OPINION SUMMARY
MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION FOUR

PATRICIA C. BEREZO,	)	No. ED109192
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	
	)	Honorable Ellen S. Levy
LALO BEREZO, ET AL.,	)	
	)	
Respondent.	)	Filed: June 4, 2021

Patricia Berezo ("Appellant") appeals the trial court's grant of summary judgment, motion to dismiss to Lalo Berezo ("Respondent"), and denying Appellant access to funds held in trust for her late husband, Michael Berezo ("Decedent"). Appellant raises four points on appeal. In Point I, Appellant argues the trial court erred granting Respondent summary judgment, concluding Decedent's references to his "wife" in the trust instrument did not entitle Appellant to the funds held in the trust. In Point II, Appellant argues the trial court erred dismissing one of her claims, concluding a proposed amendment to the trust – which would have made Appellant a beneficiary – never took effect. In Point III, Appellant argues the trial court erred granting Respondent summary judgment, concluding Appellant is not entitled to access the funds in the trust as an omitted spouse. In Point IV, Appellant argues the trial court erred by awarding attorneys' fees to Respondent and denying Appellant's motion for attorneys' fees.

AFFIRMED.

DIVISION IV HOLDS: Point I is denied. "In determining the meaning of a trust provision, the paramount rule of construction is that the settlor's intent is controlling and such intention must be ascertained primarily from the trust instrument as a whole . . . . We endeavor to ascertain the settlor's intent at the time of the creation of the trust." *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004). The meaning of "wife" when the trust was created unambiguously referred to Decedent's previous wife, Alene, who died in 2012. Alene's interest in the trust terminated at her death and was not transferable. *Alexander v. UMB Bank, N.A.*, 497 S.W.3d 323, 328-29 (Mo. App. W.D. 2016). Further, the trust predates Decedent's marriage to Appellant. Summary judgment is affirmed.

Point II is denied. Modifications to a trust are only effective if they are executed in the manner expressed in the trust. *Banks v. Central Trust and Inv. Co.*, 388 S.W.3d 173, 176 (Mo. App. E.D. 2012). This requirement protects the integrity of the trust. *Estate of Meyer v. Presley*, 469 S.W.3d 857, 863 (Mo. App. W.D. 2015). Here, the trust provided modification could only be effected "by signing a written instrument, which shall be effective upon delivery to the Trustee." Decedent did not comply with the trust's modification requirements.

Point III is denied. Appellant argued to the trial court she is an omitted spouse entitled to invade the trust as part of Decedent's "augmented estate." On appeal she argues Decedent's fraud of marital rights entitles her to take from the trust as an omitted spouse. This court "will not convict a trial court of error for an issue not presented for its determination." *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 603 n.2 (Mo. App. W.D. 2015). Parties are "bound by the position [they] took in the trial court, and we can review the case only upon those theories." *Sheedy v. Missouri Highways and Transp. Comm'n*, 180 S.W.3d 66, 70 (Mo. App. S.D. 2005). Appellant cannot now claim Decedent's alleged fraud of marital rights entitles her to take from the trust as an omitted spouse. Moreover, fraud of marital rights requires the decedent spouse to "convey or transfer property with the intent and purpose to defeat the surviving spouse's marital rights." *Carmack v. Carmack*, 603 S.W.3d 900, 905-06 (Mo. App. W.D. 2020). "Our courts have consistently applied the statute to any asset in which the surviving spouse had a marital right or interest that could have been recovered in the decedent spouse's estate but for a conveyance or transfer during the marriage." *Id*. No transfer occurred during the marriage.

Point IV is denied. We review awards of attorneys' fees for abuse of discretion and will reverse only if the award is "clearly against the logic of the circumstances . . . and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *City of Byrnes Mill v. Limesand*, 599 S.W.3d 466, 477 (Mo. App. E.D. 2020). The trial court awarded attorneys' fees to Respondent because Appellant "pursued multiple and conflicting theories of recovery," "mischaracterized the court's statements," and "refused to admit defeat despite a plethora of decisions against her position." Nothing in the record suggests the trial court's fee award shocks the sense of justice or indicates a lack of careful consideration.

Opinion by: Philip M. Hess, J.
Gary M. Gaertner, Jr., P.J. and Michael E. Gardner, J. concur.

Attorney for Appellant: Michael P. Downey, Paige Tungate, and David P. Oetting

Attorney for Respondent: Roberts J. Selsor, Britton L. St. Onge, and Rachel Berry

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