MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re: Petition to Docket Trust of Arthur Louis Swingle and Partha Lou Swingle

Duane A. Swingle,

Appellant-Respondent,

v.

David Swingle and Diana Jeffries,

Appellees-Petitioners

March 3, 2021

Court of Appeals Case No. 20A-TR-1585

Appeal from the Ripley Circuit Court

The Honorable Jeffrey Sharp, Special Judge

Trial Court Cause No. 69C01-1901-TR-1

Vaidik, Judge.

Case Summary

[1] Duane Swingle appeals the trial court's grant of summary judgment to David Swingle and Diana Jeffries in this dispute relating to a trust established by the parties' parents. We affirm.

Facts and Procedural History

[2] Duane, David, and Diana are the children of Arthur and Partha Swingle. In October 2009, Arthur and Partha executed the Revocable Living Trust Agreement of Arthur Louis Swingle and Partha Lou Swingle ("the Trust"), naming themselves as the settlors, trustees, and primary beneficiaries and Duane, David, and Diana as beneficiaries upon death. Section 2.01 of the Trust establishes how the Trust can be revoked or modified by the settlors:

> The Settlors reserve the right at any time, and from time to time, without the consent of any person or without notice to any person other than the Trustees, to revoke or modify the Trust hereby created in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the Trust Estate, by filing notice of such revocation, modification, change or withdrawal with the Trustees; provided, however, that the terms of this Agreement may not be modified by the Settlors in such manner as to increase the obligations of the Trustees without the Trustees' written consent.

Appellant's App. Vol. II pp. 49-50.

[3] Partha's mother died in October 2014, and Partha inherited an interest in a piece of real estate in Versailles. That interest, worth approximately $250,000,

became the largest asset in the Trust. In May 2015, Partha was suffering from dementia, and David and Diana petitioned for the appointment of a guardian of her estate. Arthur and Partha objected. After extensive litigation, Partha was declared incapacitated in August 2016, and Sentry Services was appointed guardian of her estate.

[4] In August 2017, Arthur executed the Arthur L. Swingle Living Trust Restatement ("the Restatement"), naming himself trust-maker and Duane trustee. The Restatement purported to amend the Trust by disinheriting David and Diana as follows:

> My beloved wife, Partha L. Swingle, is in poor state of physical health at the time of making this trust, plus she has the onset of Alzheimer[']s/dementia. It is presumed that she will not out live me, nor will be able to enjoy the assets we acquired during our marriage. Accordingly, I make no provision for her in the trust. I intentionally make no provisions for my children, David Swingle and Dianna Jeffries, as they chose to initiate legal action against Partha L. Swingle and me in relation to a guardianship over Partha L. Swingle, trying to exert control over assets that were not theirs to control. Further I have left to them a lifetime of gifts made from both Partha L. Swingle and myself in the form of cash distribution and transfer of our real estate outside the scope of this trust.

Id. at 113. Arthur did not notify Partha, her guardian, David, or Diana of this purported amendment.

[5] Partha died in February 2018, and Arthur died in December 2018. David and Diana then filed petitions to docket the Trust and seeking permission to sell the

real-estate interest Partha had inherited. Duane objected and asked the trial court to docket the Restatement instead. The parties filed cross-motions for summary judgment, with Duane arguing Arthur had the right to unilaterally amend the Trust while Partha was alive but incapacitated, and David and Diana arguing the opposite: that the Restatement was not a valid amendment to the Trust because Arthur did it without the consent of Partha or her guardian. The court ruled for David and Diana, concluding Arthur "had no individual right to modify" the Trust and therefore "the parties' rights and interests are set forth in" the Trust, not the Restatement. *Id.* at 21, 22.

[6] Duane now appeals.

Discussion and Decision

[7] Duane contends the trial court erred by granting summary judgment for David and Diana. We review motions for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[8] Duane argues Arthur had the right to unilaterally amend the Trust in August 2017. Again, Section 2.01 of the Trust governs revocation and modification:

> The Settlors reserve the right at any time, and from time to time, without the consent of any person or without notice to any person other than the Trustees, to revoke or modify the Trust hereby created in whole or in part . . . by filing notice of such revocation, modification, change or withdrawal with the Trustees[.]

Appellant's App. Vol. II pp. 49-50. Duane does not dispute that this provision generally requires both "Settlors"—plural—to agree to any amendment of the Trust. However, he asserts Arthur was permitted to amend the Trust by himself after Partha was declared incapacitated because, at that point, she was unable to agree to any amendment. We disagree.

[9] Section 5.06 of the Trust, entitled "Effect of Incapacity," sets forth what was to happen if a settlor became incapacitated:

> **All rights, benefits, and powers accorded any beneficiary under this Trust Agreement, including the Settlor, who is under a legal incapacity shall be exercised on behalf of such beneficiary by the duly appointed guardian of the estate, if any.** If there is no duly appointed guardian of the estate, the following persons shall act on behalf of such beneficiary in the following order of priority:
>
> a. Such beneficiary's natural guardian.
>
> b. The person standing in loco parentis to such beneficiary.
>
> By way of illustration and not limitation, the foregoing rights, benefits, and powers include the right to receive notices of Trustee resignations, the power to participate in the selection of a

> successor fiduciary under Article VI, and the right to represent certain beneficiaries as specified in the preceding paragraph.

Id. at 56 (emphasis added). There is no dispute that, at the time of the purported amendment in August 2017, Sentry Services was the "duly appointed guardian" of Partha's estate and could therefore exercise all her "rights, benefits, and powers" under the Trust.

[10] Indiana Code section 30-4-3-1.5(f) establishes how the guardian of a settlor is to exercise the settlor's power to amend a revocable trust: "A guardian of a settlor may exercise the settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship." Therefore, rather than proceeding alone, Arthur should have presented his desired amendment to Partha's guardian, who then would have had to go to the guardianship court for approval. *See In re Guardianship of Phillips*, 926 N.E.2d 1103, 1108 (Ind. Ct. App. 2010) (interpreting Section 30-4-3-1.5(f) to mean "Indiana law does not permit a guardian or a court to revoke a valid trust executed as part of an estate plan without cause and when such revocation is not determined based upon evidence to be in the best interests of an incompetent person" (cleaned up)). Because he failed to do so, the

Restatement is void, and the trial court properly granted summary judgment to David and Diana.[1]

[11] Affirmed.

Brown, J., and Pyle, J., concur.

[1] At points in his briefs, Duane seems to suggest Partha should be treated as though she died when she was declared incapacitated in August 2016. In fact, he repeatedly states Arthur was the "sole surviving settlor" as of the time of the purported amendment in August 2017. Appellant's Br. pp. 11, 14, 19; Appellant's Reply Br. p. 16. Duane does not cite anything in the Trust or any legal authority supporting the proposition that being incapacitated is the same as being deceased. Section 5.06 of the Trust, discussed above, specifies how an incapacitated settlor's interests are to be represented, which makes clear that an incapacitated settlor is not simply to be treated as deceased.