2017 IL App (1st) 17-0628-U

THIRD DIVISION
December 27, 2017

No. 1-17-0628

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ESTATE OF MARY JEAN ("JEAN") ROBERTS, Deceased.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department.
ROBERT A. RICHARDSON, Claimant-Appellee, v. JEAN RICHARDSON, not individually, but as Independent Executor of the Estate of Mary Jean ("Jean") Roberts, Deceased, Respondent-Appellant.	)	No. 15 P 3767 The Honorable James G. Riley and Daniel B. Malone, Judges Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

Held: The trial court erred in granting summary judgment in favor of claimant and against the estate where there remained genuine issues of material fact as to who acted to transfer the funds from the decedent's trust account into the decedent's individual account and how that transfer was effectuated.

¶ 1 This cause of action arises from a probate estate claim filed by the claimant, Robert A.

Richardson (herein Robert) against the estate of his mother, Mary Jean ("Jean") Roberts, deceased (herein Jean or decedent), on behalf of the Jean Roberts Revocable Trust dated March 26, 1998 (herein the trust), in which Robert sought the return of approximately $1.8 million in funds from an investment account at Charles Schwab & Co., Inc. (herein the Schwab account) from the estate to the trust. The trial court granted summary judgment to Robert finding that the Schwab account, which was inventoried as part of the estate, belonged to the trust. In doing so, the court found that the documents of record established that the decedent's daughter and executor, Mary Jean ("Jean") Richardson (herein Mary Jean, or executor), as co-trustee transferred the funds from the Schwab account, without the authorization required by the trust, into an account solely in the decedent's name, and that the funds therefore belonged to the trust. The court further found that because the second amendment of the trust, which named the executor as the only co-trustee (with the decedent), was never delivered to the then acting trustees, including Robert, as was mandated by the trust, the second amendment was invalid. The executor now appeals on behalf of the estate. She contends that the trial court erred in denying her motion to strike the affidavits offered in support of Robert's motion for summary judgment and for further discovery prior to any hearing or ruling on that motion in violation of Illinois Supreme Court Rules 191(a) and (b) (Ill. S. Ct. 191(a),(b) (eff. Jan. 4, 2013)). The executor further contends that the trial court erred in granting summary judgment in favor of Robert where there remained genuine issues of material fact as to whether: (1) the second amendment to the trust was valid; and (2) who acted to transfer the account from the trust to the decedent's individual account. For the reasons that follow, we reverse and remand for further proceedings.

I. BACKGROUND

¶ 2 The record reveals the following relevant facts and procedural history. On her death, on May 22, 2015, the decedent was survived by three children, Robert, Mary Jean, and James Richardson (James). The decedent's last will and testament (executed on March 31, 2010) and the codicil to that will (executed on April 18, 2012) were admitted to probate, and Mary Jean was appointed independent executor of the estate.

¶ 3 Relevant to this appeal, the decedent's will made a specific bequest to Robert in the sum of $10,000, and devised and bequeathed "the rest and residue of her estate, both real and personal and of every kind and character and wherever located, including all lapsed legacies and devises," to her then living descendants, *per stripes*, ***excluding therefrom *** Robert, and his descendants." The will also contained a "no contest" clause providing that any beneficiary who attempted to challenge the will would be treated as having predeceased the decedent and would thereby forfeit his or her inheritance. The codicil amending the will removed the $10,000 bequest to Robert entirely. The codicil explained that the decedent was taking this action "after due and careful consideration of [Robert's] actions and his conduct," and was "intentionally excluding" Robert "from sharing in [her] estate." As the codicil explained: "Both he and I know full well that he has already received more than his fair share of my estate."

¶ 4 During her lifetime, and long before making her will, the decedent created the trust, and executed several documents pertinent to that trust. We begin by setting forth those provisions relevant to the resolution of the issues raised on appeal.

¶ 5 The original trust, created on March 26, 1998, named the decedent as both trustor and sole trustee. Article IV of that trust articulated the powers that the decedent, as trustor, reserved for herself, including, *inter alia*, "property withdrawal," "amendment and revocation" of the trust, and "investment direction." Article IV further provided that all of these powers were "personal,"

and were not "exercisable by any guardian, conservator, attorney-in-fact or other personal representative" and would terminate were the trustor to become "incapacitated."

¶ 6 With respect to amendment of the trust, paragraph B of article IV provided that during her lifetime, the decedent, as trustor, could "from time to time amend or revoke this agreement in whole or in part, by an instrument in writing signed by the Trustor and delivered to Trustee."

¶ 7 With respect to property withdrawal paragraph A of Article IV permitted the trustor to "withdraw all or part of the principal of the trust" and "direct Trustee as to distributions of principal and income as provided in the dispositive provisions" of the trust. In that respect, article V of the trust articulated the "dispositive provisions" applicable during the trustor's life. Paragraph A of this article provided in pertinent part:

> "Trustor may withdraw all or any part of the principal of the trust estate from time to time by delivering to Trustee an instrument in writing duly signed by Trustor, describing the property or portion thereof desired to be withdrawn. Upon receipt thereof, Trustee shall convey and transfer to Trustor the property described in the instrument.

Paragraph B of Article V, reserved some discretion to the trustee and provided in relevant part:

> "Trustee may pay to or apply for the benefit of Trustor, to the extent not otherwise directed by Trustor, such sums from income and principal of the trust estate as in Trustee's sole discretion shall be necessary or advisable from time to time for the health, education and support in reasonable comfort of Trustor, or for the health, education and support of those legally dependent on Trustor, taking into consideration to the extent Trustee deems advisable other income and resources available to Trustor known to Trustee."

¶ 8 With respect to "investment direction," paragraph C article IV explicitly provided that the trustor reserved the right:

> "(1) to direct the retention, acquisition and disposition of the trust assets in said trust for investment purposes and (2) to approve or reject the recommendations of Trustee as to the acquisition and disposition of trust assets for investment purposes."

This section permitted the trustor to exercise either right "as part or all of the trust assets" by "notifying the Trustee of such intention," and to "release or reinstate the exercise of either right from time to time as to part or all of the trust assets. ***" Nothing in this section required that the direction or disposition of assets, or for that matter approval of the trustee's recommendations as to any such disposition, be made in writing.

¶ 9 In addition, Article IX of the trust, set forth the numerous but non-exclusive powers, duties and limitations of a trustee, and described the "Act of Joint Trustees" in the following manner:

> "Any power vested in two or more trustees may be exercised by a single trustee if all trustees have so agreed in writing, and the act of the single trustee under such authority shall constitute the act of all trustees with respect to the trust. Any power vested in three or more trustees may be exercised by a majority without consent or agreement of the remaining trustees."

¶ 10 On November 26, 2002, after the death of her husband, the decedent executed the first amendment to her trust, making her children and grandchildren the beneficiaries of the trust at her death.

¶ 11 On October 23, 2003, the decedent executed a document entitled "Appointment of Co-Trustee and Acceptance of Co-Trustees under [the trust.]" This document appointed the decedent, Robert and Mary Jean, to serve as co-trustees. The document further stated that it was the decedent's "intent that any one of the Co-Trustees, including [the decedent] [could] act

independent of the other Co-Trustees" and that the act of one "Co-Trustee would constitute the act of all Trustees with respect to the Trust." The acceptance of the document was signed by both Robert and Mary Jean.

¶ 12 On April 10, 2009, the decedent executed another document entitled "Appointment of Co-Trustees and Acceptance of Co-Trustees Under [the trust]." This document appointed all three of the decedent's children, Robert, Mary Jean, and James to act as co-trustees with the decedent. The document further provided that it was the decedent's "intent that two Co-Trustees must act together in making decisions on behalf of [the trust.]" All three of the decedent's children signed the acceptance of the document.

¶ 13 On March 31, 2010, the decedent executed the second amendment to the trust, under which she named herself and Mary Jean as co-trustees, and James as successor co-trustee. On this same date, the decedent executed a power of attorney for property, which named Mary Jean as agent and James as successor agent.

¶ 14 After the decedent's will was admitted to probate, on August 10, 2015, Robert filed a petition for formal proof of will, but withdrew it on November 30, 2015. Instead, in December, he filed a five-count petition to contest the will, alleging: (1) the decedent's lack of capacity; (2) breach of fiduciary duty by Mary Jean; (3) undue influence by Mary Jean over the decedent when the decedent was of feeble mind; (4) wrongful and unilateral termination of the decedent's estate plan by Mary Jean; and (5) intentional interference with expectancy. On that same date, Robert filed the instant claim against the estate seeking the return of the Schwab account assets from the estate to the trust.

¶ 15 On February 22, 2016, Mary Jean, as executor of the estate, filed a motion to dismiss the will

contest. After that motion was denied, she filed a four-count counterclaim (alleging Robert's breach of fiduciary duty, conversion, misrepresentation and battery), a motion to dismiss the intentional interference with expectancy count, and her answer and affirmative defenses to the remaining counts of the will contest.

¶ 16 On June 9, 2016, the trial court entered an order staying all matters regarding the will contest and the counterclaim until further order of the court, and set a briefing schedule on Robert's claim against the estate.

¶ 17 Robert then filed the instant amended claim, alleging that approximately $1,825,061.56 in assets from the decedent's individual Schwab account, inventoried as part of the estate, belonged to the trust, of which he was a beneficiary.

¶ 18 Robert alleged that between 2005 and 2010 the decedent resided in Colorado, near him and that he was primarily responsible for her care. Robert averred that in 2008, the decedent was diagnosed with dementia consistent with Alzheimer's disease. He stated that in early 2010, the decedent's three children agreed that the decedent would move to Illinois near Mary Jean and that Mary Jean would become primarily responsible for her care. At that time, the decedent's trust held an investment account at UBS in Colorado.

¶ 19 Robert alleged that at this time, Mary Jean asked him to move the trust's UBS investment account from UBS in Colorado to Schwab in Illinois. After the decedent moved to Illinois in February 2010, together with James and Mary Jean, Robert executed documents to open an account in the trust's name at Schwab, and with Huber to provide investment advisory services. He stated that as of March 31, 2010, the trust was funded with the Schwab account and James, Mary Jean and he were the authorized signatories.

¶ 20 Robert further alleged that only after his mother died, he learned that the trust had been

"defunded" and that the Schwab account had been removed from the trust and deposited into an account in the decedent's name alone, to which Mary Jean had access, and which was now in her name as executor of the estate. Robert averred that he was never asked to, nor participated in defunding the trust by removing the assets, and to the best of his knowledge James did not either. Robert alleged that Mary Jean acted alone in removing the assets from the Schwab account in violation of the requirements of the trust, and her fiduciary duties as co-trustee.

¶ 21 Robert further alleged that he had absolutely no notice of the second amendment to the trust, signed by the decedent, and that learned of this amendment only after the litigation in this matter began. He further stated that because the amendment was never delivered to him, or James, pursuant to Article IV, section B of the trust the amendment was invalid.

¶ 22 Robert also alleged that there *may be* "other assets" which were purportedly part of the estate but that should be returned to the trust, and asked that, in the event such assets were discovered after a full inventory, they too be returned to the trust and his claim against the estate be increased by the amount of those assets.

¶ 23 In support of his claim, Robert attached numerous documents, including: (1) the original trust document; (2) the first amendment to the trust; (3) the two appointments and acceptances of co-trustees; (4) a letter from the attorney Fletcher dated February 5, 2010, explaining that the April 10, 2009, appointment of co-trustees required that at least two of her children act together to make decision on behalf of the trust; (5) the second amendment to the trust; (5) numerous documents that were received from Schwab by subpoena and signed by Mary Jean, James, and Robert to open the Schwab/Huber account in the name of the trust and transfer the UBS account to Schwab; and (6) a Schwab "check and journal request form" signed on April 27, 2010, by

Mary Jean alone, authorizing the transfer of assets from the trust's Schwab account into an investment account in the decedent's name.

¶ 24 On April 19, 2016, Mary Jane filed a motion to dismiss the amended claim. That motion was denied on June 9, 2016. She then served interrogatories and requests for production of documents on Robert, and filed her answer and affirmative defenses to Robert's amended claim, including: (1) Robert's breach of fiduciary duty; (2) conversion; (3) misrepresentation; and (4) battery.

¶ 25 On July 15, 2016, Mary Jean filed an initial inventory of the estate revealing the following assets: (1) the Schwab account ($1,889,480); (2) six series 10,000 face value I Bonds ($87,948); (3) six series $5,000 face value I Bonds ($45,576); (4) a Henriette Wyeth oil painting ($125,000); and numerous additional artwork, jewelry, furniture and household items, whose value was yet undetermined.

¶ 26 On August 5, 2016, Robert filed a motion for summary judgment, alleging that the admitted facts and documents showed that Mary Jean, while acting as co-trustee of the trust, without authority, and without notice to the remaining co-trustees, defunded the Schwab account from the trust in violation of both the terms of the trust, and her fiduciary obligations. In support of the motion for summary judgment, in addition to the documents he already attached to his amended claim, Robert also attached affidavits by himself, and his brother James.

¶ 27 In his affidavit, Robert averred that he signed the April 10, 2009, appointment and acceptance of co-trustees, as well as received a letter from the decedent's attorney, Fletcher, dated February 5, 2010, indicating that the appointment gave equal authority to all of the decedent's children, and required at least two of them to act together to make decisions on behalf of the trust.

¶ 28 Robert further attested that he executed the documents to open the Schwab account in the name of the trust, with Huber acting as investment advisor and transferred the trust's UBS assets to Schwab. Because at that time, he resided in Colorado, the documents were signed, and mailed to him for signature, and he executed them and sent them back. These documents were attached to his affidavit.

¶ 29 In his affidavit, Robert further attested that he first saw Schwab's "check and journal request" form, transferring the Schwab assets from the trust to the decedent's individual investment account, as part of the instant litigation. He stated that at no time before that did anyone ask him to sign anything to remove the Schwab account, or any other assets, from the trust, or ask for his approval, consent, or participation in removing that account from the trust. As such, he was never asked to and did not participate in defunding the trust by removing those assets.

¶ 30 Robert also attested that the second amendment to the trust dated March 31, 2010, was never delivered to him, and that the first time he saw it was as part of discovery in the instant litigation.

¶ 31 James' affidavit was nearly identical to that of Robert. Therein, James attested that he signed the April 10, 2009, appointment and acceptance of co-trustees, and received the February 5, 2010, letter from the decedent's attorney, Fletcher.

¶ 32 Like Robert, James stated that he executed documents to open an account in the name of the trust at Schwab and transferred the UBS account to Schwab. James also stated that he recalled being at the Schwab offices three times. He remembered that Mary Jean and he signed the client agreement and the Schwab limited power of attorney (LPOA) to allow Huber to provide

investment advice to the trust for the Schwab account and that those documents were then sent to Robert in Colorado for his signature. The documents were attached to his affidavit.

¶ 33 James, like Robert, attested that the first time he saw the "check and journal request" form removing the Schwab account assets from the trust and placing them into an investment account solely in the decedent's name was during the instant litigation. James also attested no one ever asked him to sign anything to remove the Schwab account, or any other assets, from the trust, or asked for his approval, consent or participation in removing that account from the trust, and that he did therefore did not participate in defunding the trust. He also averred that he did not sign the "check and journal request" form, even though it appears to have a place for his signature.

¶ 34 He also attested that the first time he saw the second amendment to the trust dated March 3, 2010, was when he saw a copy of it as an exhibit to the amended claim filed by Robert. James also stated that this document was never delivered to him.

¶ 35 On August 15, 2016, Mary Jean filed a motion to strike the affidavits of Robert and James pursuant to Illinois Supreme Court Rule 191(a) (Ill. S. Ct. 191(a) (eff. Jan. 4, 2013)) alleging, *inter alia*, that they failed to attach sworn copies of the documents upon which the affiants relied, and to lay a sufficient foundation for those documents, so as to constitute inadmissible hearsay. She also filed a motion for relief pursuant to Illinois Supreme Court Rule 191(b) (Ill. C. Ct. 191(b) (eff. Jan. 4, 2013)) seeking further discovery prior to a summary judgment ruling including the deposition of numerous witnesses, such as, *inter alia*: (1) employees of Schwab and Huber; (2) the decedent's former estate planning attorney, Fletcher; and (3) numerous family members, including James' wife and son, who would testify about James' receipt of the second amendment to the trust, his knowledge and consent to the transfer of assets in the Schwab

account from the trust to the decedent, and the decedent's intent to disinherit Robert. The trial court denied both motions on August 23, 2016.

¶ 36 On October 4, 2016, Mary Jean filed her response to Robert's motion for summary judgment. Therein, she argued that there remained genuine issues of material fact as to whether the second amendment was valid, and who acted to transfer the Schwab account from the trust to the decedent. Specifically, she argued that the delivery of the second amendment changing the co-trustees to the then acting trustees was not necessary, because the term "then acting" was not included in the language of article IV, paragraph B of the trust, and the second amendment was delivered to her as the new co-trustee. In addition, she asserted that even if the second amendment to the trust was invalid, the documents of the Schwab account, signed by all three co-trustees, permitted her to transfer the funds from the trust to the decedent, particularly where the decedent gave her verbal directives to do so, and the decedent's testamentary intent to disinherit Robert was evident from her will and codicil. In addition, Mary Jean renewed her motions to strike the affidavits and for further discovery, including the deposition of witnesses, pursuant to Illinois Supreme Court Rules 191(a) and (b) (Ill. S. Ct. R. 191(a), (b) (eff. Jan. 4, 2015)).

¶ 37 In support, Mary Jean attached numerous documents, including: (1) the decedent's will and codicil; (2) a letter from the decedent's Illinois estate planning attorney, David A. Schlack (Schlack) to Robert dated March 31, 2010; (3) her own affidavit; (4) an affidavit of Edward H. Cruickshank (Cruickshank) the decedents' financial advisor at Huber; (5) an affidavit of the decedent's former Arizona estate planning attorney, Fletcher; and (4) an affidavit of Schlack.

¶ 38 In her affidavit, Mary Jean attested that from 2005 to February 2010, her mother resided in

Colorado near Robert and his wife. For most of that time, Robert acted as the decedent's sole power of attorney for property and healthcare, and was responsible for managing her finances. According to Mary Jean's affidavit, at various time between 2005 and 2010 Robert represented to her and James that he had retained a financial advisor to manage the decedent's investment portfolio. In fact, Robert had not done so and was managing the portfolio himself, despite no training or expertise in investment matters. Accordingly, during his management of the portfolio the value of the portfolio substantially declined. Robert was less than forthcoming when James and Mary Jean raised concerns about the decedent's finances.

¶ 39 In addition, according to Mary Jean's affidavit, throughout 2008 and 2009, whenever she or James inquired about their mother's health Robert reported that the decedent's mental and physical health had severely declined and that she was suffering from severe dementia and Alzheimer's, prompting Mary Jean to suggest visits on several occasions, each of which was rebuffed by Robert. In December 2009, Mary Jean who had not heard from the decedent in nearly two years received a telephone call from her mother. After that telephone call, Mary Jean discovered that the decedent had been taking Xanax for several years, and that Robert had increased his mother's Xanax dosage to keep her subdued, so that she was in a "zombie-like state." It was then that Mary Jean realized for the first time that Robert had been misrepresenting the decedent's health and cognition for quite some time.

¶ 40 Over the next few months, it became clear to Mary Jean and James that they could no longer trust Robert to care for their mother and handle her finances, and it was decided that the decedent would move to Illinois and Mary Jean would take over her care.

¶ 41 In February 2010, Mary Jean began vetting nursing homes in the Chicago area. In the course

of that research, she learned from a medical professional that her mother had been "chemically restrained" with Xanax and other medications while under Robert's care. This intensified her and James' wish to "rescue" their mother from Robert.

¶ 42 In February 2010, James and Mary Jean drove to Colorado to pack up the decedent's belongings and move her to Illinois. After arriving in Illinois, the decedent, with James' and Mary Jean's assistance took steps to ensure that Robert had no involvement in her personal or financial affairs.

¶ 43 Specifically, according to Mary Jean's affidavit, in March 2010, the decedent met with estate planning attorney, Schlack, who recommended the removal of Robert as co-trustee of the trust, via trust amendment. Schlack also recommended new Illinois power of attorneys for health care and property with Mary Jean as the power of attorney and James as successor. In addition, Schlack advised the decedent to defund the trust, execute a new will with a "no contest" clause, and allow her estate to be probated to protect her assets should Robert attempt to challenge the will or the trust in court. As an additional strategy, Schlack recommended that the decedent leave Robert a monetary bequest of $50,000, which he would forfeit if he challenged her will. According to Mary Jean's affidavit, the decedent was adamant that she did not want to leave Robert anything, but she eventually agreed to leave him $10,000, which was reflected in her will dated, March 31, 2010. Mary Jean averred, however, that at the decedent's insistence, in 2012 the decedent executed a codicil to her will removing any monetary bequest to Robert.

¶ 44 In her affidavit, Mary Jean further attested that on March 11, 2010, the decedent, James and Mary Jean met with Cruickshank, a certified financial planner and wealth manager at Huber. The purpose was to transfer the money in the trust's investment account held at UBS in Colorado to Schwab in Illinois. Although the decedent was the trustor and the co-trustee and had the

cognition and mental capacity to act as both, at the time the account was set-up, it was decided by the decedent, James and Mary Jean, that the Schwab account should mimic the UBS account with James, Robert, and Mary Jean as co-trustees with the decedent, so that Robert would not become suspicious and uncooperative in transferring the funds to Illinois.

¶ 45 In her affidavit, Mary Jean attested that on March 31, 2010, the decedent executed the second amendment to the trust, which named the decedent and Mary Jean as co-trustees and James as successor co-trustee. On that same date, the decedent executed a new power of attorney for property which named Mary Jean as power of attorney and James as successor power of attorney.

¶ 46 According to Mary Jean's affidavit, all three of those documents were reviewed and discussed at a subsequent meeting on April 27, 2010, during which the decedent, James and Mary Jean met with Cruickshank, and his colleagues, Peter Doyle (hereinafter Doyle) and Deb Sarazine (hereinafter Sarazine), to transfer the trust's Schwab account into an individual investment account in decedent's name. According to Mary Jean's affidavit, the decedent intended and authorized this transfer.

¶ 47 According to Mary Jean's affidavit, during this meeting, both the decedent and Mary Jean executed documents necessary to open an individual account for the decedent at Schwab. The decedent and Mary Jean were the signatories to the decedent's new individual account. The decedent, James and Mary Jean, all three instructed and authorized Schwab to make the transfer from the trust to the decedent's individual account. Mary Jean explained that Schwab requested an internal document entitled "check and journal request form" to effectuate transfers between accounts and Schwab's internal procedures required that only one person sign, so she signed it.

¶ 48 In her affidavit Mary Jean finally averred that on June 30, 2010, the decedent's individual

Investment account at Schwab had a value of $1,667,292, and that the value of the account at the time of her death was $1,889,480. Accordingly, from 2010 through 2015, the decedent's individual investment account grew by over $200,000, notwithstanding that it was used to pay for her living expenses, including nursing home care and other such expenses for five years.

¶ 49 In his affidavit, Cruickshank attested that he is a certified financial planner and wealth manger at Huber, that the decedent was his client from 2010 until her death in May 2015, and that he has continued to manage her estate since then.

¶ 50 According to Cruickshank's affidavit, on March 11, 2010, the decedent, Mary Jean and James all came into his office to open and fund an investment account for the trust. Cruickshank and his staff worked with them and Robert via conference call to open an investment account and to transfer assts form the UBS account into a trust account at Schwab. As of March 11, 2010, the trust document named the decedent and her three children as co-trustees. Three of the four co-trustees signed the documents to establish the new trust account with Schwab. During this meeting, the decedent was aware of and agreed to the transfer of assets to her new trust account. She consented, authorized and directed the transaction, and Cruickshank had no concerns about her cognitive abilities or her mental competency.

¶ 51 Cruickshank further attested that he next saw the decedent on April 27, 2010, when she, Mary Jean, and James met with him to transfer the assets from the trust's account to an individual investment account in the decedent's name. Again, Cruickshank attested that at during this meeting he had no concerns about the decedent's cognitive abilities or her mental competency.

¶ 52 Cruickshank attested that prior to this meeting the decedent had updated her estate planning,

including a change to the co-trustees of the trust. Prior to the meeting, Huber along with Schwab had reviewed the second amendment to the trust dated March 31, 2010, which named the decedent and Mary Jean as co-trustees, as well as the decedent's power of attorney for property dated March 31, 2010, which named her daughter Mary Jean as her power of attorney.

¶ 53 Cruickshank attested on April 27, 2010, the decedent, Mary Jean and James were all present in his office along with his colleague, Doyle and Sarazine, during which they reviewed and discussed the second amendment to the trust, which named the decedent and Mary Jean as co-trustees and James as successor co-trustee. According To Cruickshank's affidavit, "James was aware of the second amendment because he participated in the review and discussion with the rest of us who were present at the meeting."

¶ 54 According to Cruickshank's affidavit, the decedent, Mary Jean and James all consented, authorized and directed the transfer of assets from the trust's investment account to the decedent's individual investment account. In addition, Cruickshank attested that the decedent and Mary Jean both signed paperwork necessary to open the aforementioned individual investment account.

¶ 55 Cruickshank attested that Schwab's internal compliance department specified what paperwork was required to effectuate the transfer of assets from the trust account to the individual account. They directed that Mary Jean, as power for attorney for the decedent, should sign Schwab's internal "attorney-in-fact" form and Schwab's internal "check and journal request" form to facilitate the transfer of the trust account to the decedent's individual account.

¶ 56 In addition, Cruickshank confirmed that the initial value of the decedent's individual investment account as of June 30, 2010, was $1,667,292.16, and that the value of the account after her death on June 30, 2015 was $1,867,844.52, so that between 2010 and 2015 the that

account grew by $200,000, notwithstanding that it was used to pay for the decedent's living expenses, including, *inter alia*, nursing home care for five years.

¶ 57 In her affidavit, Arizona estate planning and trust administration attorney, Fletcher, attested that the decedent was her client from 2003 through 2010. Prior to that, since about 1982, the decedent had been a client of her former firm. Fletcher attested that her former partner, Michael C. Young (Young), now deceased, prepared the original trust executed on March 26, 1998. She stated that based on her experience and knowledge of Young's drafting style and their joint drafting forms, she interpreted article IV, paragraph B of the trust as follows:

> "The Trustor ([the decedent]) had the power to amend the Trust Agreement during her lifetime by an instrument in writing signed by Trustor and delivered to any new Trustee(s) appointed in the Amendment. The acting Trustee of the Trust must be aware of the changes that have been made to the Trust in order to carry out the Trustee's fiduciary responsibilities. This provision was not intended to require delivery of an Amendment to prior or former Trustees."

¶ 58 Fletcher further attested that she and Young drafted the first amendment to the trust, which was signed by the decedent on November 26, 2002. In October 2003, at the request of the decedent, Fletcher drafted an appointment of co-trustees and acceptance of co-trustees under the trust. The document appointed two of the decedent's children, Robert and Mary Jean, to serve as co-trustees with the decedent. Any one of the three co-trustees could act independently of the other co-trustees and the act of one co-trustee would constitute the act of all co-trustees with respect to the trust. According to Fletcher, the appointment was signed by the decedent on October 23, 2003 and the acceptances were signed by Robert on October 23, 2003, and by Mary Jean on November 7, 2003, respectively.

¶ 59 On March 25, 2009, Fletcher was contacted by Mary Jean, who stated that she wanted to be more involved as co-trustee and thought it was appropriate for the decedent's son, James, to also be appointed as co-trustee. Fletcher explained that she represented the decedent and could only take direction from her regarding legal matters. Fletcher was advised by Mary Jean that the decedent was capacitated but was having a difficult time remembering. As such, Fletcher decided to write a letter to the decedent explaining her telephone conversation with Mary Jean and enclosing a proposed appointment of co-trustees and acceptance of co-trustees for her consideration. The proposed appointment and acceptance of co-trustees nominated all three of the decedent's children to serve with the decedent as co-trustees of the trust. The appointment also included a provision requiring two of the co-trustees to act together to make decisions on behalf of the trust. The intent of this provision was that two of the four co-trustees were required to act. Accordingly, if the decedent herself was acting as co-trustee then at least one of her children was also required to act as co-trustee, but if the decedent was not acting as co-trustee, two of her children were required to act.

¶ 60 According to Fletcher's affidavit, the decedent signed the appointment of co-trustees on April 10, 2009, and the acceptances of co-trustees were signed by Robert on April 10, 2009, by James on August 8, 2009 and by Mary Jean on April 13, 2009, respectively. On February 5, 2010, Fletcher wrote a letter to the decedent and her three children explaining the meaning of the executed appointment and acceptances. That letter was attached to her affidavit.

¶ 61 In his affidavit, Illinois estate planning and trust administration attorney, Schlack attested that the decedent was his client from 2010 until her death on May 22, 2015. Schlack stated that in March 2010 he met with the decedent twice about changes to her estate plan. During each of those meeting, he spoke directly with the decedent about her current estate plan and her desired

changes. He was convinced that she was of sound mind and memory and that she had the mental competence and testamentary capacity to request changes to her estate plan, which had the effect of disinheriting her son, Robert. The decedent's direct quote to Schlack about her decision to disinherit Robert was: "He got his."

¶ 62 Schlack stated that after reviewing the decedent's existing documents and speaking with her, he recommended the removal of Robert as co-trustee of her trust, by way of a trust amendment. He also recommended that she execute new Illinois powers of attorney for health care and property with Mary Jean as power of attorney and James as successor. In addition, he advised that the decedent defund her trust, execute a new will with a "no contest" clause and allow her estate to be probated to protect her assets should Robert attempt to challenge her will or trust in court. Schlack further recommended that the decedent leaver Robert a bequest of $50,000 which he would forfeit if he challenged her will. According to Schlack, the decedent was adamant that she did not want to leave Robert "anything at all," but eventually agreed to leave him a specific monetary bequest in the amount of $10,000, which is reflected in her will dated March 31, 2010. According to Schlack's affidavit, at the decedent's insistence, however, the 2012 codicil removed the monetary bequest to Robert entirely.

¶ 63 In his affidavit, Schlack also attested that at the decedent' request, he wrote a letter to Robert on March 31, 2010, the same date that the decedent executed both her will and the second amendment to her trust, in which he specifically informed him of the changes to her estate planning documents including his removal as power of attorney and co-trustee.

¶ 64 That letter, which was attached to the response to the motion for summary judgment, advised Robert that Schlack was now representing the decedent in matters related to revising her personal estate plan and other legal/financial matters, and stated in pertinent part:

> "[P]lease be informed that you are to cease and desist from rendering any further fiduciary services for or on behalf of your mother, either as her trustee, Power of Attorney, or in any other capacity. All such appointments are herby cancelled, null and void."

The letter further advised that because of the "sensitive nature" of the matters, the decedent asked that Robert make any comments regarding these matters only to Schlack and not discuss them with her.

¶ 65 After a hearing, on October 11, 2016, the trial court granted Robert's motion for summary judgment on the amended claim. In doing so, the court found: (1) that the second amended trust was invalid due to lack of delivery; and (2) that regardless, there were no "writings" by the trustor authorizing the withdrawal of the trust's funds, so that the transfer was improper. The trial court directed that the amount in the decedent's Schwab account as of April 27, 2010, be returned to the trust. The court also found that pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. 304(a) (eff. Feb. 26, 2010)), there was no just cause for delaying enforcement of the appeal of the order.

¶ 66 Mary Jean filed a motion to reconsider, arguing, *inter alia*, that newly discovered evidence, namely documents signed by Robert, James and Mary Jean in February 2010, for purposes of opening the Schwab account, transferring the UBS assets to Schwab and engaging Huber for investment services, reveal that there remain genuine issues of material fact as to whether the transfer of assets to the decedent's account was proper, so as to preclude summary judgment without further discovery. Specifically, Mary Jean pointed to the following documents obtained by way of subpoena; (1) the client agreement with Huber signed by Robert, James and Mary Jean, stating in relevant part that "if this agreement is signed by more than one person on behalf of Client [the trust]," Huber may "follow the instruction of any one of them and notice to one

shall be considered notice to all;" and (2) Schwab's applications for the High Yield Checking Trust Account, providing, inter alia, that the trustees "represent, warrant and certify" that they have consented to each trustee acting "individually, independently and without the consent" of the other trustees, so that "notice to one trustee" constitutes notice to all trustees.

¶ 67 The trial court denied the motion to reconsider on January 26, 2017, and reaffirmed the trial court's summary judgment with respect to the Schwab account. Mary Jean now appeals.

¶ 68 II. ANALYSIS

¶ 69 A. Jurisdiction

¶ 70 Before addressing the merits of the appeal, we must first address whether we have jurisdiction. Citing to *Blumenthal v. Brewer*, 2016 IL 118781, Robert argues that because the trial court's order did not fully address all of the relief sought by him in his amended claim (specifically the inclusion of other assets that "may" have been removed from the trust, and a request for an accounting), it was not a final and appealable order, despite the trial court's inclusion of Illinois Supreme Court Rule 304(a) (Ill. S. Ct. 304(a) (eff. Feb. 26, 2010)) language that immediate appeal was appropriate. We disagree.

¶ 71 Generally, where multiple parties or multiple claims are involved in a case, a final order or judgment that does not resolve all of the claims between all of the parties (*i.e.*, does not dispose of the entire case) is not an appealable order and does not become appealable until all of the claims have been resolved. *In re Estate of Lee*, 2017 IL App (3d) 150651 ¶ 21. The exception to this general rule is where the trial court makes an express written finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there is no just reason to delay either enforcement or appeal of the judgment. *In re Estate of Lee*, 2017 IL App (3d) 150651 ¶ 2.

¶ 72 In *Blumenthal*, our supreme court held that the inclusion of Rule 304(a) language itself

cannot confer appellate jurisdiction, if the order appealed from is not a final order. *Blumenthal*, 2016 IL 118781, ¶ 24. The court explained that in order to be "final and appealable" for purposes of Rule 304(a), a judgment had to "terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court only ha[d] to proceed with execution of the judgment." *Blumenthal*, 2016 IL 118781, ¶ 25. Specifically, the court held:

> "While the order need not dispose of all the issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy, or upon *some definite and separate part thereof*." (Emphasis added.) *Blumenthal*, 2016 IL 118781, ¶ 24.

¶ 73 Since then our supreme court has explained that in construing and applying Rule 304(a) there is a "clear distinction" between judgments that dispose of " 'separate, unrelated claims,' " which are immediately appealable, and orders that dispose only of " 'separate issues relating to the *same* claim,' " such as different legal theories regarding the same claim, which are not. (Emphasis in original). *Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶15 (quoting *In re Marriage of Leopando*, 96 Ill. 2d 114, 119 (1983).

¶ 74 In the present case, contrary to Robert's position, there can be no doubt that the order granting summary judgment in favor of Robert disposes the rights of the parties upon a definite and separate part of the controversy, namely Robert's claim regarding the Schwab account. In that respect, we note that Robert's own motion for summary judgment sought relief only with respect to the Schwab account, and not with respect to any potential and yet unidentified remaining assets that may have been removed from the trust. Similarly, any right to an accounting of the assets in the Schwab account would necessarily be premised on first determining whether that account belongs to the estate or trust. An accounting precipitately

performed would be a waste of judicial resources, were the court to determine that the Schwab account should remain in the estate. Accordingly, the trial court's order holding that the Schwab account was a trust rather than an estate asset was a final and appealable order, conferring jurisdiction upon this court pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. 304(a) (eff. Feb. 26, 2010)).

¶ 75 In addition, even though not argued by the parties, we also find that we have jurisdiction to consider this appeal under Illinois Supreme Court Rule 304(b)(1) (Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010)). While it is true that the executor's notice of appeal only lists Supreme Court Rule 304(a) as the basis of appellate jurisdiction, our courts have repeatedly held that "where an appellant cites an incorrect supreme court rule, as a basis for jurisdiction in its notice of appeal, that deficiency does not divest this court of jurisdiction." *In re Miller*, 396 Ill. App. 3d 910, 913 (2009) (citing *In re D.D.*, 212 Ill. 2d 410, 416-17 (2004)).

¶ 76 Illinois Supreme Court Rule 304(b)(1) allows an appeal as a matter of right from certain interlocutory orders that do not dispose of an entire proceeding, without a Rule 304(a) finding that there is no just reason for delaying either enforcement or appeal of the order. Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010). Specifically, Rule 304(b)(1) allows immediate appeal of "[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). The revised committee comments for Rule 304(b)(1) provide that the rule applies to "orders that are final in character although entered in comprehensive proceedings that include other matters," such as, for example "orders admitting or refusing to admit a will to probate, appointing or removing an executor, or *allowing or disallowing a claim*." (Emphasis added) Ill. S. Ct. R. 304, Committee Comments (rev. Sept. 1988).

¶ 77 Our courts have interpreted this rule as appropriate to "promote efficiency and the sound and practical administration of estates, guardianships, and other similar types of proceedings" by recognizing that "some issues in those types of proceedings must be resolved with certainty to avoid having to repeat the entire proceeding over again." *Lee*, 2017 IL App (3d) 150651, ¶ 23. As our courts have explained, Rule 304(b)(1) is designed to prevent multiple lawsuits and piecemeal appeals, while encouraging efficiency and granting certainty as to specific issues during the often lengthy process of estate administration. *In re Estate of Thorp*, 282 Ill. App. 3d 612, 616 (1996). "Without the Rule 304(b)(1) exception, an appeal would have to be brought after an estate was closed, the result of which may require reopening the estate and marshalling assets that have already been distributed." *Thorp*, 282 Ill. App. 3d at 617. Such a result would be "both impractical and inefficient." *Thorp*, 282 Ill. App. 3d at 617.

¶ 78 In the present case, the trial court's order explicitly allowed Robert's claim regarding the Schwab account against the estate and finally determined the right of the parties as to that asset. Ill. S. Ct. R. 304, Committee Comments (rev. Sept. 1988). Accordingly, for the purpose of judicial efficiency and to facilitate the sound and practical administration of the estate and trust, we find that the entry of summary judgment in favor of Robert on that claim was final and appealable pursuant to Illinois Supreme Court Rule 304(b)(1) (Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010). We therefore turn to the merits of this appeal.

¶ 79 B. Summary Judgment

¶ 80 On appeal, the executor contends that summary judgment was improper where the affidavits relied upon by Robert violated Illinois Supreme Court Rule 191(a) (Ill. S. Ct. 191(a) (eff. Jan. 4, 2013)), further discovery was necessary pursuant to Supreme Court Rule 191(b) (Ill. S. Ct. 191(b) (eff. Jan. 4, 2013)), and there remained genuine issues of material fact as to whether: (1)

the second amendment to the trust was valid; and (2) who acted to transfer the trust account to the decedent's individual account. For the reasons that follow, we agree.

¶ 81 "Summary judgment is a drastic measure of disposing of litigation" (*Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12) and should only be granted "if the movant's right to judgment is clear and free from doubt" (*Outboard Marine Corp. v. Liberty Mutual Insurance Co*., 154 Ill. 2d 90, 102 (1992)). See also *Schade v. Clausius*, 2016 IL App (1st) 143162, ¶ 18. Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012); see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Co. of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co*., 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record, in the light most favorable to the nonmoving party and strictly against the moving party. *Schade*, 2016 IL App (1st) 143162, ¶ 17; see also *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). "Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law." *Morissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010). "A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts." *Morrissey*, 404 Ill. App. 3d at 724; see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995) ("[W]here reasonable persons could

draw divergent inferences from the undisputed material facts or where there is a dispute as to [the] material fact, summary judgment should be denied and the issue decided by the trier of fact."). Our review of the trial court's entry of summary judgment is *de novo*. See *Village of Palatine v. Palatine Associates, L.L.C.*, 2012 IL App (1st) 102707, ¶ 43; see also *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998); *Outboard Marine*, 154 Ill. 2d at 102.

¶ 82 In the present case, the trial court granted summary judgment in favor of Robert holding that the decedent's individual investment account at Schwab belonged to the trust. In doing so, the court first held that, as a matter of law, the transfer of the Schwab account from a trust account to the decedent's individual investment account was invalid because the second amendment to the trust was executed in contravention of the trust provisions. Specifically, the court relied on article IV, paragraph B of the trust, which requires an amendment to be made by an "instrument in writing signed by the Trustor and delivered to Trustee," to hold that because the second amendment was not delivered to Robert or James, it never became effective, and therefore Mary Jean, as sole co-trustee with the decedent, could not act without Robert and James to transfer the assets from the trust.

¶ 83 Contrary to the trial court's holding and Robert's position, we find that the language of the amendment provision relied upon by the trial court far from being clear was ambiguous so as to require extrinsic evidence in determining the intent of the decedent.

¶ 84 In interpreting trusts, which are construed according to the same principles as wills, the goal is to determine the settlor's intent, and the court must effectuate this intent so long as it is not contrary to law or public policy. *McCarthy v. Taylor*, 2014 IL App (1st) 132239, ¶¶ 57-59 (citing *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 574 (2009);

First National Bank of Chicago v. Canton Council of Campfire Girls, Inc., 85 Ill. 2d 507, 513 (1981)). The same general rules of construction of written instruments apply to the construction of trust instruments. *McCarthy*, 2014 IL App (1st) 132239, ¶ 57. Accordingly,"[w]hen 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 (citing *Fifth Third Bank, N.A. v. Rosen*, 2011 IL App (1st) 093533, ¶ 24). "However, where the language of a trust is ambiguous and the settlor's intent cannot be determined, a trial court may rely on extrinsic evidence to aid construction." *Ruby*, 2012 IL App (1st) 103210, ¶ 19 (citing *Rosen*, 2011 IL App (1st) 093533, ¶ 24). Language is ambiguous when it is reasonably susceptible to more than one meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).

¶ 85 Additionally, trusts may contain a latent ambiguity. *Koulogeorge v. Campbell*, 2012 IL App (1st) 112812, ¶ 24. "A latent ambiguity occurs where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a choice among two or more possible meanings." *Koulogeorge*, 2012 IL App (1st) 112812, ¶ 24 (citing *Hays v. Illinois Industrial Home for the Blind*, 12 Ill. 2d 625, 628 (1958)).

¶ 86 In the present case, the plain language of article IV, paragraph B is reasonably susceptible to more than one meaning. The requirement that the written instrument amending the trust be "delivered to Trustee," can be read as requiring either delivery to the newly appointed and acting trustee, or additionally to former trustees being removed by amendment. This is particularly true, where the law partner of the attorney who drafted the original trust attested in her affidavit that this paragraph was intended to require delivery only to newly appointed acting trustees, and not to former or prior trustees. This conclusion is further supported by the affidavits of both the

executor, and the decedent's Illinois estate planning attorney, evincing the decedent's desire to disinherit Robert without his knowledge, during her lifetime.

¶ 87 Since Robert does not dispute that the second amendment was delivered to the decedent and the executor, both of whom were the sole co-trustees of the trust at the time the second amendment was executed, we find that the trial court erred in finding that, as a matter of law, the second amendment to the trust was invalid.

¶ 88 In doing so, we further note that there also remain genuine issues of material fact as to whether Robert and James in fact had notice of the second amendment prior to the litigation, so as to shed light on their veracity as affiants. While Robert and James both averred in their affidavits that they did not even know of the existence of the second amendment prior to the instant litigation, the affidavits of the executor and Cruickshank attested that James knew both of the existence of the second amendment and was well apprised of its terms, since he was present at a meeting at Huber where that amendment was discussed in detail. What is more, in her motion seeking further discovery pursuant to Illinois Supreme Court Rule 191(b) (Ill. S. Ct. 191(b) (eff. Jan. 4, 2013)), whose denial she now appeals, the executor specifically sought the depositions of several family members, including James' wife and son, who, she alleged would testify about James' receipt of the second amendment to the trust, his knowledge and consent to the transfer of assets in the Schwab account from the trust to the decedent, and the decedent's intent to disinherit Robert. Similarly, the decedent's attorney, Schlack, attested in his affidavit that Robert received notice in writing that he was no longer a co-trustee after the second amendment to the trust was executed, and attached a letter to that effect that he sent to Robert on the same date that the second amendment was executed. As such, because the affidavits offered

by the parties present diametrically conflicting versions of events, they create questions regarding witness' credibility, that should not be decided at the summary judgment stage.

¶ 89 Robert nonetheless argues that summary judgment was proper because even if the second amendment to the trust was valid, so that the decedent and the executor were the sole co-trustees of the trust, the transfer of assets from the trust's investment account at Schwab to an individual account in the decedent's name alone, without the decedent's signature on the transfer request, or a written authorization or agreement between the decedent and the executor, was nonetheless void. For the reasons that follow, we disagree.

¶ 90 In making this argument, Robert relies on two provisions of the trust. First, he argues that paragraph A of article V, requires that any withdrawals from the principal of the trust by the trustor, must be made in writing, and because the record does not contain any such writing by the decedent the transfer was improper. Robert further argues that even if the executor was permitted to act lone under paragraph B of article V, which permits a trustee in her discretion to make payments to the benefit of the trustor for health and support, without any written instrument, the transfer was nonetheless improper, because at the time of the transfer, the decedent and the executor were joint co-trustees, and as such, under article IX, paragraph A, section 23 of the trust, the executor could act alone only if the two co-trustees "so agreed in writing."

¶ 91 In relying on these provisions of the trust, however, Robert completely disregards article IV, paragraph C of the trust, under which the trustor explicitly "reserves the right *** to direct the retention acquisition and disposition of the trust assets for investment purposes," as well as to "approve or reject the recommendation of Trustee" as to any such acquisitions or dispositions, without any requirement that such direction or approval be made in writing. There is nothing in

the trust to negate that the decedent, as trustor, had the right to direct anyone, including the executor, to dispose of "part or all" of the trust assets by way of transfer from the trust's Schwab account to her individual account. Nor is there any evidence in the record to negate that such a transfer was done for "investment purposes." In fact, the record is uncontroverted that while the trust's investment account was being managed by Robert, the account lost money, but that since the transfer of the funds into the decedent's individual investment account that account earned over $200,000, in five years, notwithstanding the use of that account to pay for the decedent's care and living expenses.

¶ 92 What is more, contrary to Robert's assertion, the affidavits offered by the executor in response to his motion for summary judgment establish that there remain genuine issues of material fact as to who acted to transfer the decedent's trust account to her individual account and how that transfer was effectuated.

¶ 93 On one hand, Robert asserts, and the trial court accepted as true that the only written document authorizing the transfer of funds was the "check and journal request" form signed by the executor, so that she must have been acting alone in effectuating this transfer. On the other hand, the affidavits of both the executor and Cruickshank attested that the decedent, James and executor were all present and directed and authorized the transfer of the funds, and that the executor alone signed Schwab's internal documents only because she was instructed to do so by Schwab. The documents obtained by subpoena from Schwab confirm that an individual signature by the executor was not only permitted by Schwab's internal procedures but also explicitly approved and agreed upon by James and Robert when they signed the documents necessary to initially open the Schwab account for the trust, and which Robert concedes were executed in accordance with the trust.

¶ 94 Most importantly, even if a writing by the decedent agreeing to, approving or directing the disposition of the assets in the trust was necessary to transfer the funds to her individual investment account, both Robert and the trial court completely disregard Cruickshank's unequivocal statement that when that individual investment account was opened, *both* the decedent and the executor "signed paperwork necessary" to open it. Under this record, and taking into consideration the executor's repeated requests for more discovery, we are compelled to conclude that there remain genuine issues of material fact which should have precluded the trial court's grant of summary judgment.

¶ 95 III. CONCLUSION

¶ 96 For all of the aforementioned reasons, we find that summary judgment at this stage of the proceedings was premature and that there remain factual issues which necessitate further discovery by the parties. Because we are well aware that such discovery is costly, we strongly urge the parties on remand to settle this matter in a manner consistent with the decedent's intent, before they deplete the entirety of her estate.

¶ 97 Reversed and remanded.