

**97PR373 (9/23/98)**

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PROBATE COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 97 PR 0373

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IN RE THE MATTER OF THE HARRY H. BEREN TRUST D

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ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

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The Parties: the trustees of the Harry H. Beren Trust D (herein "the trustees");

Yeshiva University, American Committee for Shaare Zedek Hospital in Jerusalem, Inc., Beth Medrash Govoha of America, Inc., Mesivtha Tifereth Jerusalem, Ner Israel Rabbinical College, Ponevez Yeshiva, Rabbinical College of Telshe, Torah Schools for Israel, and United Lubavitcher Yeshivoth (herein "respondents")

Boys Town of Jerusalem Foundation of America, Inc. (herein "Boys Town");

Beth Jacob High School of Denver, Yeshiva Toras Chaim-Talmudical Seminary of Denver (herein "petitioners"); and

Hillel Academy of Denver (herein "Hillel").

The Facts: Harry H. Beren (herein "settlor") created the Harry H. Beren Trust D (herein "Trust D") on April 13, 1987. There is no dispute among the parties that the trust agreement provided, in part, for

appointment of Sheldon K. Beren as successor trustee (herein "the first successor trustee"), and

certain divisions of the trust property on the funding of the trust.

Trust D was funded when the settlor died in January of 1990. The divisions of the trust property were made and the first successor trustee assumed office.

Upon the division of Trust D a second trust was created under paragraph II.C.2. of the trust agreement (herein the "II.C.2.trust"). Petitioners and Hillel (hereinafter sometimes referred to jointly as "petitioners") are the sole beneficiaries of the II.C.2.trust. The II.C.2. trust terminated on the death of the first successor trustee and has been or will be distributed outright and free of trust or other restriction to its beneficiaries. It appears to the Court that this is not disputed.

In their Amended Petition, petitioners seek, in part, a determination from this Court that the entire Trust D also terminated upon the death of the first successor trustee and that the Trust D property then vested in petitioners. In their responses, the trustees, respondents, and Boys Town reject petitioners' interpretation and assert, instead, that Trust D has not terminated.

The Issues Presented: The trustees and respondents filed motions for summary judgment. They ask the Court to determine that

Trust D is valid and remains in existence,  
Trust D did not terminate upon the death of either settlor or the first successor trustee, and Paragraph III.C. of Trust D is limited by its terms and applies only to the II.C.2.trust.  
The motions for summary judgment are the subject of this Order.

The Law: The interpretation of the language of a written agreement presents a question of law for the Court to resolve. *Colard v. American Family Mutual Insurance Co.*, 709 P.2d 11, 13 (Colo. App. 1985), cert. denied (Nov. 12, 1985); see also *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990) and *Anderson v. Denver Public Schools*, 935 P.2d 31 (Colo. App. 1996).

The Court is guided by its obligation to ascertain settlor's intent and give it effect. See *In Re the Estate of Dewson*, 509 P.2d 311, 312 (Colo. 1973); see also *Matter of Trust Created by Belgard*, 829 P.2d 457, 459 (Colo. App. 1991); *Brunton v. International Trust*, 164 P.2d 472, 475 (Colo. 1945). In reaching its conclusion, the Court assumes that the settlor's intent is expressed in the language of the instrument. *Denver Nat'l Bank v. Von Brecht*, 137 Colo. 88, 322 P.2d 667, 670 (Colo. 1958).

The Court will give the words used their plain and generally accepted meaning in the context of a trust agreement. *In re Estate of Daigle*, 642 P.2d 527, 528 (Colo. App. 1982); *Colorado Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786, 788-89 (Colo. App. 1991), *aff'd* 854 P.2d 1232 (Colo. 1993).

In giving effect to the words used by the settlor to express his meaning, the Court also looks to the entire trust instrument and considers the language of the whole agreement in determining the intended meaning of an individual provision. *Crutcher v. Joyce*, 134 F.2d 809, 814 (10th Cir., 1943); *Brunton supra*, at 475.

In its interpretation of the language of a specific provision alone or in the context of the entirety of the trust agreement, the Court's first resort is to the canons of construction generally applicable to the interpretation and construction of trust instruments. *Massachusetts Co., Inc. v. Evans*, 924 P.2d 1119, 1122 (Colo. App. 1996).

An issue of fact arises and extrinsic evidence is admissible only if the Court concludes, after its analysis, that the language of the trust instrument presents an ambiguity. *Dewson's Estate*, *supra*. An ambiguity is presented when the Court concludes that the language is susceptible to two or more meanings, or there is uncertainty as to its meaning. *In Re the Trusts Created by Ferguson*, 929 P.2d 33, 35 (Colo. App. 1996). A mere difference of opinion between the parties over the meaning of a term does not constitute an ambiguity. *Radiology Professional Corp. v. Trinidad Area Health Association, Inc.*, 577 P.2d 748, 750 (1978). It is not permissible for the Court to consider extrinsic evidence that casts doubt on the meaning of the settlor's language or renders such language susceptible to a different meaning. *Dewson's Estate supra*, at 312.

Analysis: After careful review of paragraph III.C. and the entire instrument at issue here, and after application of the canons of construction available and customarily used for the

interpretation and construction of trust language, the Court concludes that, as a matter of law, paragraph III.C. is not ambiguous. Extrinsic evidence to vary the settlor's intent is not admissible.

Overall, the trust agreement is inelegantly drafted. In addition to errors in content that are obvious to the specialist in trust or charitable contribution law, there are no titles assigned to sections of the agreement, there are no paragraph headings and there is no table of contents — some of the additional guides given to the reader by the most accommodating draftspersons. While such deficiencies make the instrument difficult to read, they do not create an ambiguity as to the meaning and intent of paragraph III.C.

Paragraph III.C. is confined to the division and distribution of "the corpus of the Trust created pursuant to Item II.C.2," which is distinct from the corpus of the entire Trust D. Although Petitioners contend, for a variety of reasons, that sentences four and five of paragraph III.C. may reasonably be read to apply to all of Trust D, consideration of those two sentences in context and consideration of the document as a whole persuades this Court that sentences four and five unambiguously relate solely to the "corpus of the Trust created pursuant to item II.C.2", not to the entire corpus of Trust D.

All of the sentences in a paragraph presumably relate to the subject of that paragraph. Therefore, the Court begins with the presumption that all of the sentences in paragraph III.C. relate to a single topic. The Court concludes that the topic of paragraph III.C. is distribution of the II.C.2. trust and that all of the sentences in paragraph III.C. relate to that distribution.

In considering this ruling the Court has weighed all of the contrary arguments advanced by Petitioners. Petitioners' primary argument focuses on the fourth and fifth sentences of paragraph III.C. and the meaning of the word "corpus." They argue that, although sentences one, two and three of paragraph III.C. relate to the distribution of the II.C.2 trust, beginning with the fourth sentence of paragraph III.C., settlor referred instead to the corpus of the whole of trust D. The Court has accorded great weight to Petitioners' arguments and analysis in its deliberations and has resolved doubt in Petitioners' favor; nevertheless, the Court has concluded that no issue of fact is presented in this case.

Four of the five sentences in paragraph III.C. use the word "corpus." The first sentence of paragraph III.C. establishes that the topic of the paragraph will be "the corpus of the Trust created pursuant to item II.C.2. above. . . ." [bold added] In the next sentence the settlor again refers to "the corpus of the Trust." [bold added] This is undeniably again a reference to the II.C.2. trust. The third sentence mentions the three beneficiaries (Petitioners here) and "their shares of the corpus." [bold added] Petitioners have not argued that the word "corpus" used in these first three sentences of paragraph III.C. does not refer exclusively to the corpus of the II.C.2. trust.

They argue, however, that the "corpus" identified in the fourth sentence refers not to the corpus of the II.C.2 trust that is the topic of the paragraph but refers instead to the entire corpus of Trust D. They argue that (1) the word "corpus" must be defined -- for this sentence -- by reference to Section V.D.2 of the trust agreement; and (2) the definition of "corpus" in Section V.D.2. includes the whole of Trust D.

Petitioners' analysis, while assisting their suggestion of an ambiguity, is unreasonably strained, is not required by plain reading or by the rules of construction, and is not analytically sound.

In Section V.D.2., settlor defined "corpus" to mean the "original property", subsequent "additions," and "accumulated income." The Court concludes that settlor wanted his references

to "corpus," in whatever context, to refer to all three components of a trust: its original contribution, its additions, and its accumulated income.

This commonly understood definition of "corpus" can be read in harmony with the fourth and fifth sentences of paragraph III.C. The definition set out in Section V.D.2. is not inherently limited to the whole of the Trust D property. The Court must, therefore, conclude that even assuming Petitioners are correct in their argument that the fourth sentence of paragraph III.C. requires resort to Section V.D.2. for definition, their argument that this leads to the total termination and distribution of Trust D is not analytically sound.

Petitioners urge the Court to find an ambiguity because the fourth and fifth sentences of paragraph III.C., if related to the II.C.2. trust, would be redundant and hence must carry some other meaning. The Court rejects Petitioners' thesis and their analysis. The two sentences are not redundant. They reinforce the direction that distributions to Petitioners, whether by exercise of the power of appointment or by default, are to be made "outright and free of trust" and "shall thereafter be administered and expended by the governing bodies of the Charities as each shall determine." The Court concludes that these instructions, rather than being redundant, add meaning to the preceding language of the paragraph.

Accepting, for purposes of the motions for summary judgment, that both sentences are redundant, the Court rejects as unfounded, petitioners' argument that they therefore can have no meaning within the paragraph. Particularly in light of the overall sloppy craftsmanship of the document, the inclusion of unnecessary or superfluous material can best be explained straightforwardly for what it is rather than looking for a strained or subtle meaning. Paragraph III.C. is susceptible of but one reasonable interpretation and the Court will not strain language or logic to create an alternative interpretation. See *Mashburn v. Wilson*, 701 P.2d 67, 69 (Colo. App. 1984).

The Court finds no ambiguity in the language of paragraph III.C., and further finds that paragraph III.C. does not require the termination and distribution of Trust D upon the death of the first successor trustee. On the issues before the Court set forth in the Motions for Summary Judgment, the Court accordingly finds that there are no genuine issues of material fact requiring trial. The Motions for Summary Judgment must be granted.

**Ruling and Order:** The Court, having carefully reviewed the entirety of Trust D, the pleadings in this action, the Motions for Summary Judgment, the briefs and responses, having heard and considered extensive oral argument, and being fully advised in the premises, for the foregoing reasons and incorporating as if set out in full the Court's bench ruling of September 17, 1998, orders that the Motions are GRANTED.

Pursuant to Rule 56 of the Colorado Rules of Civil Procedure, applicable to this proceeding by virtue of Rule 35(b) of the Colorado Rules of Probate Procedure, the Court hereby directs the entry of final judgment in favor of movants and against the Petitioners and Hillel and determines that:

1. Trust D is valid and remains in existence;

Trust D did not terminate upon the death of the survivor of Harry H. Beren and Sheldon K. Beren; and

Paragraph III.C. of Trust D is limited by its terms and applies only to "the corpus of the Trust created pursuant to Section II.C.2.

The Court has taken into account the expressed needs and wishes of the parties for resolution

of this principal issue presented in the case. The Court expressly finds that there is no just reason for delay. Accordingly, entry of final judgment on the issues presented to the Court in the Motions for Summary Judgment is proper, pursuant to C.R.C.P. 54(b). The remaining issues will be considered by the Court if and when set by the parties pursuant to the Colorado Rules of Civil Procedure.

The Clerk of the Court is directed to enter final judgment in conformity with this Order.

DATED AND ENTERED this 23rd day of September, 1998.

BY THE COURT:

C. Jean Stewart  
Judge, Probate Court