AMY NICOLE WOODALL, ET AL.,	:	
Plaintiffs	:	**CASE NO. 2014 CVH 01091**
vs.	:	**Judge McBride**
JOSEPH LEE WOODALL, ET AL.,	:	**DECISION/ENTRY**
Defendants	:	

Scott K Jones, counsel for the plaintiffs Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, and Jessica Ann Woodall, 7759 University Drive, Suite A, West Chester, Ohio 45069;

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J. Thomas Hodges, counsel for the defendants Joseph Lee Woodall, Lisa Ann Ernst, Hillary Woodall, Meghan Ernst, Rachel Ernst and Hannah Woodall, 1219 Sycamore Street, Cincinnati, Ohio 45202;

Francis M. Hyle, counsel for the defendants Joseph Lee Woodall, Lisa Ann Ernst, Hillary Woodall, Meghan Ernst, Rachel Ernst and Hannah Woodall, 5767 Harrison Avenue, Cincinnati, Ohio 45248;

Michael Minniear, counsel for the defendants Phillip Janutolo and Jennifer Janutolo, 626 Main Street, Milford, Ohio 45150.

This cause is before the court for consideration of the plaintiffs' motion for partial summary judgment. The court held a hearing on the motion on May 8, 2015. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

Betty Woodall executed a trust before she passed away in 2009. The plaintiffs are four grandchildren- Amy Woodall, James Woodall, Jeremy Woodall, and Jessica Woodall- of Betty Woodall who have not received any distributions from the trust. The defendants are the two co-trustees and children of Betty Woodall-, Joseph Lee Woodall and Lisa Ann Ernst- and Betty Woodall's other grandchildren who have received distributions from the trust. These grandchildren include Hillary Woodall, Phillip Janutolo, Meghan Ernst, Rachel Ernst, Hannah Woodall, and Jennifer Janutolo.

The trust contained two sub-trusts- the Homestead Trust and the Family Trust. The parties agree that only the Family Trust is at issue.

The parties disagree as to the meaning of Articles IX and XIX. Article XIX provides:

> **"Definition of Children.** For purposes of this Trust, "children" means the lawful blood descendants in the first degree of the parent designated; and "issue" and "descendants" mean the lawful blood descendants in any degree of the ancestor designated, provided,

> however, that if a person has been adopted, that person shall be considered as issue of the adopting parent and such adopted child and his or her issue shall be considered as issue of the adopting parent or parents and of anyone who is by blood or adoption an ancestor of the adopting parent or either of the adopting parents. The terms "child," "children," "issue," "descendant" and "descendants" or those terms preceded by the terms "living" or "then living" shall include the lawful blood descendant in the first degree of the parent designated even though such descendant is born after the death of such parent, however, these terms shall not include Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, or Jessica Ann Woodall as they are otherwise adequately provided for."

Article IX, which is the Family Trust, provides:

> **"(1) Division into Shares for Grandchildren.** Upon the Settlor's death, the Trustee shall divide this Trust as then constituted into equal separate shares so as to provide One (1) share for each then living grandchild of the Settlor. Each share shall be distributed or retained in trust as hereinafter provided."

Of note, Article VII establishes the Homestead Trust, which is not at issue. It bequeaths the settlor's personal and household effects to the settlor's children.[1] However, "the issue of a deceased child surviving the Settlor shall take per stirpes the share their parent would have taken had he or she survived the Settlor."[2]

The defendants submitted three affidavits. They are from the attorney who drafted the trust and the two co-trustees. They aver in their affidavits that Betty Woodall specifically wanted to exclude the plaintiffs from receiving distributions from the trust because they had already received gifts from her during her lifetime.[3] The settlor also told the co-trustees that this was her intention before she passed away.[4]

On August 18, 2014, the plaintiffs filed an amended complaint for a declaratory judgment alleging that they are beneficiaries under Betty Woodall's Family Trust and

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[1] Pls. Ex. A, Article VII(1) at pg. 14.
[2] Pls. Ex. A, Article VII(1) at pg. 14.
[3] Gill Aff. at pgs. 1-2, Earnst Aff. at pgs. 1-2, Woodall Aff. at pgs. 1-2.
[4] Gill Aff. at pgs. 1-2, Earnst Aff. at pgs. 1-2, Woodall Aff. at pgs. 1-2.

are entitled to an equal share of that trust. The plaintiffs also seek an accounting of the trust and all disbursements since October 27, 2009.

On December 29, 2014, the plaintiffs moved for partial summary judgment, seeking a declaration that they are entitled to take under the Family Trust as "grandchildren." The affidavits described above became the subject of a discovery dispute. Following a hearing on the discovery dispute, it became clear that the issue of whether the relevant language in the trust was ambiguous would be largely determinative of the dispute. Accordingly, on March 10, 2015 the court issued an order limiting the issue on summary judgment to whether the trust language is ambiguous. Following briefing, the oral argument took place on May 8.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[5]

The court must view the evidence in a light most favorable to the nonmoving party.[6] Even the inferences drawn from the evidence and underlying facts must be

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[5] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

[6] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[7]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986):

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[8]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[9] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[10]

The burden is on the moving party to show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law.[11] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[12]

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[7] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[8] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[9] Id. at 251-52.
[10] Id. at 250.
[11] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[12] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

"A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims."[13] To satisfy this burden, Civ.R. 56 requires the moving party to do more than make "a conclusory assertion that the nonmoving party has no evidence to prove its case."[14] "Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims."[15]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[16] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[17] The duty of a party opposing a summary judgment motion is more than that of resisting the motion's allegations.[18] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that [the nonmoving] party bears the burden of production at trial."[19]

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[13] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *See Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997) (holding same).
[14] *Burt* at 293.
[15] Id.
[16] Id.
[17] Id.
[18] *Baughn v. Reynoldsburg*, 78 Ohio App.3d 561, 563, 605 N.E.2d 478 (10th Dist.1992).
[19] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[20] Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[21]

"Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[22] Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence that may be considered in support of or in opposition to a summary judgment motion.[23]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

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[20] *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (9th Dist.1992) citing Civ.R. 56(E) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[21] Civ.R. 56(E); *Carlton v. Davisson*, 104 Ohio App.3d 636, 646, 662 N.E.2d 1112 (6th Dist.1995) (holding same); *Smith v. A-Best Products Co.*, 4th Dist. Scioto No. 94 CA 2309, 1996 WL 80533 (Feb. 20, 1996) (holding same).

[22] *Carlton* at 646; *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2nd Dist.1991) (holding same).

[23] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[24] Thus, Civ.R. 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[25] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[26]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claims. While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[27]

In deciding a summary judgment motion, the court may grant partial summary judgment when summary judgment is not appropriate upon the whole case or for all the relief demanded, and a trial is necessary as to the remaining controverted facts.[28]

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[24] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[25] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[26] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[27] *Wing*, 59 Ohio St.3d at 111.
[28] Civ.R. 56(D); *Holeski v. Lawrence*, 85 Ohio App.3d 824, 834, 621 N.E.2d 802 (11th Dist.1993).

LEGAL ANALYSIS

The meaning of "disputed language" in a trust is a question of law for the court to determine.[29] The Ohio Supreme Court has articulated four rules that courts consistently apply when discerning the meaning of a trust's language:

> "(1) In the construction of a will,[30] the sole purpose of the court should be to ascertain and carry out the intention of the testator; (2) Such intention must be ascertained from the words contained in the will; (3) The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear[s] from the context that they were used by the testator in some secondary sense; (4) All the parts of the will must be considered together, and effect, if possible, given to every word contained in it."[31]

A fundamental tenet of construction is that "[a] court's purpose in interpreting a trust is to effectuate, within the legal parameters established by a court or statute, the settlor's intent."[32] Most often the settlor has "unfettered discretion" with which to dispose of "assets as the settlor so chooses."[33]

While highly instructive, the canons of construction are ultimately "mere aids [that] must yield to the primary rule that the intention as expressed must be given effect, even though in conflict with any and all auxiliary rules of construction."[34] As aids to

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[29] *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. *See Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978) (holding same).

[30] *See Evans v. Evans*, 2014-Ohio-4450, 20 N.E.3d 1139, ¶ 76, 93 (1st Dist.) citing *Steingass v. Steingass*, 8th Dist. Cuyahoga No. 97515, 2012-Ohio-1647, ¶ 12. (noting that when construing trusts courts apply the same rules of construction as those for interpreting wills); *See Arnott* at ¶ 14, quoting *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452. (noting that interpreting a trust is similar to interpreting a contract).

[31] *Barr v. Jackson*, 5th Dist. Delaware No. 08 CAF 09 0056, 2009-Ohio-5135, ¶ 34, citing *Townsend's Ex.'rs v. Townsend*, 25 Ohio St. 477 (1874).

[32] Id., quoting *Domo v. McCarthy*, 66 Ohio St.3d 312, 612 N.E.2d 706 (1993), paragraph one of the syllabus. *See Domo* at 318 ("[O]ur role is not to question a settlor's intentions.").

[33] *Domo* at 317 citing *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 577 N.E.2d 1077 (1993).

[34] *Lillard v. Lillard*, 63 Ohio App. 403, 408, 26 N.E.2d 933 (1st Dist. 1939).

interpretation, the canons of construction "should not be permitted to thwart the design and purpose of the testator when they may be ascertained from the language employed."[35] Accordingly, discerning the settlor's intent is case and fact specific.[36]

"Generally, when the language of the trust is not ambiguous, intent can be ascertained from the express terms of the trust itself."[37] To discern the settlor's intent, the court must read the trust as a whole.[38] The trust's "express language" guides the court in interpreting the settlor's intentions.[39] The "mere absence of a definition * * * does not make the meaning of [a] term ambiguous."[40] "Common words" are "given their ordinary meaning" except when "manifest absurdity results" or another "meaning is clearly evidenced by the face or overall contents" of the trust.[41]

The case of *Ford v. Armour*, 4th Dist. Pike No. 388, 1986 WL 3663 (March 20, 1986), serves as an example of how courts consider the trust as a whole to discern the settlor's intent. The competing interests were those of the testator's wife and daughter.

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[35] *McCulloch v. Yost*, 148 Ohio St. 675, 679 76 N.E.2d 707 (1947).

[36] *Evans* at ¶ 78, citing *In re Henderson*, 990 N.E.2d 189, 2013-Ohio-1380, ¶ 8. *See Moon v. Stewart*, 87 Ohio St. 349, 101 N.E. 344 (1913), paragraph one of the syllabus (noting that "where there are doubtful clauses in a will, the court, in determining the meaning that the testator intended they should have, will not be controlled * * * by judicial decisions, in cases apparently similar, but will interpret them reasonably in the particular case").

[37] *Domo*, 66 Ohio St.3d 312 at 314, 612 N.E.2d 706. *See McDonald v. Alzheimer's Disease Assoc.*, 140 Ohio App.3d 358, 363, 747 N.E.2d 843 (1st Dist. 2000) ("When the language of the trust instrument is unambiguous, a court can ascertain the settlor's intent from the express terms of the trust itself, and extrinsic evidence is not admissible to interpret the trust provisions.").

[38] *Evans*, 2014-Ohio-4450 at ¶ 16, citing *May v. Lubinski*, 9th District Summit No. 26528, 2013-Ohio-2173, ¶ 10.

[39] *Evans* at ¶ 16, quoting *People's Bank vs. Floyd Tome*, 4th Dist. Washington No. 10CA38, 2011-Ohio-5412, ¶ 23.

[40] *May*, 2013-Ohio-2173, ¶ 13, quoting *Nationwide Mut. Fire Ins. Co. v. Gunman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

[41] *Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, at 241, 374 N.E.2d 146. *See Ford v. Armour*, 4th Dist. Pike No. 388, 1986 WL 3663, *4 (March 20, 1986), citing *Townsend*, at the syllabus ("The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear [sic] from the context that they were used by the testator in some secondary sense.").

At the outset the court noted that the will and trust were unartfully drafted and several aspects of the trust should have been outlined by express provisions but were not.[42] In spite of the fact that significant words had been left undefined, the Fourth District Court of Appeals had to parse the interests of the wife and daughter.

The appellants argued that the wife received only a beneficial life interest in the trust, which terminated at her death, and thereafter the daughter was the sole beneficiary.[43] As part of the court's analysis, it considered the overarching purpose of the trust. It found "nothing in the will pointing to the fact that the daughter was intended as a greater object of his [the testator's] bounty as opposed to his wife."[44] As such, the court concluded that "[h]aving no evidence before us, it would appear reasonable that equal benefits from the trust were intended, absent trust provisions to the contrary."[45]

When a trust is "open to two constructions, and one will give effect to the whole, and the other will destroy a part, the former must always be adopted."[46] Hence, whenever possible "every word" the settlor used "should be given meaning and application."[47] The words that the settlor deliberately used are "presumed to have been placed there for a purpose and cannot be arbitrarily ignored."[48] In light of these

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[42] *Armour*, 1986 WL 3663 at *5 (March 20, 1986).
[43] Id.
[44] Id.
[45] Id.
[46] (Citation omitted.) *Davis v. Boggs*, 20 Ohio St. 550, 556 (1870).
[47] *See De Weese v. Piqua Memorial Hospital Ass'n*, 85 Ohio App. 310, 314-15, 82 N.E.d2d 870 (2nd Dist. 1948). (In giving meaning and applying every term, the court in *De Weese* interpreted the intent of the testator so that the will provisions were consistent and harmonious). *See Pierce Point Cinema 10, L.L.C.* at ¶ 11 ("A contract should also be construed so as to give effect to all of its provisions.").
[48] *Ford v. Armour*, 1986 WL 3663 at *5.

principles, the court's examination of the instrument "should attempt to harmonize all of the provisions of the document rather than to produce conflict within them."[49]

Although all words are presumed to have an application, when a clause is made in "clear and decisive terms," it cannot later be "cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, * * * nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest."[50] Additionally, the trust's specific provisions "take precedence over more general provisions and do not create an ambiguity."[51]

However, when "ambiguity exists" or the settlor's "intent is unclear," the court may admit extrinsic evidence to discern the settlor's intent.[52] Language is unambiguous when, "if from reading only the four corners of the instrument, such language is clear, definite, and subject to only one interpretation."[53] By contrast, a trust's "[l]anguage is ambiguous if the words of a writing are 'susceptible to two or more reasonable interpretations.' "[54]

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[49] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 11, citing *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720-953 N.E.2d 285, ¶ 37.
[50] *Collins v. Collins*, 40 Ohio St. 353, 364 (1883). *See In re Shira's Will*, 82 Ohio Law Abs. 307, 165 N.E.2d 60, 64 (P.C. 1959) (holding same).
[51] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 17.
[52] *Natl. City Bank v. Laville*, 170 Ohio App.3d 317, 2006-Ohio-5909, 867 N.E.2d 416, ¶ 28. *See Jackson*, 2009-Ohio-5135 at ¶ 35 (explaining that extrinsic evidence may be used when the language itself creates doubt as to the will's meaning).
[53] (Citation omitted.) *Phillips v. Farmers Ethanol, L.L.C.*, 7th Dist. Jefferson No. 12 JE 27, 2014-Ohio-4043, ¶ 16.
[54] (Citation omitted.) *Holdren v. Garrett*, 2011-Ohio-1095, ¶ 20. *See Evans*, 2014-Ohio-4450 at ¶ 23, quoting *May*, 2013-Ohio-2173 at ¶ 10 ("[A]mbiguity is defined as the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.").

When parol evidence is permitted, it enables the court to better understand the trust's terms and the settlor's intentions.[55] Courts have permitted extrinsic evidence of various kinds in such circumstances, including an affidavit from a drafting attorney regarding a settlor's intent,[56] testimony regarding conversations between the settlor and the drafting attorney,[57] the settlor's verbal conversations and instructions with others,[58] and evidence showing the settlor's actions were consistent with the trust's interpretation.[59]

In the case at bar, the issue is whether the trust's language relating to bequests to her grandchildren is ambiguous. Phrased differently, can Betty Woodall's intent "be ascertained from the express terms of the trust itself"?[60] If the language in the trust is ambiguous, then the parties may submit extrinsic evidence to show her intent.[61]

There are two main ways in which a grandchild of the settlor may receive a distribution from the trust. Under the Homestead Trust, a grandchild may take as "the issue to a deceased child surviving the Settlor."[62] In other words, a grandchild may receive a distribution if the grandchild is standing in the shoes of a deceased parent. Under the Family Trust, upon the settlor's death "each then living grandchild of the Settlor" shall receive "an equal separate" share of the Family Trust.[63]

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[55] (Citation omitted.) *Davis v. Boggs*, 20 Ohio St. 550 at 557. *See Hearty v. Renner Products Co.*, 15 Ohio Law Abs. 184, 185 (finding that when a trust is "imperfectly expressed in writing" the court may use parol evidence to "explain and complete the trust").
[56] *Michelsen-Caldwell v. Croy*, 6th Dist. Wood No. WD-08-001, 2008-Ohio-4281, ¶ 38.
[57] *Renner Products Co.*, 15 Ohio Law Abs. 184 at 185-86.
[58] *Linney v. Clevaland Trust Co.*, 30 Ohio App.345, 362, 165 N.E. 101 (8th Dist. 1928).
[59] *Renner Products Co.*, 15 Ohio Law Abs. 184 at 185-186.
[60] *Domo*, 66 Ohio St.3d 66 Ohio St.3d 312 at 314, 612 N.E.2d 706.
[61] *Laville*, 2006-Ohio-5909 at ¶ 28.
[62] Pls. Ex. A., Art. VII(1) at pg. 14.
[63] Pls. Ex. A, Art. IX at pg. 15.

The disagreement about whether the plaintiffs receive distributions from the Family Trust as grandchildren stems from the "Definition of children" in Article XIX, stating in pertinent part: "The terms 'child,' 'children,' 'issue,' 'descendant' and 'descendants' or those terms preceded by the terms 'living' or 'then living' shall include the lawful blood descendant in the first degree of the parent designated * * * however, these terms shall not include Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, or Jessica Ann Woodall as they are otherwise adequately provided for."[64] This definition of children clearly demonstrates the settlor's intent to exclude the plaintiffs from one or more bequests in the trust. The parties disagree on which bequests the four plaintiffs are excluded from.

Using the common meaning of the phrase "then living grandchildren," the plaintiffs qualify as grandchildren under the Family Trust. However, words are not "given their ordinary meaning" when another "meaning is clearly evidenced by the face or overall contents" of the trust.[65] Article XIX clearly evidences a different meaning for "those terms preceded by the terms 'living' or 'then living'." Hence, an interpretation of the Family Trust that excludes the plaintiffs is not a modification or re-writing of the Family Trust; rather it is merely the application of a defined term.

Moreover, a trust's specific provisions "take precedence over more general provisions and do not create an ambiguity."[66] Article IX, the Family Trust, generally provides that the settlor's grandchildren receive equal shares of the Family Trust. It does not name any particular grandchildren who are beneficiaries to or excluded from the Family Trust. Article XIX, on the other hand, is a specific provision because it

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[64] Pls. Ex. A., Art. XIX at pg. 19.
[65] *Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 at 241, 374 N.E.2d 146.
[66] *Pierce Point Cinema 10, L.L.C.*, 2012-Ohio-5008 at ¶ 17.

expressly excludes certain named grandchildren. As a specific provision, the explicit exclusion of the plaintiffs from the definitions in Article XIX take precedence over the general provision in the Family Trust that the general class of grandchildren will receive equal distributions.

The plaintiffs argue that Article XIX limits itself to defining "children" only.[67] Thus, under their framework, Article XIX would not impact the meaning of "grandchildren," as used in the Family Trust. While the heading for Article XIX is "Definition of Children," the body of that article clearly defines more terms than just children, including child, issue, descendant, and descendants. Further, Article XIX goes on to limit the definitions of child, children, issue, descendant, descendants, and those terms preceded by the terms living or then living. Certainly, the heading of Article XIX could have been drafted differently to more clearly reflect that Article XIX enumerates multiple definitions and limitations. Nevertheless, the substance of Article XIX has not restricted itself to defining solely children.

The parties have debated the meaning and effect of "these" and "those" as used in Article XIX. The plaintiffs' position is that "those terms" only refers to "'child,' 'children,' 'issue,' 'descendant' and 'descendants'." They submit that "these" and "those" are used as pronouns. The defendants argue that "those terms" refers to any term in the trust preceded by the words "living" or "then living." They submit that "these" and "those" are used as demonstrative adjectives.

"These" and "those" can be used as either part of speech. In the trust, "these" and "those" are used as adjectives because they are being used to describe a noun or a

[67] Pls. Mem. to Mot. for Summ. J. at pg. 6.

pronoun.[68] By contrast, a pronoun "substitutes for nouns or noun phrases and whose referents are named or understood in the context."[69] Article XIX provides:

> "The terms "child," "children," "issue," "descendant" and "descendants" or **those terms** preceded by the terms "living" or "then living" shall include the lawful blood descendant in the first degree of the parent designated even though such descendant is born after the death of such parent, however, **these terms** shall not include Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, or Jessica Ann Woodall as they are otherwise adequately provided for. (Emphasis added.)"

Both "those" and "these" are used to describe the noun "terms" and thus are adjectives. "These" is the plural of "this," and when in an adjective form it is "used to indicate the person, thing, or idea that is present or near in place, time, or thought or that has just been mentioned."[70]

Similarly, "those" is the plural of "that," and as an adjective it describes "the person, thing, or idea specified, mentioned, or understood" and is "farther away or less immediately under observation or discussion."[71] Hence, "those terms" are terms that are "farther away" from Article XIX. Contrastingly, "these terms" are terms that have "just been mentioned," which would include "child," "children," "issue," "descendant" and "descendants" or those terms preceded by the terms "living" or "then living." When the words "these" and "those" in Article XIX are substituted with their definitions, the resulting clause demonstrates that "those" means terms outside of Article XIX (e.g. "then living grandchildren" in Article IX):

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[68] *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/adjective (accessed Oct. 14, 2015).
[69] *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/pronoun (accessed Oct. 14, 2015).
[70] *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/this (accessed Oct. 14, 2015).
[71] *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/that (accessed Oct. 14, 2015).

> "The terms "child," "children," "issue," "descendant," "descendants" and terms farther away and not immediately under discussion preceded by the terms "living" or "then living" shall include the lawful blood descendant in the first degree of the parent designated even though such descendant is born after the death of such parent, however, the terms that have just been mentioned shall not include Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, or Jessica Ann Woodall as they are otherwise adequately provided for."

This illustration demonstrates why "those terms" is not a reference to "child," "children," "issue," "descendant," or "descendants."

Additionally, under the plaintiffs' suggested interpretation of Article XIX, no purpose is served by interpreting "those terms" as only referencing "child," "children," "issue," "descendant," or "descendants." Under the plaintiffs' reasoning, the terms "living" or "then living" only exclude the plaintiffs when they precede the terms "child," "children," "issue," "descendant," or "descendants." But "child," "children," "issue," "descendant," and "descendants" are already limited so as to exclude the plaintiffs. Stated differently, the terms "living" and "then living" do not exclude the plaintiffs unless they precede one of the five terms already defined to exclude the plaintiffs. Thus, in that case, the settlor would accomplish nothing by expressly stating that "terms preceded by 'living' or 'then living'" exclude the plaintiffs.

The words that the settlor deliberately used are "presumed to have been placed there for a purpose and cannot be arbitrarily ignored."[72] In order for the specific limitation the settlor placed upon terms preceded by "living" and "then living" to serve any purpose in the trust, the terms must apply to words other than "'child,' 'children,' 'issue,' 'descendant' and 'descendants'." In the trust the terms "living" and "then living" precede the word "grandchild" and "grandchildren," but at no point does "living" or "then

[72] *Armour,* 1986 WL 3663 at *5.

living" precede the terms "child" or "children."[73] In fact, the terms "living" or "then living" are only present in Article IX, which establishes the Family Trust.

Another rule of construction dictates that a clause made in "clear and decisive terms," cannot later be "cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, * * * nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest."[74] The plaintiffs argue that the bequest in the Family Trust is clear, but the language in Article XIX is "muddied." Hence, the "muddied" language cannot cut down the prior, clear bequest in the Family Trust to the plaintiffs as grandchildren.

While the bequest in the Family Trust is clear, so too is the language in Article XIX. As discussed, the exclusion of the plaintiffs as "grandchildren" is not a modification or re-writing of the Family Trust, but an application of a specific, defined term to a general provision. The settlor states: "* * *however, these terms shall not include Amy Nicole Woodall, James Joseph Woodall, Jeremy Ray Woodall, or Jessica Ann Woodall as they are otherwise adequately provided for." That language is clear that whenever one of the enumerated terms or phrases is used (i.e. child, issue, living, then living, etc.), that bequest does not include the plaintiffs.

Even assuming arguendo that this canon of construction is vitiated by "muddied language," it must be remembered that the canons of construction are "mere aids [that]

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[73] The plaintiffs also argue that the phrase "then living" limits the beneficiaries of the Family Trust to children born before the settlor died so that the bequest overcomes the anti-lapse statute. While this is a reasonable interpretation, it still does not explain why the settlor would have defined "then living" so as to exclude the plaintiffs specifically. If all the settlor intended for "then living" was overcoming the anti-lapse statute, she need not have defined "then living" as excluding plaintiffs.

[74] *Collins*, 40 Ohio St. at 364.

must yield to the primary rule that the intention as expressed must be given effect."[75] The canons of construction "should not be permitted to thwart the design and purpose" of the settlor.[76]

In the instant case, when the trust is read as a whole to discern the settlor's intent, the trust language is clear and unambiguous. The settlor did not want the plaintiffs to receive distributions from the Family Trust because she chose to use a defined term, "then living," and coupled it with the word "grandchildren."[77] Further, Article XIX begins with "For purposes of this Trust." There is no language restricting the definitions in Article XIX as only applying to the Homestead Trust. Rather, the language suggests the definitions apply to the entire trust instrument. Moreover, the Family Trust instructs that "[e]ach share shall be distributed or retained in the trust as hereinafter provided." The phrase "hereinafter provided" would necessarily include the definitions set forth later in the trust in Article XIX.

This case is distinguishable from *Ford v. Armour*, where the court held that the parties had equal interests in the settlor's trust after examining the trust as a whole. In *Armour*, there was "nothing in the will pointing to the fact that the daughter was intended as a greater object of his [the testator's] bounty as opposed to his wife."[78] As such, the court concluded "it would appear reasonable that equal benefits from the trust were intended, absent trust provisions to the contrary."[79] Unlike *Ford*, the trust at issue contains provisions that point to the conclusion that the plaintiffs were intended to be excluded. The plaintiffs are listed by name, and the trust rationalizes their exclusion

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[75] *Lillard*, 63 Ohio App. 403 at 409, 26 N.E.2d 933.
[76] *McCulloch*, 148 Ohio St. 675 at 679, 76 N.E.2d 707.
[77] *Evans*, 2014-Ohio-4450 at ¶ 16, citing *May*, 2013-Ohio-2173 at ¶ 10.
[78] *Armour*, 1986 WL 3663 at *5.
[79] Id.

because "they are otherwise adequately provided for." For the foregoing reasons, the court finds the trust language clearly evinces the settlor's intention to exclude the plaintiffs from receiving distributions under the Family Trust as "grandchildren."

However, the defendants posit that the trust contains latent ambiguity.[80] "A latent ambiguity is one that is not apparent from the face of the instrument."[81] Latent ambiguities arise in situations where the trust language is unambiguous, suggesting only a single meaning, but an extrinsic fact creates two or more possible meanings or the language applies equally well to two or more different items.[82] For example, such ambiguities arise where the trust incorrectly describes an object or a subject, where the object or subject does not exist, where the person referred to is unintended, or where property does not belong to the settlor.[83] When a latent ambiguity exists, extrinsic evidence may be introduced to resolve it.[84] In such a situation "extrinsic evidence is admissible, not for the purpose of showing the testator's intention, but to assist the court to better *interpret* that intention from the language used in the will."[85]

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[80] Defs. Mem. to Resp. at pgs. 8, 10.
[81] *Jackson*, 2009-Ohio-5135 at ¶ 36, quoting *Conkle*, 31 Ohio App.2d 44.
[82] *Jackson* at ¶ 36.
[83] Id. at ¶ 37. *See Walsh v. Walsh*, 13 Ohio App. 315 (1st Dist. 1920) (testatrix bequeathed two Louisville & Nashville Railroad Bonds to her sisters, but extrinsic evidence revealed that she really owned two bonds of Newport & Covington Bridge Company which owned and leased to Louisville & Nashville Railroad); *Kaplan v. Fair*, 6th Dist. Lucas No. L–03–1300, 2004–Ohio–3457 (uncontroverted extrinsic evidence, in form of affidavit from attorney of testatrix, introduced by executor of testatrix's will, established that will contained latent ambiguity in that attorney erroneously named "Joyce" Smith as testatrix's beneficiary, instead of "George" Smith, and, thus inclusion of "Joyce" Smith in will was error on part of attorney, in declaratory judgment proceeding involving construction of will).
[84] *Kaplan*, 2004-Ohio-3457 at ¶ 20.
[85] (Emphasis original.) *Radzisewski v. Szymanczak*, 8th Dist. No. 97795, 2012-Ohio-2639, ¶ 19 citing *Barr*, 2009–Ohio–5135 at ¶ 36.

The defendant posits that "the current dispute between the parties illustrates that there is latent ambiguity in the trust."[86] However, a trust's language is ambiguous when susceptible to two or more "reasonable interpretations."[87] For the reasons explained above, based on the trust's express language, there is but one "reasonable interpretation" of the Family Trust. The plaintiffs deny that there is latent ambiguity, and they do not cite to any extrinsic fact that would create latent ambiguity. Rather, their interpretation stems from the four corners of the trust instrument.[88]

Moreover, the latent ambiguity suggested by the defendants is distinguishable from the circumstances that typically lead to a latent ambiguity. For example, the trust did not incorrectly describe the property, the trust does not refer to property that does not exist, the trust did not erroneously name beneficiaries by making typographical errors, and the trust does not involve property belonging to someone other than the settlor.[89]

Furthermore, the affidavits submitted by the defendants, which are extrinsic evidence, do not create a latent ambiguity. As explained, the express language in the trust has a single meaning, which is that the plaintiffs are not beneficiaries to the Family Trust. Rather than create latent ambiguity, the affidavits corroborate the plain meaning

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[86] Defs. Mem. to Resp. at pg. 10.
[87] *Holdren*, 2011-Ohio-1095 at ¶ 20. *See Evans,* 2014-Ohio-4450 at ¶ 23 quoting *May*, 2013-Ohio-2173 at ¶ 10 ("[A]mbiguity is defined as the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.").
[88] If a latent ambiguity could be created merely by challenging the interpretation of a trust, as the defendants suggest, latent ambiguities would needlessly proliferate in most, if not all, trust cases. A party would not need any extrinsic fact to demonstrate a latent ambiguity. All that would be necessary is for one party to argue a different interpretation from another party. Ultimately, this would lead to the admission of extrinsic evidence in most cases, which contravenes the maxim that the settlor's intent should be gleaned from the four corners of the trust, when possible.
[89] *Jackson*, 2009-Ohio-5135 at ¶ 37. *See Walsh*, 13 Ohio App. 315; *Kaplan*, 2004–Ohio–3457.

expressed in the trust. The drafting attorney and co-trustees all aver that the settlor did not intend to include the plaintiffs because they had already received large gifts during her lifetime. When comparing this extrinsic evidence to the clear language in the trust, no ambiguities arise. Therefore, the trust's language remains unambiguous because there is no extrinsic fact that renders the trust "susceptible to two or more reasonable interpretations."[90]

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for partial summary judgment is not well-taken and is denied as to the plaintiffs' claim that the trust language unambiguously includes the plaintiffs as beneficiaries to Betty Woodall's Family Trust.

Within seven days of the date of this Decision/Entry, counsel shall conference and call the Assignment Commissioner at 732-7108 in order to schedule a Telephone Status Conference. The Telephone Status Conference shall be scheduled and held within 30 days of the date of this Decision/Entry.

IT IS SO ORDERED.

DATED: 10-23-15

Judge Jerry R. McBride

[90] (Citation omitted.) *Holdren*, 2011-Ohio-1095 at ¶ 20. *See Evans*, 2014-Ohio-4450 at ¶ 23, quoting *May*, 2013-Ohio-2173 at ¶ 10 ("[A]mbiguity is defined as the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.").