2016 IL App (2d) 160059-U
No. 2-16-0059
Order filed December 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOSEPHINE A. AUSTER, a/k/a Josephine A. Bastounes, Individually and as Disability Trustee, Plaintiff-Appellee, v. SAM C. AUSTER and HEARTLAND BANK & TRUST CO., Defendants-Appellants.	)	Appeal from the Circuit Court of Du Page County. No. 14-MR-359 Honorable Robert G. Gibson, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Section 2-9 of the Illinois Power of Attorney Act barred defendants' attempt to amend trust; failure to comply with notice provisions concerning removal of previous trustee did not invalidate appointment of successor trustee; and reformation of unambiguous terms of trust was not warranted.

¶ 2 I. INTRODUCTION

¶ 3 Defendants, Sam C. Auster and Heartland Bank & Trust Co., appeal an order of the circuit court of Du Page County granting the request of plaintiff, Josephine A. Auster, for a

declaratory judgment finding that plaintiff was the validly appointed successor trustee of the Rosemary G. Auster Living Trust Dated February 10, 1999. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 This appeal concerns the appointment of a trustee for a trust created by Rosemary G. Auster. Rosemary is living, but is incapacitated, and her husband Clark is deceased. They had five children: Josephine (plaintiff), Mary, Joseph, Laura, and Sam (a defendant). Resolution of this appeal turns on the construction of two documents and the interpretation of a statute. The first document is the Rosemary G. Auster Living Trust Dated February 10, 1999. Relevant portions are as follows. Section 1.04 states, in pertinent part:

> "As Grantor, I retain the powers set forth in this Section in addition to any powers that I reserve in other portions of this agreement[:]
>
> * * *
>
> I may amend, restate, or revoke this agreement, in whole or in part, for any purpose. Any amendment, restatement, or revocation must be made in writing and delivered to the then-serving Trustee."

Section 3.02 states:

> "During my lifetime, this Section governs the removal and replacement of my Trustees[:]
>
> (a) I may remove any Trustee with or without cause at any time. If a Trustee is removed, resigns or cannot continue to serve for any reason, I may serve as my sole Trustee, appoint a Trustee to serve with me or appoint a successor Trustee.

> (b) During any time that I am incapacitated, my husband will serve as my Trustee. If my husband is unable or unwilling to serve for any reason, ATG TRUST COMPANY will serve as my successor Trustee.
>
> (c) It I am incapacitated, my husband, or if he is also incapacitated or deceased, a majority of my children may remove any Trustee with or without cause.
>
> If I am incapacitated and there is no named successor Trustee, my husband may appoint an individual or corporate fiduciary to serve as my successor Trustee. If my husband is incapacitated or deceased, a majority of my children may appoint my successor Trustee.
>
> All appointments, removals and revocations must be by signed written instrument.
>
> Notice of removal must be delivered to the Trustee being removed and will be effective in accordance with the provisions of the notice.
>
> Notice of appointment must be delivered to and accepted by the successor Trustee and shall become effective at that time. A copy of the notice may be attached to this agreement."

The Trust also defines the conditions under which Rosemary is to be considered incapacitated and specifies that her husband and an attending physician are to make that determination. In the event her husband is deceased, the attending physician alone is empowered to make the decision regarding incapacity.

¶ 6 Also relevant to this appeal is a Durable Power of Attorney executed by Rosemary Auster. The Power of Attorney states it becomes effective when Rosemary, in the opinion of two licensed physicians, cannot manage her affairs, if a court determines she is incapacitated, if she is detained or disappears, or if she executes a Certificate of Authorizations by Principal (as

defined elsewhere in the Power of Attorney). It further states that the authority granted by the document shall not be affected by her "subsequent disability, incompetency, incapacity, or lapse of time." Section 3.18 states, in pertinent part:

> "My Attorney-in-Fact may exercise, in whole or in part, release or let lapse any power of appointment held by me, whether general or special, or any amendment or revocation power under any trust even if the power may be exercised only with the consent of another person and even if my Attorney-in-Fact is the other person subject to any restrictions on the exercise imposed on my Attorney-in-Fact under this power of attorney."

Rosemary's husband was named as her initial attorney-in-fact, and defendant was named as his successor.

¶ 7 Additionally, section 2-9 of the Illinois Power of Attorney Act (Act) bears potential relevance here:

> "In exercising powers granted under the agency, including powers of amendment or revocation and powers to expend or withdraw property passing by trust, contract or beneficiary designation at the principal's death (such as, without limitation, specifically bequeathed property, joint accounts, life insurance, trusts and retirement plans), the agent shall take the principal's estate plan into account insofar as it is known to the agent and shall attempt to preserve the plan, but the agent shall not be liable to any plan beneficiary under this Section unless the agent acts in bad faith. *An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency.* The agent shall have access to and the

> right to copy (but not to hold) the principal's will, trusts and other personal papers and records to the extent the agent deems relevant for purposes of this Section." (Emphasis added.) 755 ILCS 45/2-9 (West 2010).

Defendant also relies on section 2-4, which states: "The principal may specify in the agency the event or time when the agency will begin and terminate, the mode of revocation or amendment and the rights, powers, duties, limitations, immunities and other terms applicable to the agent and to all persons dealing with the agent, and the provisions of the agency will control notwithstanding this Act, except that every health care agency must comply with Section 4-5 of this Act." 755 ILCS 45/2-4 (West 2010).

¶ 8 The parties agree that Rosemary is incapacitated. One of her treating physicians issued an opinion to that effect in April 2013. On April 29, 2013, ATG Trust Company—the successor trustee named in the trust document—formally declined to accept appointment as trustee. Defendant then sought a replacement trustee, and, after a number of banks declined to act as trustee, Heartland Bank & Trust Company agreed to do so. On October 24, 2013, citing section 3.18 of the Power of Attorney, defendant executed an amendment to the trust naming Heartland as the successor trustee. Meanwhile, on September 12, 2013, citing section 3.02(c) of the trust, a majority of Rosemary's children named plaintiff as the successor trustee (plaintiff, Joseph, and Mary). Plaintiff subsequently initiated the present action seeking a declaration that she is the lawfully appointed trustee of the Rosemary G. Auster Living Trust Dated February 10, 1999.

¶ 9 The trial court, finding the trust unambiguous, concluded that plaintiff was the lawfully appointed successor trustee. The court explained that parol evidence was not admissible to controvert the terms of an unambiguous trust. It further found that defendant's subsequent attempt to amend the trust was barred by section 2-9 of the Act, as the Power of Attorney did not

make a specific reference to the trust in defining defendant's powers of amendment. Defendant now appeals.

¶ 10 III. ANALYSIS

¶ 11 On appeal, defendant raises three principal issues. First, he contends that the Power of Attorney granted him the authority to amend the trust, section 2-9 of the Act notwithstanding. Second, he argues that the appointment of plaintiff as successor trustee was not valid in that it did not strictly comply with the terms of the trust. Third, he asserts that the trial court should have allowed him to seek reformation of the trust to conform with Rosemary's alleged intent. We find none of these contentions persuasive.

¶ 12 A. DEFENDANT'S AUTHORITY

¶ 13 First, we will address defendant's contention that the Power of Attorney vested him with authority to amend the trust to name Heartland Bank as successor trustee. Defendant cites section 3.18 of the Power of Attorney as his source of authority to amend the trust. This section states, "My Attorney-in-Fact may exercise, in whole or in part, release or let lapse any power of appointment held by me, whether general or special, or any amendment or revocation power under any trust." This indeed appears to be a broad grant of authority to amend the trust. However, the trial court found that section 2-9 of the Act limited defendant's authority. In pertinent part, this section states, "An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency." 755 ILCS 45/2-9 (West 2010). The Power of Attorney does not mention the trust by name, simply granting defendant authority over "any trust." In other words, the Power of Attorney grants this authority *generally*. This plainly runs afoul of the statute's requirement

of a "*specific* reference to the trust." (Emphasis added.) The construction of such documents presents a question of law subject to *de novo* review. *Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 889 (2010) (trust); *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13 (statute).

¶ 14 Defendant calls our attention to section 2-4 of the Act, which states, in pertinent part, "The principal may specify in the agency the event or time when the agency will begin and terminate, the mode of revocation or amendment and the rights, powers, duties, limitations, immunities and other terms applicable to the agent and to all persons dealing with the agent, *and the provisions of the agency will control notwithstanding this Act*." (Emphasis added.) 755 ILCS 45/2-4 (West 2010). According to defendant, the final phrase of this section establishes that the Power of Attorney controls over the provisions of section 2-9 requiring a specific reference to the trust. Defendant's contention violates several principles of statutory construction.

¶ 15 First, it would violate the principle that a statute should not be construed so as to render any portion of it meaningless. *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, 281 Ill. App. 3d 719, 724 (1996). Quite simply, if, in the absence of a specific reference to a trust as specified in section 2-9, a court were to examine a document and perhaps parol evidence to ascertain if some other grant of authority existed, the purported requirement of a specific reference would have no meaning. Any grant of authority would be sufficient. There is no legitimate way to say that the requirement of a specific reference may be freely disregarded if such a reference does not appear in a power of attorney that would allow this portion of section 2-9 to have any meaning whatsoever.

¶ 16 Second, defendant's position imputes an absurd intent to the legislature. It is axiomatic that legislative enactments will not be construed in an absurd, unjust, or inconvenient fashion. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003). On defendant's interpretation, the legislature enacted an entire Act but did not require anyone to follow its provisions. We cannot presume the legislature intended such an absurdity.

¶ 17 Third, defendant's position ignores the precept that in the event of a conflict between statutory sections, the more specific section controls over the more general section. *State v. Mikusch*, 138 Ill. 2d 242, 254 (1990). In *Village of Chatham v. County of Sangamon*, 351 Ill. App. 3d 889, 896 (2004), the court explained, "A general statute is one that applies to cases generally while a specific statute is particular and relates to only one subject." Here, section 2-4 is clearly the more general of the statutes. It states, in essence, that where some portion of a power of attorney conflicts with the Act, the power of attorney controls. However, the portion of section 2-9 at issue here concerns an attorney-in-fact's authority regarding a trust—a much more specific subject. Thus, to the extent the two statutory provisions conflict, we must give effect to section 2-9.

¶ 18 Accordingly, we hold that section 2-9's requirement that the Power of Attorney must make a "specific reference to the trust" applies here. That said, defendant's protestations to the contrary notwithstanding, that the Power of Attorney granted defendant authority concerning "any trust" is plainly not a "specific reference" to the trust. Defendant spends considerable time arguing that we should interpret the statute broadly to effectuate Rosemary's intent. However, we cannot simply disregard section 2-9 of the Act. Indeed, as section 2-9 is entitled "Preservation of Estate Plans and Trusts," it is apparent that the legislature determined that the

best way to preserve estate plans and trusts was to ensure that an attorney-in-fact be allowed to substantively change a trust only where that authority is expressly set forth.

¶ 19 We also reject defendant's contention that the requirement to specifically identify the trust over which the attorney-in-fact has power only applies when the attorney-in-fact attempts to cause a payment to him- or herself. The language at issue states:

> "An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal *to pay income or principal to the agent* without specific authority and specific reference to the trust in the agency." (Emphasis added.) 755 ILCS 45/2-9 (West 2010).

The last-antecedent rule states that "relative or qualifying words, phrases, or clauses are applied to the words or phrases or clauses immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote, unless the intent of the legislature, as disclosed by the context and the reading of the entire statute, requires such an extension or inclusion." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). Here, there is no reason apparent to us to extend the language "to pay income or principal to the agent" beyond requiring the trustee to make a payment to the attorney-in-fact. Defendant suggests that such an extension is consistent with the overall purpose of section 2-9, *i.e.*, preserving the settlor's estate plan. However, this would be true only if the sole threat to the estate plan was the attorney-in-fact seeking pecuniary gain. Clearly, other amendments could threaten an estate plan as well, such as changing the distribution of funds among a settlor's children other than to the attorney-in-fact. Indeed, virtually any change could be contrary to a settlor's intent. We find defendant's argument on this point unpersuasive.

¶ 20 In short, we agree with the trial court that section 2-9 bars defendant's attempt to amend the trust here.

¶ 21 B. PLAINTIFF'S APPOINTMENT

¶ 22 Defendant next contends that plaintiff's appointment as successor trustee is invalid due to the terms of the trust specifying the steps that must be taken to remove a trustee. Specifically, he complains that plaintiff did not provide notice of removal to Rosemary. Section 3.02 of the trust states, "Notice of removal must be delivered to the Trustee being removed and will be effective in accordance with the provisions of the notice." Construing this provision presents a question of law subject to *de novo* review. *Herlehy*, 407 Ill. App. 3d at 889.

¶ 23 In fact, plaintiff executed (along with two siblings) a document appointing her trustee. This was communicated to defendant after the majority had made the appointment. We note that the document effectuating the appointment states, "Whereas, Rosemary G. Auster has been determined by her licensed physician to suffer a disability and unable to effectively manage her property or financial affairs, thereby triggering the appointment of Successor Co-Trustees." We further note that the trust does not specify the form of the notice required, and the clear implication of the above-quoted statement is that Rosemary cannot manage her affairs and is being replaced as—which entails being removed as—trustee. Furthermore, at the time of the appointment, defendant was attorney-in-fact for Rosemary (at the time Sam attempted to appoint Heartland, he served a notice of removal on himself as attorney-in-fact). Accordingly, delivery of this document to defendant would seem to satisfy the requirement of notice.

¶ 24 Moreover, assuming, *arguendo*, that the notice requirement was not satisfied, we agree with the trial court that this did not render plaintiff's appointment invalid. Again, defendant was attorney-in-fact for Rosemary. As early as April of 2013, defendant was attempting to find a

successor trustee for Rosemary, as evidenced by ATG Trust Company's declination of that role occurring on April 29, 2013. Thus, Rosemary's attorney-in-fact had actual knowledge that Rosemary was no longer capable of serving as trustee. Requiring notice that Rosemary was being removed under such circumstances would elevate form over substance. *Cf. In re Spelt*, 143 Ill. 2d 245, 230-31 (1991) ("When it is evident that a respondent received actual notice of the proceeding against him, then a commitment order, based upon clear and convincing evidence and issued by a circuit court after a hearing on the merits, may be deemed proper in an appropriate case even though the record does not demonstrate that respondent received formal notice as well."). As the trial court succinctly put it: "The trust language does not require the person deemed incapacitated by two physicians to receive notice to make the appointment effective. Nor would this comport with common sense." Providing notice to an incapacitated person, particularly where that person's attorney-in-fact had actual knowledge of the incapacity, would appear to be a useless act and accomplish nothing. Defendant was not prejudiced by a lack of formal notice.

¶ 25 Accordingly, we find defendant's argument unpersuasive.

¶ 26 C. REFORMATION

¶ 27 Defendant's final contention is that the trial court erred in not granting him leave to seek reformation of the trust to correct a purported scrivener's error. Defendant would like section 3.02(b) of the trust to be amended to contain additional language stating that any individual appointed trustee in accordance with the terms of this section "is not related or subordinate to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code." In support of this change, defendant relies upon the testimony of Louis Pavone, who drafted the trust and would testify he inadvertently omitted such language.

¶ 28 In *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008), the court explained that "The purpose of an action for reformation is to change a written instrument by inserting some omitted provision or deleting some existing provision so that the document conforms to the original agreement of the parties." Regarding a trust, Illinois courts have held that "the use of extrinsic evidence to nullify the effect of unambiguous language should be allowed 'only in extreme cases.' " *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1133 (2006). For example, in *Reingberg v. Heiby*, 404 Ill. 247, 249-50 (1949), an attorney preparing a trust copied descriptions of lands bequeathed to the settlor's two daughter from an erroneous source, resulting in one receiving 20 acres and the other 4 acres rather than an equal division as contemplated by the settlor.

¶ 29 In this case, the trust is not ambiguous. Section 3.02(b) plainly states what is to occur should a successor trustee need to be appointed during Rosemary's lifetime. Defendant would simply add a condition limiting the choice of whom that successor could be. Defendant identifies no reason why this is one of the "extreme cases" (*Handelsman*, 366 Ill. App. 3d at 1133) where extrinsic evidence should be allowed to override the unambiguous language of the trust. In *Reinberg*, giving effect to the language of the trust would have resulted in a distribution of assets between the settlor's children contrary to the settlor's desires—a substantive matter. Here, we are dealing simply with who should be trustee—a matter more procedural in nature.

¶ 30 Regardless of whether plaintiff or a corporate trustee serves as successor, the trustee will have fiduciary duties. See *Smith v. First National Bank of Danville*, 254 Ill. App. 3d 251, 261-62 (1993); *Dick v. People's Mid-Illinois Corp.*, 242 Ill. App. 3d 297, 303 (1993). An action for a breach of fiduciary duty would lie against either, providing a means of redress should the trustee act inappropriately. See *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929-30 (2005).

Furthermore, assuming plaintiff will not faithfully discharge her duties is mere speculation. In short, we perceive no grave injustice that will occur if the trust is given effect as it is written.

¶ 31 Before closing, we will briefly comment on one additional issue. Defendant points to similar limitations to the one he proposes on the selection of successor trustees in other sections of the trust. For example, section 3.06 concerning corporate fiduciaries contains such a limitation. However, section 3.05, which addresses the appointment of a co-trustee, does not. Thus, the limitation proposed by defendant is not universally included with respect to the appointment of trustees outside of section 3.02. As such, this point is not particularly compelling.

¶ 32 IV. CONCLUSION

¶ 33 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 34 Affirmed.