Court of Appeals, State of Michigan

ORDER

In re Geraldine M Hardy Trust

Docket No. 351966

LC No. 12-781611-TV

Michelle M. Rick
Presiding Judge

Amy Ronayne Krause

Anica Letica
Judges

On the Court's own motion, our October 28, 2021 opinion is AMENDED as follows. The reference to "Charleston, North Carolina" in the first full paragraph on page 6 of the opinion is corrected to "Charleston, South Carolina." The reference to "North Carolina's medical educational institutions" in the third full paragraph on page 11 is corrected to "South Carolina's medical educational institutions."

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 3, 2021
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re GERALDINE M. HARDY TRUST.

LAURA M. KYSTAD, Trustee,

Petitioner-Appellee,

v

UNIVERSITY OF SOUTH CAROLINA,

Respondent-Appellant,

and

MEDICAL UNIVERSITY OF SOUTH CAROLINA, JEROME McDANIEL, and PAMELA MELTON,

Respondents-Appellees.

UNPUBLISHED
October 28, 2021

No. 351966
Wayne Probate Court
LC No. 12-781611-TV

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

Respondent, the University of South Carolina (USC) appeals by right, pursuant to MCR 5.801(A)(2), from the trial court's order determining that USC was "no longer an interested party" in a dispute over the intended beneficiary of a trust established by Dr. Geraldine McDaniel Hardy. We affirm.

I. BACKGROUND

In 1975, Dr. Hardy drafted a trust document, which she executed in 1977, leaving her estate (which turned out to be significant) to a medical educational institution in South Carolina, her original home state. Unfortunately, the name she used for the institution did not match the location she identified. Respondents the University of South Carolina (USC) and the Medical University

of South Carolina (MUSC) both claim to be Dr. Hardy's intended beneficiary. By 2012, Dr. Hardy had developed dementia and lost the capacity for testamentary intent. Following appointment of petitioner Laura Kystad as Dr. Hardy's conservator, nobody could find an executed copy of her will, which should have funded her trust. With the participation of a guardian ad litem (GAL), Kystad, Dr. Hardy's relatives who would have been her heirs if she had died intestate (respondents Jerome McDaniel and Pamela Melton), and MUSC, Dr. Hardy's estate was restructured. In relevant part, a new will and a new trust were drafted, with the goal of effectuating Dr. Hardy's intentions while also providing something for the would-be heirs and ensuring that Dr. Hardy could be taken care of for the rest of her life. Only then did MUSC's Michigan lawyer realize USC could also be a potential claimant to Dr. Hardy's trust. However, that possibility was not further explored until after Dr. Hardy's death in 2018. The sole issue in this appeal concerns the trial court's determination that the relevant trust provision was ambiguous and that Dr. Hardy had intended to benefit MUSC, not USC.

We note as an initial matter that there have been several probate proceedings involving Dr. Hardy, for reasons we will discuss. Many of the same parties and attorneys were involved, as was the same trial judge. Unfortunately, by the time this particular litigation was commenced, the participants already knew a great deal of factual background that was simply assumed and therefore not properly documented in this record. In addition, many of the submissions made by the parties to the trial court had attached exhibits that might have been illuminating, but more often than not, only the first few of those exhibits were successfully scanned into the electronic record. Some, but not all, of those exhibits have been provided by the parties on appeal. Therefore, the facts in this matter are not consistently discernible from the record provided, through no apparent fault of the parties. In order to fill in some gaps in our understanding of what occurred, we take judicial notice of documents filed in this court as part of Kystad's attempted appeal in Docket No. 324930.[1] See *Hawkeye Casualty Co v Frisbee*, 316 Mich 540, 549; 25 NW2 521 (1947); *In re Albert*, 383 Mich 722, 724; 179 NW2d 20 (1970). We have also consulted the respondent educational institutions' websites to fill in other gaps. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015).

A. *DRAMATIS PERSONAE*

Geraldine McDaniel Hardy was born in Greenville, South Carolina, in 1925. Hardy attended Winthrop College, "The South Carolina College for Women," and graduated *cum laude* with a bachelor of science degree in 1944. Hardy attended what was then known as the Wayne State University College of Medicine from 1951 to 1955, receiving her doctorate degree in medicine in 1955. She "was one of only two women in the graduating class of 67 medical students." According to the Department of Licensing and Regulatory Affairs (LARA), Dr. Hardy was issued her license to practice medicine on January 1, 1958. Dr. Hardy rarely, if ever, returned to South Carolina, although she apparently retained considerable real property holdings in the state,

[1] Kystad's attempted appeal in Docket No. 324930 arose out of one of the other probate proceedings involving Dr. Hardy and is of no other relevance to this appeal.

and she never had any children. Winthrop College is located in Rock Hill, South Carolina, and we have not found any evidence that Dr. Hardy ever lived in either Columbia or Charleston.

The current incarnation of USC was opened as an institution in 1880.[2] In 1893, women were permitted to enroll, and in 1924, women were allowed to live on campus. By the late 1950s, MUSC (as will be discussed below) was already established as a medical school, but there was growing concern in South Carolina that the state needed a second medical school. In 1972, Congress passed a law authorizing grants from the Veterans' Affairs administration for the creation of new medical schools. Contemporary local newspaper articles indicated that USC already had a "pre-med" program and intended to expand that program. In 1973, USC applied for a grant, which was approved the following year, to develop a medical school. USC's School of Medicine admitted its first students in 1977, and it held its first graduation in 1981. USC currently has a Neuropsychiatry and Behavioral Science clinical department with departments of general psychiatry, child and adolescent psychiatry, forensic psychiatry, and geriatric psychiatry. USC's main campus is located in Columbia, South Carolina.

Meanwhile, as noted above, the predecessor to MUSC, then called the Medical College of South Carolina, was founded in 1824 in Charleston, South Carolina. At the time, it was comprised of several "schools," including a School of Medicine. Women were permitted to enroll at the Medical College of South Carolina in 1894, and the first woman was admitted in 1898. Initially a private institution, the Medical College of South Carolina became a state institution in 1913. MUSC apparently established a psychiatry department in 1956. In 1969, the institution's name was changed to the Medical University of South Carolina, and its "schools" were renamed as "colleges." MUSC currently has a Department of Psychiatry and Behavioral Sciences with, *inter alia*, a Women's Reproductive Behavioral Health Division, and eight specialty programs. MUSC's Department of Psychiatry and Behavioral Sciences is a department within its College of Medicine. MUSC's main campus is located in Charleston, South Carolina.

Melton and McDaniel are, respectively, Dr. Hardy's niece and nephew. They are the closest surviving relatives of Dr. Hardy, who had no children, and they are Dr. Hardy's heirs at law. Kystad is an attorney unrelated to Dr. Hardy. Kystad was appointed to be Dr. Hardy's conservator and guardian, and she also became the trustee of Dr. Hardy's revised 2012 Trust.

B. DR. HARDY'S ORIGINAL 1977 TRUST

On August 3, 1977, Dr. Hardy executed a Living Trust Agreement. The trust document was drafted in 1975, and no one knows why Dr. Hardy delayed executing it for two years. The 1977 Trust document recited that Dr. Hardy had funded the trust with only $10, with the right to add other property or assets in the future. The 1977 Trust document strongly implied that the trust was expected to be a beneficiary of Dr. Hardy's will, and it indicated that the trust "may be executed in any number of counterparts," all of which should be considered as a whole. It would turn out that a pour-over Last Will and Testament was drafted for Dr. Hardy at approximately the same time as the 1977 Trust, but no one was ever able to find a copy that Dr. Hardy had executed.

[2] Two predecessor institutions had been founded in 1801 and 1866.

Relevant to the specific concern in this matter, the 1977 Trust provided:

> Upon the death of the Settler [Dr. Hardy], the trust estate shall be distributed to the MEDICAL SCHOOL, UNIVERSITY OF SOUTH CAROLINA, Charleston, South Carolina, to establish the GERALDINE McDANIEL, M.D. CHAIR[3] to deal with the study of the psychiatry of women. It is my desire that said CHAIR be held by a woman M.D. selected by a committee of three (3) persons from the University of South Carolina staff, and composed of the then current Dean of the Medical School, a professor of medicine and a professor of psychiatry. In the event that the assets of the trust estate should prove inadequate to endow a CHAIR, the Settlor directs said medical school to establish a lecture series with substantially the same criteria as above, or a scholarship fund to make grants to qualified female applicants for research and/or for study in the field of the psychiatry of women.

However, there is no entity called "Medical School, University of South Carolina" located in Charleston.

C. DR. HARDY'S COURT-AMENDED 2012 TRUST

Dr. Hardy's stopped practicing medicine in 2006, and she surrendered her license in 2008. In late 2010, Melton received third-hand information that Dr. Hardy was having difficulty paying her taxes; Melton called Dr. Hardy "and realized she was having memory issues." Melton and her husband drove from South Carolina to Michigan and "found Dr. Hardy to be living in a deplorable state," essentially a hoarder-house, and Dr. Hardy had no understanding of her finances or ability to manage her affairs. Dr. Hardy did, however, appear to have food and to be eating. Melton left Michigan, feeling Dr. Hardy was safe for the time being and intending to return, but she rapidly concluded that Dr. Hardy was being taken advantage of by other people. On December 29, 2010, Melton filed a formal report with Adult Protective Services.

On January 4, 2011, a petition for guardianship was filed in the probate court, and the matter was assigned to the same probate judge who presided over this matter. It appears that there was no serious question that Dr. Hardy had dementia and was in need of a guardian and conservator. The trial court appointed Kystad to serve as Dr. Hardy's guardian and conservator, noting that Kystad is an attorney and that the court needed "to get a clear picture of what's going

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[3] In academia, a "chair" can refer to the head of a department, or can be essentially synonymous with "professorship." See *Merriam-Webster's Collegiate Dictionary (11th ed)*. An "endowed chair" more specifically refers to a position that can be held by a professor, typically by appointment as a special honor or to attract exceptional talent to a particular institution, that is paid for, in whole or in part, by an endowment fund, sometimes with a particular remit specified by the founder (i.e., funder). See, e.g., USC's Endowed Chair and Professorship Policy at < https://sc.edu/policies/acaf121.html >; MUSC's Endowed Chairs Policy at < https://education.musc.edu/-/sm/education/leadership/provost/f/endowedchrpol.ashx >. At USC, endowed chairs "are prestigious term appointments for scholarly achievement and distinction within a specific departmental unit." < https://sc.edu/about/offices_and_divisions/provost/faculty/chairs_professorships/endowed.php >.

on with Dr. Hardy" in light of her dementia. Much of the proceedings in that matter involved clashes between Kystad and Melton and McDaniel regarding Dr. Hardy's care and the extent to which Melton and McDaniel were permitted to interact with Dr. Hardy.

Relevant to this appeal, it was discovered that Dr. Hardy's trust was unfunded, and no one was able to find an executed copy of her will. Therefore, Kystad petitioned the trial court to amend and fund the 1977 Trust. Kystad opined that Dr. Hardy "lack[ed] testamentary capacity," but noted that Dr. Hardy "continue[d] to express the desire to fund the educational pursuits of women in medicine." Kystad proposed to restructure Dr. Hardy's estate and assets by establishing a new trust to effectuate the goals of the 1977 Trust. Additionally, the restructuring would fund that trust, provide funding for Dr. Hardy's care for the remainder of her life, minimize tax consequences for Dr. Hardy's estate, and provide some inheritance to Dr. Hardy's heirs at law. According to a contemporaneous report from the GAL, in relevant part:

> 3. Geraldine Hardy executed a Revocable Living Trust on August 3, 1977, which provided that all of her assets were to be paid to the medical school at the University of South Carolina in Charleston, South Carolina, to be used by the medical school with regard to studies of psychiatry in women. Geraldine Hardy did not intend for any family members to receive any part of her estate upon her death pursuant to her trust.
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> * * *
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> 16. I personally visited with Geraldine Hardy to review the Petition for Authority to Amend, Restate and Revise Existing Trust and to Execute and Fund the Trust on May 18, 2012 . . . . Dr. Hardy was having a good afternoon and seemed to recall that she prepared a trust a number of years ago. Independent of the petition and proposed amendment to the trust Dr. Hardy stated that she worked hard all of her life and always intended that her money go to the Medical School at the University of South Carolina rather than to distant relatives. She stated that she did not feel close to her family and did not feel obligated to give her hard earned money to them. This is consistent with statements made by Dr. Hardy on previous visits with her. I am not sure Dr. Hardy understands that some of her money would pass to her niece and nephew with the Restatement of her Trust. She did not object to the proposed Amendment and Restatement of Trust and seemed comfortable that this would avoid probate to a large degree and would give a charitable gift to the Medical School at the University of South Carolina.

It was generally agreed that unless a new will was fashioned, the trust would remain unfunded, and Melton and McDaniel would inherit the entirety of Dr. Hardy's estate. Kystad also sought to act as trustee, and she noted that she was continuing to discover additional assets of Dr. Hardy.

At a hearing, Kystad discussed a compromise with Melton and McDaniel regarding the trust amendment: all of Dr. Hardy's non-taxable assets would go into a "family trust," and all of Dr. Hardy's taxable assets would go into a "charitable trust." The intent was for the "charitable trust" to effectuate the intent of the 1977 Trust, the "family trust" would provide some inheritance to Melton and McDaniel, and Dr. Hardy's estate would be protected from severe tax consequences

that were expected to ensue otherwise. The trial court expressed general approval of the plan, but noted that the University of South Carolina should be involved as an interested party. At the next hearing, Melton and McDaniel agreed to Kystad's proposed compromise. An attorney representing MUSC was also present, but no representative from USC was present, and there was no explanation or discussion on the record regarding the identity of Dr. Hardy's intended beneficiary.

However, after the trial court approved the amendment, MUSC moved for reconsideration, pointing out that the 2012 Trust had deleted Dr. Hardy's identification of Charleston, North Carolina, as the location of her intended beneficiary. That omission created an ambiguity as to whether the identified beneficiary was MUSC or USC. MUSC's Michigan attorney would later explain that he did not previously know there was a second medical school in South Carolina until he reported to his client. The trial court held a hearing, at which it "denied the motion because no notice was provided to the University of South Carolina School of Medicine and a motion for clarification [i.e., rather than the motion for reconsideration] would be more appropriate." No such motion was made, and MUSC did not pursue the matter further. It appears that, at the time, Dr. Hardy was still in excellent physical health, and it was unclear whether Dr. Hardy's estate would ultimately be worth anything.

The 2012 Trust was executed on September 11, 2012. In relevant part, it provides:

> a. The Trustee shall distribute the assets of the Charitable Trust to the MEDICAL SCHOOL, UNIVERSITY OF SOUTH CAROLINA, to be used by the School to establish the GERALDINE McDANIEL, M.D. CHAIR, which shall be a teaching position in the Medical School to deal with the study of the psychiatry of women. It is Grantor's desire that such CHAIR be held by a female M.D., and faculty member of the Medical School, selected by a committee of 3 persons of the Medical School consisting of the Dean, a professor of medicine, and a professor of psychiatry.
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> b. In the event that the assets of the Charitable Trust should prove inadequate to endow a CHAIR, at the time of Grantor's death, then the Trustee shall distribute the assets of the Charitable Trust to the MEDICAL SCHOOL OF THE UNIVERSITY OF SOUTH CAROLINA, to be used by the Medical School to establish a lecture series which has as its subject the study of the psychiatry of women, or, in the alternative, in the discretion of the Medical School, to be used to establish a scholarship fund to make grants to female applicants, enrolled in the Medical School, for research or study in the field of the psychiatry of women.
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> c. The Trustee shall have the discretion to work with the representatives of the Medical School to carry out the purposes expressed in this Article in such manner as may be necessary to satisfy the requirements of the Medical School in establishing programs for the utilization of the funds to be received from the Charitable Trust; provided, that the Trustee shall not have any power or discretionary authority which would otherwise disqualify the amount allocated to the Charitable Trust from being deductible as a Charitable Distribution for purposes of the Federal Estate Tax. [sic] imposed on Grantor's estate.

As noted, the 2012 Trust no longer specifies the city in which the trust's beneficiary is located. There is no evidence that USC was specifically notified about either trust at that time.

D. ESTATE ADMINISTRATION AFTER 2012 TRUST AMENDMENT

Approximately a month after the 2012 Trust was executed, Kystad filed the petition commencing this specific litigation, seeking supervision of the Trust. Kystad named MUSC's attorney, McDaniel, and Melton as interested persons. Kystad also noted that "As the court is aware, there has been a great deal of family controversy concerning the affairs of [Dr.] Hardy in connection with [the other probate proceedings]," reminded the court about the amended 2012 Trust, and opined that in light of the various controversies that had already arisen, the court should supervise the trust administration. Melton and McDaniel disputed some of the proposed implementation details, but they agreed that the trust should be supervised. The first six years or so of the proceedings are not relevant to this appeal. Very generally, they concerned matters like visitation stipends, petitions for fees, reports from the GAL, accountings, and related trust administration matters. Neither USC nor MUSC actively participated, but the record indicates they were both kept apprised of the proceedings. At least by April 10, 2013, both USC and MUSC had been served with various documents in this matter. Indeed, USC's specific attorneys were apparently known by April 18, 2013. The issue of which institution was Dr. Hardy's intended beneficiary went unaddressed.

Dr. Hardy died on July 13, 2018. Initially, Kystad petitioned the probate court to make interim fee payments and a partial distribution to Melton and McDaniel, and the GAL supported that petition. The trial court granted the petition at the end of 2018. Then, in early 2019, Kystad petitioned the probate court for instructions, for the first time explicitly naming USC as an interested person in addition to Melton, McDaniel, and MUSC. Kystad stated that there is a Medical School at USC, but that USC has no presence in Charleston, whereas MUSC is an independent medical school that is located in Charleston. Kystad sought instructions as to which of the two educational institutions should benefit from Dr. Hardy's trust. Presumably, USC received prompt notice, because its attorney filed an appearance the following month. All parties agreed that MUSC and USC were independent entities, that MUSC was located in Charleston, and that USC did not have any presence in Charleston. The various parties engaged in considerable and active advocacy regarding which educational institution Dr. Hardy intended to benefit, and whether Melton and McDaniel could be considered properly interested parties at all.

The trial court, after considering the parties' arguments and holding hearings on the matter, issued a thoughtful and thorough written opinion. After summarizing the procedural history of the matter and the parties' arguments, it made several findings. First, it concluded that "the 2012 Restatement was not intended to create a *change* in the charitable beneficiary from the 1977 Trust," and indeed, by 2012, Dr. Hardy lacked the testamentary capacity to make any such changes. It concluded that "[a]lthough the 2012 Restatement replaces the 1977 Trust, the 1977 Trust was the document executed by the testator and most accurately reflects her intentions as to the Trust language." It also concluded that the beneficiary named in the 1977 Trust appeared clear on its face, but because MUSC was the only medical school ever located in Charleston, whereas USC's main campus was in Columbia and matriculated its first School of Medicine class in 1977, there was a latent ambiguity. The trial court reasoned that:

> Based on only this undisputed information, the ambiguity becomes clear. Because there is and has been only one medical school in Charleston, South Carolina, the identification of "Medical *School*, University of South Carolina" appears to be a scrivener's error, perhaps due to the former classification of departments within the Charleston School[4] as "schools" rather than "colleges." The named entity is the Medical University of South Carolina located in Charleston, South Carolina and the 2012 Restatement should have identified it as such.
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> The Columbia School attempts to create a dispute by presenting evidence that the new medical school was frequently in the local news at the same time the Trust was executed. But there is no evidence that Dr. Hardy read or was aware of those articles, particularly when she had been a Michigan resident for at least 20 years by that time and was not likely a subscriber to the Greensville News or the Columbia Record.[*]
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> [*] The Columbia School points out that Dr. Hardy attended an all-women's undergraduate university and argues that because her Trust seeks to fund work specifically related to women, she had a particular interest in funding women's education. The Columbia School further argues that its commitment to women's education was discussed in news reports and that such commitment was demonstrated by 2 out of its 24 students in its first class in 1977 being women. Leaving aside whether an 8% female class of medical students was "remarkable" at the time, there is again no evidence that Dr. Hardy was aware of these news reports or that she tied the Columbia School to women's education in particular as opposed to recognizing a general increase nationwide in medical schools accepting women around that time.

The trial court then also rejected any claim that Dr. Hardy had a personal or familial connection to either institution. It noted that certain letters purporting to show that Melton's son attended MUSC were unclear and undated, so they had "limited relevance." It also noted that although Melton had attended USC, she attended USC's nursing school before there even was a medical school at USC. Furthermore, there was no evidence that Dr. Hardy had any strong feelings about either institution. It finally observed that USC:

> also makes a textual argument that certain other references to the "University of South Carolina" and a comma placement demonstrate Dr. Hardy's intent to identify the Columbia School rather than the Charleston School as the charitable beneficiary. As noted by Respondents, "University of South Carolina" appears as part of both schools' names so its use does not necessarily point to one school over the other. It is also logical that exact reference to a particular city carries more weight than a misplaced comma.[**] It is more likely that the named city is correct

[4] USC takes issue with the trial court's references to "the Charleston School" and "the Columbia School," but it is clear from the trial court's opinion and from statements made on the record that this was simply convenient shorthand used by the trial court, and it was aware that in South Carolina, neither institution was known by those names.

> and the comma was a mistake, rather than that the comma was purposely placed but the named city was a scrivener's error. Thus, those arguments also fail to raise a dispute regarding the proper entity identification.
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> [**] As an analogy, if a person identifies "the Michigan University located in Ann Arbor, Michigan," no one would first assume that Michigan State University is the school that the person is referencing. If it was revealed that the person's entire house was painted green and white[5] and his father worked at MSU for his entire career, perhaps that would be a sufficient indicator that the person mistakenly identified the location of the school as Ann Arbor rather than East Lansing. No such evidence has been presented here.

The trial court concluded that the latent ambiguity in the 1977 Trust must be resolved in favor of MUSC. It therefore ordered that USC was no longer an interested party, and it dismissed USC's petition. This appeal followed.

II. STANDARD OF REVIEW AND GENERAL PRINCIPLES OF LAW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The interpretation and application of statutes, rules, and legal doctrines is also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

This Court reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Testamentary documents such as wills and trusts are interpreted and reviewed in the same manner as contracts. See *In re Estate of Reisman*, 266 Mich App 522, 527; 702 NW2d 658 (2005); *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989). The fundamental goal in reviewing a trust is to determine and carry out the intent of the settlor to the extent possible. *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012). "As with other legal documents, the 'intent' is to be gleaned from the [trust] itself unless an ambiguity is present," especially "in the case of testamentary documents because the maker is not available to provide additional facts or insight." *In re Kremlick's Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). However, "if a [trust] evinces a patent or latent ambiguity, a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction." *Id*. "A latent ambiguity is one where the language

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[5] For the benefit of readers from outside Michigan or not well-versed in collegiate athletics, green and white are MSU's official school colors, and MSU's main campus is in East Lansing. The official school colors of the University of Michigan, which has its main campus in Ann Arbor, are blue and yellow. There is considerable public rivalry between the two schools, even among people who have attended neither.

employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among 2 or more possible meanings." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964) (quotation and citation omitted).

III. PROPER TRUST LANGUAGE UPON WHICH TO RELY

It is manifestly apparent from the materials provided in this record and from the related probate proceedings that, as the trial court found, the 2012 amendment and restatement of Dr. Hardy's trust was intended to effectuate her intent from 1975 or 1977, not to alter that intent. The record materials also tend to indicate that none of the individuals involved in the 2012 amendment and restatement of the trust were aware that there were two medical educational institutions in South Carolina until after the trial court had already sanctioned the 2012 Trust document. It is beyond any reasonable dispute that the omission of "Charleston" from the 2012 Trust was an inadvertent oversight. USC complains that it never received prior notice of the 2012 estate changes, and nobody followed through on the ambiguity issue when MUSC's attorney discovered the potential ambiguity. Furthermore, the usual rule is that extrinsic evidence may not be considered to establish a scrivener's error unless it is already apparent that a testamentary document contains a mistake or an ambiguity. *Burke v Central Trust Co*, 258 Mich 588, 592; 242 NW2d 760 (1932). USC therefore argues that MUSC should be bound by the language of the 2012 Trust, which does not mention "Charleston." We disagree.

In the trial court, USC presented a tortured argument to the effect that it should be permitted to challenge the 2012 Trust while holding the other parties to the 2012 Trust and taking advantage of the other 2012 estate modifications that funded the 2012 Trust. Leaving aside whether USC should have the opportunity to challenge the 2012 estate modifications, it is clear that those modifications were intended by all involved parties to be a "package deal," and in effect there is only one "bell to unring." It would be conceptually improper to void only part of the "package." Nevertheless, on appeal, USC appears no longer to be pursing the desire to "have it both ways," presumably because it only wanted to challenge the 2012 Trust to the extent the 2012 Trust provided anything for Melton and McDaniel.

More importantly, the rule against admitting extrinsic evidence to show a drafting error appears to be based on the presumption that the document was actually signed as-is by the testator or settlor, who intended to use the language as written. See *Newland v First Baptist Church Soc of Bellvue*, 137 Mich 335, 339; 100 NW 612 (1904); *Kinney v Kinney*, 34 Mich 250, 252-253 (1876). The purpose is to refrain from creating a new will (or, in this case, trust) for the settlor based on unexpressed intentions. *Lee v Gaylord*, 239 Mich 274, 279-280; 214 NW 104 (1927). Unusually, the 2012 Trust does not contain Dr. Hardy's words, it was neither read nor signed by her, and she was no longer even capable of understanding it. Rather, the 2012 Trust is a new document, created by other people with the goal of effectuating, to the extent possible under the circumstances, Dr. Hardy's intent as she had directly expressed in 1977. Indeed, the 2012 Trust even says so on its face. Under exceptional circumstances, rules of law should not be applied by rote or in a mechanistic fashion where doing so would clearly undermine the purpose the rule seeks to achieve. See *Leizerman v First Flight Freight Svc*, 424 Mich 463, 472; 381 NW2d 386 (1985); *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *Lakeside Oakland Devel, LC v H & J Beef Co*, 249 Mich App 517, 526-527; 644 NW2d 765 (2002). The

circumstances of this case are so exceptional: the settlor's true intent cannot be determined without considering the words she actually used. Therefore, the rule against relying solely on extrinsic evidence to show a drafting error should apply only to the 1977 Trust, not to the 2012 Trust.

As a consequence, as noted, it is manifestly apparent that the description of Dr. Hardy's intended beneficiary in the 2012 Trust was erroneously altered from what she actually expressed in her own words. As the trial court properly found, in determining which of the two educational institutions was the true intended beneficiary, we must rely on the words used by Dr. Hardy herself, which are found only in the 1977 Trust.

USC argues that MUSC must nevertheless be bound to the language of the 2012 Trust, but USC does not meaningfully support this argument on appeal. To the extent the argument is cognizable, it is essentially an estoppel argument premised on MUSC having had a full opportunity to litigate the issue. However, the evidence shows that no one knew there was a second medical school in South Carolina until the revised estate plan was finalized. Although MUSC or Kystad probably should have pursued clarification in 2012, both MUSC and USC were aware of the proceedings since 2013 and neither thought it was worth the bother. Furthermore, in the absence of USC's participation, MUSC did not truly have a full opportunity to litigate the ambiguity. Finally, the goal is to determine and effectuate Dr. Hardy's intentions, which would not be furthered by procedural gamesmanship by any involved party.

USC takes the position that, if the 1977 Trust is to be considered, the language of the 1977 Trust is unambiguous. As the trial court found, USC is incorrect. As discussed, there is a "University of South Carolina" that has a "School of Medicine." However, no such institution is located in Charleston. In contrast, there is a "Medical University of South Carolina" located in Charleston. Although the language used in the 1977 Trust *looks* unambiguous to someone unfamiliar with North Carolina's medical educational institutions, it is clear that Dr. Hardy made some kind of error.[6] Furthermore, the range of possible errors are limited. Either Dr. Hardy erred in the name of her intended beneficiary (i.e., "Medical ~~School,~~ University of South Carolina") or she erred in the location of her intended beneficiary (i.e., "Medical School, University of South Carolina, Columbia"). Correction of one error or the other would immediately resolve whether Dr. Hardy intended to benefit USC or MUSC. The question presented is: which of those two errors was the one Dr. Hardy made?

IV. RESOLUTION OF DR. HARDY'S INTENT

Unfortunately, little reliable extrinsic evidence exists. USC presents a history of its medical school, noting that there was a known need for a second medical educational institution in South Carolina, that the founding of its medical school was publicized, that its medical school was founded shortly before Dr. Hardy's trust was drafted, and its medical school first admitted students approximately when Dr. Hardy's trust was executed. USC also argues that the only

[6] As discussed, extrinsic evidence may be used to establish a latent ambiguity; doing so does not implicate the rule against establishing a scrivener's error solely on the basis of extrinsic evidence. We must presume the words used by Dr. Hardy were intentional and that she believed, albeit mistakenly, that her description of her intended beneficiary was correct and adequate.

evidence of a connection Dr. Hardy had to either school was Melton's attendance at USC's nursing program. It also points out that until 1969, long after Dr. Hardy had left South Carolina for good, MUSC was known as the "Medical *College* of South Carolina." It further relies on statements from the GAL to the effect that Dr. Hardy maintained in 2012 that she wanted her money to "go to the Medical School at the University of South Carolina." Finally, USC argued in the trial court that one would intuitively assume references to "Michigan State University, Ann Arbor" or "University of Michigan, East Lansing" to be purely geographic errors. Thus, USC argues, all of the circumstantial evidence indicates that Dr. Hardy probably included "Charleston" by mistake and intended to benefit USC.

However, as the trial court found, Melton's attendance at USC's nursing program does not establish that Dr. Hardy knew about USC's medical school. Melton attended from 1974 to 1976, which overlaps with the founding of USC's medical school but predates the first admission of students to USC's medical school. Conversely, Melton and McDaniel purportedly provided proof in the form of letters to or from Dr. Hardy that she offered to pay for a grand-nephew's education at MUSC, although the trial court found those letters ambiguous at best. The evidence therefore shows that Dr. Hardy *may* have had some possible, tenuous connection to USC in general, but there is no evidence she had any connection to USC's medical school in particular.

Furthermore, the GAL's report about what Dr. Hardy said is intrinsically unreliable, for several reasons. First, Dr. Hardy lacked testamentary intent at that time. Secondly, the report from the GAL does not purport to be a direct quotation from Dr. Hardy. Thirdly, the GAL appears to have been, like everyone else involved in the proceedings at that time, unaware that there were two medical schools in South Carolina. As a consequence, the GAL would likely not have exercised sufficient precision in reporting the name of the school. Finally, even if Dr. Hardy did have testamentary intent and the GAL reported an exact quotation, it would not resolve the major problem with USC's position: there is no evidence that Dr. Hardy *did* know about USC's medical school.

By our arithmetic, Dr. Hardy left South Carolina at the age of approximately 25, rarely returned to South Carolina (if at all), and executed the 1977 Trust at approximately the age of 53. She apparently retained large land holdings in South Carolina, so it can safely be presumed that she kept herself at least somewhat up-to-date on what was happening in the state. However, whether Dr. Hardy specifically knew of USC's medical school is speculative. Today's ability to look facts up out of thin air at the touch of a keyboard or phone remained solidly in the realm of science-fiction in 1977. Rather, Dr. Hardy would have needed to rely on sources like a subscription to an out-of-state newspaper, being explicitly told by someone else, mention in a journal to which she was subscribed, or something similar—and there is simply no evidence that she did have any of the requisite subscriptions or personal connections. In contrast, it is difficult to believe that Dr. Hardy could have been unaware of the existence of MUSC: when she left South Carolina to attend medical school, MUSC was the only medical educational institution in South Carolina. In other words, Dr. Hardy must have been aware of MUSC, and she was probably aware of USC in general, but it is merely possible that she might have been specifically aware of USC's new medical school.

USC draws an analogy to "University of Michigan, East Lansing" or "Michigan State University, Ann Arbor," arguing that most people, upon hearing either reference, would

immediately presume the name of the institution to be correct and the location to be a mistake. Once again, the trial court thoughtfully explained why this might be true if all other things were equal, but here, all other things are not equal. We take judicial notice that the names "MSU" and "U of M" are highly iconic to most Michiganians. We lack similar familiarity with South Carolina, but we accept USC's contention that MUSC and USC are indeed known as "MUSC" and "USC" in that state. However, MUSC is not a "general-purpose" university the way MSU and U of M are. It is not clear that MUSC and USC have the same kind of exceedingly public and extensive athletic and merchandising rivalry as do MSU and U of M. The proposition that "Charleston" was probably a mistake is therefore significantly weakened. Again, although it may be safely presumed that Dr. Hardy was aware of USC in general, the issue is whether she was aware of USC's medical school specifically. We agree with the trial court that USC's analogy does not withstand scrutiny.

USC also makes much of the fact that the phrase "University of South Carolina" appears twice in the bequest paragraph of the 1977 Trust, whereas the phrase "Medical University of South Carolina" is nowhere to be found. This again is plausible on its face, but it ignores the fact that the 1977 Trust must contain one of two possible drafting errors—either the proper name of the institution or the location of the institution—and the issue is which error Dr. Hardy actually made. If the error was the name of the institution, then it would not be particularly surprising to encounter the same error repeated in the very next sentence. Furthermore, as the trial court observed, "University of South Carolina" appears in the names of both institutions, and as noted above, it is not clear how easy it would have been to look up either institution's full and correct name.

An "endowed chair" is a prestigious academic appointment "within a specific departmental unit," at least at USC.[7] It would make the most sense to endow a chair "to deal with the study of the psychiatry of women" at an institution that already has a department of psychiatry. Furthermore, Dr. Hardy's trust specifies that the holder of the chair should be selected by, *inter alia*, "a professor of psychiatry." The necessary implication is that Dr. Hardy expected such a professor of psychiatry to exist. MUSC had a large, well-regarded psychiatry department that had been founded in 1956. As the trial court noted, when Dr. Hardy's trust was drafted, MUSC had recently changed its name from "Medical College of South Carolina" to "Medical University of South Carolina," and changed its internal "schools" to "colleges." Significantly, MUSC's psychiatry department is currently located within its "College of Medicine." Any psychiatry-related endowed chair would therefore be placed within MUSC's College (formerly "School") of Medicine. If Dr. Hardy was unaware of the name changes, or if she was uncertain of the correct names, it would have made sense for her to use a partially out-of-date name for her intended beneficiary and all the more important to identify the beneficiary's location.

Conversely, USC's medical school technically had a fledgling "neuropsychiatry" department and a psychiatry professor by 1975, although the department, like the school, would not have been operational until 1977. As noted, there is no specific evidence Dr. Hardy was aware of USC's medical school, and certainly no evidence she was aware of USC's neuropsychiatry department. However, if she was aware of USC's neuropsychiatry department, she almost certainly would have also known that the department was heavily affiliated with the Hall

[7] See footnote 3.

Psychiatric Institute, which focused on child psychiatry and outpatient treatment. USC's neuropsychiatry department, such as it was, therefore would be a seemingly poor "fit" for the purpose of her proposed endowed chair. It would make the most sense for her to have endowed a chair at the institution that already had a thriving and complex psychiatry department. Thus, a plausible alternative exists to USC's postulate that Dr. Hardy *must have* been mistaken about the location instead of the name of her intended beneficiary. Therefore, USC's construction of the 1977 Trust language is merely one possibility of no greater likelihood than another, so it is conjecture rather than circumstantial proof. *Skinner v Square D Co*, 445 Mich 153, 164-167; 516 NW2d 475 (1994). In other words, the proposition that Dr. Hardy *must have* had the right name but the wrong location is simply not supported.

Ultimately, this Court must presume that all of the words in the 1977 Trust were placed there intentionally. Dr. Hardy must have had a particular institution in mind and—critically—she must have believed she had accurately or adequately identified that institution. In other words, the 1977 Trust does not reflect a scrivener's error, but a memory error. Either Dr. Hardy misremembered (or was uncertain of) the name of MUSC, or Dr. Hardy misremembered the location of USC. There is simply no non-speculative evidence showing that Dr. Hardy was aware in 1975 that USC was developing a medical school, and it is even more speculative whether she was aware in 1975 that USC's medical school had any kind of psychiatry program. In contrast, she must have been aware of MUSC but could reasonably have been uncertain or unaware of its current name. Even if she did know about both institutions' psychiatry programs, the psychiatry department at MUSC would have been a better "fit" for the purpose of her proposed endowed chair. In other words, the evidence that Dr. Hardy intended to benefit MUSC is weak and inferential, but the evidence that Dr. Hardy intended to benefit USC is nonexistent. As a consequence, the evidence—such as it is—supports only one conclusion: as the trial court found, that Dr. Hardy accurately recalled the location of her intended beneficiary and misremembered its name.

Affirmed.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica