2019 IL App (1st) 181543-U

No. 1-18-1543

Order filed on April 9, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHICAGO TITLE LAND TRUST COMPANY, successor to LaSalle Bank, not personally but as Trustee under Trust Agreement dated August 21, 1972, known as Trust No. 44313,	)	Appeal from the Circuit Court of Cook County.
Plaintiff,	)	
v.	)	No. 17 CH 05172
PETER QUALIZZA,	)	
Defendant and Counterplaintiff-Appellant,	)	The Honorable Raymond W. Mitchell,
WILLIAM NICOLOPULOS, 2830 HARRISON LLC, and DEAN NICOLOPULOS,	)	Judge Presiding.
Defendants and Counterdefendants-Appellees.	)	

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason concurred in the judgment.
Justice Hyman dissented, with opinion.

ORDER

¶ 1 *Held*: Defendant-settlor properly exercised his power of direction pursuant to the land trust agreement. In addition, the Marital Separation Agreement did not waive defendant-settlor's

contingent beneficial interest in the land trust. Accordingly, plaintiff correctly issued the deed conveying the trust property. We affirm.

¶ 2 This appeal involves a dispute pertaining to the execution of the power of direction under a land trust agreement. The house located at 2830 West Harrison Street in Glenview, formerly the marital home of Judy Qualizza and her ex-husband, William Nicolopulos, was held in a land trust. William directed Chicago Title Land Trust Company (Chicago Title) to convey the trust property to 2830 Harrison LLC (the LLC), of which the former couple's sons, Dean and Paul Nicolopulos, were members. Chicago Title complied and issued a deed transferring the trust property, but subsequently sought rescission of that deed, as did Peter Qualizza, Judy's widower. Chicago Title and Peter both filed pleadings to set aside the conveyance because William did not have the power to direct the transfer. The circuit court, however, dismissed those claims. On appeal, Peter asserts that the circuit court failed to recognize that the former couple's joint power of direction with the right of survivorship was terminated when they amended the land trust agreement upon their divorce. Alternatively, Peter asserts that the Marital Separation Agreement (MSA) extinguished William's survivorship rights in relation to his joint power of direction because it waived his contingent beneficial interest in the land trust. We affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The subject property was held in a land trust (Trust No. 44313) created by Judy and William in 1972. The trust agreement named Chicago Title as trustee and Judy as the sole beneficiary. It also provided that both Judy and William had the power to direct or otherwise manage the trust property and the assets derived therefrom, jointly with the right of survivorship, stating:

> "JUDY A. NICOLOPULOS together with WILLIAM G. NICOLOPULOS or the survivor thereof, may sell, assign, transfer, or otherwise dispose of all or any part of the beneficial interest under this trust, and may use and consume proceeds thereof; and they may also amend, alter, or revoke from time to time any provisions for successors in interest in event of death."

¶ 5 Years later, Judy and William divorced. The judgment for dissolution of marriage incorporated the parties' MSA, which identified the trust property as a marital asset and divided the beneficial interest in the land trust between them. Specifically, the MSA provided that William would own 25% of the beneficial interest in the land trust and Judy would own 75%. The MSA also stated, however, that "Husband and Wife own as joint tenants the former marital residence located at 2830 W. Harrison Street, Glenview, Illinois." The MSA contemplated that the marital home would be sold when the couple's son, Paul, reached 18 or, if not then, when Judy remarried. Judy did not elect to sell the home when either of those events occurred.

¶ 6 In accordance with the MSA's terms, Judy and William amended the land trust agreement by executing an assignment, which stated:

> "Power of Direction to be exercised jointly by Judy A. Nicolopoulos [*sic*] together with William G. Nicolopoulos [*sic*] and all proceeds shall be divided, 75% to Judy A. Nicolopoulos [*sic*] and 25% to William G. Nicolopoulos [*sic*] pursuant to the Judgment for Dissolution of Marriage lodged herewith."

Judy and William extended the terms of the land trust agreement for an additional 20 years in 1992, and again in 2012. Meanwhile, Judy married Peter. Thereafter, Judy and William amended the land trust agreement to incorporate her married name in 2013. Judy died on May 28, 2016.

¶ 7 On February 7, 2017, William directed Chicago Title to transfer the trust property to the LLC. Chicago Title issued a trustee's deed conveying the property to the LLC and the deed was recorded on March 27, 2017. In the following months, Judy's will was discovered. The will bequeathed her entire estate to Peter.

¶ 8 In light of Judy's will, Chicago Title filed a complaint against William, Dean and the LLC, asserting that the trust property was incorrectly transferred to the LLC and seeking rescission of the trustee's deed. Peter then filed a counterclaim against William, Dean and the LLC, which also sought rescission of the trustee's deed and asserted, among other things, that William was not authorized to direct Chicago Title to convey the trust property. Specifically, he asserted that William did not retain the sole power of direction because the assignment revoked any survivorship rights he had under the land trust agreement.

¶ 9 William, Dean and the LLC moved to dismiss the complaint and counterclaim pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (720 ILCS 5/2-619(a)(9) (West 2016)), asserting that Chicago Title correctly issued the deed to the LLC because upon Judy's death, William succeeded to the entire beneficial interest and power of direction in the land trust as the "survivor thereof."

¶ 10 The circuit court agreed and dismissed the complaint and counterclaim with prejudice. Peter now appeals.

¶ 11 ANALYSIS

¶ 12 Section 2-619(a)(9) of the Code permits the involuntary dismissal of a claim that is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). Thus, a motion to dismiss brought under section 2-619 does not challenge the legal sufficiency of the complaint but instead, asserts an affirmative matter or

defense to defeat it. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). When ruling on a section 2-619 motion, courts must interpret the pleadings and supporting documents in favor of the nonmovant. *Id*. at 367-68. As with all questions of law, our review of a section 2-619 dismissal is *de novo*. *Id*. at 368.

¶ 13 The same rules of construction apply to trusts that are applicable in construing wills. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). The primary purpose in construing a trust is to ascertain the settlor's intent, which is best determined by examining the trust as a whole, and giving any words employed by the settlor their plain and ordinary meaning. *Id*. If possible, courts should construe the trust so that no language is treated as superfluous or rendered void or insignificant. *Id*. at 172-73. Furthermore, when multiple instruments define or relate to a trust, they should be construed together to effectuate the settlor's intent. *Id*. at 176. In this regard, where one construction of a trust would render a portion of it meaningless and another would give effect to all provisions and all language, the latter construction will be adopted. *Id*. (citing *Feder v. Luster*, 54 Ill. 2d 6, 11 (1973)). Ultimately, the relationship between the trustee, the beneficiaries and the holder of the power of direction is determined by the documents comprising the trust agreement, including any amendments effectuated by assignment or otherwise. *Dorman v. Central National Bank in Chicago*, 97 Ill. App. 3d 429, 433 (1981).

¶ 14 Land trust agreements generally can be freely amended. *Id*. at 432. Where the amendment pertains to the identity of the beneficiaries, the power of direction or the allocation of proportionate interests in the trust, it may be effectuated by a simple assignment without further documentation. *Id*. That being said, an amendment does not supersede the provisions of a trust agreement unless there is a clear revocation of those provisions by the amendment. See *Tolman v. Ree*ve, 393 Ill. 272, 282-83 (1946).

¶ 15 Peter implicitly argues that since the assignment amended the beneficial interest in the land trust, it effectively terminated Judy and William's survivorship rights and joint power of direction in relation to that interest. Thus, he asserts that William did not retain the sole power of direction in the land trust upon Judy's death. Under well-settled principles applicable to the construction of trust instruments, we disagree.

¶ 16 As set forth above, the land trust agreement vested the power of direction in Judy and William, jointly with the right of survivorship. It plainly states that Judy and William, or "the survivor thereof, may sell, assign, transfer, or otherwise dispose of all or any part of the beneficial interest under this trust." Here, the assignment did not amend that provision of the trust agreement. Rather, it simply added William as a beneficiary of the land trust by assigning 25% of the beneficial interest in it to him. In doing so, the assignment did not terminate his joint power of direction with the right of survivorship because it did not contain a clear revocation of that right. In fact, the assignment plainly states that the "[p]ower of direction to be exercised jointly by Judy A. Nicolopoulos [*sic*] together with William G. Nicolopoulos [*sic*]." Thus, the assignment apparently ratified the original trust provision. Regardless, since the assignment did not expressly revoke the power of direction and survivorship provision of the trust agreement when it amended the beneficial interest in the land trust, we must construe the trust so as to effectuate both. See *id*; *Donovan*, 145 Ill. 2d at 172-73 (citing *Feder*, 54 Ill. at 11).

¶ 17 To the extent Peter argues that the assignment revoked the right of survivorship with respect to the parties' joint power of direction because it omitted survivorship language, this misconstrues the holding in *Dorman*.

¶ 18 There, the plaintiffs appealed from the circuit court's judgment holding that the defendant-settlor's power of direction in the land trust was superior to the ultimate rights of the

trust beneficiaries. *Dorman*, 97 Ill. App. 3d at 430-31. The defendant, who was the sole beneficiary of a land trust, conveyed his entire beneficial interest in the trust to the plaintiffs by assignment. *Id*. at 430. Under the land trust agreement, the power of direction was vested in " 'the beneficiary or beneficiaries at the time.' " *Id*. The assignment, in addition to amending the beneficial interest in the land trust, however, also amended the power of direction in the trust to add that the defendant join in any direction to convey, despite that he was no longer a beneficiary. *Id*. Ultimately, the plaintiffs' direction to convey the trust property was refused because the defendant did not join in their direction. *Id*. Before the circuit court, the plaintiffs argued that since the assignment named them as the only trust beneficiaries, pursuant to the land trust agreement, they, alone, possessed the power of direction. *Id*. at 432. The circuit court disagreed and this court affirmed, holding that the power of direction can be separated from the beneficial interest in a land trust; thus, the sole beneficiary of a land trust may assign his beneficial interest in the trust while at the same time retain the power of direction to defeat the interests of any future beneficiaries while he is alive. *Id*. at 432-33 (citing *Rudolph v. Gersten*, 100 Ill. App. 2d 253, 264 (1968)).

¶ 19 Similarly, here, Judy and William's respective beneficial interests in the land trust were separate from their joint power of direction with the right of survivorship in the trust. Unlike *Dorman*, however, the assignment in this case did not amend the power of direction to remove the right of survivorship when it amended the beneficial interest in the land trust because it did not contain a clear revocation of that right as set forth above. See *Tolman*, 393 Ill. at 282-83 (stating, "where, as here, the codicil does not contain a clause of revocation but, instead, includes specific clauses of ratification, the provisions of the will are to be disturbed only so far as is

necessary to effectuate the provisions of the codicil"). Therefore, we conclude that the assignment did not revoke William's joint power of direction with the right of survivorship.

¶ 20 Likewise, we reject Peter's alternative argument that the MSA extinguished William's joint power of direction with the right of survivorship because it waived his contingent beneficial interest in the land trust.

¶ 21 It is well-settled that a divorce, by itself, does not terminate a spouse's property rights which exist independent of the marriage. *In re Marriage of Velasquez*, 295 Ill. App. 3d 350, 353 (1998). A marital settlement agreement may extinguish a divorced spouse's beneficial interest in a land trust, however, if it contains a clear waiver, beyond a mere general waiver provision, of that spouse's interest in that asset. *Id*. To determine the efficacy of a waiver in a marital settlement agreement, we must consider whether the asset in dispute was specifically listed as a marital asset and awarded to a spouse, and whether the waiver provision specifically stated that the parties waived any beneficial interest in that asset. *Id*.

¶ 22 Here, the beneficial interest in the land trust was specifically listed as a marital asset under the MSA, however, it was not awarded entirely to Judy or William. While the MSA provided that each party would own their respective beneficial interest in the land trust as their "sole and separate property," it plainly states that "Husband and Wife own as joint tenants the former marital residence." In this context, it is important that long after the dissolution of their marriage, the parties elected to continue to hold their interests in the property in the form of a land trust. Had they intended to prioritize their ability to alienate their respective beneficial interests short of a sale of the property, they could have elected to transfer ownership to themselves as tenants in common, but they did not. "In dealing with land trust property, settlors and beneficiaries should be required to adhere to the documentation which they have caused to

be created." *Favata v. Favata*, 74 Ill. App. 3d 979, 984 (1979). And while Peter stresses the unfairness of allowing William to exercise the sole power of direction following Judy's death, the same result would have obtained had William predeceased Judy. So the fortuitous circumstance that the holder of the 75% beneficial interest did not survive the holder of the 25% beneficial interest is not a basis to disregard the trust provision vesting the power of direction in the survivor of William and Judy.

¶ 23 Furthermore, the dissent seems to conflate the parties' beneficial interests in the land trust with Chicago Title's legal and equitable interest in the trust property by asserting that "the parties intended for Judy to have a 75% beneficial interest and William to have a 25% beneficial interest in the marital home" and that "William has failed to show that he did not waive his beneficial interest in the property." It is well-settled, however, that in a land trust, legal and equitable title is vested exclusively in the trustee. See *id*. at 982 (stating, "[a]ny recognition of the rights of a beneficiary by an attempted amendment, which purportedly deals with legal or equitable title, would be disruptive of land trust practice and administration").

¶ 24 Nonetheless, given that the MSA did not specify that William waived his contingent beneficial interest in the land trust, it has no effect on his joint power of direction with the right of survivorship granted under the trust agreement. Moreover, the MSA indicates that Judy and William intended to retain ownership of the beneficial interest in the land trust, jointly with the right of survivorship, as it specifically refers to the trust property as the "*former* marital residence," with respect to their joint tenancy. In any event, the MSA did not extinguish William's joint power of direction with the right of survivorship because it did not specifically waive his contingent beneficial interest in the land trust. See *In re Marriage of Velasquez*, 295 Ill. App. 3d at 353.

¶ 25 Based on the foregoing, we conclude that William properly exercised his power of direction to convey the trust property. Chicago Title therefore correctly issued the deed to the LLC. Accordingly, we affirm the dismissal of Peter's counterclaim.

¶ 26 CONCLUSION

¶ 27 For the reasons stated, we affirm the circuit court's judgment dismissing Peter's counterclaim.

¶ 28 Affirmed.

¶ 29 JUSTICE HYMAN, dissenting:

¶ 30 I respectfully dissent from the majority's decision, and I believe this issue warrants publication under Rule 23(a).

¶ 31 **The Majority's Decision**

¶ 32 The Marital Separation Agreement (MSA), when read in conjunction with the land trust and the assignment that amended it, make plain that when Judy and William divorced they intended for William to receive a 25% beneficial interest in the marital home. And, indeed, had Judy sold the home before she died, that is what he would have received. But, the majority concludes that once Judy died, William was entitled to 100% of the beneficial interest. That was not the parties' intent nor was it warranted by the language of the trust, the amendment, and the MSA, which changed the parties' beneficial interest and extinguished both parties' rights of survivorship in exercising the power of direction.

¶ 33 As the majority notes, the primary purpose in construing a trust is to ascertain the settlors' intent. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). And, when multiple instruments define or relate to a trust, they should be construed together to effectuate the settlor's intent. *Donovan*, 145 Ill. 2d at 176. The power of direction constitutes a

separable property interest that can be transferred or retained apart from the property interest represented by the rest of the beneficial interest. *Dorman v. Central National Bank in Chicago*, 97 Ill. App. 3d 429, 432 (1981). Thus, we must ascertain the parties' intent as to each interest separately.

¶ 34 In 1972, when Judy and William signed the land trust document, the sole beneficiary was Judy, and Judy and William "or the survivor thereof" had the power of direction. Judy and William intended that Judy own 100% of the beneficial interest, but the parties would have to act together to sell the home. If one of them died, the survivor provision allowed the other party to sell it.

¶ 35 Thirteen years later, when Judy and William divorced, they signed two documents, an assignment, which amended the trust, and the MSA, which divided the parties' marital assets, including the marital home. We must read these three documents together, in the context of their divorce, to effectuate Judy's and William's intent.

¶ 36 After the assignment, Judy owned a 75% beneficial interest and William owned a 25% beneficial interest. The assignment does not state that the parties held their beneficial interests jointly and as the trial court notes, it is silent as to rights of survivorship. But, the MSA states that "the parties [were] attempting to make an approximately equal division of the marital property *** [and] "in accordance with [that] intention" each party would own their respective beneficial interest in the land trust as their "sole and separate property." Thus, both the amendment and the MSA provide that Judy and William would hold their beneficial interests individually rather than jointly, without any rights of survivorship. Otherwise, the right of survivorship would have been flagged.

¶ 37 The majority notes that the MSA states that Judy and William "own as joint tenants the formal marital residence" and suggests this language shows the parties intended to retain ownership jointly with the right of survivorship. Unlike in *In re Marriage of Dudek*, 201 Ill. App. 3d 995 (1990), on which William relies, he and Judy never owned the marital residence jointly. And the original trust harkens to a time of marital satisfaction. Furthermore, nothing in the original trust or the assignment suggests that they were to hold their beneficial interests as joint tenants with rights of survivorship.

¶ 38 The assignment also amended the power of direction. As this court held in *Dorman*, the relationship between the trustee, the beneficiaries, and the holder of the power of direction turns on the documents comprising the trust agreement including any amendments. *Dorman*, 97 Ill. App. 3d at 433. As noted, the trust originally provided that Judy or William "or the survivor thereof" could sell the property. The assignment, however, stated the power of direction would be "exercised jointly" but omitted language granting rights of survivorship. The absence of survivorship language in the assignment and the conscious intent of the parties as expressed in their MSA to hold property separately support a finding that, on divorcing, they intended to extinguish the right of survivorship for the power of direction in the original trust.

¶ 39 Accordingly, when reading the three documents in conjunction, in dividing the marital assets, the parties intended for Judy to have a 75% beneficial interest and William to have a 25% beneficial interest in the marital home as their "*sole and separate* property." If Judy sold the home, she would need William's consent and would be obligated to give him his 25% beneficial interest from the proceeds. Absent the survivorship language, when either party died, the right to sell the home would transfer to their heirs.

¶ 40 The majority relies on the test set forth in *In re Marriage of Velazquez*, 295 Ill. App. 3d 350 (1998), to support its finding that William was entitled to 100% of the beneficial interest and to convey the property after Judy died. As the majority notes, *Velasquez* articulates a two-part test to determine whether contingent interests are extinguished under an MSA: (i) the asset in dispute must be specifically listed in the agreement and awarded to one spouse; and, (ii) release language in the agreement must encompass the waiver of any expectancy or beneficial interest in the asset on the part of the other spouse. *Id.* at 353. The majority concludes both requirements are met because the marital home was listed in the MSA but was not awarded to one spouse only and the release language in the MSA did not specify that William waived his contingent beneficial interest in the land trust.

¶ 41 Reliance on *Velasquez* is misplaced. First, Judy and William signed the MSA 13 years before the appellate court issued the opinion in *Velasquez*. Parties' property rights should not be determined by a test or standard that did not exist at the time they entered their MSA. Further, the two-part test in *Velasquez* ignores the key factor in interpreting a trust and related documents—the parties' intent. The test looks solely to the language in the MSA to determine if it extinguishes any contingent interests but fails to examine the trust documents and any amendments to determine if that is what the parties intended. And, indeed, applying the *Velasquez* test to the facts before us does not effectuate the parties' intent and instead leads to an absurd result. If Judy sold the marital residence while she was alive, William would have received 25% of the beneficial interest, as spelled out in the 1985 assignment. But, once she died, the majority, based on *Velasquez*, has concluded that William is now entitled to 100% of the beneficial interest. No logical explanation can be proffered for this discrepancy.

¶ 42 But, even under *Velasquez*, William has failed to show he did not waive his beneficial interest in the property. Like most divorcing couples, Judy and William intended to divide their assets and avoid future financial entanglement. Thus, the MSA states that William and Judy were to hold their beneficial interests as their "sole and separate property." Further, the MSA states that each party was forever waiving and relinquishing any right title, claim, interest, and estate they held as husband and wife. In short, William waived his interest in Judy's 75% beneficial interest and Judy, likewise, waived her interest in William's 25% beneficial interest they would have held had they remained married. Contrary to the majority's contention, this is not conflating the parties' beneficial interest in the land trust with Chicago Title's legal and equitable interest in the property. It is adhering to the intent of the parties as expressed in both the amendment to the trust and the MSA. The majority instead chooses to ignore this language and the parties' intent.

¶ 43 Finally, in addition to failing to effectuate the parties' intent, the outcome as set forth in the majority opinion creates a financial windfall for William. Under the MSA, Judy was required pay the mortgage, taxes, insurance premiums, and maintenance. She did so from 1985 until the time of her death in 2016. This financial responsibility was part and parcel with her continuing to live in the home and receiving a 75% beneficial interest in it. But the majority grants William who had no financial obligations for the property for 30 years not only his own 25% beneficial interest, to which he is entitled, but allows him to usurp Judy's 75% interest, to which he has no rights.

¶ 44 Accordingly, I would reverse the trial court and remand for further proceedings.

¶ 45 **Designation as Non-precedential**

¶ 46 I believe this case should be published as an opinion under Supreme Court Rule 23(a) (eff. Apr. 1, 2018). See *Snow & Ice, Inc. v. MPR Management, Inc.*, 2017 IL App (1st) 151706-U, ¶¶ 27-53 (Hyman, P.J., concurring in part and dissenting in part).