

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
FEB 22 2008
COURT OF APPEALS
DIVISION TWO

In re the Estate of)
)
) 2 CA-CV 2007-0094
) DEPARTMENT A
)
 WILLIAM NATHAN SPENCER,)
) MEMORANDUM DECISION
) Not for Publication
) Rule 28, Rules of Civil
 Deceased.) Appellate Procedure
)
)
 _____)

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. PB 2005-108

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

Law Offices of John S. Perlman and
Bradley D. Beauchamp, L.L.C.
By John S. Perlman

Globe

and

Michael A. Carragher

Globe
Attorneys for Appellee

Quindry & Koniuszy, LLP
By Philip C. Quindry and Robin B. Swenson

Mesa
Attorneys for Appellants

B R A M M E R, Judge.

¶1 Appellants Thomas and Christi Moore and Haskell Wells appeal from the trial court's judgment declaring invalid an amendment to a joint trust agreement that would have made them beneficiaries of that trust. They argue on appeal that the trust's provisions implicitly but necessarily granted the surviving trustor the power to amend the trust or, in the alternative, that the trial court should have held an evidentiary hearing to determine whether the trustors had intended the surviving trustor to have the power to amend the trust. Finding no error, we affirm.

Factual and Procedural Background

¶2 The facts are undisputed. In 1998, William Spencer and his wife, Consuelo, as trustors, created the Spencer Living Trust, naming themselves as co-trustees. Upon both of their deaths, the trust's assets were to be distributed to their daughters, Velva Lee Washburn and Lanna Spencer, and their grandson, Bret Stout. Stout was named the successor trustee. Consuelo died in 2002, leaving William as the sole trustor and trustee. Shortly thereafter, William executed an amendment to the trust that altered the disposition of the trust assets upon his death to include the Moores and Wells.

¶3 When William died in August 2005, Stout became trustee. In that capacity, he filed a petition to set aside William's purported 2002 amendment to the trust. In response, the Moores and Wells petitioned the trial court to declare the trust amendment valid. After hearing argument, the court granted Stout's petition and ruled the 2002 amendment was invalid. It also denied the Moores' and Wells's request for an evidentiary hearing to

determine whether William and Consuelo had intended for the other, as survivor, to have the power to amend the trust. This appeal followed.

Standard of Review

¶4 Whether the trust documents permitted William to amend the trust after Consuelo’s death is a legal conclusion we review de novo. *See In re Walter P. Herbst & Shirley A. Herbst Trust*, 206 Ariz. 214, ¶ 14, 76 P.3d 888, 890 (App. 2003). As with the interpretation of a will or contract, “[t]he basic rule for the interpretation of . . . trusts is to ascertain the intent of the settlor[s]” *In re Estate of Gardiner*, 5 Ariz. App. 239, 240, 425 P.2d 427, 428 (1967); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993) (contracts); *In re Estate of Johnson*, 168 Ariz. 108, 110, 811 P.2d 360, 362 (App. 1991) (wills). The intent of the trust’s settlors is best determined by the language of the trust itself, and only if that language is ambiguous will we look beyond it. *State ex rel. Goddard v. Coerver*, 100 Ariz. 135, 141, 412 P.2d 259, 262-63 (1966).

Discussion

Power to Amend or Revoke

¶5 The Spencer trust provides in Article Eleventh that: “During the joint lifetime of the Trustors they, by written instrument filed with the Trustee and signed by each Trustor, may amend or revoke any of the provisions of this Trust Agreement, in whole or in part.” That Article does not reserve to either William or Consuelo the right to amend or revoke the

trust after the death of the other. In Arizona, “[a] settlor cannot modify [or revoke] the trust unless the right to modify [or revoke] has been reserved to the settlor under the terms of the trust.”¹ *Herbst Trust*, 206 Ariz. 214, ¶ 15, 76 P.3d at 891. Moreover, “when the settlor reserves a power to revoke his trust in a particular manner or under particular circumstances, he can revoke it only in that manner or under those circumstances.” *In re Estate & Trust of Pilafas*, 172 Ariz. 207, 210, 836 P.2d 420, 423 (App. 1992). The courts in both *Herbst Trust* and *Estate & Trust of Pilafas* adopted rules from the Restatement (Second) of Trusts (1959). *See Herbst Trust*, 206 Ariz. 214, ¶¶ 16-17, 76 P.3d at 891 (adopting Restatement (Second) § 331); *Estate & Trust of Pilafas*, 172 Ariz. at 210, 836 P.2d at 423 (adopting Restatement (Second) § 330); Restatement (Second) § 330(2) (“[T]he settlor cannot revoke the trust if by the terms of the trust he did not reserve a power of revocation.”); Restatement (Second) § 331(2) (“[T]he settlor cannot modify the trust if by the terms of the trust he did not reserve a power of modification.”).

¶6 Although *Herbst Trust* and *Estate of Pilafas* are factually distinguishable, cases addressing language similar to that found in Article Eleventh consistently hold that such language unambiguously reserves the power to revoke only to the settlors acting jointly. *See L’Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fl. Dist. Ct. App. 1999) (trust

¹The power to revoke a trust typically includes the power to amend it, and an unrestricted power to amend generally includes the power to revoke the trust. Restatement (Second) of Trusts § 331 cmts. g, h (1959); Restatement (Third) of Trusts § 63 cmt. g (2003); *see also In re Walter P. Herbst & Shirley A. Herbst Trust*, 206 Ariz. 214, ¶ 17, 76 P.3d 888, 891 (App. 2003) (“We follow the Restatement in the absence of contrary controlling authority.”).

amendable during “the life of the Settlers” unambiguously required any amendment to be joint); *Williams v. Springfield Marine Bank*, 475 N.E.2d 1122, 1125 (Ill. App. Ct. 1985) (reservation of power to amend to “Settlers” does not permit individual settlor to amend trust); *Scalfaro v. Rudloff*, 934 A.2d 1254, 1258 (Pa. 2007) (use of plural language in reserving power to revoke “clear and unambiguous in stating that the power of revocation was to be exercised by the [settlers] jointly, and not by either one of them unilaterally”); compare *Roberts v. Sarros*, 920 So. 2d 193, 195-96 (Fl. Dist. Ct. App. 2006) (power to amend reserved to “Grantors” allowed amendment by survivor because trust terms stated singular and plural terms interchangeable); *Day v. Rasmussen*, 629 S.E.2d 912, 915 (N.C. App. Ct. 2006) (reservation of power “during their lifetimes” ambiguous).

¶7 The most recent Restatement of Trusts, however, has softened the rules adopted in *Herbst Trust* and *Estate & Trust of Pilafas*. It now suggests a court may, in some circumstances, presume a settlor has reserved the power of revocation or amendment where the settlor “has retained an interest in the trust,” such as the power to appoint or to withdraw the trust’s principal. Restatement (Third) of Trusts § 63 cmt. c (2003). After Consuelo’s death, William retained those powers pursuant to §§ 4.02 and 4.04 of the Spencer trust. Thus, the Moores and Wells reason, because Article Eleventh is “silent on the issue of amendment or revocation of the Trust after the death of one of the Trustor[s],” we may presume William also retained the authority to amend the trust.

¶8 Adopting the new Restatement’s rule, however, would not change the result here. The presumption that a settlor has the power to revoke when he or she has retained an interest in the trust, *see* Restatement (Third) § 63 cmt. c, arises only when “the settlor has failed expressly to provide whether the trust is subject to a retained power of revocation or amendment.” If so, then whether the settlor has the power to revoke is a “question . . . of interpretation.”² Restatement (Third) § 63(2) (referring to comment (c)). Under the Restatement (Third) § 63(1), however, “[t]he settlor of an inter vivos trust has power to revoke or modify the trust to the extent the terms of the trust . . . so provide.” Here, the terms of the Spencer Trust explicitly reserve, to William and Consuelo jointly, the power to revoke; thus, the trust terms do not “fail[] expressly to provide whether the trust is subject to a retained power of revocation or amendment.” *Id.* at § 63(2). Consequently, subsection (2) of § 63 does not apply, and we may not judicially amend the trust when its plain terms already clearly define the power to amend or revoke.

¶9 Nor do we agree, as the Moores and Wells suggest, that the trust terms do not address whether the surviving settlor can revoke or amend the trust following the death of the other settlor. Article Eleventh of the trust is titled “Amendment or Revocation” and contains only the provision reserving to William and Consuelo the joint authority to amend the trust. But that does not mean that the trust leaves open the question of whether the

²The term “retained power” refers to powers retained or reserved by the settlor or settlors in the trust instrument. *See generally* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees*, § 104 (2d ed. 1984); Restatement (Second) of Trusts § 330.

survivor could amend the trust; its failure to reserve that power to the survivor clearly indicates the survivor does not have such authority. “The doctrine of *Expressio unius est exclusio alterius* is that the expression in a contract of one or more things of a class, implies the exclusion of all things not expressed” *Herman Chanen Constr. Co. v. Guy Apple Masonry Contractors Inc.*, 9 Ariz. App. 445, 447, 453 P.2d 541, 543 (1969). Under that principle, because William and Consuelo reserved only a joint power to revoke or amend, they intended no other power be reserved. Moreover, the trust clearly enumerates the powers and authority the surviving settlor would have after the other’s death, and those powers simply do not include the power to revoke or amend.

¶10 Our conclusion is consistent with the rationale the Restatement (Third) provides for the presumptions described in comment (c)(1) of § 63, which states we should presume revocability “in cases of more complicated trusts” in part because of “the risk of confusion and doubts about a settlor’s understanding,” which might be “aggravated by the patently deficient performance of counsel in failing expressly to deal with the obviously important matter of revocability.” Here, there was no failure by counsel to expressly deal with amendability or revocability—that authority was reserved for exercise by William and Consuelo “[d]uring [their] joint lifetime.”

Power to Withdraw or Appoint Principal

¶11 The Moores and Wells also argue, however, that the survivor’s power to withdraw the entire trust principal pursuant to § 4.02 is “in effect, identical to the power to

revoke the Trust,” therefore allowing us to imply the power to amend the trust. Although they cite no relevant case law, we have found some authority for the premise that unlimited power to access a trust’s principal is concomitant with the power to revoke and amend the trust. *See In re Estate of Coleman*, 28 Cal. Rptr. 3d 282, 287 (Cal. Dist. Ct. App. 2005) (“A revocation occurs where the settlor makes a conveyance of the trust property out of the trust.”); *Trenton Banking Co. v. Howard*, 187 A. 569, 571 (N.J. Ch. Ct. 1936) (authority to remove trust principal “comprises the right to revoke the trust”); *Boyle v. Kempkin*, 9 N.W.2d 589, 592 (Wis. 1943) (“[W]here the settlor reserved the right to increase or decrease the trust fund, this amounted to a reservation of the general power to revoke.”); *see also* Restatement (Second) of Trusts § 342.

¶12 Even were we to adopt this rule, however, it would not apply here. If William had withdrawn all of the assets from the Spencer Trust, the trust would not have ceased to exist. William’s will, executed at the same time as the trust, provided that any property not otherwise distributed by his will would be placed in the Spencer Trust and distributed “as part of the Trust Estate thereunder.” Thus, even had William removed the principal from the trust, if he did not modify his will to delete the reference to the trust, the withdrawn property would fund the trust and be distributed pursuant to its terms at William’s death. Accordingly, because of the provisions in his will, William’s simply withdrawing all the trust principal would not serve as a de facto revocation of the trust. *Cf. Delaware Trust Co. v. Davis*, 163 A.2d 588, 591 (Del. Ch. Ct. 1960) (despite “draining off of . . . original assets” of trust, trust

still existed because “it may serve as a conduit” for distribution of second trust’s principal upon death of beneficiary of second trust).³

¶13 Moreover, to interpret § 4.02 as reserving a general power to the survivor of Consuelo and William to revoke and amend the trust would be inconsistent with the trust’s remaining provisions. See *In re Estate of Pouser*, 193 Ariz. 574, ¶ 10, 975 P.2d 704, 708 (1999) (“In attempting to ascertain the testator’s intent, we consider the text of the will as a whole”); cf. *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992) (“A contract must be construed in its entirety and in such a way that every part is given effect.”).

¶14 The power reserved to the surviving trustor by §§ 4.01 and 4.02 to invade the trust’s principal and accumulated income was also provided the joint trustors by § 2.01. Section 2.01 uses language virtually identical to § 4.02: “The Trustee shall pay to the Trustors so much of the net income or principal, or both, of the Trust Estate, up to the whole thereof, as the Trustors may from time to time request.” To interpret § 2.01 as also

³*In re Estate of Coleman*, 28 Cal. Rptr. 3d 282, 287 (Cal. Dist. Ct. App. 2005), adopts a different rule than *Delaware Trust*. In *Estate of Coleman*, a will purported to devise property to a trust that the court determined had been revoked by the removal of its principal. 28 Cal. Rptr. 3d at 287-88. The court determined the will effectively created a testamentary trust identical to the revoked trust. *Id.* at 288. “An expectation or hope of receiving property in the future cannot be held in trust.” Restatement (Second) of Trusts § 86. Therefore, a trust that, at its creation, purports to hold some future expectancy in trust, such as devise under a will, would not be valid. The practical effect of the rule in *Estate of Coleman*, however, is that removing all of the property from the Spencer Living Trust would not permanently terminate it. Thus, the rule in *Estate of Coleman* does not alter our conclusion that William’s authority to invade the Spencer Trust’s principal was not synonymous with a power to revoke that trust.

permitting the trustors, acting jointly, to amend or revoke the trust would render Article Eleventh unnecessary. We therefore decline to adopt such an interpretation. See *In re Rowlands' Estate*, 73 Ariz. 337, 342, 241 P.2d 781, 784 (1952) (“No language of the will is to be ignored or treated as surplusage, unless no other conclusion is reasonably possible.”), quoting *Lyon v. Alexander*, 156 A. 84, 86 (Pa. 1931); cf. *Taylor*, 175 Ariz. at 158 n.9, 854 P.2d at 1144 n.9 (“[A] contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous.”).

Recognizing Substance or Form

¶15 We recognize—and, indeed, the parties agree—that William could have accomplished his testamentary objectives by transferring the entire trust principal to a new trust pursuant to his authority under § 4.02 or by making appointments in his will pursuant to § 4.04. The Moores and Wells reason that William’s failure to use one of those methods was a mere “technicality” and argue we should not require William to have taken those “superfluous” steps in order to amend the trust. In support of this contention, the Moores and Wells rely on Restatement (Third) of Trusts § 63 comment (g), which states that the power to revoke a trust is the same as the power to amend it, and *Kimberlin v. Dull*, 218 S.W.3d 613 (Mo. Ct. App. 2007).

¶16 Both comment (g) and *Kimberlin*, however, are distinguishable. Although the trust in *Kimberlin* provided it could be amended by the settlors “‘acting jointly only,’” the court determined that language “contemplated pre-death amendments only” and concluded

an amendment by one settlor following the death of the other was valid. *Id.* at 617. The trust in *Kimberlin*, unlike the Spencer Trust, explicitly reserved to the settlors, “both individually and jointly,” the power to revoke the trust “at any time.” *Id.* at 614. Under Restatement (Third) of Trusts § 63 comment (g), cited by the court in *Kimberlin*, the power to revoke a trust “includes the power to modify the terms of the trust.” *See also* Restatement (Second) of Trusts § 331 cmt. g. In contrast, the provision in the Restatement (Third) of Trusts relied on by the Moores and Wells provides for only a presumption that the settlor has the power to revoke or amend the trust when he or she has retained an interest in the trust. Restatement (Third) of Trusts § 63 cmt. c. That presumption, as we have explained, arises only when the trust does not otherwise expressly describe the power reserved to the settlor to revoke or amend—a situation not present here. *See* Restatement (Third) § 63(1), (2).

¶17 The court in *Kimberlin* also noted that “the predeceased [settlor’s] wishes could easily be disregarded through the revocation of the original trust and creation of a new trust, funded by the same corpus.” 218 S.W.3d at 617. Thus, the court reasoned, “[t]he deceased [settlor] could not reasonably expect the original disposition of her property to be protected when the other [settlor] had the right to revoke the trust at any time.” *Id.* Consequently, the court would not “interpret the trust in a manner that compels a useless act.” *Id.* The Moores and Wells rely on that reasoning here to argue that requiring William to exercise his power to withdraw or appoint the principal would be to require a useless or superfluous act, when the same result would be achieved by the trust amendment he created.

¶18 We do not agree, however, that those steps are necessarily either useless or superfluous. Nor does requiring them elevate form over substance. The power to appoint by will requires the surviving settlor to exercise that power in a will meeting the requisite legal requirements. Those requirements exist, in part, to “prevent fraud and to afford means to determine the authenticity of wills, and a testator who would deprive an heir of his inheritance must do so only upon the conditions prescribed by the law.” *In re Tyrrell’s Estate*, 17 Ariz. 418, 423, 153 P. 767, 769 (1915). Our jurisprudence does not permit a settlor to sidestep those requirements by exercising a presumed—not explicit—power to amend a trust.

¶19 Although, again, William might have removed the trust corpus and created a new trust funded from the withdrawn assets, that process is somewhat more complex than merely amending the Spencer Trust. And we are not willing to assume Consuelo and William believed the process inconsequential simply because we might view it as such. As we noted above, any property so withdrawn and not either placed in the new trust or devised by William’s will would have been returned upon his death, pursuant to the terms of his unamended will, to the Spencer Trust and distributed by its terms, notwithstanding William’s creation of a second trust.

¶20 A joint trust like the one before us is an agreement between the settlors of that trust. *Cf. Gitto v. Gitto*, 778 P.2d 906, 909 (Mont. 1989) (“Voluntary trusts arise by express agreement of the parties.”). Indeed, the trust itself states that it is an “agreement . . . between

William Nathan Spencer and Consuelo E. Spencer.” The terms upon which they agreed—and which, as we have explained, do not allow the survivor to revoke or amend the trust—should not be discarded or ignored for the sake of convenience.

¶21 As we have discussed, William and Consuelo explicitly reserved the power to amend or revoke the trust only when acting jointly. In contrast, they provided that the authority to access the trust’s principal would be available to both of them jointly during their lives and also to their survivor. Had they intended to do so, they could easily and explicitly have reserved to the surviving trustor the power to amend or revoke the trust. That the trust’s language does not do so strongly suggests that William and Consuelo intended for the survivor to be able to appoint or invade the trust’s principal and income but not able to revoke or amend the trust.

¶22 Because adopting and applying Restatement (Third) of Trusts here would not change the outcome determined by the rules adopted in *Herbst Trust* and *Estate & Trust of Pilafas*, we see no reason to alter those rules. Indeed, to adopt the rule that the Moores and Wells propose would effectively alter the terms of any extant joint trust with amendment and revocation provisions similar to those found in the Spencer Trust—even though the settlors when creating those trusts might have relied on the rules discussed in *Herbst Trust* and *Estate & Trust of Pilafas* in defining their powers. “[T]he doctrine of *stare decisis* cautions against overruling a former decision” and “is grounded on public policy that people should know what their rights are as set out by judicial precedent and having relied on such rights in

conducting their affairs should not have them done away with by judicial fiat.” *Derendal v. Griffith*, 209 Ariz. 416, ¶ 33, 104 P.3d 147, 155 (2005), quoting *White v. Bateman*, 89 Ariz. 110, 113, 358 P.2d 712, 713-14 (1961).

Evidentiary Hearing – Parol Evidence

¶23 The Moores and Wells also argue the trial court erred by declining to hold an evidentiary hearing to evaluate extrinsic evidence of William’s and Consuelo’s intent in drafting the trust.⁴ Their argument, however, is limited to the application of Restatement (Third) of Trusts § 63(2), which provides that “whether a trust is subject to a retained power of revocation or amendment” is a “question . . . of interpretation.” As we have discussed, we do not reach § 63(2) because the Spencer Trust does not “fail[] expressly to provide” a power of revocation or amendment, a prerequisite to interpretation under that section. Indeed, the Moores and Wells admit the trust document is unambiguous and instead argue the power to revoke or amend the trust is inherent in the other powers reserved to the surviving settlor. *See Coerver*, 100 Ariz. at 141, 412 P.2d at 262-63 (if trust terms not ambiguous, no extrinsic evidence need be considered).

¶24 Moreover, because clearly the trust terms nowhere permit the surviving settlor to revoke or amend the trust, the admission of extrinsic evidence suggesting the contrary would violate the parol evidence rule. *See Taylor*, 175 Ariz. at 154, 854 P.2d at 1140 (evidence offered “to contradict or vary the meaning of the agreement” violates parol

⁴The Moores and Wells proposed that the attorney who drafted both the trust and the 2002 amendment would testify as to William’s and Consuelo’s intent.

evidence rule); *cf. Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, ¶ 45, 33 P.3d 518, 530 (App. 2001) (extrinsic evidence not admissible to “supply a missing term or to vary or contradict” instrument); Restatement (Second) of Contracts § 216 (1981) (“consistent additional term” of contract may be proven by extrinsic evidence only if “agreed to for separate consideration” or if “term . . . might naturally be omitted from the writing”).⁵ Thus, the trial court did not err by declining to hold an evidentiary hearing.

Sole Beneficiary

¶25 The Moores and Wells next argue William should have been permitted to amend the trust irrespective of its terms because he was its sole beneficiary. *See Manice v. Howard Sav. Inst.*, 104 A.2d 74, 75 (N.J. Sup. Ct. Ch. Div. 1954) (settlor who is sole beneficiary of trust “can terminate the trust and compel the trustee to reconvey the trust property to him, even though the agreement expressly provides that he should have no power to revoke it”). Even were Arizona to adopt this rule, however, it does not apply here. William was not the sole beneficiary of the trust. Article Fifth of the trust governs the distribution of assets upon the surviving trustor’s death and names several remainder

⁵Naturally omitted terms under Restatement (Second) of Contracts § 216 (1981) would encompass, for example, an oral condition on a personal guaranty that an investor must contribute a minimum sum to have his or her investment covered by that guaranty, *Anderson v. Preferred Stock Food Markets, Inc.*, 175 Ariz. 208, 213, 854 P.2d 1194, 1199 (App. 1993), or an agreement by the payee of a note to make mortgage loans to the note’s maker, *Jamison v. S. States Life Ins. Co.*, 3 Ariz. App. 131, 135, 412 P.2d 306, 310 (1966). We find no authority suggesting § 216 would permit altering an agreement between joint trust settlors to give an individual settlor power to amend the trust when the trust explicitly gives that authority only to the settlors acting jointly.

beneficiaries. Admittedly, those beneficiaries' interest in the trust was contingent on William's failure to invade or appoint the trust's principal. But the definition of a trust beneficiary is not restricted to those with a vested or certain interest in the trust. *See* Restatement (Second) of Trusts § 127 cmt. b (“[I]f the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue or descendants.”); Restatement (Third) of Trusts § 48 cmt a (“The ‘beneficiaries’ of a trust are the persons or classes of persons, or the successors in interest of persons or class members, upon whom the settlor manifested an intention to confer beneficial interests (*vested or contingent*) under the trust”) (emphasis added); *see also Johnson v. Superior Court*, 68 Ariz. 68, 71, 199 P.2d 827, 829 (1948) (status as beneficiaries, for purposes of bringing legal action, not “less real” because final value of estate cannot be determined); *Estate & Trust of Pilafas*, 172 Ariz. at 210, 836 P.2d at 423 (“Even a revocable trust vests the trust beneficiary with a legal right to enforce the terms of the trust.”).

Attorney Fees

¶26 Stout requests an award of “fees and costs.” He cites no substantive authority permitting or requiring such an award. Accordingly, we decline to award attorney fees. *See In re Wilcox Revocable Trust*, 192 Ariz. 337, ¶ 21, 965 P.2d 71, 75 (App. 1998).

Conclusion

¶27 For the reasons stated above, we affirm the trial court's judgment invalidating William Spencer's purported 2002 amendment to the Spencer Living Trust.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge