

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

DOROTHY DUWELL BURBRINK, et al.,	:	CASE NO. C-97589
	:	
Plaintiffs	:	
	:	
-vs-	:	<u>ENTRY GRANTING SUMMARY</u>
	:	<u>JUDGMENT AND REQUIRING</u>
	:	<u>ASSETS FROM THE ESTATE OF</u>
PNC BANK OHIO, N.A.	:	<u>DELLA M. ALBERS BE</u>
	:	<u>DISTRIBUTED PURSUANT TO</u>
Defendant	:	<u>THE JOSEPH H. ALBERS</u>
	:	<u>RESTATED TRUST</u>
	:	<u>AGREEMENT AS AMENDED</u>
	:	
	:	

This matter comes before Judge Wayne F. Wilke upon motions for summary judgment brought by Plaintiffs Dorothy Duwell Burbrink and Donald Burbrink; Intervening Plaintiffs Lola and Douglas O'Banion; and Defendant PNC Bank Ohio, N.A. Plaintiffs are represented by Keith S. Riehl, the Intervening Plaintiffs are represented by Thomas S. Sapinsley and Thomas J. Breed, while Richard H. Lippert represents Defendant PNC Bank Ohio. The parties stipulated to the material facts and have declined the opportunity to orally argue their motions.

FACTS

The decedent herein, Della M. Albers, died on March 23, 1997, a resident of this county. The decedent executed her last will and testament on February 10, 1988. Her husband, Joseph H. Albers, executed a Trust Agreement with the Central Trust Company, N.A. on November 13, 1987, prior to the date the decedent executed her will. Joseph H. Albers amended the trust on December 4, 1989. The terms of the Trust were restated on December 10, 1991 and the grantor executed a First Amendment to Restatement of Trust

Agreement on November 17, 1993. Decedent Della M. Albers died subsequent to the Trust's restatement and amendment, on March 23, 1997. Defendant PNC Bank, Ohio, N.A. was appointed Executor of the Estate of Della M. Albers on May 30, 1997 and is the successor in interest to the Central Trust Company, N.A.

Joseph H. Albers predeceased the decedent. Item III of the decedent's will provides that if her husband predeceased her, the decedent directed her entire estate to be given to the Central Trust Company to be added to the trust funds it held under her husband's trust. Later in Item IV of her will, the decedent wrote that she "specifically direct[s] that any assets, proceeds or monies held by said Trustee in or for my behalf, be held, administered and disposed of by it as such Trustee, for the uses and purposes and for the benefit of the persons and upon the terms set forth in said trust agreement as it exists at the date of my death" (emphasis added).

Upon Joseph Albers' death, the corpus of the trust was divided into two funds, Fund A and Fund B ("the Funds"). The Funds were to be used for the care, support and maintenance of Della Albers during her lifetime and upon her death, the corpus remaining in Fund A was to be poured over into Fund B. Exactly how Fund B is to be distributed, however, is the central issue of this litigation.

Under paragraph 6(aa.1) of the 1987 Trust, Plaintiffs Dorothy Duwell Burbrink and Donald Burbrink are to receive the greater of \$300,000 or 3/6 of Fund B and the balance is to be distributed to certain charities and relatives of Joseph and Della Albers. Under the Amended Trust Agreement, the Grantor directed the Trustee to make certain charitable bequests first and after paying those bequests, to pay 50% of the remainder in Fund B to the Plaintiffs. Pursuant to the Restatement of Trust Agreement, the charities

are to receive a lesser distribution, Dorothy Duwell Burbrink only is to receive 25% of the remainder and Intervening Plaintiffs Lola and Douglas O'Banion are to receive the remaining 75%. Last, the First Amendment to the Restatement of Trust Agreement deletes the charitable bequests but it maintains the distribution of 25% of Fund B's remainder to Dorothy Duwell Burbrink and 75% to the Intervening Plaintiffs. Plaintiffs Dorothy Duwell Burbrink and Donald Burbrink have demanded that the Trustee make distributions in accordance with the Trust dated November 13, 1987, prior to the Trust's restatement and amendment. Intervening Plaintiffs Lola O'Banion and Douglas O'Banion have demanded that the Trustee make distributions in accordance with the Joseph H. Albers Trust Agreement as restated and amended. PNC Bank, N.A. has declined to make either distribution. The Defendant, Plaintiffs and Intervening Plaintiffs have all filed motions and cross-motions for summary judgment under Civ.R. 56(C).

CONCLUSIONS OF LAW

Revised Code §2721.05 allows any person interested as or through an executor, administrator or trustee to have a declaration of rights or legal relations with respect to any question arising in the administration of an estate or trust, including questions of construction of wills and other writings. Civil Rule 56(C) provides for summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Before summary judgment may be granted, a court must determine that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to only one conclusion, and viewing such evidence most strongly in favor of the non-movant, the conclusion is

adverse to that party. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333. The parties herein have stipulated to the material facts of this case so that summary judgment is appropriate. The question remains as to the construction of Joseph H. Albers' Trust documents.

When faced with a complaint to construe an estate-planning document, a court's obligation is to ascertain and carry out the intention of the grantor or testator. *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32, 34. The intent of the grantor or testator is to be ascertained from the express language of the trust instrument unless there is some ambiguity or uncertainty as to its meaning. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314. Because there is little ambiguity in the documents before this court, in this case the grantor's intent may be easily gleaned from the express language in the trust. Contrary to the Plaintiffs' contention, there is no question that the Grantor desired the ability to amend his trust. It is clear that the Grantor intended to preserve his ability to control and direct his revocable trust agreement during his lifetime. In particular, the original Trust Agreement of Joseph H. Albers from November 13, 1987 provides the following:

"2.(a) Grantor may at any time or times modify, alter or revoke this agreement in whole or in part and may withdraw assets by instrument or instruments in writing delivered to Trustee, provided, however, that the duties, powers and liabilities of Trustee shall not be substantially changed or increased without its written consent.

(b) Notwithstanding any other provisions of this Agreement, if Trustee receives any property under the Last Will and Testament of Spouse or otherwise by reason of Spouse's death, Grantor shall not have the powers reserved under paragraph 2(a) hereof with respect to such property, nor shall any such property be used for the purposes set forth in Paragraph 4(a) hereof."

It is well settled that simply reserving the right to amend, modify, or revoke does not invalidate an inter vivos trust. *Cleveland Trust Co. v. White* (1938), 134 Ohio St. 1, 6.

Contrary to the Plaintiffs' contention that Della Albers "wanted distribution in accordance with the terms of said Trust dated November 13, 1987"¹, the will of Della Albers unequivocally and unambiguously stated that she wanted her estate to be added to the funds held by the Central Trust Company. Furthermore, she directed the Trustee to administer and dispose of those funds pursuant to the terms of her husband's Trust as it existed at the date of her death. The Plaintiffs' argue that the Trustee should distribute Fund B in accordance with the terms of the Trust in 1987 and ignore the amendments and restatement that occurred up until 1993. Their position is untenable.

Revised Code §2107.63 provides that a testator may

"by will devise, bequeath, or appoint real or personal property *** to a trustee of a trust that is evidenced by a written instrument signed by the testator or any other settlor either before or on the same date of the execution of the will of the testator, that is identified in the will, and that has been signed, or is signed at any time after the execution of the testator's will ***"

"The property or interest so devised, bequeathed, or appointed to the trustee shall become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of the trust, and shall be administered in accordance with the terms and provisions of the instrument creating the trust, including, unless the will specifically provides otherwise, **any amendments or modifications of the trust made in writing before, concurrently with, or after the making of the will** and prior to the death of the testator." (emphasis added).

Prior to the enactment of R.C. §2107.63, an Ohio testator could not devise or bequeath property to an inter vivos trust without incorporating its terms in the will. A change in the trust agreement subsequent to the execution of the will did not affect the

¹ Page 4, ¶ 2, Plaintiffs' Motion for Summary Judgment with Affidavit of John B. Cornetet Attached, filed July 17, 1998.

trust incorporated in the will, unless such changes were added by codicil to the will. *Hageman v. Cleveland Trust Co.* (1974), 41 Ohio App.2d 160, 162. The enactment of R.C. §2107.63 eliminated this duplication by expressly authorizing bequests to the trustee of a trust identified in the will irrespective of the date on which the will was executed. *Id.* Revised Code §2107.63 incorporates the doctrine of "Independent Legal Significance", which, as applied to a living trust as in this case, means that a testamentary pour-over to the living trust will be valid and operative even as to modifications made after the execution of the will. *Id.* quoting *Knowles v. Knowles* (1965), 4 Ohio Misc. 158.

As a matter of law, the 1989 Amendment to the Trust Agreement, the 1991 Restatement of Trust Agreement and the 1993 First Amendment to Restatement of Trust Agreement simply republished and amended the original Trust Agreement. The Trustee is obligated to administer and dispose of the funds held for the benefit of Della Albers in accordance with the terms of, but not limited to, Section 6 of the First Amendment to Restatement of Trust Agreement.

Pursuant to Civ.R. 56(C), summary judgment is hereby granted in favor of Defendant PNC Bank, N.A. and Intervening Plaintiffs Lola and Douglas O'Banion.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Keith S. Riehl
Richard H. Lippert
Thomas J. Breed
Thomas S. Sapinsley

