



FIFTH THIRD BANK

Ambiguous Trust Language- and how to handle it

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What is an ambiguity

The Restatement (Third) of Property provides a legal definition of ambiguity:

“An ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text.”

Uncertainty in meaning revealed by the text- whether a devise of “my money” only refers to the testator’s cash on hand or also includes checking, savings, or money-market accounts.

Uncertainty in meaning revealed by extrinsic evidence- language in a will that devises property to “my cousin John” when extrinsic evidence reveals that testator had no cousin John but had a nephew John and a cousin James.

Case law addressing ambiguities

- Consideration of extrinsic evidence

- Coffman’s Admr. V. Coffman, 109 S.E. 454 (Va. 1921)- direct evidence of a testator’s actual intention as stated in his declarations of intention or instructions for his will’s preparation is inadmissible.
- Virginia Nat’l Bank V. United States, 443 F. 2d 1020 (4th Cir. 1971)- in determining the testator’s intention to qualify Trust A for the federal estate tax marital deduction, the federal court applied state law on the question of what extrinsic evidence may be used. Under the law of Virginia, the court should have received and considered, as evidence of attendant facts and circumstances, the testimony as to what the trust officer and the attorney advised and told the decedent, since such testimony does not involve her own direct expression of intention.
- Estate of Smith, 580 P. 2d 754 (Ariz. Ct. App 1978)- holding that affidavit by testator’s attorney regarding testator’s declarations of intention could be used in resolving testator’s intended meaning of word “money” in her will.

Challenge to unambiguous terms

- In Re Trust of Nelson, 184 A. 3d 526 (app. Div. 2018)
- Trustee of a trust that left property to settlor's grandchildren sought a declaratory judgment that settlor did not consider the children of her daughter to be "grandchildren" because daughter was married outside their Orthodox Jewish faith.
- The trial court entered judgment for daughter's son, finding that he and his brother were trust beneficiaries under the plain meaning of "grandchildren".
- Reversing and remanding for trial, the appellate court held that a trial court could look beyond the apparently plain language of the trust that seemed to benefit all grandchildren to determine whether settlor intended to benefit only some grandchildren.
- The appellate court found that the plaintiff had presented evidence that settlor used the term "grandchildren" in a different sense, personal to her and not in accordance with the plain meaning of "grandchildren".
- Appellate court concluded that trial court could consider extrinsic evidence in accordance with UTC Section 415 which authorizes the court to reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Scope of construction

- On the basis of extrinsic evidence of intention, words can be judicially changed, transposed, or inserted into donative documents other than wills.
 - Reinberg v. Heiby, 88 N.E. 2d 848 (Ill. 1949) - inserting into deed of gift grant of 12 acres each to grantor's 2 daughters in place of grant of 20 acres to one daughter and 4 acres to other daughter
 - Bosse v. Bosse, 57 S.W.2d 995 (Ky. 1933) – inserting name of insured's wife in place of name of insured's sons as beneficiary of life insurance policy
 - Berman v. Sandler, 399 N.E. 2d 17 (Mass. 1980)- inserting “the first paragraph of” into inter vivos trust document

Correcting ambiguous descriptions

- Ambiguous description of property
 - Patch v. White, 117 U.S. 210 (1886) – devise in a will of a parcel of land described as “lot number 6, in square 403 with the improvements thereon”. Extrinsic evidence showed that, although there was a lot 6 in square 403 that never belonged to the testator but he did own lot 3 in square 406.
- Ambiguous description of people
 - Breckheimer v. Kraft, 273 N.E. 2d 468 (Ill. App. Ct. 1971)- a latent ambiguity arises if extrinsic evidence establishes that the language does not precisely fit any person who existed when the donative document was executed. The testator devised her residuary estate in equal shares to “my beloved nephew Raymond Schneikert and Mabel Schneikert his wife, of Plymouth, Wisconsin.” Extrinsic evidence revealed a latent ambiguity: when the will was executed Raymond was married to Evelyn, not to Mabel. Mabel was Raymond’s former wife; she had remarried and was then living in Sheboygan, Wisconsin, with her new husband. The extrinsic evidence, including testimony of the attorney who drew the will in the hospital nine days before the testator’s death, showed that the intended devisee was Raymond’s current wife, Evelyn, but that the testator got confused and gave the name “Mabel” when asked for Raymond’s wife’s name. The court altered the text by removing the words “Mabel Schneikert” so that the devise was to “Raymond Schneikert and his wife...”

Construction where ambiguity not resolved by the evidence- personal property

- Gertrude's will devised to Ann "my diamond ring that I inherited from my grandfather." Extrinsic evidence shows that Gertrude owned a ruby ring that she inherited from her grandfather and a diamond ring she inherited from her aunt.
- Although the text of the devise is not ambiguous on its face, the extrinsic evidence reveals a latent ambiguity- the description of the devised property imprecisely fits more than one item of Gertrude's property.
- If possible, Gertrude's devise is construed in accordance with Gertrude's intention as established by a preponderance of the evidence: did Gertrude mean the ruby ring from her grandfather or the diamond ring from her aunt?
- If the evidence cannot establish Gertrude's intent the devise need not fail for uncertainty.
- Instead the devise may be construed to assure that one of Gertrude's two rings is devised to Ann but absent evidence to establish which ring the constructional preference will be to devise the lower-valued ring.

Construction where ambiguity not resolved by the evidence- people

- George's will devised property to "my cousin Janice."
- Extrinsic evidence shows that George had two cousins by the name of Janice, one the daughter of George's aunt Rachel and the other the daughter of George's uncle Samuel.
- Although the text of the devise is not ambiguous on its face, the extrinsic evidence reveals a latent ambiguity-the description of the devisee precisely fits more than one person George knows.
- While extrinsic evidence should be considered, if it does not determine which cousin Janice George intended the devise need not fail for uncertainty.
- Instead the devise may be construed in accordance with that part of George's intention that is known – he wanted to devise the property to one of his cousin's named Janice.
- The devise may be construed to refer to both cousins named Janice, each taking half of the devised property as tenants in common.

Constructional Preferences

- Constructional preferences should be made in accord with common intention:
 - The construction that is more in accord with the donor's general dispositive plan than other plausible constructions.
 - The construction that renders the document more effective than other plausible constructions, including the construction that favors completeness of disposition and the construction that avoids illegality.
 - The construction that favors family members over non-family members, the construction that favors close family members over more remote family members and the construction that does not disinherit a line of descent.
 - The construction that gives more favorable tax consequences than other plausible constructions.
 - The construction that accords with the transferor's contractual obligations.
 - The construction that is more in accord with public policy than other plausible constructions.

Recap

- Ambiguities can take the form of terms with uncertain meanings (money; effects) or can take the form of terms that are certain in meaning but don't fit the situation (my cousin Janice when there is only a cousin Jane)
- In addition to addressing these types of ambiguities, courts will address terms that are not ambiguous but are being challenged due to the settlor's/testator's use of the term (grandchildren, adopted children). The UTC specifically authorizes a court to consider these circumstances.
- Once an ambiguity is established courts will consider extrinsic evidence to ascertain "probable" settlor intent.
- Courts may choose to construe trust terms as the remedy or may choose to reform trust terms as the remedy. The burden of proof differs depending upon the approach.

Resolving ambiguities

- If the ambiguity is due to a scrivener's error it might be possible to accept an affidavit from the drafting attorney explaining and clarifying the ambiguity.
- In some situations it might be possible to use a non-judicial settlement agreement in which the trust's qualified beneficiaries agree to a particular interpretation of an ambiguous term or phrase. This is only possible if all the qualified beneficiaries are in agreement and execute the NJSA.
- Where the use of an NJSA is not possible or the situation cannot be adequately resolved through an agreement among the parties, judicial construction or reformation will have to be pursued.
- If a petition is filed, internal counsel should be consulted to ensure that the trustee is properly represented and a determination is made whether the trustee will take an affirmative position on construction or interpretation of an ambiguity.

When to use a non judicial settlement agreement to resolve ambiguities

- Common law

- The ability of beneficiaries and trustees to enter into private agreements among themselves to modify or terminate trusts has always existed.
- The problem with the creation of these agreements prior to the enactment of the Uniform Trust Code was the fact that it was generally not possible to have all the trust's beneficiaries consent to the actions of the trustee set forth in the agreement.
- There was no ability to represent minor, unborn, unknown or unascertained beneficiaries without a court appointing a representative for these beneficiaries.
- So while there was no restriction on the nature of an action that might be covered in a common law private agreement, obtaining complete beneficiary knowledge and consent was not possible.

The Uniform Trust Code

- Statutory law

- The Uniform Law Commission promulgated the Uniform Trust Code (“UTC”) in 2000, with amendments in years 2001, 2003, 2004 and 2005.
- The UTC was first enacted in 2002 in Kansas and the latest enactment was in 2021 in Hawaii.
- To date, 35 states and D.C. have enacted versions of the UTC and it was introduced in New York in 2021.
- Three key sections of the UTC address the ability of a trustee and beneficiaries of a trust to enter into private agreements pertaining to modification or termination of a trust:
 - Article 1, Section 111- Nonjudicial settlement agreements
 - Article 3, Sections 301-305- Representation
 - Article 10, Section 1009- Beneficiary’s Consent, Release or Ratification
- Statutory agreements (NJSAs) tend to be more restricted in scope but allow for more comprehensive representation of trust beneficiaries

UTC Provisions Addressing NJSAs

- Article 1, Section 111:

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

UTC Article 1, Section 111

d) Matters that may be resolved by a nonjudicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee's report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (5) transfer of a trust's principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

UTC Article 3, Section 303

SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) a [conservator] may represent and bind the estate that the [conservator] controls;
- (2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;
- (3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (4) a trustee may represent and bind the beneficiaries of the trust;
- (5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (6) a parent may represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

UTC Article 3, Section 304

SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST.

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

UTC Article 10, Section 1009

SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

The Interplay of These Sections with Each Other

- One of the primary advantages of a statutory NJSA is the ability to have certain beneficiaries represented by others.
- The virtual representation statute gives the statutory seal of approval to the representation of others in such agreements – provided the statutory tests are met.
- The consent and release statute clarifies that the beneficiary must affirmatively consent to an action in order for the consent to be valid and must know his or her rights and the material facts relevant to the action to which he/she consents.

Example - Facts

- Trust agreement contains contradictory terms regarding the distribution of a trust.
- The trust agreement provides both that the current beneficiary is to receive distribution of the trust at age 40 and that the trust is to be held for the life of the current beneficiary and upon the death of the current beneficiary be distributed to the current beneficiary's then living lineal descendants, per stirpes.
- Current beneficiary has reached age 40 and has three children. Two children are adults ages 21 and 20 who are living independently – the third child is 15 and lives with current beneficiary.

Example - Analysis

First step in analysis:

- What law governs the trust and can a statutory NJSA be used?
- Assume that the state law governing this trust has adopted the UTC Section 111 in its entirety. While the UTC authorizes an NJSA to address “any matter involving a trust” it also limits those matters to those that “do not violate a material purpose of the trust and that involves terms and conditions that could properly be approved by a court”.
- Could it be argued therefore that determining whether the trust should distribute outright to the beneficiary at age 40 or continue to be held in trust is a determination as to settlor intent and a material purpose of the trust?
- Could the determination be a matter that could only properly be presented to a court and resolved by that court?

Example – Analysis, cont'd

Second step in analysis:

Who should be parties to the NJSA?

- The governing law (UTC) provides that “interested persons” should execute the NJSA.
- The trustee can execute on behalf of itself (and others connected to it); the current beneficiary can execute on behalf of himself.
- Should the two young adults, children of the current beneficiary execute the agreement? Will their interests be affected if the agreement provides that outright distribution to the current beneficiary should occur when he reaches age 40?

Representation of minors and unborns:

- Who can or should represent the minor child? Under the UTC, a parent is authorized to represent a minor child however would the parent have a conflict of interest in representing his minor child?
- Can the two adult children represent the minor child? Are their interests substantially similar?

Example – Analysis, cont'd

Third step in the analysis:

How can the trustee obtain binding consent to the NJSA by the trust beneficiaries and a release that will likely be upheld if later challenged?

UTC provides that a trustee will not be liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach and at the time of the consent and release the beneficiary knew of the rights being affected and material facts related to the action constituting the breach.

In this example, this would mean that all of the children of current beneficiary must be able to understand that by authorizing an outright distribution to their father at age 40 they may not receive any of the trust funds when he dies. They must also be aware of the nature and value of the trust assets in order to make an informed decision whether to consent to the outright distribution of the trust assets when their father reaches age 40

Example – Analysis, cont'd

- Under what circumstances might the trustee NOT agree to enter into either a statutory or non-statutory NJSA in this situation?
 - Assume the minor child lives with his mother who is divorced from current beneficiary. Mother is not willing to agree to represent her son in the execution of the NJSA and does not want to authorize an outright distribution to current beneficiary.
 - Assume the two adult children have not been getting statements pertaining to the trust since they are not current beneficiaries and therefore do not know the size or nature of the trust assets. Current beneficiary does not want them to know the size or nature of the trust assets and only wants them to execute the agreement if this information is not provided.
- Under what circumstances would the trustee enter into an NJSA without consent of the trust's qualified beneficiaries?
 - How is that decision made?

Matters That May Best Be Resolved Through Court Proceedings

- The UTC contains some specific sections under Article 4 that set forth circumstances under which trusts can be modified or terminated through a petition to the court.
 - Section 411 (a) allows for modification or termination of an irrevocable, non-charitable trust if all the trust's beneficiaries and the settlor consent. The court is expected to authorize the action even if the request violates a material purpose of the trust.
 - Section 411 (b) allows for modification or termination of an irrevocable, non-charitable trust if all the trust's beneficiaries consent (the settlor does not participate) but only if the court determines that the requested action does not violate a material purpose of the trust.
 - Section 412 provides: The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention. This section broadens a court's ability to apply the principle of equitable deviation to the trust.

Matters That May Best Be Resolved Through Court Proceedings, cont'd

- Section 413 authorizes a court to apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.
- Section 415 authorizes the court to reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.
- Section 416 provides that a court, in order to achieve the settlor's tax objectives, may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

Best Practices to identify ambiguities

- Review the donative document (will or trust) and identify any terms that could be subject to multiple interpretations: money, effects, household items etc.
- Review trust terms for completeness of disposition – consider the “what if” scenarios. What if the daughter dies before the mother – do the trust terms address this situation?
- Develop a family tree for the settlor/testator to ensure that individuals identified in donative documents can be ascertained and their relationship to the settlor/testator determined- is Jane L. Smith the settlor’s niece or someone else?
- Become familiar with the family dynamics – what is or was the settlor’s relationship with his children and their children? Were there tensions that might result in exclusion of certain family members even though trust terms do not so state?
- Identify and locate the drafting attorney or law firm in the event clarification of terms might be required.

Questions?

Thank you