Title

Employing the term *spouse* in trust instruments: An unambiguous term can still be "textually" ambiguous

Text

A trust term can be unambiguous and ambiguous at the same time. Consider the term spouse. In *Trust Agreement of Johnson*, 194 N.J. 276, 944 A.2d 588 (2008), the court wrestled with the issue of whether a class of trust beneficiary characterized as "spouses" of certain designated individuals included their surviving spouses, *i.e.,* their widows and widowers. While the trial court found the word *spouses* to be "unambiguous on its face," the appellate courts disagreed. They saw the term *spouses* as contextually ambiguous. The trial court, in holding that "spouses" included surviving spouses, was guided by the plain meaning rule. The appellate courts in upholding the decision of the trial court saw themselves as resolving a contextual ambiguity. All three courts took into consideration extrinsic evidence, particularly the testimony of the scrivener as to the settlor's probable intent.[202]

Here is another "unambiguous" provision for the benefit of someone's "spouse," in this case the spouse of the settlor's only living son. At the time of the trust's execution (funding) he was married to Cynthia. Later he divorced Cynthia and married Carol. Was Cynthia now out and Carol now in? Or was it still Cynthia, and Cynthia alone? The trial court's finding of the latter was affirmed on appeal. "We decline to redraft the Trust to reach a presumed intent to benefit a potential replacement 'spouse.'" See *Ochse v. Ochse*, No. 04-20-00035-CV, 2020 WL 6749044 (Tex. App.—San Antonio Nov. 18, 2020). Both courts found it contextually unambiguous that "spouse" meant Cynthia, and Cynthia alone. There was no "evidence" to the contrary.

These language-construction issues play out at the intersection of the parol evidence rule and the plain meaning rule. See generally §8.15.6 of *Loring and Rounds: A Trustee's Handbook* (2021), which section is reproduced in its entirety in the Appendix below.

Appendix

§8.15.6 *Parol Evidence and Plain Meaning Rules* [from *Loring and Rounds: A Trustee's Handbook* (2021)].

> *The plain meaning rule appears simple: courts shall not admit extrinsic evidence to contradict or add to the plain meaning of the words in a will. In his famous treatise on evidence, Wigmore explained that the rule arose from the English society's reverence for the power and legal effect of written words.*[177]

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[202] *See* Trust Agreement of Johnson, 194 N.J. 276, 281, 944 A.2d 588, 591 (2008).

[177] Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35(4) Real Prop. Prob. & Tr. J. 813 (Winter 2001).

> *Furthermore, to be influenced by and draw meaning from subtle details of wording may well ignore the realities of how drafting is done, not to mention that the words were those of one whose work product suggests inattention to the particular issue or circumstances for which it has become necessary to discover, or attribute, an intention*.[178]

The plain meaning rule. In the trust context, the plain meaning rule, when applicable, excludes extrinsic evidence of the settlor's intent. Instead, in construing the terms of a trust the court is bound by the plain meaning of words employed in the governing instrument. Implicit in the rule is the fiction that a word has one universal or absolute meaning. "In truth there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document."[179] Still, the policy rationale for honoring the fiction, at least in the context of testamentary trusts, is compelling: "Modern justifications of the rule include (1) a fear of evidence fabrication, (2) the possibility of fraud, (3) a concern that a decedent had relied on the language used, and (4) that such extrinsic evidence is unattested and therefore violates the will statutes."[180]

The plain meaning rule's surrounding circumstances exception. There is a long-standing surrounding-circumstances exception to the plain meaning rule. "The document is meant to be understood as … [the settlor]… understood it—against the backdrop of his or her occupation, property holdings, and relationships with family and others."[181] The surrounding-circumstances exception to the plain meaning rule "pays tribute to the importance of context."[182]

The plain meaning rule's latent ambiguity exception. It has been a general rule of evidence that "latent ambiguities permit extrinsic evidence, whereas patent ambiguities do not."[183] A latent ambiguity is not apparent from the naked language of the governing instrument. Only in the carrying out of its terms is the ambiguity revealed. "A patent ambiguity, on the other hand, is one arising from an apparent contradiction within the document itself or where a term that is used in the document could yield several meanings."[184] For more on patent and latent ambiguities, see §5.2 of this handbook.

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[178]Restatement (Third) of Trusts §50 cmt. g.

[179]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 4 (2014) (citing John Henry Wigmore, Evidence in Trials at Common Law §2462 (1981)).

[180]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 5 (2014).

[181]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 13 (2014).

[182]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 13 (2014).

[183]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 10 (2014).

[184]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 10, 5 (2014).

The parol evidence rule. The parol evidence rule would restrict the introduction of extrinsic evidence of settlor intent only if the terms of the governing instrument are all inclusive.[185] "Once reduced to a writing embodying the complete expression of such settlor intent, there is no need for any other evidence of such intent; all earlier expressions of intent have become integrated into the final document."[186]

Ambiguous dispositions. Under the parol evidence rule, "if the manifestation of intention of the settlor is integrated in a writing, that is, if a written instrument is adopted by him as the complete expression of his intention, extrinsic evidence, in the absence of fraud, duress, mistake, or other ground for reformation or rescission, is not admissible to contradict or vary it."[187] The Rule applies even when the law does not require that there be a writing.[188] Only when the trust instrument is ambiguous may extrinsic evidence be considered in ascertaining the intentions of the settlor.[189] An example might be a conveyance "to the use of" *X*. Extrinsic evidence would be allowed in to clarify whether such words evidence an intention to establish a trust relationship.[190] Or consider the ambiguity inherent in a provision that calls for a termination distribution to "*X* and the children of *Y*." The introduction of extrinsic evidence would be warranted to ascertain whether the settlor intended that *X* take half or share equally with the children of *Y*. At least one court has so held.[191] For more on the drafting pitfalls of "coupling an individual with a class," the reader is referred to §5.2 of this handbook.

When the parties are not in accord as to a word's meaning. Words that cause confusion are

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[185]*See* Mense v. Rennick, 491 S.W.3d 661 (Mo. Ct. App. 2016).

[186]Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 6 (2014).

[187]1 Scott on Trusts §38 at 403. *See also* Restatement (Second) of Trusts §38; 1 Scott & Ascher §4.5. *See generally* Lewin ¶6-03 through ¶6-13 (England). *See, e.g.*, Mense v. Rennick, 491 S.W.3d 661 (Mo. Ct. App. 2016).

[188]1 Scott on Trusts §38.

[189]Mense v. Rennick, 491 S.W.3d 661 (Mo. Ct. App. 2016); Dennis v. Kline, 120 So. 3d 11 (Fla. Dist. Ct. App. 2013). *See generally* 1 Scott on Trusts §38; Restatement (Third) of Trusts §21(2); 1 Scott & Ascher §4.5. *But see* UTC §103(17) (defining "Terms of Trust" as the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding); UTC §414 cmt. (noting that in determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text). "The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof." UTC §414 cmt.

[190]Restatement (Third) of Trusts §21 cmt. c.

[191]*In re* Schaffner, 557 N.Y.S.2d 198 (App. Div. 1990).

not necessarily ambiguous.[192] A mere "difference of interpretation" is not tantamount to an ambiguity.[193] "Words do not become ambiguous simply because lawyers or laymen contend for different meanings or even though their construction becomes the subject matter of litigation."[194]

Family. A provision for the benefit of *X*'s *family* may mean *X*'spouse and children.[195] Or it may be more expansive in scope encompassing perhaps *X*'s siblings and parents as well.[196] In any case, the word has only one intended meaning within the particular context. It may take a court, however, to divine its contextualized plain meaning.[197] Ordinarily the court does so without the benefit of parol evidence.[198]

Spouse. Still, there is the case that involved whether a class of trust beneficiary characterized as "spouses" of certain designated individuals included their surviving spouses, *i.e.*, their widows

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[192]*See, e.g.*, Jackson v. Nowland, 338 Ga. App. 614, 791 S.E.2d 190 (2016) ("Here, the trial court erred in finding an ambiguity with regard to the trust instruments' termination provisions and in considering parol evidence to interpret those provisions. Absent parol evidence, the trustee discretion clause and paragraph 6.04 can be reconciled within the four corners of the trust instruments. Only when one considers the actual age of the beneficiaries at the time the trust was drafted does an ambiguity appear."); Citizens Bus. Bank v. Carrano, 117 Cal. Rptr. 3d 119, 126 (2010) (there being no latent ambiguity attached to the term *issue* as employed in the governing trust instrument, "Christopher's issue" included his illegitimate biological son, even though the biological mother was married to someone other than Christopher).

[193]Gordon v. Gordon, No. 11-14-00086-CV, 2016 Tex. App. LEXIS 3357 (Tex. App. Mar. 31, 2016). *See also* Mense v. Rennick, 491 S.W.3d 661 (Mo. Ct. App. 2016).

[194]*In re* Estate of Oswald, 244 P.3d 698 (Kan. Ct. App. 2010) (quoting from Thomas v. Cont'l Cas. Co., 225 F.2d 798, 801 (10th Cir. 1955)). *See also* Lazarus v. Sherman, 10 A.3d 456 (R.I. 2011) ("We emphasize that '[b]cause ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate … the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner.' (quoting Garden City Treatment Center, Inc. v. Coordinated Health Partners, Inc., 852 A.2d 535, 542 (R.I. 2004)).").

[195]2 Scott & Ascher §12.14.3.

[196]See the Legislative Note in the official commentary to §5 of the Model Protection of Charitable Assets Act (musing that "family member" is not a "precise" term and inviting the state to clarify for purposes of the Act whether the term includes, with respect to an individual, "a spouse, descendants, ascendants, siblings, spouses of family members, an unmarried domestic partner, or step-relatives.").

[197]*See generally* Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35(4) Real Prop. Prob. & Tr. J. 813 (Winter 2001). *See also* the quotations that introduce this section.

[198]*See In re* Estate of Oswald, 244 P.3d 698 (Kan. Ct. App. 2010).

and widowers.[199] While the trial court found the word *spouses* to be "unambiguous on its face," the appellate courts disagreed.[200] They saw the term *spouses* as contextually ambiguous. The trial court, in holding that "spouses" included surviving spouses, was guided by the plain meaning rule.[201] The appellate courts in upholding the decision of the trial court saw themselves as resolving a contextual ambiguity. All three courts took into consideration extrinsic evidence, particularly the testimony of the scrivener as to the settlor's probable intent.[202]

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Remarriage. Consider a trust established in contemplation of divorce for the benefit of the settlor's ex-wife until such times as she "remarries." Did her status as a beneficiary terminate upon her remarriage *to the settlor*? One court has held that it did not.[203] Notwithstanding the confusion that was caused by the particular fact pattern, it cannot be said that the word "remarriage" itself was somehow inherently ambiguous.

Widow. The word *widow* is another example of an unambiguous word that can nonetheless cause confusion in the hands of the unskilled scrivener.[204] One commentator has observed: "Where the settlor makes a gift in trust for his 'widow' the instrument and the surrounding circumstances may indicate that the settlor meant only the woman to whom he was married at the time of his death should take ….In other cases the intent is inferred that he meant only the woman to whom he was married at the time of the creation of the trust."[205]

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[199]*See* Trust Agreement of Johnson, 194 N.J. 276, 944 A.2d 588 (2008).

[200]*See* Trust Agreement of Johnson, 194 N.J. 276 n.1, 944 A.2d 588 n.1 (2008).

[201]*See* Trust Agreement of Johnson, 194 N.J. 276 n.1, 944 A.2d 588 n.1 (2008).

[202]*See* Trust Agreement of Johnson, 194 N.J. 276, 281, 944 A.2d 588, 591 (2008).

[1] Ochse v. Ochse, No. 04-20-00035-CV, 2020 WL 6749044 (Tex. App.—San Antonio Nov. 18, 2020).

[203]Bank of N.Y. v. Hiss, 27 N.Y.S.2d 646 (Sup. Ct. 1941).

[204]*See, e.g.*, Offerman v. Rosile, 31 Kan. App. 2d 1055, 1061, 77 P.3d 504, 508 (2003) (while it was unclear to the litigants whether the former wife of the settlor of a revocable trust who had died unmarried qualified as his "widow" thus entitling her to an equitable interest under the trust, the trust instrument by the way having been drafted by a stockbroker who was not an attorney, the court saw "absolutely nothing ambiguous in the use of the term 'widow,'" ruling that because the settlor had died unmarried, he had died without a "widow").

[205]Bogert §182. *Cf. In re* Lynch, [1943] 1 All E.R. (Ch.) 168 (Eng.) (involving a dispute over the meaning of the word *widowhood*).

Education. A poorly drafted provision for someone's "education" is another example of where the context in which a word is used, not necessarily the meaning of the word itself, is what causes the confusion, at least in the minds of some.

Take the case of a trust that was established in part for the education of Nathan, the settlor's grandson. The trust provided as follows: "for the purposes of this trust, … [Nathan]… shall not be deemed to have 'completed his education' so long as he is under thirty-five (35) years of age and shall be continuing his formal education at a recognized academic college or university which meets the approval of the trustee." The trust was to terminate when Nathan had "completed his education" and the trust property as it then existed was to pass outright and free of trust to the settlor's children.

When Nathan was 20 years of age, he dropped out of college, telling the trust officer that he did not want to continue his education. Approximately eighteen months later, he returned to college. At the time Nathan had dropped out of college, had the trust terminated and the trust property vested in the settlor's children? The trustee brought an action for declaratory judgment. The appellate court agreed with the Bank, which had argued at trial and on appeal that the provision in the trust giving Nathan until he is 35 years old to complete his education was an indication that the settlor had not intended that Nathan be required to be enrolled in a college or university every semester without break. "The purpose of the trust was to provide an education for Nathan, and the trust allowed Nathan up to the age of 35 to complete his education ….Considering the will and trust language as a whole, we hold that the terms of the trust are not ambiguous. We further hold that the trial court did nor err in determining that the trust did not … [at the time Nathan dropped out of college]… terminate by its own terms."[206]

Minority and majority. The terms *minority* and *majority* become problematic when their ages are changed by statute during the life of a trust, say from age 21 to age 18. "If the governing instrument provides that the beneficiary is to receive the trust property on reaching his or her 'majority,' it would seem that the beneficiary is entitled to receive the property at age 18, regardless of when the governing instrument was executed. If the governing instrument provides that the beneficiary is to receive the trust property at age 21, however, he or she is not entitled to it until he or she reaches that age."[207]

Market value. Is the concept of a property's *market value* inherently ambiguous? Perhaps not inherently, but in the context of a particular governing trust instrument one court has found it actually to mean the property's net value, *i.e.*, its fair market value net of encumbrances.[208]

Child. One New York court has come right out and asserted that the word *child* "is unambiguous, and resort to parol evidence is not necessary to discern the … [settlor's]… intention."[209] Perhaps it meant to say not *per se* ambiguous. In any case, the Uniform Probate Code

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[206]Hurley v. Moody Nat'l Bank of Galveston, 98 S.W.3d 307, 311 (Tex. 2003).

[207]5 Scott & Ascher §33.1 n.3.

[208]*See* Trupp v. Naughton, No. 320843, 2015 Mich. App. LEXIS 1114 (Mich. Ct. App. May 26, 2015) (unpublished).

[209]*In re* Mfrs. & Traders Trust Co., 839 N.Y.S.2d 642 (App. Div. 2007).

for its purposes defines the word *child* as "an individual entitled to take as a child under … [the]… Code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant."[210] A well-drafted trust instrument should have its own definition of child, one that explicitly and unambiguously addresses the issues of adoption and illegitimacy, as well as keeps to a minimum incorporations by reference.[211] Not all trustees are lawyers and not all lawyers have taken trusts.[212] The topics of adoption and illegitimacy are covered in §5.2 of this handbook as part of our discussion of class designations.

The UTC is extrinsic-evidence friendly. The Uniform Trust Code via its reformation sections sweeps away time-honored checks on the introduction of extrinsic evidence in the trust context, checks that had been designed to regulate somewhat the litigation floodgates. These UTC sections are taken up in §8.15.20 of this handbook and §8.15.22 of this handbook.[213] Unambiguous provisions are no longer safe in jurisdictions that have enacted the UTC.[214] At least one Florida court, however, appears to be bucking the trend.[215] Indiana would seem not to be fully on board as well.[216]

Extrinsic evidence purporting to negate or support the imposition of a resulting trust. When an express trust fails, or is fully performed and there is property still remaining in the trust estate, a resulting trust is generally imposed on the surplus, a topic we take up in §4.1.1.1 of this handbook.[217] In other words, the trustee may not walk away with the property, unless the terms of the express trust provide otherwise.[218] "Whether the trust is inter vivos or testamentary, the

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[210]UPC §1-201(5).

[211]*See generally* §8.15.17 of this handbook (doctrine of incorporation by reference).

[212]*See generally* §8.25 of this handbook (few American law schools still require Agency, Trusts and Equity).

[213]*See, e.g.*, Frakes v. Nay, 247 Or. App. 95, 273 P.3d 137 (2010) (applying Oregon's UTC trust reformation provisions).

[214]*See, e.g.*, UTC §415 (reformation to correct mistakes even in the absence of ambiguity).

[215]*See* Miami Children's Hosp. Found., Inc. v. Estate of Hillman, 101 So. 3d 861 (Fla. Dist. Ct. App. 2012) ("We find that the trust documents are clearly not ambiguous and that the trial court erred in concluding that MCHF was not the intended beneficiary of the … trust.").

[216]*See* Kristoff v. Centier Bank, 985 N.E.2d 20 (Ind. Ct. App. 2013) (the court declining to order termination of a trust under Indiana's version of UTC §412 as such an order would be in contravention of the dispositive intentions of the settlor as those intentions had been clearly and unambiguously articulated within the four corners of the governing trust instrument).

[217]*See generally* 6 Scott & Ascher §41.2 (Failure); §42.2 (Surplus); §4.1.1.1 of this handbook (the resulting trust).

[218]*See generally* 6 Scott & Ascher §§41.2 (Failure), 42.2 (Surplus); §4.1.1.1 of this handbook (the resulting trust).

traditional view is that extrinsic evidence of the settlor's declarations that the trustee is to be permitted to keep the property if the trust is fully accomplished without exhausting the trust estate is ordinarily inadmissible."[219] So also when an express trust fails.[220]

The purchase-money resulting trust. In §3.3 of this handbook, we discuss the purchase money resulting trust, an express trust/resulting trust hybrid that can arise orally even when the subject property is land.[221] A purchase money resulting trust may be *rebutted* as well by parol evidence that an outright gift to the transferee was actually intended.[222] Courts, however, are generally reluctant to engraft an express trust upon an absolute conveyance of land.[223] This is not because of the parol evidence rule but because of the statute of frauds, a topic that is covered in §8.15.5 of this handbook.

[219]*See generally* 6 Scott & Ascher §§41.2 (Failure), 42.2 (Surplus); §4.1.1.1 of this handbook (the resulting trust).

[220]6 Scott & Ascher §41.2.

[221]*See generally* 6 Scott & Ascher §43.1. *Cf*. 6 Scott & Ascher §43.2.2 (Unenforceable Express Agreement by Grantee to Hold in Trust).

[222]6 Scott & Ascher §43.2.

[223]1 Scott & Ascher §4.5.