

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

PNC BANK, N.A., TRUSTEE	:	CASE NO. CI-990704
	:	
Plaintiff	:	<u>OPINION & ENTRY</u>
	:	<u>GRANTING DECLARATORY</u>
-vs-	:	<u>JUDGMENT</u>
	:	
CAMPING AND EDUCATION	:	
FOUNDATION, et al.	:	
	:	
Defendants	:	
	:	

This matter came before Judge Wayne F. Wilke on June 24, 1999, regarding a complaint for declaratory judgment brought by Plaintiff PNC Bank as Trustee under an trust agreement with the decedent, John L. Holden. At the close of the hearing, the Court ordered written closing arguments to be filed by all the parties by July 20, 1999, with any rebuttals to be filed by July 27, 1999.

FACTS

The decedent, John L. Holden, died on December 29, 1998. The decedent entered into a Charitable Remainder Unitrust Agreement (hereinafter "the Trust") with the Central Trust Company, now PNC Bank, N.A. as trustee on December 22, 1976. Paragraph 3.4 of the Trust provides, upon the decedent's death, for distribution of the Trust residue to five charitable organizations in varying proportions.

That section of the Trust also allowed the decedent to substitute charities or the proportions they are to receive, but only if certain conditions were met. Specifically, the decedent required any such change to be "effected by written instrument, signed by the

[decedent] before two witnesses and acknowledged before a person authorized to administer oaths (emphasis added)".

On January 26, 1987, the decedent executed the First Amendment to the Trust. This amendment was signed by the decedent and the Trustee before two witnesses and acknowledged before a person authorized to administer oaths.

On April 9, 1992, the decedent executed the Second Amendment to the Trust. This amendment was signed by the decedent and Trustee before two witnesses only.

On July 2, 1996, the decedent and Trustee executed the Third Amendment to the Trust. Again, this amendment was signed by the decedent and the Trustee before two witnesses only.

Last, on May 5, 1997, the decedent and Trustee executed the Fourth Amendment to the Trust. This last amendment was signed by the decedent and the Trustee before two witnesses, both of who were commissioned notaries of the State of Ohio at the time they witnessed the amendment's execution. The Court is asked to determine which of the amendments is valid and to determine the beneficiaries so that the Trustee may make proper distribution.

CONCLUSIONS OF LAW

Under Ohio law, a settlor may only amend a trust by complying with the manner for amendment as established by the trust agreement itself. *Magoon v. The Cleveland Trust Co.*, (1956), 101 Ohio App. 194, 198. The First District Court of Appeals recently recognized this well-settled point of law in the case of *McKibben v. Samuels* (Feb. 19, 1999), Hamilton App. No. 980156, unreported.

In this case, a valid amendment to the original Trust required a written instrument signed by the grantor/donor before two witnesses. In addition, a valid amendment must be acknowledged before a person authorized to administer oaths. When construing an estate planning document, a probate court must ascertain and effectuate the intent of the testator within the bounds of the law. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314. The express language of the instrument generally provides the court with an indication of the testator's intent as related to the provisions therein. *Stevens v. National City Bank* (1989), 45 Ohio St.3d 276, 278. In the event the language employed in the instrument is unclear or ambiguous, then the court may look to extrinsic evidence to help ascertain the testator's intent. *In re Estate of Evans* (1956), 165 Ohio St. 27, 30. In this case, the words used by the testator are sufficiently clear so that extrinsic evidence is neither admissible nor needed to help determine the testator's intent.

The use of the words "must be acknowledged" in this case requires an actual act of taking an acknowledgment. Essentially, the Paragraph 3.4 of the Trust requires four steps for a valid amendment to the Trust. The grantor/donor must sign; the two witnesses must sign as witnesses; and there must be an acknowledgment. For purported Amendments Two through Four, only three of those steps were accomplished.

Ohio Revised Code §147.541 provides that the words "acknowledged before me" on a notary's certificate of acknowledgment means that the person acknowledging the act appeared before the person taking the acknowledgment and requires more than simply passively recognizing such act. The act of acknowledgment is a separate and distinct act from that of witnessing the donor's signature. In this case, a proper acknowledgment was only performed to the First Amendment to the Trust. The mere presence of a notary at

the execution of the other three purported amendments is insufficient to validly execute those amendments pursuant to Paragraph 3.4 of the Trust. Consequently, the only amendment to the Trust that was properly executed was the First Amendment.

Therefore, the Court finds that the documents titled "Second Amendment to Charitable Unitrust Agreement", "Third Amendment to Charitable Unitrust Agreement" and "Fourth Amendment to Charitable Unitrust Agreement" are ineffective to modify the terms of the Charitable Remainder Unitrust Agreement dated December 22, 1976, and First Amendment dated January 26, 1987.

The Trustee is HEREBY ORDERED to distribute the assets of the in accordance with the terms of the First Amendment to Charitable Unitrust Agreement dated January 26, 1987. Upon such proper distribution, the Trustee is relieved of any and all liabilities with regard to the distribution of the trust assets.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: all parties not in default