IN THE COURT OF APPEALS OF IOWA

No. 9-602 / 89-312

IN THE MATTER OF THE TRUST OF ANNE HAMILTON KILLIAN, TRUST AGREEMENT OF MARCH 4, 1959, f/b/o JOHN RICHARD KILLIAN.

KATHLEEN KILLIAN, RICHARD KILLIAN, and DEBORAH L. KILLIAN WALDEN,

141

Appellants,

vs.

JAN BARBOUR KILLIAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHN R. KILLIAN, DECEASED,

Appellee.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Appellants appeal a trial court ruling establishing parties' interest in the Anne Hamilton Killian Trust. **AFFIRMED AS MODIFIED.**

Jay M. Shriver and James J. Brandt of Pappajohn, Shriver, Eide & Nicholas, Mason City, for appellants Kathleen Killian and Richard E. Killian.

H. Edward Beatty and Gerald Nyell Fatka of Lynch, Dallas, Smith & Karman, Cedar Rapids, for appellant Deborah L. Killian Walden.

William H. Carmichael and Lawrence E. Blades of Blades, Carmichael, Rosser & Benz, Cedar Rapids, for appellees.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ., but decided en banc.

SACKETT, J. 142

This appeal comes from a trial court's order construing the terms of an irrevocable inter vivos trust agreement executed by Anne Killian on March 4, 1959. Anne Killian died September 12, 1963. The disagreement before us is between appellants Kathleen Killian, Richard Killian, and Deborah L. Killian Walden, children of Anne's son John[1] and their stepmother, appellee Jan Barbour, who was married to John when he died on June 11, 1988.

The trust agreement made provisions for Anne's husband, her two children, and their spouses and descendants. The issue here concerns the portion of the trust assets that were set aside for John, his spouse, and his descendants. That portion of the agreement provided in relevant part:

> The residuary trust estate shall thereupon be divided into two equal shares, one share to be set aside for trustor's daughter, Joan Killian Hunter, her spouse and descendants, and one share to be set aside for trustor's son, John Richard Killian, his spouse and descendants.
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> The trustee shall from time to time transfer and deliver so much of the income and principal of the share of the residuary trust estate set aside for John Richard Killian to John Richard Killian as the trustee shall determine in their sole discretion is needed for the adequate health, maintenance, education and support of said John Richard Killian, his wife and descendants, taking into account any and all other property and income available to them. The distributions hereinbefore authorized shall continue for a period of twenty-one (21) years after the death of the last survivor of John

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1. John's fourth child, John R. Killian II, the trustee, and the guardian ad litem for unborn decendents of Anne Killian are not parties to this appeal.

> Richard Killian, his daughter, Kathleen Killian, and his son, John Richard Killian, Jr., at which time the share of the trust estate set aside for the benefit of John Richard Killian and his family shall thereupon terminate and the accumulated income and undistributed principal shall thereupon be paid, transferred and delivered to the then surviving descendants of said John Richard Killian per stirpes and not per capita. Notwithstanding any of the other terms and provisions hereof, John Richard Killian shall have the right and power to appoint by his will in trust or outright to his wife any amount not in excess of one-third (1/3) of John Richard Killian's share of the residuary trust estate as of the time of the death of said John Richard Killian.
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> * * *

After John's death, Jan requested a distribution of one-third of the assets of the trust outright. Jan claimed she was entitled to these assets by virtue of certain provisions of John's will exercising the power of appointment given to him by the trust agreement. The trial court determined Jan was a beneficiary under the trust, that John gave her one-third of the assets of the trust outright, and that she remained a beneficiary under the remainder of the trust agreement.

Appellants challenge this decision and contend on appeal that (1) Jan was not a beneficiary under the trust, (2) John failed to exercise the power of appointment, and if he did exercise the power of appointment, the exercise did not result in Jan receiving one-third the trust assets outright, and (3) Jan has no remaining right to receive benefits from the remaining trust assets. We affirm in part and modify in part.

I.

Appellants contend the trial court was not correct in concluding that the term "wife," as used in the trust agreement, included Jan. They contend the wife referred to in the trust agreement was their mother, who was John's wife at the time the trust instrument was signed by Anne. Appellants contend the trial court should have considered the facts and circumstances surrounding the creation of the trust agreement and determined that Jan, as John's wife, was not provided for in the agreement.

We find the word "wife" as used in this trust agreement to be clear and unambiguous; the term meant any woman who was in an existing, validly contracted marriage with John. We therefore find it unnecessary to consider outside evidence. When an agreement is clear, outside evidence should not be received to explain its meaning. See In re Estate of Kiel, 357 N.W.2d 628, 630 (Iowa 1984). At the time of John's death, the person to whom the term "wife" referred was Jan. We have also, however, reviewed de novo the evidence the appellants contend should support another finding and have arrived at the same conclusion. We reject appellants' argument that the word "wife" in the trust agreement did not refer to Jan and affirm the trial court on this issue.

II.

The more difficult issue is whether the trial court was correct in determining the end result was that Anne Killian took a one-third interest in the trust assets outright. Appellants argue any interest Jan takes should remain in trust, with ultimate disposition to the descendants of John Killian. Appellants contend there is no clear language in John's will and codicil stating that Jan is to receive the money outright.

John's will bequeathed everything to his spouse, Jan Barbour Killian, "including any and all property over which or concerning which [he] may have [had] any general or special power of appointment and specifically the power of appointment contained in the Anne Hamilton Killian Trust." A subsequent codicil to John's will provided:

> It is my intent to give to my wife, JAN BARBOUR KILLIAN, all of my interest in the Anne Hamilton Killian Trust that is transferable by me during my life or at my death, it being my understanding that I have the power to appoint by my will, in trust or outright, to my wife, any amount not in excess of one-third (1/3) of my share of the residuary trust estate as the same is constituted at the time of my death.

Appellants contend John failed to specify in his will and codicil whether the interest of Jan, if any, should be given to her outright or continue to be held in trust. Appellants point to the fact that John states his desire to exercise the power and then recites said power verbatim, failing to make an election.

In determining the nature or extent of the interest or estate given, we first look to the trust agreement to determine what power was given John, <u>see</u> <u>In re Estate of</u>

Spencer, 232 N.W.2d 491, 495 (Iowa 1975), and then we look to the provisions of John's will to determine if and how the power given in the trust was carried out. Id. The donee of a power of appointment can only appoint an interest as is authorized by the instrument creating the power, and not a greater one. See Union & New Haven Trust Co. v. Taylor, 50 A.2d 168, 171, 133 Conn. 221, 228 (1946).

The trust instrument gives John the right "to appoint by his will in trust or outright to his wife any amount not in excess of one-third (1/3) of John Richard Killian's share of the residuary trust estate as of the time of the death of said John Richard Killian" (emphasis added). John's will and codicil give everything to Jan, "including any and all property over which or concerning which [he had] any general or special power of appointment," and give "that [which] is transferable by [him] either during [his] life or at [his] death" (emphasis added). Neither the will nor the trust agreement are written in terms of giving Jan (or John's wife) a portion of the assets of the trust outright. Rather, they refer to giving Jan, or the wife, a portion of John's interest.

The question, therefore, is what was John's interest in the trust when he died? His interest was that share of interest and principal the trustee saw fit, in its discretion, to distribute to him. There are no words in the trust agreement expanding his interest beyond that amount.

That is what John had and that is what he gave to Jan. John gave, and could give, a one-third interest in that which John had. John never had a right to more than that income and principal which the trustee, in its discretion, determined he should have.

A power of appointment is limited to that which is expressed in the instrument creating it. No intent by the donee can broaden the donor's intent, see Loring v. Marshall, 396 Mass. 166, 484 N.E.2d 1315, 1319 n.9 (1985); Cross v. Cross, 559 S.W.2d 196, 202 (Mo. Ct. App. 1977), nor does a court have jurisdiction to enlarge the power. See O'Hara v. O'Hara, 44 A.2d 813, 816, 185 Md. 321, 327 (1945); In re Clark's Trust, 40 Misc. 2d 803, 804, 244 N.Y.S.2d 134, 136 (1963). We will not strain to affirm a construction that would allow a daughter-in-law to share outright when a child and grandchildren would not so receive. Our de novo review of this record convinces us this trust was established to provide for protection of Anne's lineal descendants and for continued family ownership of assets for the longest possible term.

We modify the trial court's order to provide the share Jan took by virtue of the power of appointment was the exclusive right to income from one-third of the John Richard Killian trust and the right to receive principal from that one-third share at the trustee's discretion. We modify the trial court's order to strike that part which gives Jan one-third of the trust assets outright. We modify the award to provide she shall receive principal and interest from the trust as the trustee, in its discretion, deems appropriate. The trustee is limited in distributions to no more than one-third of the principal and income in the John Killian Trust at the time of John's death, and in no event shall income distributed exceed that portion of the income attributable to one-third of the principal in the trust at John's death, less any amount of principal distributed to Jan following John's death.

III.

Appellants' last contention is that when John died, Jan no longer was a "wife" under the terms of the remainder of the trust. We agree. When John died, the marriage was terminated by death. We modify the trial court's ruling to strike the part by which Jan remains a beneficiary under the remainder of the trust. Because of our decision, we find it unnecessary to address the last issue raised on appeal.

Cost on appeal are taxed one-half to appellants and one-half to appellee.

AFFIRMED AS MODIFIED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court.

The majority state:

> Neither the will nor the trust agreement are written in terms of giving Jan (or John's wife) a portion of the assets of the trust outright. Rather, they refer to giving Jan, or the wife, a portion of John's interest.

I respectfully disagree. I find the following words in the trust make the bequest to the wife an exception to the trust provision that limited John's interest during his lifetime to an amount determined by the trustees:

> Notwithstanding any of the other terms and provisions hereof, John Richard Killian shall have the right and power to appoint by his will in trust or outright to his wife any amount not in excess of the residuary trust estate as of the time of the death of said John Richard Killian.

The words "notwithstanding any of the other terms," etc. indicate a clear intention not to be bound by other limitations in the trust.

The trust estate was divided one share to the daughter and one share to John. Then John's share was limited to distribution during his lifetime of an amount determined by the trustee's discretion.

The "notwithstanding" clause indicates a clear intention not to be bound by other terms of the will. The reference to John's share identifies the portion of the estate to be divided. The "notwithstanding" clause then is clear that John may give by his wife an amount in trust or outright to his wife not to exceed one-third of John's one-half of the trust estate.

I would hold that John exercised the power contained in the "notwithstanding" clause. The will is specific in stating John bequeathed everything to his spouse Jan. I do not believe John's recitation in the codicil of his desire to exercise the power contained in the "notwithstanding" clause and then his failure to specifically state he does in fact exercise that power, detracts in any way from the clear mandate in John's will that he bequeaths everything to Jan including "specifically the power of appointment contained in the Anne Hamilton Killian Trust."

I agree with the majority's holding that the wife of John referred to in the trust is the wife in being at John's death.

I respectfully disagree with the majority's holding in Division III that when John died, Jan was no longer his wife under the terms of the remainder of the trust. The term "wife" refers to the wife alive when John dies. I would affirm the trial court in all respects.