

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Brief, September 19, 2003

LINDA FAYE LEFKOWITZ GRABER

v.

LAWRENCE SCOTT GRABER

MICHAEL A. PARKER, TRUSTEE

v.

STEVE R. GRABER, TRUSTEE

Appeal from the Circuit Court for Shelby County
No. 140490-4 Rita L. Stotts, Judge

No. W2003-01180-COA-R3-CV - Filed December 31, 2003

This case involves interpretation of a trust agreement. The husband and wife entered into a marital dissolution agreement providing for the creation of a trust. The MDA said that the trust would be used for the college expenses of the parties' children. The trust agreement said that the children's college educations would be funded by the principal of the trust, but also said that the trust principal should be used to benefit the wife, and that providing for the wife's needs was the primary purpose of the trust during her life. The wife sought a disbursement of trust funds for her benefit. The trustees disagreed on the primary purpose of the trust and whether such a disbursement would be appropriate, and filed a petition in the trial court below seeking instructions. The trial court held that the trustees were permitted to use the funds to benefit the wife and should not factor in the children's potential college expenses. One of the trustees appeals. We affirm in part and reverse in part, holding that the trustees may disburse the trust funds to benefit the wife, but must also keep in mind the children's future college expenses.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Aubrey L. Brown, Jr., Memphis, Tennessee, for the appellant Steve R. Graber, respondent and counter-petitioner.

J. Alan Hanover, Memphis, Tennessee, for the appellee Michael A. Parker, petitioner and counter-respondent.

OPINION

On March 7, 1994, Lawrence Scott Graber (“Husband”) and Linda Faye Lefkowitz Graber (“Wife”) entered into a Marital Dissolution Agreement (“MDA”), which the trial court incorporated by reference in its Final Decree of Absolute Divorce. Under the section which addresses the division of marital property, the MDA provides for the creation of the Lawrence Scott Graber 1994 Trust (“the Trust”), which would be funded by the sale of his interest in National Mortgage Company. The MDA provided that Husband was obligated to fund the trust from these proceeds only if the sale occurred within one year after execution of the MDA.¹ The MDA also names as Trustees Steve R. Graber (“Trustee Graber”) and Michael A. Parker (“Trustee Parker”) (collectively “the Trustees”).

The MDA also refers to the Trust in the section concerning child support for Husband and Wife’s two children, born in 1987 and 1989 respectively. The MDA provides that, “In the event the children’s college tuition is not funded in full by the [Trust], which trust fund shall be used first for said college expenses, to include tuition, room and board, and other expenses, then and in that event only, Husband shall pay the children’s reasonable college expenses” Thus, under the MDA, Husband agreed to pay for reasonable college expenses not paid for by the Trust.

The Trust Agreement was appended to the MDA and executed the same day as the MDA. It refers to the payment of the children’s college expenses in paragraph 3.4:

During the life of Former Wife, if any Child should attend college, the Trustee shall pay the tuition and other expenses of that Child’s college education out of the principal of the Trust Estate, even if the payment of such expenses shall consume the entire Trust Estate. . . . [Husband] agrees that he shall pay for all tuition and other expenses of such college education of the Children as are not so paid from the Trust Estate.

Therefore, under section 3.4, should either child attend college, the Trustees are obligated to pay their expenses out of the principal of the Trust, even if it consumes the entire Trust. Husband again agreed to pay any college expenses not paid by the Trust. However, section 3.3 of the Trust Agreement also addresses the purpose for which Trust funds are to be used:

The Trustee, at any time or times, may convey, transfer and pay so much or all of the principal of the Trust Estate (including, without limitation, articles of tangible personal property) to, or apply so much or all of said principal for the benefit of, Former Wife, in such amounts, and at such time or times, as the Trustee, shall determine, without regard to the interests of any remainderman. The principal of the

¹The Trust was in fact funded.

Trust Estate shall be so employed for the use or benefit of Former Wife as the Trustee may from time to time reasonably deem necessary for the maintenance, support, medical care and education of Former Wife, having in mind the standard of living to which Former Wife has become accustomed and the means available to or for Former Wife from other sources. In exercising his discretion under this Section 3.3, the Trustee shall consider the needs of Former Wife as the primary purpose of the Trust during her life.

Section 3.3 of the Trust Agreement, therefore, authorizes the Trustees to disburse the principal to benefit Wife as necessary for her maintenance, support, medical care, and education, adding that Wife's needs are the "primary purpose of the Trust during her life."

Pursuant to section 3.3 of the Trust Agreement, Wife requested the Trustees to disburse portions of the principal to pay for her school tuition, dental expenses, an automobile, and other miscellaneous expenses. The Trustees disagreed over whether to grant her request, based upon differing interpretations of the Trust Agreement. On January 17, 2003, Trustee Parker filed in the trial court below a "Petition for Instructions and Construction of Trust," in which he asserted that the Trustees were obligated to grant Wife's request for disbursement of Trust funds under the terms of the Trust Agreement, and requested that the trial court direct the Trustees to do so.² Trustee Graber filed an answer and counter-petition, in which he asserted that because the language of paragraph 3.4 is mandatory and because of the language in the MDA that the Trust "shall be used first" for the children's college educations, the Trustees had a duty to preserve the principal of the Trust for the children's expenses rather than disbursing them to Wife, toward whom they had only the discretion to distribute the Trust principal. Trustee Graber requested a declaratory judgment adopting his interpretation of the Trust and determining the proper distribution of the Trust estate in accordance with his interpretation.

In March 2003, the trial judge issued an order holding:

[T]he Court's instructions are that said Trustees are to exercise their discretion as to requests for withdrawals of principal from the Trust by the former wife at this time as set out in paragraph 3.3 without regard to the interests of the children of the parties as set out in paragraph 3.4

In her oral ruling, the trial judge reasoned:

[A]pparently the father appreciated the fact that he might have to step up to the bat when these children started attending college and pay these expenses and that there would not be enough left in the trust to fund their educations. I mean the MDA says

²Trustee Parker also requested the court to issue instructions concerning the payment of the net income of the trust as well as instructions on the types of investments the trustees were required to hold. The trial court's resolution of these questions is not at issue in this appeal.

so, the trust document says so, and I don't know why else the language would be in there with regard to the primary purpose of the trust during the wife's lifetime. . . .

. . . And certainly I would think that the reason that this document is worded the way it is is to make sure that the request—that whatever expenditures there are are reasonable.

From that order, Trustee Graber now appeals.

A trust agreement is to be interpreted in the same manner as any other contract. *Holder v. First Tenn. Bank N.A. Memphis*, No. W1998-00890-COA-R3-CV, 2000 WL 349727, at *3 (Tenn. Ct. App. March 31, 2000) (citing *Marks v. S. Trust Co.*, 310 S.W.2d 435, 437-38 (Tenn. 1958)). The construction and interpretation of a trust, therefore, is a matter of law. *Id.* Accordingly, our standard of review is *de novo* with no presumption of correctness. *Id.*

A contract is to be interpreted according to its plain terms as written. *Warren v. Metro. Gov't of Nashville & Davidson County*, 955 S.W.2d 618, 622-23 (Tenn. Ct. App. 1997). The interpretation should be one that gives reasonable meaning to all of the provisions of the agreement, without rendering portions of it neutralized or without effect. *Davidson v. Davidson*, 916 S.W.2d 9118-922-23 (Tenn. Ct. App. 1995) (quoting *Associated Press v. WGNS, Inc.*, 348 S.W.2d 507, 512 (Tenn. Ct. App. 1961)). The entire written agreement must be considered to ascertain the parties' intent. *D & E Const. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518-19 (Tenn. 2001). The intent of the parties is derived from the four corners of the agreement, giving effect to all parts of the agreement. *Gale Smith & Co. v. Governor's Club, LLC*, No. M2001-01616-COA-R3-CV, 2002 WL 31094849, at *4 (Tenn. Ct. App. Sept. 20, 2002) (quoting *Blue Diamond Coal v. Holland-Am. Ins. Co.*, 671 S.W.2d 829, 833 (Tenn. 1984)). If, however, the agreement is “ ‘ambiguous, the intent of the parties may be derived from extrinsic evidence.’ ” *Id.* (quoting *Blue Diamond Coal*, 671 S.W.2d at 833). A contract is considered ambiguous if, after considering its plain terms as a whole, it is susceptible to more than one meaning. *McGee v. Best*, 106 S.W.3d 48, 62-63 (Tenn. Ct. App. 2002).

A court may also look outside the four corners of a contract when terms of separate contracts form integral parts of a single transaction. *Oman Const. Co. v. Tenn. Cent. Ry. Co.*, 370 S.W.2d 563, 570 (Tenn. 1963). In such a case, the contracts will be read together. *Id.* Documents relating to the same subject matter and executed at substantially the same time by the same parties may be considered together as forming part of the same transaction. *State v. A Tract of Land Known as 141 Belle Forest Circle*, No. M2000-01827-CCA-R3-CD, 2001 WL 1517028, at *4 n.2 (Tenn. Crim. App. Nov. 29, 2001) (quoting *Baily v. Hannibal & St. J.R. Co.*, 84 U.S. 96, 108 (1872)) (citing 17A AmJur 2d *Contracts* §§ 388, 390 (1991)). This may apply even if the parties to the separate documents are not the same so long as all of the parties were aware of the documents and the documents were delivered contemporaneously to accomplish an agreed purpose. 17A AmJur 2d *Contracts* § 388 (1991).

On appeal, Trustee Graber renews his argument that the language of the Trust Agreement and the MDA together require the Trustees to consider payment of the children's college expenses, to the point of excluding any distribution to Wife under paragraph 3.3. He argues first that the purpose of the Trust was not to support Wife's needs, but rather to effectuate a division of marital property and to fulfill Husband's obligation to fund the children's college educations. He points out that the language creating the Trust is found in the section of the MDA dividing marital property, rather than the alimony section. He notes further that, under the MDA, Wife had already been paid her share of the marital property assets, significant because the only other place the Trust is mentioned in the MDA is the child support section. He asserts that, because the child support section of the MDA requires Husband to pay college expenses not covered by the Trust "which . . . shall be used first for said college expenses," it is "apparent" that the establishment of the Trust was consideration for Husband's agreement to be responsible for the college expenses, and that the statement that the principal of the Trust would be used first to pay for college expenses was consideration for Husband's agreement to fund the Trust with proceeds from the sale of his share of marital property. Trustee Graber also argues that the purpose of the Trust is ascertained from the four corners of the Trust Agreement by comparing the *permissive* language of paragraph 3.3 with the *mandatory* language of paragraph 3.4. While paragraph 3.3 says that the Trustees "may" distribute the Trust principal to Wife at their discretion, section 3.4 states that the Trustees "shall" pay for the children's college expenses. He asserts that this indicates that the purpose of the Trust is to fund the children's educations.

In response, Trustee Parker argues that there is no ambiguity in the Trust Agreement about the purpose of the Trust, pointing to the language in paragraph 3.3 that the Trustees are to use their discretion "without regard to the interests of any remainderman" and that "[i]n exercising his discretion under this Section 3.3, the Trustee shall consider the needs of Former Wife as the primary purpose of the Trust." Because there is no ambiguity, Trustee Parker argues, there is no justification for looking beyond the four corners of the Trust to the MDA to determine the purpose of the Trust. In the alternative, if the MDA is considered, Trustee Parker asserts that the language of the MDA providing that the "trust fund shall be used first for said college expenses" applies only if and when any of the children attend college. He points to the language in paragraph 3.4 of the Trust Agreement providing, "[I]f any Child *should* attend college, the Trustee shall pay the tuition and other expenses of that Child's college education out of the principal." (emphasis added).

Considering the Trust Agreement as a whole, there is obvious ambiguity concerning the purpose for which Trust funds are to be used. Section 3.3 states that the principal of the Trust "shall" be used to benefit Wife in the discretion of the Trustees, and that Wife's needs are considered "the primary purpose of the Trust during her life." Section 3.4 provides that, during Wife's life, if one of the parties' children attends college, the Trustee "shall" pay the college expenses and tuition out of the principal of the Trust, "even if the payment of such expenses shall consume the entire Trust Estate." To the extent that the Trustee funds are insufficient to fully meet Wife's reasonable needs and also fully fund the children's college expenses, there is some conflict in these two provisions addressing the purpose for which the funds should be used. Under these circumstances, it is appropriate to consider extrinsic evidence in order to ascertain the intent of the parties. *Gale Smith*

& Co. v. Governor's Club, LLC, 2002 WL 31094849, at *4. The MDA clearly must be considered, since it not only discusses the purpose for which Trust funds are to be used, but also was executed on the same day. Moreover, the Trust Agreement was executed as required by the MDA between Husband and Wife and then appended to the MDA, indicating they are separate documents forming parts of the same transaction, thus justifying their consideration together. *See Oman Const. Co.*, 370 S.W.2d at 570; *A Tract of Land Known as 141 Belle Forest Circle*, 2001 WL 1517028, at *4 n.2; 17A AmJur 2d *Contracts* § 388 (1991).

While consideration of the MDA does not resolve the ambiguity within the Trust Agreement, it clearly militates against application of Trust funds to meet Wife's needs to the exclusion of payment of at least a portion of the children's college expenses. The MDA states that the "trust fund shall be used *first* for . . . college expenses." (emphasis added). In considering the provisions of the Trust Agreement as well as the MDA, we affirm the trial court's holding insofar as the Trustees were permitted by the trial court to utilize Trust funds in their discretion as reasonably necessary for Wife's "maintenance, support, medical care and education." Insofar as the trial court held that the Trustees were permitted to do so "without regard to the interests of the children of the parties as set out in paragraph 3.4," we must reverse the decision of the trial court. Clearly the parties anticipated that the Trust would not fund the entire cost of the children's college education; hence the provision stating that Husband would pay any such expenses not paid by the Trust. Reconciling the competing provisions, however, we are constrained to hold that the Trustees must keep in mind utilizing Trust funds to pay at least a reasonable portion of the children's college expenses, should the children choose to attend college. If one or both do not decide to attend college within a reasonable time after graduating from high school, then the Trust funds may be used to benefit Wife without regard to anticipated college expenses. As much as possible, this interpretation of the Trust Agreement gives reasonable meaning to all of its provisions, without rendering portions of the it neutralized or without effect. *See Davidson*, 916 S.W.2d at 922-23.

The decision of the trial court is affirmed in part and reversed in part, as set forth above, and the cause is remanded for any further proceedings not inconsistent with this Opinion. Costs are taxed equally to appellant, Steve R. Graber, and his surety, and appellee, Michael A. Parker, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE