[Cite as *Evans v. Evans*, 2014-Ohio-4450.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

RANDALL L. EVANS AND DEBORAH E. CRABTREE, SUCCESSOR CO-TRUSTEES OF THE DAVID W. EVANS AND CAROL M. EVANS TRUST,	:	Case Nos. 12CA5 12CA6
Plaintiffs-Appellees,	:	
vs.	:	DECISION AND JUDGMENT ENTRY
DAVID W. EVANS, ET AL.,	:	
Defendants-Appellants.	:	**Released: 10/02/14**

APPEARANCES:

Richard M. Lewis, Christen N. Finley, and Suzanna T. King, The Law Firm of Richard M. Lewis, LLC, Jackson, Ohio, for Appellants David W. Evans and David A. Kelly, Guardian of the Estate of David W. Evans, Sr.

Eric. J. Wittenburg, Jennifer L. Routte, and Treisa L. Fox, Wittenberg Law Group, Reynoldsburg, Ohio, for Appellants Randall L. Evans, Deborah E. Crabtree, David W. Evans, Jr., and Ellen McCabe, individually.

Steven D. Rowe and Erica Ann Probst, Kemp, Schaeffer & Rowe Co., LPA, Columbus, Ohio, for Appellees Randall L. Evans and Deborah E. Crabtree, Successor Co-Trustees of the David W. Evans and Carol M. Evans Trust.

Russell N. Cunningham and Troy A. Callicoat, Barrett, Easterday, Cunningham & Eselgroth LLP, Dublin, Ohio, and Lorene G. Johnston, Jackson, Ohio, Co-counsel for Appellee Carl Michael Evans.

McFarland, J.

{¶1} This consolidated appeal arises from the decision of the Jackson County Common Pleas Court, Probate Division, dated May 3, 2012, regarding the interpretation of a revocable trust established in 2003. The trust is known as the "David W. Evans and Carol M. Evans Trust." The court's entry decided Counts One, Two, Three, Four, Five, Seven, Eight, and Nine of Plaintiff's amended complaint for declaratory judgment. Defendants-Appellants David W. Evans, Sr., and David A. Kelly, Guardian of the Estate of David W. Evans, Sr., appealed the decision and were assigned appellate case number 12CA5. Appellants Randall L. Evans, Deborah E. Crabtree, Ellen E. McCabe, and David W. Evans, Jr., individually, also appeal the same decision, and were assigned appellate case number 12CA6. For the reasons which follow, we affirm the judgment of the trial court and overrule all assignments of error.

I. FACTUAL AND PROCEDURAL HISTORY

{¶2} David W. Evans, Sr., (David) and Carol M. Evans (Carol) were first married in 1952. The couple had five children: Deborah Crabtree, David W. Evans, Jr., Carl Michael Evans, Randall L. Evans, and Ellen McCabe. Over the course of their relationship, David and Carol divorced twice and remarried a third time in October of 1996.

{¶3} Mr. and Mrs. Evans acquired vast real and personal property during the course of their lives together. David purchased and developed property throughout Jackson County. Carol was a school teacher and administrator. David also purchased cattle and farming equipment. The farm was worked and managed by the couple's son, Carl Michael (Carl), and his son Michael. In 2002, Carl was severely injured while working on the farm.

{¶4} On July 31, 2003, Mr. and Mrs. Evans executed the "David W. Evans and Carol M. Evans Trust," (hereinafter Trust). In 2006, David suffered a stroke. He had a lengthy hospitalization and nursing home stay. When David recovered he began socializing with unsavory individuals in the Jackson County area and giving away large amounts of money to some of these individuals.

{¶5} On March 26, 2008, Carol was murdered by Terry Vance.[1] After Carol's death, David signed amendments to the Trust and resigned as trustee. Randall L. Evans and Deborah E. Crabtree became the co-trustees of the Trust. On January 20, 2010, David was found guilty of various charges relating to Carol's murder, including murder and conspiracy. His criminal conviction was upheld on appeal.

[1] A woman David had been associating with, Heather Speakman, was also involved with Carol's murder and was also convicted on various felony charges.

{¶6} Plaintiffs Randall L. Evans and Deborah E. Crabtree, as co-trustees of the Trust filed a complaint for declaratory judgment and instructions on October 30, 2009, seeking guidance as to the interpretation and administration of the Trust. Their father and the five Evans children were named as defendants. On November 25, 2009, Plaintiffs filed an amended complaint. All parties filed timely answers to the amended complaint. By entry dated May 6, 2010, David A. Kelly, Guardian of the Estate of David W. Evans, Sr., was substituted as a party defendant in the declaratory judgment action.

{¶7} The trial court conducted hearings on the various claims set forth in the amended complaint. These claims for relief are summarized as follows:

> Count 1: Was the trust valid?
>
> Count 2: Did the trust provisions require arbitration, or could it be waived?
>
> Count 3: Was David's amendment to the original trust valid?
>
> Count 4: Did application of R.C. 2105.19 prohibit plaintiffs from distributing income from the trust towards defense costs on behalf of David and did the statute operate to foreclose David as to any rights to income and principal of the trust, for any purpose?
>
> Count 5: Was Carl entitled to trust notices and annual reports?

> Count 6: Was Carl required to account for income associated with his operation of Franklin Valley Farms?
>
> Count 7: Who was the proper payee of the obligation associated with the purchase of the Evans Center from the trust?
>
> Count 8: What were the rights and responsibilities of the defendants in connection with the original trust as amended?
>
> Count 9: Were the assets of David and Carol to be treated as separate property, pursuant to Article VII(C) of the trust?
>
> Count 10: Should a constructive trust be imposed and an accounting required over any trust property under the control of Carl?

{¶8} In his answer, Carl Evans filed various counterclaims. He alleged that the co-trustees/plaintiffs had used trust funds to pay for the criminal defense of their father. Carl also alleged that plaintiffs had trespassed on his property and destroyed his hay crop. Carl requested the following relief: (1) that the court interpret the trust; (2) that the court remove the successor co-trustees, and appoint a special fiduciary; and (3) that he be awarded treble damages for his lost hay crop.

{¶9} Eventually, the parties entered into various stipulations of fact. In resolution of counts 1 and 2, the parties stipulated the trust was valid and waived arbitration. On October 21 and 22, 2010, the trial court heard

evidence and arguments on counts 3, 7, and 9. On March 21, August 23, 24, and 25, 2011, the trial court heard testimony and argument on counts 4, 5, 6, 8, and 10. Also on March 21, the parties agreed that all parties would receive trust notices, effectively resolving count 5. On May 3, 2012, the trial court issued its final decision/order/entry. This timely appeal followed.

{¶10} Appellate case number 12CA5 was filed by David A. Kelly, as Guardian of the Estate of David W. Evans, Sr. Hereinafter, Appellant in this case shall be referred to as "Guardian."

II. ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN ITS MAY 3, 2012 ENTRY BY APPLYING THE "SLAYER STATUTE," R.C. 2105.19, TO VESTED PROPERTY RIGHTS APPELLANT DAVID W. EVANS HAD BEFORE CAROL M. EVANS' DEATH, WHICH IS BEYOND THE SCOPE OF THE SLAYER STATUTE AND IN VIOLATION OF ARTICLE I, SECTION 12, OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED IN ITS MAY 3, 2012 ENTRY BY ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, AND LOOKING BEYOND THE FOUR CORNERS OF THE TRUST TO INTERPRET, DEFINE AND IDENTIFY "SEPARATE" AND "COMMONLY OWNED" PROPERTY IN A WAY THAT CONTRADICTS ARTICLES III AND VII OF THE TRUST.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY FINDING THAT THE "SLAYER STATUTE" APPLIES TO CAUSE APPELLANT DAVID W. EVANS TO FORFEIT ANY RIGHTS HE HAD TO THE ORCHARD LOTS, TRAGO STREET, AND THE NOTE RECEIVABLE AND PAYMENTS THERUNDER FROM THE SALE OF THE EVANS CENTER, BECAUSE IT FOUND SUCH

PROPERTY TO CONSTITUTE "COMMONLY OWNED" PROPERTY.

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY APPLYING THE "SLAYER STATUTE" TO DIVEST APPELLANT DAVID W. EVANS OF ASSETS WHICH IT DETERMINED TO BE "COMMONLY OWNED" TRUST ASSETS, AND BY ORDERING THE TRUSTEES TO REPLACE FROM APPELLANT'S SEPARATE PROPERTY ASSETS ANY DISTRIBUTIONS THAT WERE MADE FROM ASSETS OTHER THAN THOSE THAT WERE HIS SEPARATE PROEPRTY, AS DETERMINED BY THE COURT.

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY FINDING THAT THE "SLAYER STATUTE" TERMINATED APPELLANT DAVID W. EVANS' RIGHT TO AMEND THE TRUST AS TO HIS VESTED PROPERTY RIGHTS.

VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, FINDING THAT THE TRUST OPERATED LIKE A JOINT AND SURVIVORSHIP BANK ACCOUNT.

{¶11} Appellate case number 12CA6 was filed by Appellants Randall L. Evans, Deborah E. Crabtree, Ellen E. McCabe, and David W. Evans, Jr. Hereinafter, these Appellants shall be referred to as "The Evanses."

ASSIGNMENTS OF ERROR

I. AS TO CLAIM NINE, THE TRIAL COURT ERRED IN FINDING THAT THE TRUSTORS ASSIGNED ALL PROPERTY THAT THEY OWNED AT THE TIME THE TRUST WAS SIGNED TO THE TRUSTEES. [2]

[2] On October 21, 2010, prior to taking testimony on Claim 9, a verbal motion to amend Count 9 was made to include a request that the Court determine what assets of David and Carol had been contributed to the Trust. All parties consented to the motion and the court ordered Count 9 be amended.

II. AS TO CLAIM NINE, THE TRIAL COURT ERRED IN ITS DEFINITION OF "SEPARATE PROPERTY" AND IN ITS RELIANCE ON PAROL EVIDENCE OUTSIDE THE FOUR CORNERS OF THE TRUST DEFINING SEPARATE AND COMMON PROPERTY.

III. AS TO CLAIM FOUR, THE TRIAL COURT ERRED IN ITS APPLICATION OF R.C. 2105.19, (THE "SLAYER STATUTE"), ITS FINDING THAT A TRUST IS SIMILAR TO THAT OF A JOINT AND SURVIVORSHIP BANK ACCOUNT AND IS TREATED THE SAME FOR PURPOSES OF THE SLAYER STATUTE, AND ITS FINDING THAT DEFENDANT DAVID W. EVANS, SR., IS DEEMED TO HAVE PREDECEASED CAROL M. EVANS, DECEDENT, "AS TO ALL ASSETS THE COURT SPECIFIES IN THIS DECISION TO BE PART OF THE TRUST," INCLUDING THE PROPERTY DETERMINED TO BE "COMMON PROPERTY."[3]

IV. AS TO CLAIM SEVEN, THE TRIAL COURT ERRED IN FINDING THAT THE EVANS CENTER PAYMENTS WERE JOINT PROPERTY INSTEAD OF DAVID W. EVANS, SR.'S SEPARATE PROPERTY.

V. AS TO CLAIM EIGHT, THE TRIAL COURT ERRED IN FINDING THAT ARTICLE XXIII OF THE TRUST FULLY CONTROLS THE DISTRIBUTION OF THE ASSETS AND THAT ARTICLE XIII WAS INCLUDED IN THE TRUST BY ERROR.

VI. AS TO CLAIM THREE, THE TRIAL COURT ERRED IN ITS DENIAL TO APPLY R.C. 5804.12 AFTER IT FOUND THAT ARTICLE XIII HAD NO EFFECT ON THE TRUST.

{¶12} In addition to the above assignments of error, Plaintiffs-Appellees Randall L. Evans and Deborah E. Crabtree, successor co-trustees

[3] As to Count 4, the parties agreed and consented to the application of R.C. 2105.19, the "Slayer Statute," to prevent the trustees from making any distributions of income and or principal to David from life insurance proceeds the trustees received as a result of Carol's death. The parties also agreed David is deemed to have predeceased Carol for any assets the Court determined to be Carol's "separate property."

of the David W. Evans and Carol M. Evans Trust (successor-co-trustees), filed an appellate brief in the consolidated appeal. The successor co-trustees set forth two assignments of error, as follows:

I. THE TRIAL COURT COMMITTED ERROR AS A MATTER OF LAW WHEN IT APPLIED THE "SLAYER STATUTE" (R.C. 2105.19) TO VESTED PROPERTY RIGHTS OF DAVID W. EVANS, AN APPLICATION WHICH VIOLATES ARTICLE I, SECTION 12 OF THE OHIO CONSTITUTION. [MAY 3, 2012 FINAL DECISION/JUDGMENT ENTRY PGS.6-11].

II. THE TRIAL COURT COMMITTED ERROR BY ORDERING THAT THE TRUSTEES REPLACE FROM APPELLANT DAVID W. EVANS SEPARATE PROPERTY ANY DISTRIBUTIONS MADE FROM ASSETS OTHER THAN THOSE DEEMED TO BE HIS SEPARATE PROPERTY. [MAY 3, 2012 FINAL DECISION/JUDGMENT ENTRY PGS. 10,13].[4]

III. STANDARD OF REVIEW

{¶13} The determination of the meaning of disputed language of a trust is a question of law. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. "A court's purpose in interpreting a trust is to effectuate, within the legal * * * parameters established by a court or by statute, the settlor's intent." *Arnott*, *supra*, at 14, quoting *Domo v. McCarthy*, 66 Ohio St.3d 312, 612 N.E.2d 706 (1993), paragraph one of the syllabus. Interpreting a trust is akin to interpreting a contract; as with trusts,

[4] Appellee Carl Michael Evans filed a Motion to Strike the successor co-trustees' brief on the ground that it was not a properly perfected cross-appeal. The successor co-trustees responded that they are simply in agreement with two assignments of error previously set forth in the consolidated appeal. We denied the motion to strike. In the interests of justice, we will consider the successor co-trustees assignments of error in conjunction with the other assignments set forth herein.

the role of courts in interpreting contracts is "to ascertain and give effect to the intent of the parties." *Arnott, supra,* at 14, quoting *Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. The Supreme Court of Ohio has held that "[t]he construction of a written contract is a matter of law that we review de novo." *Arnott*, at 23, citing *Saunders, supra,*at 9. The same is true of the construction of a written trust; in both *In re Trust of Brooke*, 82 Ohio St.3d 553, 697 N.E.2d 191 (1998), and *Natl. City Bank v. Beyer,* 89 Ohio St.3d 152, 729 N.E.2d 711 (2000), the Supreme Court of Ohio applied a de novo standard of review in interpreting trust language in appeals of declaratory judgments.

{¶14} In the trial of any case, civil or criminal, the weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of fact to decide. *McDonald v. Alzheimer's Disease Assoc.*, 140 Ohio App.3d 358, 364, 747 N.E.2d 843 (1st Dist.2000), citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E. 2d 212 (1967), paragraph one of the syllabus.

IV. LEGAL ANALYSIS

A. The trial court's determination regarding trust property contained within the Trust.

{¶15} We begin with assignment of error one, appellate case number 12CA6.

I. AS TO CLAIM NINE, THE TRIAL COURT ERRED IN FINDING THAT THE TRUSTORS ASSIGNED ALL PROPERTY THAT THEY OWNED AT THE TIME THE TRUST WAS SIGNED TO THE TRUSTEES.

{¶16} R.C. 2721.05, part of the Declaratory Judgment Act, allows a trial court to interpret and construe provisions in a Trust. *In re Arnott,* 190 Ohio App.3d 493, 2010-Ohio-5392, 942 N.E.2d 1124, at ¶ 26. "Interpreting a trust is akin to interpreting a contract * * *." *May v. Lubinski,* 9th Dist. Summit No. 26528, 2013-Ohio-2173, 2013 WL 2326996, ¶ 10, quoting *Arnott* v. *Arnott,* 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. Therefore, the trust must be read as a whole to discern the intent of the settlor. *May, supra* at ¶ 10; See, *Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 6. "When construing provisions of a trust, our primary duty is to 'ascertain, within the bounds of the law, the intent of the * * * settlor.'" *People's Bank vs. Floyd Tome,* 4th Dist. Washington No. 10CA38, 2011-Ohio-5412, ¶ 23, quoting *In the Matter of the Trust of Brooke,* 82 Ohio St.3d 553, 557, 1998-Ohio-185, 697 N.E.2d 191. "The express language of the trust guides the court in determining the intentions of the settlor." *Tome, supra,* at ¶ 23, quoting *Brooke* at 557, 697 N.E.2d 191, citing *Casey v. Gallagher,* 11 Ohio St.2d 42, 227 N.E.2d 801 (1967). "Any words used in the trust are presumed to be used according to their common, ordinary meaning." *Tome, supra* at ¶ 23, quoting *Brooke* at 557,

697 N.E.2d 191, citing *Albright v. Albright,* 116 Ohio St. 668, 157 N.E. 760 (1927).

{¶17} The trust was signed by both David and Carol Evans on July 31, 2003. The trial court made the following finding:

> "[P]ursuant to the express terms of Article VII of the Trust, David W. Evans and Carol M. Evans assigned all their real and personal property, whether titled or not, to the Trustee(s) at the time the Trust was signed on July 31, 2003. As to non-titled assets, the transfer took place both legally and equitably upon signing the document."
>
> * * *
> "The Court also finds that Article VII does not create an assignment of property which the Trustors, or either of them, acquired after July 31, 2003."

{¶18} Appellants Randall, Deborah, David, and Ellen (the Evanses) argue the language relied on by the trial court is precatory and was erroneously interpreted as an assignment. Black's Law Dictionary defines "precatory language" as "having the nature of prayer, request, or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." 6th Ed. 1991. The Evanses argue the trial court focused on two lines in Article VII of the 64-page, poorly-drafted trust, specifically:

> "[T]he Trustors intend this Trust to be the recipient of all their assets, including without limitation assets whether commonly owed, jointly owned, marital, deferred marital, community, quasi-community or separate. The Trustor(s) intend this trust to

> be the named beneficiary of all interest of which either or both Trustor(s) are, or may become, Beneficiaries."

The Evanses argue the preceding language does not constitute a present assignment of all property to the Trust. The Evanses further argue the inclusion of Article IV(b) which reserves the right to add or withdraw property from the Trust, demonstrates they did not intend for all their property to be automatically swept into the Trust. These appellants point out there is no mention of timing when the property would be transferred into the Trust. However, Appellee Carl Evans argues the trial court did not err by adopting the plain language of the Trust and applying its provisions to all the real or personal property of David and Carol in existence on July 31, 2003.

{¶19} Based upon our de novo review of the record, we agree with the trial court's finding that Mr. and Mrs. Evans assigned all of their real and personal property, titled or not, to the trust on the date of its signing, July 31, 2003. As indicated above, in construing a trust, we must read the trust as a whole. *May*, at ¶ 10. We begin by acknowledging Article VII's first sentence contains language which appears precatory in nature: "The Trustors intend this trust to be the recipient of all their assets, including without limitation assets whether commonly owned, jointly owned, marital, deferred, marital, community, quasi-community or separate." However, the

express terms of Article VII, paragraph (a), employed subsequently, do state as follows: "The Trustor(s) have paid over, assigned, granted, conveyed, transferred, and delivered, and by this Trust Agreement do hereby pay over, assign, grant, convey, transfer and deliver unto the Trustee(s) their property…." Words used in a trust are presumed to be used according to their common ordinary meaning. *Tome, supra*, at ¶ 23, quoting *Brooke* at 557, 697 N.E.2d 191, citing *Albright v. Albright*, 116 Ohio St. 668, 157 N.E. 760 (1927). The language "do hereby pay over, assign, grant, convey, transfer, and deliver is clear and unambiguous." And, David and Carol, "by this Trust Agreement" signed on July 31, 2003, did grant, convey, and deliver their real and personal property, titled or not, to the trust. The Evanses' argument that the timing for the property to be conveyed to the trust is not stated does not have merit.

{¶20} The language which the Evanses argue is precatory actually reveals evidence of Mr. and Mrs. Evans' intent. Read together with the earlier paragraph contained in Article VII regarding David and Carol's intent that the trust be the recipient of "all their assets" presumably lead the trial court, and us, to find the language constitutes an effective present assignment to the trust. David Evans was a high school graduate and a business man. Carol Evans had a college degree and had been a school

teacher. Both had bought and sold property, together and separately, for over 30 years. There is evidence in the record that David and Carol had two meetings with the attorney or attorneys who drafted the trust and kept the trust papers overnight. It appears both David and Carol had the opportunity to read the trust. Despite the use of technical language and the conflicting provisions contained later on in the agreement, we find no reason to believe David and Carol were incapable of understanding the word "intend," the phrase "all their assets" and "by this Trust Agreement," or the language of transfer "pay over, assign, grant, convey, transfer, and deliver." For the above reasons, we find no merit to this assignment of error and it is, hereby, overruled.

B. The trial court's interpretation of "separate" and "commonly owned" trust property.

{¶21} We next consider assignment of error two, appellate case number 12CA5, jointly, with assignment of error two in appellate case number 12CA6.

> II. THE TRIAL COURT ERRED IN ITS MAY 3, 2012 ENTRY BY ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, AND LOOKING BEYOND THE FOUR CORNERS OF THE TRUST TO INTERPRET, DEFINE, AND IDENTIFY "SEPARATE" AND "COMMONLY OWNED" PROPERTY IN A WAY THAT CONTRADICTS ARTICLES III AND VII OF THE TRUST.

II. AS TO CLAIM NINE, THE TRIAL COURT ERRED IN ITS DEFINITION OF "SEPARATE PROPERTY" AND ITS RELIANCE ON PAROL EVIDENCE OUTSIDE THE FOUR CORNERS OF THE TRUST DEFINING SEPARATE AND COMMON PROPERTY.

{¶22} The Guardian argues the language of Article VII was clear and unambiguous and the trial court erred by looking to the Memorandum of Trust for guidance. The Guardian contends the trial court should have interpreted "separate property" and "commonly owned property" by looking to the four corners of the document and the plain meaning of the terms. Appellants, the Evanses, also argue the trial court erred when it disregarded language in Article VII, Sections (a), (b), and (c), and relied on the Memorandum of Trust. Appellee Carl Evans responds that the trial court did not err in looking to the Memorandum of Trust as the language contained in Article VII was ambiguous. Relevant to the consideration of these related assignments of error, the trial court found as follows:

> "Although the Memorandum of Trust purports to be for convenience only (paragraph 1) , it is, nonetheless, indicative of what the Trustors knew or should have known when they signed the Trust and what they should do when transferring assets to the trust. The Memorandum clearly indicates that "separate property" should be identified and two options as to how "separate property" could be identified (paragraph 8.)."
>
> * * *
>
> "It would have been very easy for Trustors to designate their assets as "separate" or "common," if they so desired. The parties took no steps to identify "separate property." The

> Trustors did keep some property in the name of just one of the Trustors, which has been the separate property of that Trustor prior to the Trustors' most recent marriage. Accordingly, the Court believes the only property that should be considered "separate property" for purposes of the Trust is any property that was titled in the name of one Trustor prior to the Trustors' most recent marriage and remained so titled by the same titling instrument through the date of death of Carol M. Evans (not physically titled into the names of the Trustees of the Trust prior to such decision.)" [5]
>
> * * *
> "The "Slayer Statute" does not apply to the "separate property" described in this paragraph. David W. Evans also owns other "after acquired" property outside of the Trust that is not impacted by this Decision…."

{¶23} When construing the provisions of a trust, a court must ascertain, within the bounds of the law, the settlor's intent. *McDonald v. Alzheimer's Disease Assoc.* 140 Ohio App.3d 358, 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. *Id.*, citing *Domo v. McCarthy,* 66 Ohio St.3d 312, 314, 612 N.E.2d 706, 708 (1993); *PNC Bank, N.A. v. Camping & Edn. Foundation,* 1st Dist. Hamilton No. C-990690, 2000 WL 331635. However, where ambiguity exists in a

[5] In its May 3, 2012 decision, the trial court found: "As of the date of this Decision, the only 'separate property' of David W. Evans in the hands of the Trustees is the following: Liberty Life Insurance Policy No. XF10195958 on the life of David W. Evans and David W. Evans' remaining interest in the property acquired in the deeds attached as Exhibit 4, 35, and 40(all the same deed) and 5, 36, and 41(all the same deed) (excluding the property conveyed in deeds attached as Exhibits E, 37 and 42) of the document in the record titled "supplement to Stipulation of Facts Filed by All Parties on September 9, 2010.'"

trust instrument or the settlor's intent is unclear, a court may look to extrinsic evidence to determine the settlor's intent. *McDonald, supra.* "[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." *May,* at ¶ 13, (Internal quotations and citations omitted.) *Robinson v. Beck,* 9th Dist. No. 21094, 2003-Ohio-1286, ¶ 10. If a writing is ambiguous, parol evidence is admissible to interpret, but not to contradict the express language. *McDonald, supra,* citing *Pharmacia Hepar, Inc.v. Franklin,* 111 Ohio App.3d 468, 475, 676 N.E.2d 587, 592 (1996); *Ohio Historical Society v. General Maintenance & Engineering Co.,* 65 Ohio App.3d 139, 146, 583 N.E.2d 340, 344 (1989). The Guardian argues the trial court found Article VII, which assigned all the Evanses' property to the Trust, to be clear and unambiguous, while disregarding other clear and unambiguous language contained in Article III. In particular, Article VII also stipulates the property in the Trust "shall retain its character." Article III provides: "…property held in any Trust created herein as the separate property of either Trustor shall be solely administered under the authority of the Trustor whose property it is, so long as she is living and competent."

{¶24} The Guardian argues the language contained in Articles III and VII plainly indicates the settlors intended the property transferred into the Trust to keep its character, i.e., property owned by David before July 21, 2003 remained his for him to administer as he saw fit, with the same being equally applicable as to Carol's separate property. Therefore, the trial court's analysis should not have gone beyond the four corners of the trust document to the Memorandum of Trust to interpret the settlors' intent and define the meaning of "separate" and "commonly owned" property. The Guardian also points out all parties, despite the poor draftsmanship of the Trust, prior to trial stipulated to its validity. The Guardian argues it was error for the trial court to consider paragraph (8) of the Memorandum of Trust when interpreting the term "separate property" as used in the Trust. The Guardian points out paragraph (1) of the Memorandum, clearly states: "The use of this abstract, although helpful where used with transfer letters, is for convenience only. Any interpretations as to the provisions of the trust must be found in the trust and not in the abstract." The Guardian notes the trial court deemed paragraph (8) in the Memorandum to require Mr. and Mrs. Evans to prepare a list of separate property, which was apparently never done.[6] The guardian contends the lack of a list was the basis for the

[6] No list of separate property was ever introduced into evidence.

determination that there was no separate property of either Dave or Carol in the Trust. Finally, the Guardian suggests utilizing the definitions of "separate" and "commonly owned" contained in Black's Law Dictionary or referring to those definitions under Ohio law, specifically R.C. 3105.171, to which David and Carol, divorced twice, would have had some familiarity.

{¶25} Appellee Carl Evans responds that the Memorandum, although acknowledged for purposes of convenience, is nonetheless indicative of what the Trustors knew or should have known when they signed the Trust. The Memorandum clearly indicated that "separate property should be identified" and presented two options for doing so. Carl argues after the trial court noted the provisions of the Trust to be contradictory regarding "separate property," it was entitled to examine the Memorandum for evidence of the trustors' intent.

{¶26} **A**ll parties have urged us to look to the Ohio statutes regarding division of assets and, we further note, Mr. and Mrs. Evans were educated people, experienced in business and acquisition of property, and had been through domestic relations court on more than one occasion. We pause to discuss how characterization of property as "separate" or "marital" is handled by a trial court in divorce proceedings. When a trial court grants a divorce, the court must determine what constitutes the parties' marital

property and what constitutes their separate property. *Barkley v. Barkley*, 119 Ohio App.3d 155, 694 N.E.2d 989 (4th Dist. 1997); R.C. 3105.171(B). However, the trial court's characterization of the parties' property involves a factual inquiry. *Barkley, supra*; *Wright v. Wright*, 4th Dist. Hocking No. 94CA2, 1994 WL 649271. As an appellate court, we review such factual determinations under the standard of manifest weight of the evidence. *Wylie v. Wylie* 4th Dist. Lawrence No. 95CA18, 1996 WL 2902044; *Miller v. Miller*, 4th Dist. Washington No. 93CA7, 1993 WL 524966. A judgment of a trial court will not be reversed as being against the manifest weight of the evidence if the court's judgment is supported by some competent, credible evidence. *Barkley, supra*; Sec. *Pacific Natl. Bank v. Roulette*, 24 Ohio St.3d 17, 20, 492 N.E.2d 438, 440 (1986); *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶27} We have already found the trial court's ruling that all property as of July 31, 2003 was given to the trust, by virtue of the Trust agreement, as indicated in Article VII. Article VII clearly states the Trust is to be the recipient of "all our assets." However, Article VII goes on to provide for "commonly owned property" in subsection (b) and "separate property" subsection (c). Furthermore, Article III gives each trustee the authority to act independently in performing transactions on behalf of the trust, however,

it also provides: "[e]xcept as to transactions involving a real property owned by the Trustor(s) which shall require the joint consent and signatures on all sale and transfer documents of both the Trustor(s)…." These provisions are inconsistent. While the Trust language assigned all property to the Trust, it also specified the property retain its separate character. While the Trust language specified the property would retain its "separateness" where applicable, it also required joint consent for transactions involving real property.

{¶28} In its decision, the trial court was obligated to make a factual inquiry as to the characterization of the property of the parties as "separate" or "commonly owned." The trial court reviewed the Trust and noted ambiguity, which it explained as follows:

> "The Trust, on the other hand, grants either Trustor/Trustee the authority to transfer property that is in the Trust. This power to transfer contradicts the idea of "separate property." The memorandum of trust tries to overcome the shortcomings in the "trust" regarding "separate property" and requires the consent of both Trustors/Trustees in transactions involving real estate. (paragraph 1.)"

{¶29} The trial court necessarily relied on the extrinsic evidence of the Memorandum of Trust to assist in analysis of the conflicting articles and, ultimately, Mr. and Mrs. Evans' intent at the time they executed the trust. Extrinsic evidence is admissible when the language of the trust creates doubt

as to its meaning. *Henson v. Casey*, 4th Dist. Pickaway No. 04CA9, 2004-Ohio-5848, citing *Oliver v. Bank One, Dayton N.A.*, 60 Ohio St.3d 32, 573 N.E.2d 55 (1991), paragraph one of the syllabus. The Evans trial court explained its analysis as follows:

> "Paragraph 8 says, 'All property transferred into the trust is intended to be commonly owned property of the Trustor(s) unless, the Trustor(s) have provided otherwise by a Separate Property Addendum to the Trust, or a separate agreement of parties.' There was no evidence of a Separate Property Addendum to the Trust, nor a separate agreement of the parties. Although the abstract-memorandum is 'for convenience only," the terms of the memorandum should have put the couple, and any subsequent drafter of a deed to the trust, on notice that the couple should make special provision for property which they intended to be 'separate.'"
>
> "If the Trustors had intended to maintain any of such property as 'separate' when transferred to the Trust, they had ample opportunity to do so…The couple could have designated any of their property as 'separate'…The couple took no steps to make an independent observer believe that any of the property they had deeded to the Trust was 'separate.' In the Court's opinion, once the above-described property was transferred to both Trustees without any of said limiting provisions, the property lost its character as what might have been 'separate.' It is further the opinion of the Court by a preponderance of the evidence that the couple intended the properties not to be 'separate.'"

{¶30} In the case before us, the trial court was faced with a difficult task of construing the conflicting language contained in Articles III and VII, which indicated: (1) the property was given to a joint trust; (2) the property was to retain its separate character, where applicable; (3) the property was to

be administered solely by the trustor who separately owned it; and yet (4) joint consent was required in order to transfer the real property. The language of the Trust articles created doubt as to the meaning of "separate" property in this particular case. The trial court implicitly found the Articles to be conflicting. We find the trial court did not err by going beyond the four corners of the trust document and considering the Memorandum of Trust. The Memorandum of Trust provided the trial court with "some competent credible evidence" of the intent of Mr. and Mrs. Evans when they created the joint trust in July 2003. The trial court did not err by construing that all property in the Trust was to be considered "commonly owned." As such, we overrule these two related assignments of error.

C. The trial court's application of R.C. 2105.19, the "Slayer Statute."

{¶31} We next consider jointly the following assignments of error contained in appellate case number 12CA5, set forth as follows:

I. THE TRIAL COURT ERRED IN ITS MAY 3, 2012 ENTRY BY APPLYING THE "SLAYER STATUTE, R.C. 2105.19, TO VESTED PROPERTY RIGHTS OF APPELLANT DAVID W. EVANS HAD BEFORE CAROL M. EVANS' DEATH, WHICH IS BEYOND THE SCOPE OF THE SLAYER STATUTE AND IN VIOLATION OF ARTICLE I, SECTION 12, OF THE OHIO CONSTITUTION.[7]

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY FINDING THAT THE

[7] This assignment of error corresponds with error one, set forth in the successor co-trustees brief.

"SLAYER STATUTE" APPLIES TO CAUSE APPELLANT DAVID W. EVANS TO FORFEIT ANY RIGHTS HE HAD TO THE ORCHARD LOTS, TRAGO STREET, AND THE NOTE RECEIVABLE AND PAYMENTS THEREUNDER FROM THE SALE OF THE EVANS CENTER, BECAUSE IT FOUND SUCH PROPERTY TO CONSTITUTE "COMMONLY OWNED" PROPERTY.[8]

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY APPLYING THE "SLAYER STATUTE" TO DIVEST APPELLANT DAVID W. EVANS OF ASSETS WHICH IT DETERMINED TO BE "COMMONLY OWNED" TRUST ASSETS, AND BY ORDERING THE TRUSTEES TO REPLACE FROM APPELLANT'S SEPARATE PROPERTY ASSETS ANY DISTRIBUTIONS THAT WERE MADE FROM ASSETS OTHER THAN THOSE THAT WERE HIS SEPARATE PROPERTY, AS DETERMINED BY THE COURT.[9]

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, BY FINDING THAT THE "SLAYER STATUTE" TERMINATED APPELLANT DAVID W. EVANS' RIGHT TO AMEND THE TRUST AS TO HIS VESTED PROPERTY RIGHTS.

{¶32} The well-established policy of the common law is that no one should be allowed to profit from his own wrongful conduct. *Schrader v. Equitable Life Ins. Co.*, 20 Ohio St.3d 41, 485 N.E.2d 1031 (1985). This is a civil concept, and the probate court is the proper forum to determine the

[8] This assignment of error corresponds with that set forth in appellate case number 12CA6: IV. AS TO CLAIM SEVEN, THE TRIAL COURT ERRED IN FINDING THAT THE EVANS CENTER PAYMENTS WERE JOINT PROPERTY INSTEAD OF DAVID W. EVANS, SR.'S SEPARATE PROPERTY.

[9] This assignment of error corresponds with the second assignment of error set forth in the successor co-trustees' brief.

effect of a killing on succession to property of a decedent. *Id.* (The law will always give a remedy.) R.C. 2105.19 provides:

> "(A) Except as provided in division (C) of this section, no person who is convicted of…R.C. 2903.01, 2903.02, or 2903.03 of the Revised Code…shall in any way benefit by the death.[10] All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.
>
> (B) A person prohibited by division (A) of this section from benefiting by the death of another is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which the person has exerted control, because of the decedent's death….."

{¶33} R.C. 2105.19 is commonly referred to as the "slayer statute." *Ahmed v. Ahmed,* 158 Ohio App.3d 527, 2005-Ohio-5120, 817 N.E.2d 424, ¶ 16. That kind of statute prevents a murdering heir from receiving property because of the killing. *Ahmed, supra,* at ¶ 16; see, *Egelhoff v. Egelhoff*, 532 U.S. 141, 152, 121 S.Ct. 1322 (2001). Under that statute, no one who is convicted of murder, aggravated murder, or voluntary manslaughter "shall in any way benefit by the death." *Ahmed, supra,* at ¶ 16. It continues, "All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's

[10] These Ohio Revised Code sections referenced are aggravated murder, murder, and voluntary manslaughter, respectively.

death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent." R.C. 2105.19(A); *Ahmed, supra,* at ¶ 16. If the murderer has benefited from the death, then he or she "is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which he has exerted control, because of the decedent's death." R.C. 2105.19(B); *Ahmed, supra,* at ¶ 16.

i. The trial court's application of the "Slayer Statute" to David W. Evans Sr.'s vested property rights.

{¶34} In its May 3, 2012 decision, the trial court held:

> "The 'Slayer Statute' states that no person convicted in the murder of another person 'shall in any way benefit by the death' and that 'benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.' Ohio courts have held that the entire balance of a joint and survivor bank account passes as if the convicted murderer died first. See, In re Estate of Fiore (8th Dist.1984), 16 Ohio App.3d 473 and In re Estate of Wolfe, (6th Dist.1991), 71 Ohio App.3d 501. The Trust in this case has beneficial interests and benefits payable that are similar to that joint and survivor bank accounts.
>
> * * *
>
> On Count Four of the Amended Complaint, the Court finds that David W. Evans has been found guilty of the murder of Carol M. Evans. Accordingly, the Court finds by a preponderance of the evidence that the 'Slayer Statute' applies to the Trust in this case in a manner similar to a joint and survivor bank account as between the co-settlors; therefore, pursuant to the Slayer Statute

> the husband-settlor shall be deemed to have predeceased the wife-settlor, as to all assets the Court specifies in this Decision to be a part of the Trust; except that property defined by this Decision to be the 'separate property' of the husband-settlor only, which property shall remain the 'separate property' of the husband. At this juncture, the parties have not asked the Court to determine the application of the 'Slayer Statute' to property David W. Evans acquired after July 31, 2003, the date of the Trust."

{¶35} The Guardian argues application of the slayer statute in this case operated so as to deprive David of vested property rights. The Guardian contends the trial court went beyond the four corners of the trust document to derive its own definition of "separate property," as well as relying on the case law pertaining to joint and survivorship bank accounts. The Evanses also argue the slayer statute is not designed to strip a convicted person of his or her vested rights in property vested before the decedent's death. Appellants' argue the trial court's ruling causes their father to forfeit the vested interest he spent his life building and buying. The Successor Co-Trustees also argue if their father owned property, separately or commonly, with Carol prior to her death, he retains his ownership interests therein. Citing *Bauman v. Hogue*, 160 Ohio St. 296, 300, 116 N.E.2d 439 (1953), they point out the Supreme Court of Ohio drew a clear distinction between property the title to which vested before commission of a crime and that which vests by virtue of a crime.

{¶36} Appellee Carl Evans generally argues public policy supports the trial court's application of the slayer statute in this manner. Carl argues the slayer statute, as applied to their father's interest in the joint trust was correctly applied and does not amount to an unlawful forfeiture. Carl contends excluding their father from the benefits of the joint trust simply causes him to be treated as if he had predeceased their mother and the estate planning arrangement is distributed as originally contemplated by the spouses when the joint trust was entered.

{¶37} In *Bauman v. Hogue,* 160 Ohio St. 296, 116 N.E.2d 439, (1953), the Supreme Court of Ohio held that under statute precluding inheritance by murdered of decedent, the husband was not entitled to take $2500 setoff in inventory of the decedent's estate. The Court discussed the enacting of Section 10503-17 of the General Code, the "slayer statute" as codified in 1953. In *Bauman, supra*, the defendant argued the slayer statute did not prevent him from taking and receiving because the slayer statute applied only to an inheritance under a will or by intestate succession, and, in taking under the relevant statute (pertaining to probate administration), there was no such inheritance. The Supreme Court disagreed and reasoned: "If the defendant receives anything as surviving spouse…, he will… 'inherit or take * * * part of the * * * estate' of his wife." The *Bauman* court reviewed

other cases[11] involving application of the slayer statute and discussed the difference between vested rights before a crime is committed and rights that could not be taken away merely because of a crime. The *Bauman* court stated:

> "The writer of this opinion confesses that it is difficult for him to understand how the agreement of * * * the building and loan company to pay the survivor could be vested before there was a survivor and when either party had full power at any time before that by withdrawals from the account to extinguish any rights of the other party or of a survivor….In the instant case, any rights of defendant to take as the surviving spouse of his wife could only vest on the death of his wife. (Internal citations omitted.). Until then, the creation of that right would depend entirely upon her death before his. Thus, his crime is the act which removes the condition precedent to the existence of his right and changes his contingent, expected, or inchoate right into a vested right…(Internal citations omitted.). We do not* * * have a situation where denial of recovery would amount of taking away a vested right because of the crime. We have a situation where allowing defendant recovery would amount to giving a vested right because of the crime."

{¶38} The *Bauman* case was cited by the 8th District Court of Appeals *In re Estate of Fiore,* 16 Ohio App.3d 473, 476 N.E.2d 1093 (8th Dist. 1984). There, an estate administrator sought an order declaring all funds on deposit in a joint and survivorship account in the names of a decedent and the party convicted of decedent's death to be the property of the estate to the exclusion of the guilty party. On appeal of the decision on

[11] In particular, the court reviewed *Hodapp v. Olaff,* 129 Ohio St. 432, 195 N.E. 838 (1935).

various grounds, the court held that for purposes of the slayer statute, the guilty party was considered to have predeceased the decedent and the decedent was to be treated as the survivor entitled to the whole account and, the slayer statute did not impair the obligations of contracts as set forth in the Ohio and United States Constitutions. *Fiore* held:

> "We read R.C. 2105.19 to mean what it says - that a person convicted of murder shall not in any way benefit by the death. Absent this statute, where two parties had an equal right to the proceeds of a joint and survivorship account, and one murdered the other, the murderer would benefit by extinguishing the decedent's right in the account, vesting the sole right in the whole account in himself. Such a result is prohibited by the statute. *Id.* The language of the statute covers all property and all benefits payable in respect of decedent's death, and is not limited to property that descends according to intestate succession laws or passes by will." *Id.*

{¶39} The appellate court in *Fiore* distinguished *Hodapp* in that *Hodapp* involved property passing by will or descending by intestate succession. The *Fiore* court noted R.C. 2105.19 is broader, prohibiting a murderer from benefitting in any way and covering all types of property, money, or benefits distribute in respect of a decedent's death.

{¶40} The Appellant in *Fiore* also argued that R.C. 2105.19 violated Section 12, Article I of the Ohio Constitution by forfeiting his property as a result of his conviction. The *Fiore* court disagreed, citing *Egelhoff v. Presler* (P.C. 1945), in which the Probate Court of Franklin County held that

G.C. 10503-17, the predecessor of R.C. 2105.19, was not unconstitutional because the statute only prevented the murderer from inheriting property, rather than divesting him of such property. The *Fiore* court went on to note:

> "While a joint and survivorship account creates a present, vested joint interest in the parties, *Eger v. Eger*, 39 Ohio App.2d 14, 20, 314 N.E.2d 394 (1974), the right to be the survivor and absolute owner of the account is not vested, but it is clearly continent upon outliving the other party."

{¶41} The *Fiore* court cited the precise language in *Hogue* which we have previously set forth on pages 31 and 32 of this opinion. Furthermore, the court in *Fiore* had "[n]o difficulty in finding the statute constitutional and upholding the legislature's determination that a statute preventing a murdered from benefitting from his wrong is reasonable and bears a real and substantial relationship to the public health, safety, and morals."

{¶42} In the absence of Ohio case law directly on point with the factual scenario presented here, the trial court found *Fiore* most analogous. Based upon our de novo review, we find the trial court did not err by its application of the slayer statute so as to cause deprivation of vested property rights or to create any constitutional concerns. In this case, the trial court determined and we have, as stated herein, upheld the trial court's findings as to: (1) what property was contained within the Trust by virtue of the Trust Agreement executed in July 2003; and, (2) what was meant by the terms

"separate" and "commonly owned." The joint trust was a joint estate planning vehicle with certain rights to be enjoyed by the surviving trustor. "Survivorship" is defined by Black's Law Dictionary, 6th Ed. 1991, as follows:

> "The living of one of two or more persons after the death of the other or others. Survivorship is where a person becomes entitled to property by reason of his having survived another person who had an interest in it. A feature of joint tenancy and tenancy by the entirety, whereby the surviving co-owner takes the entire interest in preference to heirs or devisees of the deceased co-owner."

{¶43} David deprived Carol of the right to enjoy numerous survivorship benefits which would have been available to her as a co-trustor. For example:

1. Article VIII "Trusts for Spouse and Family" states:

> "At my death, if I do not survive my Spouse:
>
> (a) Division of Property
>
> Trustee shall divide the remaining property into two trusts, "Trust A" and "Trust B."[12]
>
> (c) Division of Marital Share
>
> …As to such assets in Trust B, the terms of Trust B shall be irrevocable, and the Surviving Trustor shall be the irrevocable lifetime beneficiary thereof….

[12] At this point, the Trust provides significant detail stipulating allocation to Trust A for maximum tax advantages.

> (d) Control of Assets
>
> The Surviving Trustor may, at any time by written notice, require the Trustee either to make any nonproductive property of this Trust productive or to convert productive property to nonproductive property, each within a reasonable time. The Surviving Trustor may further require the Trustee to invest part, or all, of this share of Trust assets for the purpose of maximizing income rather than growth, or growth rather than income.
>
> (e) Right to Change Beneficiary
>
> The Surviving Trustor Retains the right to change the beneficiaries of Trust A.
>
> IX. Survivor's Trust A
>
> "Survivors Trust A shall be held, administered and distributed as follows:
>
> a. Income
>
> Trustee shall pay net income to my Spouse until death, at least quarter-annually.
>
> b. Principal
>
> If net income is insufficient to maintain the standard of living my Spouse and I enjoyed prior to my death, Trustee shall use that portion of principal necessary to enable my Spouse to maintain that standard of living. Trustee may distribute principal only to my Spouse."

{¶44} The above provisions of Articles VII, and IX are benefits of which Carol was deprived due to not being, in fact, the surviving Spouse/Trustor.

{¶45} The Trust herein was also similar to a joint and survivor bank account in that, pursuant to Article XV(e), either Trustor had authority to withdraw the portion of the account contributed by that owner. And in general, trusts and joint and survivor bank accounts are forms of ownership with survivorship rights which allow property to pass to the surviving party and evade probate administration.

{¶46} We find the trial court did not err with regard to its application of the "Slayer Statute" to the property rights of David Evans. The statute is to be applied so as to treat David as having predeceased Carol. The trial court reasoned that the Trust had "beneficial interest and benefits payable" that are similar to a joint and survivor bank account. The rights which the surviving trustor would have only arose upon the death of the first trustor. These rights to be enjoyed by the surviving trustor depend entirely upon the decease of the first trustor. Carol was deprived of the opportunity to enjoy her beneficial interest and the benefits which would have been distributable to her as a surviving Trustor. As such, we overrule these assignments of error and affirm the judgment of the trial court.

i.i. The trial court's application of the "Slayer Statute" as relates to David W. Evans' Sr.'s right to amend the trust.

{¶47} R.C. 5806.02, revocation or amendment of trust, provides:

> "(A) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This division does not apply to a trust created under an instrument executed before January 1, 2007.[13]
>
> (B) If a revocable trust is created or funded by more than one settlor, all of the following apply:
>
> (1) To the extent the trust consists of community property, either spouse acting alone may revoke the trust, but the trust may be amended only by joint action of both spouses.
>
> (2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.
>
> (3) Upon the revocation or amendment of the trust by less than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment."

{¶48} Carol was murdered on March 26, 2008. David amended the trust on two occasions after his wife's death: April 10, 2008 and November 10, 2009. The former amendment, at issue in this appeal, deleted three specific bequests: (1) a bequest to Deborah Crabtree of approximately 50 acres of property known as "The Winery"; (2) a bequest to Carl Michael Evans of approximately 270 acres known as "the House Farm"; and (3) a

[13] In the May 3, 2012 decision, the trial court held: "It is further the opinion of the Court that Ohio Revised Code Section 5806.02(B)(1), addressing the ability to amend a trust where it was created by more than one settlor, is a remedial statute and a codification of the common law of Ohio; the Court is also of the opinion that the date limitation contained in Section 5806.02(A) does not apply to the remaining paragraphs of Section 5806.02. If the date limitation were to apply to all the provisions of Section 5806.02, the limitation would have appeared as a preamble to all provisions of Section 5806.02:i.e., preceding paragraph (A), not contained in paragraph (A). Even if Section 5806.02 is not applicable because of its effective date, the Court's decision would not be altered." In this appeal, the parties have not asserted an issue as to the language contained in R.C. 5806.02(A).

bequest of approximately 160 acres known as the "Freeman-Jones Farm." In addition, David amended the "Allocation of Trust Assets" as follows:

Deborah Crabtree	Estate share 22.5%
David W. Evans Jr.	Estate share 22.5%
Carl Michael Evans	Estate share 10%
Randall Lee Evans	Estate share 22.5%
Ellen Evans McCabe	Estate share 22.5%

{¶49} Regarding the application of R.C. 5806.02(B)(1), the court found:

> "Therefore, the Surviving Trustor, David W. Evans, may amend the Trust with regard to the portion of the Trust property attributable to his contribution and that also qualifies as "separate property" as herein described; that is only the property titled in the name of the husband-settlor prior to the Trustors' marriage on October 30, 1996 and still owned (by the husband) by virtue of the same titling instrument at the time of executing the trust, and transferred to the Trust by operation of this Court's decision, after offset by the Trustee for any improper distributions made from the Trust to or for the benefit of David W. Evans from Trust property that was not his separate property. The "Slayer Statute" terminates David W. Evans' right to amend, if any, as to any other portion of the Trust. Accordingly, it is the decision of the Court that the First Amendment to the Trust signed on April 10, 20088 and the Second Amendment signed on November 10, 2009 are valid as to the portion of the trust property attributable to David W. Evans' contribution that also qualifies as "separate property" as herein described."

{¶50} Appellant Guardian argues David and Carol clearly intended to be able to amend the trust as to each of their separate property during their

lives, pursuant to the language of Article IV(a). He concedes his amendment should have no effect on Carol's "separate" property. Pointing out that a settlor may amend so long as he reserves the power to do so, David argues his amendment is valid and not barred by the slayer statute. Appellants, the Evanses, argue Article II applies only to David and only first person language continues throughout the trust. Therefore, the clear intent is that only David could amend or revoke during his lifetime and the property he contributed to the trust was intended to be for his benefit.

{¶51} Appellee Carl Evans argues that the trial court's decision eliminating David's right to amend the trust should be upheld and that the terms of the trust mandate that conclusion. Carl argues by virtue of application of the slayer statute, David is deemed to have predeceased Carol, the joint trust terms became irrevocable.

{¶52} The settlor, by a term of the trust instrument, may reserve to himself, or grant to another the power to modify or alter the trust. *Huntington Trust Co., vs. Kear,* 4th Dist. Ross No. 1643, 1991 WL 62185,*3 citing Bogert, Trusts & Trustees (2d.Ed. Rev. 1983) 230, Sec. 993. Further, if a power to amend or modify the terms of a trust is subject to no restrictions, it includes a power to revoke or terminate the trust. *Kear*, *supra* at *3, citing, Restatement of the Law 2d, Trusts (1959) 145 Sec. 331; cf.,

also IV Scott on Trusts (4Ed.1989) 385, Sec. 331.2. If the settlor retains a restricted power to revoke or amend during his life, the revocation or amendment is valid only if it takes effect before the death of the settlor. *Wesbanco v. Blair*, 2nd Dist.Clark No. 2011 CA90, 971 N.E.2d 420, 2012-Ohio-2337, ¶ 15, citing *First Natl. Bank of Cincinnati v. Oppenheimer* (P.C. 1963), 190 N.E.2d 70, 73-74.

{¶53} Article IV(a) provides: "I reserve the right to amend or revoke this Agreement, wholly or partly, by a writing signed by me or on my behalf and delivered to Trustee during my life." We think the trial court correctly applied the slayer statute to David's purported right to amend the Trust in the manner in which he did. Application of the slayer statute entails treating the slayer as if he or she has predeceased the decedent. The purported amendment was done in April 2008. Carol died in March 2008. If David is treated as having predeceased Carol, then he clearly would have had no ability to amend the trust as the amendment would not have been delivered in his lifetime, as required by Article IV(a). *Wesbanco, supra* at ¶ 15. As such, we overrule this assignment of error and affirm the judgment of the trial court.

i.i.i.The trial court's application of the "Slayer Statute as to David W. Evans' Sr.'s claim to rights in the Orchard Lots, Trago Street, and Evans Center Payments.

{¶54} The trial court found:

> "As of the date of this Decision, the "separate property" of Carol M. Evans and the commonly owned property consists at least of the Winer, Freeman-Jones Farm, Lee Hollow property, Trago Street lots, numerous Orchard lots, note receivable and payments from Randall L. Evans for the purchase of the Evans Center…."

{¶55} Appellant Guardian points out David and Carol married for the final time in 1996. David acquired the Trago lots in 1991. He also acquired the Evans Center property during 1988-1990 and developed it at a time when he was not married to Carol. The Guardian argues the Trago Lots and Evans Center constitute David's "separate property" according to the plain meaning of such terms and under R.C. 3105.171(A)(6). The Guardian argues the properties retained their character as separate property under Article VII of the trust and the trial court erred by finding these properties constituted property transferred by deed or by operation of the assignment clause as of July 31, 2003. The Guardian also argues the real estate known as the "orchard" property retained its separate character when it was transferred to the trust on July 31, 2003.

{¶56} Appellants, the Evanses also argue the note payable on the sale of the Evans Center and the payments on that note should have been deemed

to be their father's separate property.[14] They also point out the Evans Center was acquired and developed while their father was single. He retained his separate ownership in the property after his 1995 dissolution from Carol. The Evans Center was his separate property and when the trust sold the property, he should have been entitled to receive all of the proceeds of the sale.[15] The Evanses argue the trial court erred in finding the slayer statute applied to the Evans Center and the payments on the note from its sale. The Evanses request this court to reverse the ruling and remand the case with instructions that the Evans Center and payments on the note be classified as their father's separate property, exempt from application of the slayer statue.

{¶57} Appellee Carl Evans points out the parties stipulated the Evans Center was owned by David and Carol as trustees of the trust and was sold by them as trustees, conveyed out of the trust, to their son. In return, the trust was to receive the monthly installment payments for 20 years. Furthermore, Carl points out that his parents used the down payment from Randall Evans for the Evans Center to buy a beach house in South Carolina

[14] Appellants point out their father purchased the Evans Center property between 1987 and 1990 and constructed the Evans Center there. He conveyed the property to Evans Center, Inc., for approximately one year, but then conveyed it to himself in 1991. He conveyed the Evans Center to the trust by quit claim deed on March 8, 2005. Then in 2007, Randall Evans purchased the Evans Center with a down payment of $548, 821.47, followed by payments of $6,000.00 a month for 20 years. The then-Trustees of the trust, Dave and Carol, signed the deed conveying the property to Randall on April 20, 2007.

[15] Article XV(3) provides that if proceeds from sale are reinvested, the reinvestment also retains its character as separate property of the original Trustor.

that was conveyed in a survivorship deed to David, Carol, and Randall. The Evans Center was a joint trust asset and the down payment was used to buy additional commonly owned property. Carl highlights the trial court made a factual determination from the evidence presented that there was only limited separate property in the case.

{¶58} The trial court found:

> "On Count Seven of the Amended Complaint, the Court finds that the Trustees held the legal title to the Evans Center and then sold the Evans Center from the Trust, that the Trustors titled the recipient account of the payment in a variety of ways, but that the name on the account had little to do with the use of the funds, which was for the mutual benefit of both Trustors. Accordingly, the Court is of the opinion that the logical recipient of the past, present, and future Evans Center payments is Randall L. Evans and Deborah E. Crabtree, Co-Trustees of the Trust, the document intended, if not inartfully, to control all of the Trustor's assets for the Trustors' mutual benefit. The "Slayer Statute" applies to the note receivable from the sale of the Evans Center and any payments on such note received by the Trustees; therefore, Dave Evans, Sr. forfeits any right he may have had to such asset(s)."

{¶59} As set forth in section IV(B) above, we have already found the trial court did not err with regard to its definitions as to "separate and common property." As such, we find no merit to the arguments that the Trago Street property, the "Orchard" property, and the Evans Center note and payments constitute separate property of David W. Evans. As such, this

assignment of error and it is hereby, overruled. The judgment of the trial court is affirmed.

i.v. The trial court's application of the "Slayer Statute" to cause the Trustees to be ordered to replace from David W. Evans Sr.'s separate property for distributions made on behalf of David W. Evans Sr.

{¶60} Consistent with its finding regarding "separate property" or "commonly owned property", the trial court declared to the extent the trustees made distributions for David W. Evans Sr.'s benefit from assets other than those declared to be his separate property, the Trustees were to use their father's separate property to replenish the assets. Appellant Guardian argues this ruling must be reversed because the trial court erred in its interpretations of "separate" and "commonly owned." If the ruling is reversed, it can then be determined whether any of the prior distributions were improper. Appellants successor co-trustees also contend the trial court committed error when it applied the slayer statute to property commonly owned. The trial court found as follows:

> "To the extent the Trustees have made distributions to or for the benefit of David W. Evans from assets other than those that are his separate property, the Trustees shall use the assets that are the separate property of David W. Evans within the trust to replace the assets, if any, that were inappropriately distributed. The "Slayer Statute" applies to all of the property described in this Paragraph. "

{¶61} Where the rights of the parties are not clearly defined in law, broad equitable principles of fairness apply and will determine the outcome of each case individually. *McDonald Co. v. Alzheimer's Disease Assoc. Inc.*, 140 Ohio App.3d 358, 747 N.E.2d 843 (1st Dist. 2000), at ¶ 16-18, citing *In re Estate of Cogan*, 123 Ohio App.3d 186, 188, 703 N.E.2d 858, 860. "In equitable matters, the court has considerable discretion in attempting to fashion a fair and just remedy." *McDonald, supra* at ¶ 16-18, citing *Winchell v. Burch,* 116 Ohio App.3d 555, 561, 688 N.E.2d 1053, 1057 (1996). It has the power to fashion any remedy necessary and appropriate to do justice in a particular case. *McDonald, supra* at ¶ 16-18, citing *Carter-Jones Lumber Co. v. Dixie Distrib. Co.* (C.A. 6, 1999), 166 F.3d. 840-846. In *In re Wolfe,* 71 Ohio App.3d 501, 594 N.E.2d 1055, (6th Dist. 1991), the appellate court considered whether a trustee could retain a $15,000.00 check of a murdered decedent's estate for the payment of the murderer's criminal fine. Appellant, therein, asserted that R.C. 2105.19 prevented a person convicted of murder from benefiting, *in any way,* from the death of his victim. The appellate court cited the statute and noted the public policy underpinning the statute prevented a murderer from receiving any benefit from the death of his victim. The appellate court stated the probate court

had properly treated the murderer as if he had predeceased Mae Wolfe. Her will had devised her entire estate to her children. However, the court held:

> "Hence, the realty, personality, money, insurance or any other benefits deemed by the court to be a part of decedent's estate could not be used to benefit Robert C. Wolfe because he had no right to any of the proceeds of her estate….The payment of the criminal fine is a benefit to Robert C. Wolfe. By ordering the trustee of his estate to withhold $15,000.00 of the decedent's estate to pay that fine, the trial court violated the mandates of R.C. 2105.19."

{¶62} Again, we have found the trial court did not err when it made the factual findings characterizing certain properties as "separate" or "commonly owned." The trial court, in its equitable powers, had the authority to make the order directing the trustees to replace from David W. Evans Sr.'s separate property for distributions made on his behalf. The trial court's order was proper. As such, this assignment of error has no merit and we, hereby, overrule it.

D. The trial court's analogy of the Trust herein to a joint and survivor bank account.

{¶63} For ease of analysis, we next turn to assignment of error six, appellate case number 12CA5 and assignment of error three, appellate case number 12CA6, set forth as follows:

> VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNTS 3, 4, 7, 8, AND 9, FINDING THAT THE TRUST OPERATED LIKE A JOINT AND SURVIVORSHIP BANK ACCOUNT.

III. AS TO CLAIM FOUR, THE TRIAL COURT ERRED IN ITS APPLICATION OF RE.C.105.19, (THE "SLAYER STATUTE", ITS FINDING THAT A TRUST IS SIMILAR TO THAT OF A JOINT AND SURVIVORSHIP BANK ACCOUNT AND IS TREATED THE SAME FOR PURPOSES OF THE SLAYER STATUTE, AND ITS FINDING THAT DEFENDANT DAVID EVANS, SR., IS DEEMED TO HAVE PREDECEASED CAROL M. EVANS, DECEDENT, "AS TO ALL ASSETS THE COURT SPECIFIES IN THIS DECISION TO BE PART OF THE TRUST," INCLUDING THE PROPERTY DETERMINED TO BE "COMMON PROPERTY."

{¶64} Appellant Guardian argues the trial court erred by its finding that the trust operated like a joint and survivorship bank account. The Guardian argues the facts of this case are not analogous to those in *In re Fiore*, 16 Ohio App.3d 473, 476 N.E.2d 1093 (8th Dist.1984). In *Fiore*, the guilty party had a vested joint interest in the account during the decedent's lifetime, but did not have vested rights in becoming the survivor, absolute owner of the account. The slayer statute applied to the account in *Fiore* because the guilty party would otherwise inherit/obtain property rights which he did not have before the decedent's death, and would financially benefit from the crime.

{¶65} The Guardian contends, according to trust language, the property in the trust retained its character as joint, community, separate, or otherwise. It is argued, pursuant to Article VII, David retained ownership in

his separate property and his interest in commonly owned property even when it was transferred to the Trust, but, pursuant to Article III, it was still his property to use, access, and control. The Guardian argues Carol's death gave David no greater power to control his separate Trust property than he had during her lifetime. The Guardian argues the distinction between a joint and survivorship bank account and a private trust is critical, and that the trial court found the Trust should be treated like a joint and survivor bank account in a conclusory fashion, without any analysis or citation to record or legal authority. David again urges we should look to the terms of the Trust to interpret, define, and identify "separate property."

{¶66} Appellants, the Evanses, point out joint and survivorship bank accounts are governed by contract law. The Evanses argue the property at issue here is neither payable nor distributable with respect to their mother's death. They argue disbursements of their father's separate property or his half interest in common property are not benefits only payable upon death, but was property he could distribute as he saw fit because his interest was vested and not dependent upon a contingency. They point out there is no language in the Trust that makes the property in the Trust owned as joint and survivorship. The express terms of the Trust at issue do not unify it as a "joint and survivorship" form of ownership. The Evanses also emphasize,

again, the language of the Trust which states that the property retains its character whether separate or common. They urge the property in the Trust is titled and easily tracked as separate or common, pursuant to Article VII, and to convert the property to "joint and survivorship" divests their father of his vested interests and would act as a forfeiture as his estate. The Evanses also argue to apply the slayer statute to a trust like a joint and survivorship bank account sets a dangerous precedent which will effect generations to come and create the potential for severe injustices.

{¶67} Appellee Carl argues the trial court correctly determined the joint trust in this case operated similarly to a joint and survivor bank account. Carl also cites *Fiore*, noting that either owner of a joint bank account may withdraw the portion of the account contributed by that owner. Comparing this to the Trust at hand, Appellee cites Article XV(e) which states "The Trustor who contributed such separate estate may at any time, during the joint lives of the Trustor(s) and from time to time, withdraw all or any part of the principal of such separate estate." Appellee points out joint and survivor bank accounts are similar to trusts in that both forms of ownership bestow survivorship rights which allow the property to pass to the surviving party and outside of probate administration. Appellee asserts it is impossible for the benefits payable at Carol's death to the three trusts to pass

under the joint trust to others unless David is considered to have predeceased Carol for purposes of the joint trust. Appellee points out Carol could have outlived her husband and been able to inherit her beneficial interest in all of the joint trust assets after his death.

{¶68} We disagree with the arguments that the trial court erred in its finding that the Trust here operated like a joint and survivor bank account. We also disagree that the trial court's finding will set a dangerous precedent for years to come. The trial court's finding, set forth as follows, specifically limits its holding to this case:

> "The Trust *in this case* has beneficial interest and benefits payable that are similar to that of joint and survivor bank accounts…[T]he Court finds by a preponderance of the evidence that the "Slayer Statute" applies to the Trust *in this case* in a manner similar to a joint and survivor bank accounts as between the co-settlors…." (Emphasis added.)

{¶69} Again, the trial courts reasoned that the Trust herein has "beneficial interest and benefits payable" that are similar to a joint and survivor bank account. In our resolution of sections IV(B) and (C), above, we necessarily addressed these same arguments taking issue with the trial court's definitions as to "separate" and "commonly owned" property, and the trial court's reliance on the *Fiore* case. We need not set forth the analysis again, but would comment the trial court was given the difficult task of interpreting the lengthy, poorly-written trust, and, was given the task to do

so in the absence of much Ohio case law on the application of the "Slayer Statute" or on the application of the statute to a joint trust. We find no error in the trial court's decision which analogized the Trust herein to a joint and survivorship bank account. Likewise, we find no error in the trial court's application of R.C. 2105.19 to the Trust property as a result of the comparison. As such, we overrule the within two assignments of error and affirm the judgment of the trial court.

E. The trial court's analysis of Trust Articles XIII and XXIII.

{¶70} We next consider assignment of error five, appellate case number 12CA6:

> V. AS TO CLAIM EIGHT, THE TRIAL COURT ERRED IN FINDING THAT ARTICLE XXIII OF THE TRUST FULLY CONTROLS THE DISTRIBUTION OF THE ASSETS AND THAT ARTICLE XIII WAS INCLUDED IN THE TRUST BY ERROR.

{¶71} Due to an interaction between Articles XII and XIII, we begin by setting forth the language of Article XII. Article XII of the Trust is entitled "Family Trust." It is divided into the following sections: (a) Income; (b) Principal; (c) Residue; (d) Spouse's Right; and (e) Withdrawal Right. Article XIII of the Trust is entitled "Heirs at Law." It lists the children of David and Carol and states they are named as the "Primary

Beneficiaries." Article XIII also contains the following sections: (1) Distribution to Family; (b) Death of Beneficiary; and, (c) Withdrawal Right.

{¶72} Article XXIII of the Trust is entitled "Allocation and Distribution of Trust Assets." It begins: "The Trustee shall allocate, hold, administer and distribute the Trust assets as hereinafter delineated." Article XXIII contains the following provisions, numbered and entitled as follows:

(a) Upon the Death of the First Trustor;

(b) Upon the Death of Both Trustor(s);

(c) Personal Property Distribution;

(d) Support and Education;

(e) Extraordinary Distribution;

(f) Gifts or Loans;

(g) Handicapped Beneficiaries;

(h) Primary Beneficiaries;

(i) Special Bequests[16];

(j) Allocation of Trust Assets;

(k) Distribution of Trust Assets;

(l) Per Stirpes;

(m) Intestate Succession; and

[16] This section of the Trust also contains the three specific bequests of "The Winery" to Deborah E. Crabtree, and both the "House Farm" and the "Freeman Jones Farm" properties to Carl Michael Evans, as previously mentioned in Section IV(C)(ii) above.

(n) Property Exposed to Environmental Hazards.

The following provision is also contained within section (j):

Deborah Crabtree	Estate Share	10%
David W. Evans, Jr.	Estate Share	10%
Carl Michael Evans	Estate Share	15%
Randall Lee Evans	Estate Share	10%
Ellen E. Evans	Estate Share	5%
Evans Farm Trust	Estate Share	50%

{¶73} As to claim eight, the trial court made the following findings regarding the proper interpretation of the joint trust:

> "Since the Court has declined to utilize ORC 5804.12,[17] the court finds itself back in the predicament of interpreting the Trust. Upon the testimony and evidence presented, the arguments of counsel and the record, the Court finds that the most logical interpretation of the Trust is that Article XIII was likely included as a clerical error…[I]t appears that the terms of Article XIII are general terms, which would likely be included in a standardized computer form/program. When Article XXIII was added, Article XIII should have been deleted. Another conclusion is that Article XIII is the dispositional portion of unfunded Article XII. Either way, the provisions of Article XIII have no impact on the final distribution from the Trust. The provisions found in Article XXIII relating to ultimate disposition are much more specific and individualized. Rules of construction lead the Court to adopt the specific terms of Article XXIII of the Trust as they existed on wife-Trustor's date of death over the general terms of Article XIII as to all trust

[17] R.C. 5804.12 provides, generally, that a court may modify the administrative or dispositive terms of a trust because of circumstances not anticipated by the settlor.

> assets, except those assets that are defined herein as "separate property" of David W. Evans, which will be governed by the terms of Article XXIII at his death as amended by him. Therefore, all of the assets held by the Trustees to which the "Slayer Statue" applies as specified in this Decision shall be distributed to the beneficiaries designated in Article XXIII of the Trust in the proportions designated as of the date of Carol M. Evans' death or held in accordance with the continuing Farm Trust, all as specified in Article XXIII of the Trust."

{¶74} Appellants, the Evanses, argue the trial court erred by disregarding Article XIII of the trust, a general provision that the trust assets be distributed evenly among the five children, in favor of applying Article XXIII, which contained more specific and individualized bequests. They argue by applying Article XXIII and eliminating Article XIII, the trial court failed to effectuate Carol's intent in 2003 and after other unanticipated circumstances. They argue that numerous sections of the Trust demonstrate the Trustors wanted their assets divided equally among their children, and Article XIII is specific. They point out Article XXIII does not contain language to the effect: "Notwithstanding what I may have written earlier in this Trust" or "No matter what else this Trust provides, I want this Article to control the distribution of my assets," and they contend the trial court cannot justify eliminating the entire article. The Evanses also urge administration of the "Evans Farm Trust" is no longer practicable due to family differences.

{¶75} Appellee Carl Evans responds that the trial court correctly ruled the specific distribution language of Article XXIII overrode the more general language contained in Article XIII. Appellee urges all the provisions of the trust must be considered in context and in light of Trust purposes, to minimize taxes and help insure continuity of the family farming enterprise. Appellee's points to express language contained in the provisions of the Trust and bolstered by provisions of the Memorandum of Trust. Carl's arguments are summarized as follows:

> 1. Paragraph 4 of the Memorandum of Trust provides that on the death of either Trustor, the Trust property becomes allocated into three trusts, Trust A, B, and C, and at that time, Trusts B and C become irrevocable. Appellee argues this would be expected in a trust designed to minimize estate taxes.
>
> 2. The Trust language is consistent with the Memorandum, in that Article X provides that Decedent's Trust B becomes irrevocable.
>
> 3. Article X (f) of the Trust provides that the balance of Trust B shall be distributed in accordance with the provisions specified in the section entitled "Allocation and Distribution of Trusts Assets" as constituted and provided on the date of death of the first of the Trustor(s) to die. The statement is repeated in Article XI as to Trust C. And Article IX(g) provides for the balance of Trust A to be distributed in accordance with the "Allocation and Distribution of Trust Assets" as constituted and provided on the date of the last of the Trust(s) to die. Article IX(e) provides that the surviving Trustor retains the right to change the beneficiaries of Trust A.
>
> 4. The express terms of the trust that Trusts B and C become irrevocable on the death of Carol are supported by the Memorandum of Trust, the tax planning intent behind the trust, and the clear instructions to pay out the trust in accordance with the Allocation and

Distribution of Trust Assets. Furthermore, the specific terms of Trusts B and C did not contain an express right to amend the trust beneficiaries as did Trust A. As such, David had no right to amend the provisions of Trusts B or C.

5. If David is deemed to have predeceased Carol as provided by R.C. 2105.19, his assets would actually be allocated to Trusts B and C for the benefit of Carol and her assets would have funded Trust A. All three trusts would then be irrevocable at her death.

6. The Trust provisions governing A, B, and C, all expressly make the provisions of Article XXIII applicable to the distribution of the assets contained in those trusts and ignores the provisions of Articles XII and XIII. The specific allocation of trust assets provided for in Article XXIII has been set forth above. Article XXIII also contains the three specific bequests set forth above, along with specific provisions for the 50% Farm Trust share. There are no Trust provisions directing property to the trusts discussed in Articles XII and XIII. There is no provision in Article XII for what is to happen at the death of the second spouse. The provisions of Articles XII and XIII have nothing to do with the specific language in Article XXIII.

7. The actions David took in revoking the specific gifts and changing the percentages contained in the allocations under Article XXIII are significant in that at the time, David must have thought them to be controlling and unambiguous.

8. By adopting the more specific terms of Article XXIII, the trial court followed the rules of construction and gave effect to the specific provisions and instructions of the Trust.

{¶76} In construing the language of a revocable inter vivos trust, courts apply the same rules of construction as those used for interpreting wills. *Steingass v. Steingass*, 8th Dist. Cuyahoga No. 97515, 2012-Ohio-1647,¶ 12, citing *Ohio Citizens Bank v. Mills*, 45 Ohio St.3d 153, 543 N.E.2d 1206 (1989), superseded by statute on other grounds. Our

fundamental goal is "to ascertain and carry out within the bounds of the law, the intent of the testator." *Steingass, supra*, at ¶ 12, quoting *Prentiss v. Goff*, 192 Ohio App.3d 475, 2011-Ohio-734, 949 N.E.2d 560 (8th Dist.), citing *Domo v. McCarthy*, 66 Ohio St.3d 312, 314, 612 N.E.2d 706 (1993).

{¶77} According to the Supreme Court of Ohio there are several principles that apply to a court's task of construing the terms of a will. These include:

> "1. In the construction of a will, 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 appears from the context that they were used by the testator in some secondary sense.
>
> 4. All parts of the will must be construed together, and effect, if possible, given to every word contained in it."

{¶78} *In re Henderson*, 990 N.E.2d 189, 2013- Ohio-1380, ¶ 8, citing *Stevens v. National City Bank*, 45 Ohio St.3d 276, 279, 544 N.E.2d 612 (1989), quoting *Townsend's Executors v. Townsend*, 25 Ohio St. 477 (1874) paragraphs one through four of the syllabus. However, we are cognizant of the fact that any attempt to discern the intent of the testator is limited to the testator's own will, and that each case is fact-specific. *Henderson, supra* at

¶ 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"). While we are guided by the general rules of construction as stated above, no case is directly on point when reaching an individual's intent to distribute his estate. *Henderson, supra* at ¶ 16. Rules of construction are designed to aid in interpretation of wills and should not be permitted to thwart the desire and purpose of the testator when they may be ascertained from language employed. *McCulloch v. Yost,* 148 Ohio St. 675, 76 N.E.2d 707 (1947).

{¶79} Again, in construing the provisions of the Trust herein, the trial court was faced with a difficult task and turned to the rules of construction in making its determination that the specific language of allocation and specific bequests of Article XXIII prevailed over the generalized language of Article XIII. The trial court noted these specific terms and provisions existed as on the wife-Trustor's date of death, March 26, 2008. We would note these specific terms and provisions existed on July 31, 2003, when David and Carol jointly executed the Trust and Memorandum of Trust. Although the trial court makes no comment as such, we think David's quick and decisive

actions in amending the trust and deleting the specific bequests, approximately three weeks after his wife's death, suggest he also believed the provisions of Article XXIII to be unambiguous and controlling.

{¶80} Surely David and Carol, experienced and successful business people and farmers, knew the extent of their bounty, and desired to gain all possible tax advantages for their heirs. As is often the case, farming families wish to see their farming activities continue and their real property, barns and outbuildings, equipment, and livestock kept together, especially when years of labor and worry have been spent acquiring it. The evidence at trial demonstrated that Appellee was the only family member who, into adulthood and along with his son, worked the family farm, knew how to manage it, and desired to keep the farming operations continuous. Although the testimony at trial alluded to hostilities between Appellee and his parents shortly before Carol's death, the specific language of the trust at the time of its creation, bequeathed two farms to Appellee. And although as previously discussed in section IV(B) and as will be discussed in the final section of this opinion, although the family fortunes and David and Carol's relationship had deteriorated in the years after the Trust was executed, the parties never took steps to designate what they considered to be "separate" property, or to

amend the Trust to revoke the specific bequests to Appellee and his sister Deborah.

{¶81} "When an instrument, of any kind, is open to two constructions, the one consistent and the other repugnant to law, or the one will give effect to the whole, and the other will destroy a part, the former must always be adopted." *James v. Pruden,* 14 Ohio St. 251 (1863), paragraph two of the syllabus. While we cannot say that to agree with the Appellants herein and reverse the trial court's ruling would necessarily be "repugnant to law," we do opine that in declining to do so, we acknowledge the trial court's attempt to give effect to the "whole" of the Trust document and to be consistent with David and Carol's wishes in July 2003, and, in the absence of other amendment or action taken on Carol's part, consistent with her wishes at the time of her death in March 2008. For the foregoing reasons, we find the trial court had competent, credible evidence for finding that the terms of Article XXIII are much more specific and individualized and, in doing so, adopting the language of Article XXIII as the reasonable interpretation in this particular case. As such, we overrule the assignment of error and affirm the judgment of the trial court.

F. The trial court's denial of the request to apply R.C. 5804.12 to modify the trust due to "unanticipated circumstances."

{¶82} Finally, we consider assignment of error six, appellate case

number 12CA6, set forth as follows:

> VI. AS TO CLAIM THREE, THE TRIAL COURT ERRED IN ITS DENIAL TO APPLY R.C. 5804.12 AFTER IF FOUND THAT ARTICLE XIII HAD NO EFFECT ON THE TRUST.

{¶83} As previously discussed, Appellants, the Evanses, disagree with the trial court's decision as to the conflict between the language of Articles XIII and XXIII in the Trust. The trial court found Article XIII, which contained general language for equal allocation and distribution of assets, was likely included as a clerical error and that Article XXIII, which contained more specific language and specific bequests, was indicative of David and Carol's intent at the time of the creation of the Trust and, Carol's intent, at the time of her death. Article XXIII was the Trust provision which David sought to amend shortly after Carol's death. Appellants, the Evanses, contend that Deborah and Carl could no longer work together effectively to administer the Evans Farm Trust, as provided for in Article XXIII. The Evanses urged the trial court to find unanticipated circumstances existed so as to modify the terms of the Trust. The trial court declined to do so.

{¶84} R.C. 5804.12 provides, in pertinent part, as follows:

> "(A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention.

> (B) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration.
>
> (C) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust."

{¶85} The Evanses contend the trial court's finding that the unanticipated circumstances presented to the trial court did not invoke the application of R.C. 5804.12 was erroneous. The Evanses contend the statute was applicable to effectuate Carol's intent after two unanticipated circumstances in her life: her murder and the family feud which preceded it.

{¶86} Specifically, the Evanses argue in 2003, their parents' intent was to keep the family farm together, with Appellee in charge of the farming operation. By 2007, they argue, Appellee's management of the farm and treatment of his parents had created a family feud, which Carol noted in various journal entries. The Evanses contend Carol's intent had changed drastically. Randall and other family members testified about the feud and the change in Appellee's personality. Also, Deborah Crabtree testified, due to the feud, that she would have difficulties working with Appellee to administer the Evans Farm Trust. The Evanses contend had Carol anticipated these hostilities, she would have simply provided for the even distribution of assets as she had always intended. The Evanses also contend

that although death can strike at any time, the intentional killing of their mother was clearly unanticipated. They argue at the time of her death, Carol was working on changes to the Trust.

{¶87} Appellee Carl asserts the trial court heard three days' worth of testimony and properly refused to apply R.C. 5804.12 in this case because: (1) there can be no retroactive application of the statute; (2) the requested modification does not further joint trust purposes; and (3) the requested modification is not consistent with the Trustor's intent. He asserts the trial court correctly held that the evidence presented at trial did not provide any factual evidence of unanticipated circumstances which would merit the court's revising portions of the trust.

{¶88} Appellee also argues the requested modification does not further the trust purposes. He argues it is clear that one of the main purposes of the joint trust was to get the specific properties to the specified beneficiaries to maintain in the future. Appellee notes an "In Terrorem" [18] clause was included in the trust to discourage any challenge to the unequal disposition. And Appellee argues it is not unusual for families with farms to perpetuate those farms through the family member most involved in the business.

[18] Black's Law Dictionary, 6th Ed. 1991, defines an "In terrorem clause" as: "A provision in a document such as a lease or will designed to frighten a beneficiary or lessee into doing or not doing something; e.g., clause in a will providing for revocation of a bequest or devise if the legatee or devisee contests the will."

{¶89} Appellee also argues the requested modification is not consistent with the Trustor's intent, which is to be determined at the time a trust is created. *Pack v. Osborn*, 117 Ohio St.3d 14, 881 N.E.2d 237, ¶ 8. Appellee urges that the statute gives a court authority to give effect to intentions and purposes of the settlors at the time an instrument is created, and not at the time of death, which would undermine the tenents of estate planning when beneficiaries feel they have been unequally treated. As noted above, David's amendment of Article XXIII attempted to revoke the specific bequests of two farms to Carl and "the Winery" property to Deborah.

{¶90} As relates to the Evanses' arguments regarding the unanticipated circumstances, Appellee contends: (1) despite the fact she was murdered, Carol knew that death was inevitable when she executed the trust on July 31, 2003; (2) the evidence demonstrated Mr. and Mrs. Evans had already experienced financial losses in 2002 and 2003, shortly before they turned over the farming operation to Carl Michael; (3) the evidence demonstrated the dispute between David and Carl had gone on for months before her death; (4) the evidence demonstrated Carol refused to take part in the 2008 litigation against Carl; and (5) the evidence demonstrated that although Carol tried to treat her children equally, at times she gave them as individuals, larger financial gifts.

{¶91} As to claim three, the trial court made these findings:

> "It is the opinion of the Court that the unanticipated circumstances that were presented to the Court, i.e. economic setbacks, family disputes, marital discord, etc., were not the type of unanticipated circumstance(s) that would invoke the application of the statute. All of the events presented at trial happened during the lifetime of the wife-Trustor while she was capable of making changes to the Trust. She did not make any changes to the Trust. While the wife's murder was certainly unanticipated, life is by nature uncertain, and death may come at any time. …[I]t is further the opinion of this Court that the testimony and evidence presented did not convince the Court by a preponderance of the evidence that the wife-Trustor's intention was different from that as contained in Article XXIII of the Trust…. The Court, therefore, declines the adoption of O.R.C. 5804.12, as requested by Plaintiffs.

{¶93} Upon review of the record, we find there is competent credible evidence to support the trial court's finding that the evidence presented did not demonstrate Carol's intent, despite the unfortunate circumstances which occurred during the intervening years between 2003 and 2008, was different from the allocation and distribution plan she jointly established with David in Article XXIII of the Trust. We addressed this at length in section IV(E) above.

{¶94} We have already noted that the rules of construction for interpreting wills are equally applicable for interpreting trusts. *Steingass, supra*, at ¶ 8. Where the language of a will is clear, words cannot be added or changed, even if the consequences seem harsh to some, *Summers v.*

Summers, 121 Ohio App.3d 263, 699 N.E.2d 958, (4th Dist. 1996), ¶ 16-18, citing *Stevens v. Wildesen,* 54 Ohio App. 185, 187, 6 N.E.2d 793, 793-794 (1936). The theory that the testator would have drafted her will differently had she foreseen the circumstances existing at her death does not justify altering the manifest meaning of the will. *Summers, supra*, citing *Union Sav. Bank & Trust Co., v. Alter,* 103 Ohio St. 188, 132 N.E. 834 (1921).

{¶95} One of the important functions of a court of equity is to assist in enforcement and administration of trust, and hence to make such orders and decrees as will secure the carrying out of the creators' expressed intent, as to the dispositive provisions, as to the directions, as to the methods to be used, and as to the details of administration to be followed by the trustee. *Papiernik v. Papiernik,* 45 Ohio St.3d 337, 544 N.E.2d 664 (1989), quoting 6 Bogert, Trust & Trustees (2 Ed.Rev. 1980) 226, Section 561. See, also, *Sandy v. Mouhot,* 1 Ohio St.3d 143, 438 N.E.2d 117 (1982); *Tootle v. Tootle,* 22 Ohio St.3d 244, 490 N.E.2d 878 (1986). Thus, we must determine the grantor's expressed intent as it can be gathered from the trust document. *Papiernik, supra,* 544 N.E.2d 664 (1989). "With the grantor's intent in mind," the *Papiernik* court held, "we are then in a position to apply the doctrine of deviation to determine whether a modification of the trust provisions is justified." *Id.*

{¶96} Similarly, a court of equity, in proper cases, will apply the "change of circumstances" doctrine to permit a trustee to administer the trust assets in a manner other than that expressed in a trust instrument. *Toledo Trust Co. v. Toledo Hospital, et al.*, 117 Ohio App. 425, 192 N.E.2d 674 (6th Dist. 1962). The principle regarding "change of circumstances" is stated in 1 Restatement of Law of Trusts, Section 167, as follows:

> "(1) The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust."[19]

{¶97} In the case before us, the trial court noted economic setbacks, family disputes, and marital discord were not the type of unanticipated circumstances that would invoke application of the statute. At this juncture, we must stop and state that we cannot agree that because "death may come at any time," it follows that even murder is an anticipated circumstance. However, in this case, we do not find evidence that Carol's intent for allocation and distribution of the trust assets had changed to support applying the statute as requested by the Appellants and thus, the fact of her

[19] In Papiernik, the Supreme Court of Ohio used the terms "modification" and "deviation" interchangeably in its discussion of the "doctrine of deviation."

murder does not change the outcome established by the trial court's decision.

{¶98} The trial court noted and the record revealed that economic setbacks had already occurred at the time David and Carol entered into the Trust agreement in 2003. The record also revealed the dispute which appears to have pitted Appellee against his four siblings, with Carol caught in the middle, occurred began several months before Carol's murder. And, it appears marital discord was nothing new to David and Carol, who had been together for over thirty years, married three times and divorced twice. Despite these circumstances testified to at trial, there is competent credible evidence to suggest that Carol's intent for allocation and distribution of the assets and family farms had not changed since 2003. We agree with the trial court's conclusion that the events presented at trial happened during Carol's lifetime, while she was capable of making changes to the Trust and there is no evidence Carol took any steps to do so. We find the trial court did not err by declining the invitation to apply R.C. 5804.12 to modify the terms of the trust due to unanticipated circumstances.[20] As such, we overrule this assignment of error and affirm the judgment of the trial court.

[20] Although the trial court did not discuss retroactive application of R.C. 5804.12 in its decision, we note that R.C. 5804.12 does not specifically authorize that modification of a Trust may have retroactive effect. Appellee also made the argument that the interests of the beneficiaries were fully vested on the death of

JUDGMENT AFFIRMED.

Carol M. Evans and the trial court was without authority to modify any of the terms of the trust except as to the operation or termination of the Evans Farm Trust.

Harsha, J., concurring:

{¶99} In their first assignment of error appellants children claim that the trial court erred in its interpretation of Article VII of the trust by finding that the trustors assigned all property that they owned to the trust when they executed the trust on July 31, 2003. They argue that the statements in Article VII that their parents intended the trust to be the recipient of all of their real and personal property was precatory because it is qualified by language that it is their "intent," and that the trust thus did not constitute a present assignment of their property to the trust. (*See* Ants. 12/14/12 Brief, p. 13)

{¶100} R.C. 5804.01, which was enacted by H.B. No. 416, effective January 1, 2007, as part of the Ohio Trust Code, provides that a trust may be created by several methods, including: (A) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death; (B) declaration by the owner of property that the owner holds identifiable property as trustee; (C) exercise of a power of appointment in favor of a trustee; and (D) a court order. *See generally* 1 Carlin, *Merrick Rippner Probate Law*, Section 34:24 (2014). R.C. 5804.01 represents Ohio's codification of a similar provision in the Uniform Trust Code. Under R.C. 5804.01(B) if the settlor is the same

person or entity as the trustee, there is no requirement that the assets be reregistered or transferred by separate instrument to the trust by that person or entity; the self-declaration is sufficient to accomplish the transfer. See Comment to Uniform Trust Code Section 401 (as included in the Official Comment to R.C. 5804.01). Therefore, the parents (David Evans Sr. and Carol Evans) did not need to transfer their properties by separate instrument, e.g., deed, or reregistration to effectuate the conveyance.

{¶101} To be sure, R.C. 5804.01 was enacted by the General Assembly after the trust here was created in 2003. But R.C. 5804.01 reflects prior common-law precedent that where the settlor/trustor is the same person or entity as the trustee, there is no requirement to transfer legal ownership of the property to the trust outside the trust's self-declaration of the property within its ambit. *See generally Stephenson v. Stephenson*, 163 Ohio App.3d 109, 2005-Ohio-4358, ¶ 8-9 (9th Dist.), citing *Hatch v. Lallo*, 9th Dist. Summit No. 20642, 2002 WL 462862, *2 (Mar. 27, 2002) ("the law does not require that a settlor, who also serves as trustee of a trust established by declaration, transfer legal title to the trust property, since the trustee already holds legal title"); *see also African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhlrichsville, Ohio*, 5th Dist. Tuscarawas No. 08AP50037, 2009-Ohio-1394, ¶ 42 ("Unless the settlor and

the trustee of a trust are the same person or entity, the mere assertion that property is held in trust, without the transfer of the legal interest or title to the property, cannot create an express trust"); *Cartwright v. Batner*, 2014-Ohio-2995, __ N.E.3d __ (2d Dist.), ¶ 40-41 (while the preferred approach would be to sign documents transferring assets to the trust, this is not strictly necessary where the settlor is the same as the owner of the assets).

{¶102} Although appellants are correct that a couple statements in the trust indicated an "intent" that the trust be the recipient of all of the parents' real and personal property, they ignore the additional unambiguous statement in Article VII of the trust that the trustors "have paid over, assigned, granted, conveyed, transferred, and delivered, and by this Trust Agreement do hereby pay over, assign, grant, convey, transfer and deliver unto [themselves as] the Trustee(s) their property." There is no qualification or precatory nature to this statement. The additional trust statements concerning the "intent" of the parties that the trust be the recipient of all their property merely reinforce the settlors' intent to transfer all of their property to the trust. Because the parents David Evans Sr. and Carol Evans declared which of their properties were subject to the trust and they were both the settlors/trustors and the original trustees, no additional transfer of the properties would have been required.

{¶103} Nevertheless, there remains an issue regarding whether the declaration was sufficiently specific, i.e., whether there should be an exhibit or attachment to the trust of a schedule of the assets transferred to the trust in order for the transfer to be valid. This issue is not necessarily an easy one to resolve.

{¶104} First, the statute itself does not indicate any specificity requirement. Nevertheless, R.C. 5804.01 represents Ohio's codification of a comparable Uniform Trust provision. In the official comment to Section 401 of the Uniform Trust, the intent of the provision makes it appear desirable to include some specificity regarding the assets transferred to the trust:

> A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust. * * * A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm

> title with third party transferees and for this reason is not recommended.

{¶105} It remains unclear, however, whether a schedule of assets with appropriate legal descriptions is required.

{¶106} Second, under prior law, "[m]ere declaration of * * * intent to place the assets in the trust [i]s sufficient and effective," and the declaration may be effected by attaching a schedule of assets. *Stephenson* at ¶ 9, 14. But this case law does not express a requirement that a schedule be attached as long as it is sufficiently clear what assets are intended to be transferred to the trust. *See Miller v. Miller*, 139 Ohio App.3d 512, 517, 744 N.E.2d 778 (8th Dist.2000) (failure to attach referenced "Schedule A" to trust declaration did not result in transfer being invalid where attendant circumstances placed beneficiaries on notice of transfer of assets).

{¶107} Third, related provisions permit the specification of real and personal property in legal instruments but do not appear to require it. *See* R.C. 5301.255(A) and (D) (memorandum of trust *may* be presented for recordation and *may* describe specific real property); R.C. 5810.14(A) (personal property *may* be transferred to a trustee by executing the necessary written instrument that identifies the personal property transferred). That is, it is unclear whether a declaration that transfers "all" real and personal

property owned by a person or entity to a trust in which the same person or entity is the trustee needs to identify the property with greater specificity. It would appear, however, that it would be preferable to do so, particularly to avoid subsequent disputes with third parties who are conveyed the property without knowledge of the trust provisions.

{¶108} At a minimum, it would have been preferable for the settlors to have attached a schedule of the assets they intended to transfer to their revocable intervivos trust as common trust property to avoid any future dispute, particularly for successive third parties lacking notice. Nevertheless, because appellants do not specifically claim in their first assignment of error that a schedule of the assets was required to effectuate the transfer of property, I agree that the trial court did not err in determining that the parents' declaration of trust executed in July 2003 assigned all property they owned to the trust. Ultimately, resolution of this issue will await a future case in which the issue is properly raised and argued. With these reservations, I concur in the judgment and opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court, Probate Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J.: Concurs in Judgment and Opinion.
Harsha, J: Concurs in Judgment and Opinion with Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.