

Nos. 1-15-1610 & 1-15-1695  
Consolidated

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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In re Estate of Evelyn B. Stefani, deceased:	)	Appeal from the
	)	Circuit Court of
THE SALVATION ARMY, an Illinois	)	Cook County.
Corporation, as a Remainder Beneficiary of the	)	
STEFANI LIVING TRUST dated	)	
September 10, 1997, and DANIEL FINNEGAN,	)	
as successor trustee of the Stefani Living Trust	)	
dated September 10, 1997,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	
MARY KENDZIOR, both individually and as	)	No. 12 P 6691
Successor Trustee of the Stefani Living Trust dated	)	
September 10, 1997; ALZHEIMER'S	)	
ASSOCIATION; ST. JUDE CHILDREN'S	)	
RESEARCH HOSPITAL; THE HUMANE	)	
SOCIETY OF THE UNITED STATES; ST.	)	
JOSEPH HOME OF THE AGED; FOUNDATION	)	
FOR INTERNATIONAL MENTAL HEALTH	)	
REHABILITATION; HOWARD HUGHES,	)	
LYNN HUGHES; LISA KENDZIOR; IRIS	)	
ALESNA; SOPHIE MARSHALL; and JOYCE	)	
AHORT,	)	Honorable
	)	James G. Riley,
Defendants-Appellants.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 **Held:** We affirm the ruling of the circuit court which found the attempted amendment of the Stefani Living Trust by Evelyn Stefani, dated July 6, 2011, failed because she did not have a general power to amend the Living Trust.

¶ 2 Gino and Evelyn Stefani created a joint trust titled the Stefani Living Trust dated September 10, 1997. Gino died in 2004 and upon his death the assets he had contributed to the trust were to be segregated and allocated into two irrevocable trusts. These two trusts were to be held for the benefit of Evelyn during her lifetime. Evelyn's contribution to the Living Trust was to be segregated in a third trust upon Gino's death. Evelyn had the power to amend or revoke this third trust. Upon Gino's death, Evelyn did not segregate the funds as required. On July 6, 2011, Evelyn purported to amend and restate the entire trust. She died on April 3, 2012. After her death, The Salvation Army, the sole remainder beneficiary under the Living Trust prior to the amendment filed an action contesting the validity of the 2011 Amendment.

¶ 3 At a hearing on February 24, 2015, a question was raised concerning Evelyn's power to amend the Living Trust. On April 28, 2015, after briefing on the matter, the circuit court ruled since Evelyn attempted to amend and restate the entire Living Trust, something all parties agree she could not do, the 2011 Amendment failed in its entirety. This appeal timely followed.

¶ 4 On appeal, the defendant-appellants argue the circuit court erred in invalidating the entire 2011 Amendment and contend we should allow the 2011 Amendment to stand as to the subtrust Evelyn did have authority over. Based on our findings below, we reject this argument and affirm the order to the circuit court invalidating the 2011 Amendment in its entirety.

¶ 5 **JURISDICTION**

¶ 6 On April 28, 2015, the probate court entered an order ruling "[t]he attempted amendment of the [Stefani] Living Trust by Evelyn Stefani, dated July 6, 2011, is invalid in its entirety and a legal nullity, having no effect on the [Stefani] Living Trust dated September 10, 1997." The

probate court also made an express written finding pursuant to Supreme Court Rule 304(a) that "there is no just cause to delay enforcement or appeal of this order." On May 27, 2015, the Foundation for International Mental Health Rehabilitation filed its notice of appeal. On May 28, 2015, Mary Kendzior, both individually and as successor Trustee of the Stefani Living Trust dated September 10, 1997, and Lisa Kendzior filed their notice of appeal. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 304(a). Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 304(a) (eff. Feb. 26, 2010). We also have jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(1), which allows for appeals from "a judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010).

¶ 7

#### BACKGROUND

¶ 8 The deceased subjects of the underlying action, Evelyn Stefani (Evelyn), and her husband, Gino Stefani (Gino), were the settlors of a joint trust titled the Stefani Living Trust dated September 10, 1997 (the Living Trust). Gino died November 29, 2004. Pursuant to terms of the Living Trust, on his death, a Family Trust, a Survivor's Trust 1 and a Survivor's Trust 2 were to be created. Survivor's Trust 1 was to be funded with Evelyn's contributive share of trust assets, while Survivor's Trust 2 was to be funded with the remainder of Gino's contributive share of trust assets after the Family Trust was funded. The Living Trust expressly provides at Article 4 Section 3(b), except as to the survivor's trust over which the survivor has a general power of appointment (here Survivor's Trust 1), "[a]ll other trusts shall become irrevocable and shall not be subject to amendment after the death of the first of us." Accordingly, Survivor's Trust 2 and the Family Trust became irrevocable upon Gino's death. In the Living Trust, the Stefanis

designated their accountant, appellee, Daniel Finnegan (Finnegan) as a successor trustee of the Living Trust after both Gino and Evelyn's death.

¶ 9 After Gino's death and until her own death on April 3, 2012, Evelyn was the sole trustee of the Living Trust. During that time period, Evelyn failed to fund or segregate the assets of the the Family Trust, Survivor's Trust 1 and Survivor's Trust 2. Instead, by document dated July 6, 2011 (the 2011 Amendment), Evelyn purported to "amend and restate the entire existing Trust Agreement." The 2011 Amendment defines the "existing Trust Agreement" as the "Trust Agreement dated September 10, 1997 between Gino Stefani and Evelyn B. Stefani, as Trustors and Trustees."

¶ 10 The parties have conceded Evelyn's intent was clear: "the plain intention is she intends to amend the entire trust." The parties concede that while Evelyn was trustee, she failed to identify, segregate or account for the separate subtrusts as she was required to under the Living Trust. Evelyn treated all Living Trusts assets as though they were assets of a single amended trust governed entirely by the 2011 Amendment.

¶ 11 Mary Kendzior (hereafter Kendzior, while appellants collectively are referred to herein as the Kendzior Parties) was the designated successor trustee to Evelyn under the 2011 Amendment. Upon Evelyn's death in 2012, Kendzior opened the underlying probate case and proceeded to administer the entire Living Trust under the terms of the 2011 Amendment.

¶ 12 In June 2013, appellee, The Salvation Army, the sole residuary beneficiary of the Living Trust, filed supplemental complaints in the probate case to contest the validity of the 2011 Amendment and for an accounting. In July 2013, Finnegan, designated successor trustee under the Living Trust, also appeared in the underlying probate case. After the appearance of Finnegan and The Salvation Army, the Family Trust, Survivors' Trust 1 and Survivor's Trust 2 were funded and separately accounted for via court order.

¶ 13 The issue of the 2011 Amendment's invalidity was raised at a hearing on February 24, 2015, when Finnegan's counsel stated to the Court: "What Evelyn tried to do [was] to amend the whole thing, which she couldn't – she didn't have the power to do. So she re-wrote the whole trust, and the fall back position ... of Mary Kendzior is that since she couldn't do the whole thing, we're just going to sort of read it as if she ... carved out her Survivor's Trust 1 and did something different with that." The trial court then questioned the legal impact of the 2011 Amendment and whether the court should completely ignore Evelyn's "failed attempt to modify everything." At the probate court's direction, the parties fully briefed and argued the issue, after which the probate court ruled. On April 28, 2015, the probate court ruled the 2011 Amendment was invalid in its entirety. This appeal timely followed.

¶ 14 The Kendzior Parties raise only one issue on appeal: whether Evelyn Stefani's 2011 Amendment which improperly sought to restate the entire existing trust agreement was still effective so as to amend the one-sub trust she did have authority over. Based on our analysis, the circuit court correctly found the 2011 Amendment invalid and unenforceable.

¶ 15 ANALYSIS

¶ 16 On appeal, the Kendzior Parties argue Evelyn's intent was to amend only Survivor's Trust 1 and the fact that the 2011 Amendment was overly broad does not render it invalid in its entirety. Neither party disputes the plain language of the 2011 Amendment states in relevant part, "[b]y this Amendment, Trustor desires to amend and restate the entire existing Trust Agreement and Trustee agrees to accept the changes set forth in this Amendment and Restatement." Furthermore, neither party disputes the language to revoke or amend under the Living Trust. After the death of one of the Stefanis, the surviving spouse "may at any time amend, revoke, terminate, in whole or in part, the Survivor's Trust in which the Survivor Trustor has a general power of appointment." Finally, the same section of the Living Trust provides,

"[a]ll other trusts shall become irrevocable and shall not be subject to amendment after the death of the first of us."

¶ 17 The facts of this case are not in dispute and the parties are only disputing the legal effect of the 2011 Amendment. Under Illinois law, "[w]hen the material facts are not in dispute and the only question is the legal effect of an instrument, the standard of review is *de novo*." *Estate of Nicholls v. Nicholls*, 2011 IL App (4th) 100871, ¶ 17. Accordingly, our review is *de novo*.

¶ 18 Under Illinois law, "[i]f a method of exercising a power to modify is described in the trust instrument, the power can be asserted only in that manner." *Whittaker v. Stables*, 339 Ill. App. 3d 943, 946 (2003) citing *Parish v. Parish*, 29 Ill. 2d 141, 149 (1963).

¶ 19 The Kendzior Parties acknowledge Evelyn's amendment sought to modify the entire trust agreement, not just Survivor's Trust 1. However, in an attempt to save the 2011 Amendment, they argue we should uphold the validity of the 2011 Amendment because both of the Stefanis intended for Evelyn to be able to amend the Survivor's Trust 1 and Evelyn intended to do so.

¶ 20 We reject the Kendzior Parties' argument. "General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills." *Storkan v. Ziska*, 406 Ill. 259, 263 (1950). "When the language of the document is clear and unambiguous, a court should not modify or create new terms." *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 19.

¶ 21 "In interpreting trusts, which are construed according to the same principles as wills, the goal is to determine the settlor's intent, which the court will effectuate if it is not contrary to law or public policy." *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 325 Ill. 2d 565, 574 (2009) citing *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 513 (1981). However, a settlor's intent to be determined is not presumed to have

been in the testor's mind but, rather, the intent expressed by the instrument's language. *In re Estate of Laas*, 134 Ill. App. 3d 504, 509 (1985).

¶ 22 The parties agree the language of the trust is clear and unambiguous. While the Kendzior Parties argue Evelyn's intent was solely to amend Survivor's Trust 1, we cannot accept such an argument. Based on the plain language of the 2011 Amendment Evelyn's intent is clear, she intended to "amend and restate the entire existing Trust Agreement." This is something she could not accomplish based on the language of the Living Trust. The Living Trust provided she could only amend the trust she had the general appointment power over, which was Survivor's Trust 1. The power to amend did not include a general power to amend the Living Trust. Furthermore, the record demonstrates after the 2011 Amendment, Evelyn's actions show an intention to amend the Living Trust, not just Survivor's Trust 1. Evelyn did not segregate funds in the three separate trusts as required after the death of Gino, but treated all trust assets as if they were in one singular trust.

¶ 23 We also reject the Kendzior Parties' argument that the fact the amendment was overly broad does not render it invalid in its entirety. They argue we can allow the amendment to stand as to Survivor's Trust 1 but not as to the Family Trust and the Survivor's Trust 2. This is in part because the trusts are separate and independent and have all been funded by order of the probate court. In support of this argument, the Kendzior Parties point to cases where Illinois courts have struck an invalid part of an instrument and allowed the valid portions to stand. See *First Nat'l Bank of Joliet v. Hampson*, 88 Ill. App. 3d 1057, 1062 (1980) (stating where invalid portions can be separated from the valid portions and still give effect to the scheme of the settlor the invalid portions will be disregarded and those that are valid upheld); *Hopkinson v. Swaim*, 284 Ill. 11, 21 (1918) (providing where there has been a full execution of power and something has been added which is not authorized, and where the boundaries between the excess and the rightful execution

are distinguishable and severable, the execution is good, and the excess only void.). However, those cases do not support the Kendzior Parties' position.

¶ 24 Illinois law does allow Illinois courts to excise invalid parts of an instrument, like a trust, from valid portions as stated in cases like *Hampson* and *Hopkinson*. However, as both those cases recognize, such an action may only be taken when the boundary between the invalid portion and the valid portion are readily distinguishable in the document itself. *Hampson*, 88 Ill. App. 3d at 1062; *Hopkinson*, 284 Ill. at 1062. In *Hampson*, the court found the invalid provision could be severed from trust B without affecting the remainder of trust B or the remainder of the entire trust. *Hampson*, 88 Ill. App. 3d at 1062. Likewise, in *Hopkinson*, the court found the provisions of testator's will which were within the limits of his power and those which were not were perfectly clear in the document. *Hopkinson*, 284 Ill. at 1062.

¶ 25 In contrast with the courts in *Hampson* and *Hopkinson*, which could distinguish between the valid parts and the invalid parts of the instruments at issue, we cannot make such a distinction here. The invalid language in 2011 Amendment states, "Trustor desires to amend and restate the entire existing Trust Agreement." If we delete the invalid language from the instrument ("the entire existing Trust Agreement"), there is nothing left to amend and restate. The Kendzior Parties' argument that we can allow the 2011 Amendment to stand as to just Survivor's Trust 1 is based on the premise it was Evelyn's intention to only amend that trust. However, as previously stated, the language of the 2011 Amendment demonstrates a clear intention to amend the Living Trust in its entirety. In such a situation we may not substitute, modify or create new terms within the instrument to allow solely for the amendment of Survivor's Trust 1. *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 19.

¶ 26 Accordingly, Evelyn's attempt to restate and amend the Living Trust by way of the 2011 Amendment fails in its entirety.



¶ 27

CONCLUSION

¶ 28 We affirm the circuit court's order finding that the 2011 Amendment was a legal nullity and failed to amend any portions of the Living Trust.

¶ 29 Affirmed.