58a-101 *et seq.* This interest appears to be subject of extinguishment if Royd-Sykes does not survive her mother and does not leave issue surviving as stated in Article IV, paragraph A of the Trust. However, for purposes of this appeal, Royd-Sykes must be treated as a remainderman of the Osborne property and a qualified beneficiary of the Trust.

I am in complete agreement with the majority that, notwithstanding reference in the Trust to a power of sale provision, the intent of C. Wayne Dicken was clear that he

did not wish to have the property sold and it was to remain to be inherited by his children. As such, Dicken violated her fiduciary duty as trustee to the remaindermen. Her actions were violations of K.S.A. 58a-801, K.S. A. 58a-802, and K.S.A. 58a-815(b) violations of the KUTA.

I would not, however, as the majority has ordered, hold that Dicken is not entitled to any of the interest on the proceeds from the sale of the Osborne property. I agree that such an order is clearly allowed under K.S.A. 58a-1001 and K.S.A. 58a-1002.

The prime reason for my disagreement with the majority's order is based on the fact that while the remaindermen have lost their right and opportunity to inherit the Osborne property (and the sales are final), they have received from Dicken, as trustee of the Trust, \$660,000 of the proceeds of such sales far in advance of the time they would otherwise have received their remainder interest, at the time of their mother's death.

The wisdom of Dicken advancing these funds and the obligations, if any, of the remaindermen upon receipt of these funds is not an issue in this appeal. And, since an agreed family settlement agreement was attempted and failed, receipt by the remaindermen of these funds is only significant as reducing the amount of income Dicken would be entitled to receive as a life tenant as interest on the principal of assets in which she holds a life estate.

It is clear from the Trust that C. Wayne Dicken intended his surviving wife to enjoy the income from the life estate he created. He did not want her to sell the Osborne property, but she has done so, and I would not penalize her by not allowing her any income from the sale proceeds as the majority has.

I would reverse that part of the trial court's order approving the sale of the Osborne property. But I would affirm the order insofar as it exercised strict and complete control over the remaining principal amount of the proceeds from the sale of the Osborne property which remains in the trust and allow Dicken, as the life tenant, all interest earned on such principal amount for the rest of her life.