

In Re Omega Trust, Or, Beware the Emoji

When it comes to personal legal documents such as wills and trusts, a general rule is that the most recent, duly executed copy controls. And so thought certain beneficiaries of Mark Douglas of New Hampshire, only to be challenged in state court by individuals claiming Mr. Douglas had also made them beneficiaries of his revocable living trust, even though no language identifying them as such was in the trust document itself. The question before the lower New Hampshire court and ultimately the New Hampshire Supreme Court was whether late-in-life emails from Mr. Douglas to his attorney, in themselves, were a valid amendment to the trust.

Facts

Mr. Douglas as grantor executed The Omega Trust on December 30, 2005,¹ as a revocable trust for his benefit during his lifetime and retained the power to amend or revoke the trust. (Unusual for a revocable living trust, the grantor appointed someone else as trustee.) Mr. Douglas amended the trust twice in 2015. The second 2015 amendment altered the trust's terms of revocation, amendment, and execution. In 2016 he exchanged a series of emails with his trustee, his attorney, and his trust protector proposing a third trust amendment that included, among other things, adding four new beneficiaries. Douglas's attorney acknowledged the request and was preparing the amendment for signature when Douglas died.

One of the four new beneficiaries petitioned the New Hampshire district court to recognize the supposed third amendment. That court dismissed the petition, and the New Hampshire Supreme Court heard the matter on appeal. In its opinion, that court established a liberal threshold for trust amendment based on "clear expression of intent even if inconsistent with stated formalities in the terms of the trust" and recognizing that "the settlor's power to revoke or modify the trust can be exercised in any way that provides clear and convincing evidence of the settlor's intention." The emails and other statements by Mr. Douglas evidenced his intent to amend the trust and the terms he wanted, and the 2016 trust beneficiaries prevailed.

Significance and Potential Impact

New Hampshire, like most states, enacted a version of the Uniform Trust Code (UTC) and recognizes the Restatement (Third) of Trusts, and the quotations above are taken from each of these. This is significant because even though the 50 individual states each developed independent bodies of law through their 200+ years of existence, most strive for commonality with the others by looking to the Uniform Trust Acts and various Restatements published from time to time by the Uniform Law Commission and American Law Institute, two non-profit organizations whose goals include ensuring consistency among jurisdictions. In other words, a liberal interpretation of one trustor's intent in one case in one small state based on these authorities may well result in similar interpretations of similar facts in other state courts.

What makes the outcome of this case unusual is that even though the grantor's electronic communications stated his wish to amend, reflecting his intent, no communication on either side contained a complete and final writing of an amendment. In New Hampshire, at least, the ruling may

well lead to email reviews by potential claimants who believe they should have been beneficiaries of a decedent's trust or estate. And what other kind of electronic communication might come into play?

Though unrelated, a subsequent 2023 Canadian opinion deemed a "thumbs-up" emoji in contract negotiations sufficient evidence to bind one of the parties in the case.² And there have been U.S. cases where the use of an emoji came under a court's review, though unlike the Canadian case, none were adverse to the person who sent the emoji.³ When viewed together with the Omega Trust case, it's clear that in today's world, where more information is conveyed electronically than ever before, these communications can have unexpected and unintended consequences in court.

It could be argued that the Court in the Omega case could hardly reach a different conclusion given the text it had to work with and the authorities it relied on. To avoid this outcome, a revocable trust might simply describe the method for amending its terms, such as in a signed, dated writing containing the language of the amendment and delivered to the Trustee, and then state that the provision is the exclusive method for amending the trust and any other method of amending it is deemed ineffective.

Conclusion

In cases where a life insurance death benefit is paid by the testamentary terms of a will or revocable trust, beneficiaries and trustees are involved if a legal dispute related to an electronic communication arises, which can potentially delay payment of the proceeds. Financial professionals can share these cautionary tales and explain to the client and estate planning attorney how the use of clear, exclusive language when drafting documents is one way to help safeguard against this outcome.

If you have a wealth transfer or trust planning opportunity, Prudential's Individual Life Advanced Planning team wants to help. We look forward to being of assistance, and can be reached at 800-800-2738, Option 4.

¹ *In re Omega Tr.*, 175 N.H. 179, 281 A.3d 1281 (N.H. 2022).

² *South West Terminal Ltd. v. Achter Land*, 2023 SKKB 116 (CanLII) (June 8, 2023).

³ See e.g. *Lightstone RE LLC v Zinntex LLC*, 2022 N.Y. Misc. LEXIS 5925 (N.Y. Supreme Ct. Aug. 25, 2022); *Bardales v. Lamothe*, 2019 U.S. Dist. LEXIS 186273 (M.D. Tenn. Oct. 25, 2019).

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