

Virginia Chase and Theresa L. Coffee (hereinafter collectively referred to as Coffee) appeal the grant of a Petition for Relief Pursuant to Indiana Code 29-1-13-10 (Petition for Relief) filed by Bernard F. Miller, personal representative of the Estate of Jon K. Miller (hereinafter collectively referred to as the Estate), concerning the ownership of three parcels of real estate. Coffee presents the following restated issue for review: Did the trial court err in granting the Petition for Relief and denying Coffee's motion to dismiss under Indiana Trial Rule 12 (B)(1) and (6) (Motion to Dismiss) without conducting an evidentiary hearing?

We affirm.

The relevant, undisputed facts are that on June 30, 1999, Jon Miller (the decedent) purchased three parcels of real estate in Vanderburgh County, Indiana. On September 13, 2001, an instrument entitled "Agreement and Declaration of Trust" (the Trust Agreement) was created, "by and between Jon K. Miller, as Grantors and Beneficiaries [sic], ... and Theresa L. Coffee ... (hereinafter referred to as the "Trustee'[".]” *Appellant's Appendix* at 14.

The document provided that "the persons named in the attached Exhibit 'B' are the Beneficiaries of this Trust". *Id.* Virginia Chase was the only name listed on the attached Exhibit B. On the signature page of the Trust Agreement, Chase signed as beneficiary and Coffee signed as "Trustee." *Id.* at 19. The decedent did not sign the instrument either as beneficiary or settlor, nor, it appears, was there even a place for him to sign in his indicated capacity of settlor. The Trust Agreement described the trust property as follows:

Trust Property. The Beneficiaries are about to convey or cause to be conveyed to the Trustee by deed, absolute in form, the property described in the Attached Exhibit "A", which said property shall be held by the Trustee, in trust, for the following uses and purposes, under the terms of this Agreement and shall be hereinafter referred to as the "Trust Property."

Id. at 14. Exhibit A was a legal description of the decedent's three parcels of real estate.

On September 18, 2001, the decedent executed an instrument entitled "Warranty Deed to Trustee" (the Warranty Deed), which provided, in relevant part, as follows:

The Grantor(s) Jon K. Miller of the County of Vanderburgh and the State of Indiana for and in consideration of 10.00 Dollars, and other good and valuable consideration in hand paid, conveys, grants, bargains, sells, aliens remises, releases, confirms and warrants under Provision of Section ____.

Unto Theresa L. Coffee as Trustee and not personally under the provision of a trust agreement dated the thirteenth day of September, two thousand one (2001), known as Trust Number 7410, the following described real estate in the County of Vanderburgh, State of Indiana to wit: 7410 Telephone Road Evansville, Indiana 47715[.]

Id. at 22. The deed was duly recorded.

The decedent died, it appears, sometime in 2003.¹ On July 10, 2006, the Estate filed its Petition for Relief pursuant to Ind. Code Ann. § 29-1-13-10 (West, PREMISE through 2008 2nd Regular Sess.). That provision states:

Upon the filing of a petition by the personal representative or any other person interested in the estate alleging that any person has, or is suspected to have, concealed, embezzled, converted or disposed, of any real or personal property belonging to the estate of a decedent, or has possession or knowledge of any such property or of any instruments in writing relating to such property, the court having probate jurisdiction, upon such notice as it may direct, may order such person to appear before it for disclosure, and may finally adjudicate the rights of the parties before the court with respect to such property. Insofar as concerns parties claiming an interest adverse to the estate, such procedure for disclosure or to determine title is an independent proceeding and not with IC 29-1-7-2.

The legal basis upon which the Petition for Relief was premised is reflected in paragraph 8,

¹ Decedent's probate estate was opened on July 17, 2003.

which states:

During [depositions of Chase and Coffee], both deponents contended that the possession and control of the real estate is properly withheld from the Estate pursuant to a purported “Agreement and Declaration of Trust” and a purported “Warranty Deed to Trustee”, copies of which documents are attached hereto as Exhibits “B” and “C”, respectively. No trust was validly created in favor of Ms. Chase or Ms. Coffee by virtue of these documents. Among other deficiencies, Exhibit B lacks the signature of the decedent as a settlor. Exhibit C was insufficient, among other reasons, for its failure to identify an existing Trust, referencing “Trust Number 7410” which is not known to exist, now or in the past.^[2]

Appellants’ Appendix at 9 (footnote supplied).

On September 1, 2006, Coffee filed a Motion to Dismiss the Estate’s petition. The substance of Coffee’s claim that the Estate had no ownership interest in the real estate is reflected in paragraphs 2 and 7 of the motion to dismiss. Those paragraphs state as follows:

2. The Estate of Jon K. Miller is not the owner of the title to the real estate set forth in the Petition. The Respondent, Theresa Coffee, has asserted ownership of title to the real estate in Trust for Virginia Chase. The Respondent, Virginia Chase, as beneficiary of the Trust is in possession of the real estate pursuant to a regular Deed of conveyance executed by the Decedent prior to his death and attached as Exhibit “C” to the Estate’s Petition which Deed conveyed the property to Theresa Coffee as Trustee. There is no obligation at law that this Deed identify any specific trust. Moreover, it transferred the property to a Trustee of an existing Trust. It would not be necessary that the Decedent even have knowledge of the terms of the Trust in order to convey title.

* * * * *

7. Nothing in such Deed of conveyance intimates that he sought to retain or reserve any title or ownership in and to such property and such Deed was an absolute conveyance of the real estate on its face. Nothing in the

² We can find no indication that a trust named “Trust Number 7410” exists or did exist. At the March 5, 2008 hearing, Coffee explained that such was the trust the decedent intended to create with the Trust Agreement. Coffee made no argument that, apart from that instrument, Trust Number 7410 does or did exist.

Petition has contended that the Deed is in any way a forgery signed by mistake or in any way an improper conveyance of the real estate. The Petition only suggests that the Deed was insufficient because it failed to identify a trust which, if the Court gives any construction to the Deed, it will quickly realize that it did identify a Trust Agreement to which the property was transferred. Whether the Trust Agreement has any validity is a question for determination between the Trustee and the beneficiaries thereof since the decedent clearly relinquished title by the Deed of conveyance. The Deed of conveyance was absolute on its face and complete. It was also and obviously recognized by the real property assessment authorities and the Recorder to be an absolute conveyance by the decedent before his death of any ownership interest in the property.

Appellants' Appendix at 26-27.

On March 5, 2008, the trial court conducted a hearing, ostensibly focusing on the Motion to Dismiss. A review of the transcript of that hearing, however, reveals that the parties and the court discussed at length the validity and effect of the Trust Agreement and the Warranty Deed, i.e., the substantive arguments supporting and opposing the competing motions below. On May 21, 2008, the trial court granted the Estate's Petition for Relief, and denied Coffee's Motion to Dismiss. On June 16, 2008, Coffee filed a motion to correct error, which was denied after a July 9, 2008 hearing.

We begin by noting the precise nature of the relief that Coffee seeks. The trial court granted the Estate's Petition for Relief and denied Coffee's Motion to Dismiss. The practical effect of those rulings was an award of summary judgment in favor of the Estate. Coffee seeks a reversal of the grant of the Estate's Petition for Relief and a remand for a hearing at which she may present evidence relative to the Estate's petition.

Coffee's Motion to Dismiss was premised upon T.R. 12(B). T.R. 12(B) provides that a motion to dismiss for failure to state a claim shall be treated as a motion for summary

judgment when “matters outside the pleading are presented to and not excluded by the trial court.” Where a trial court treats a T.R. 12(B) motion to dismiss as a motion for summary judgment, it must grant the parties a reasonable opportunity to present T.R. 56 materials. *See* T.R. 12(B) (“[i]f, on a motion, asserting the defense number (6), ... matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56”); *Azhar v. Town of Fishers*, 744 N.E.2d 947 (Ind. Ct. App. 2001). “The trial court’s failure to give explicit notice of its intended conversion of a motion to dismiss to one for summary judgment is reversible error only if a reasonable opportunity to respond is not afforded a party and the party is thereby prejudiced.” *Azhar v. Town of Fishers*, 744 N.E.2d at 950.

Our courts have identified several pertinent considerations in determining whether a trial court’s failure to give express notice deprives a party of a reasonable opportunity to respond with T.R. 56 materials. First, we consider whether the parties relied on evidence outside the pleadings to such an extent that “it should have been so readily apparent that there is no question that the conversion is mandated by T.R. 12(B).” *Id.* at 950-51. Next, we consider whether there was ample time after the motions were filed for the parties to move to exclude the evidence relied upon by the movant in support of its motion or to submit T.R. 56 materials in response thereto. Finally, we consider whether the nonmovant presented ““substantiated argument”” setting forth how he or she ““would have submitted specific controverted material factual issues to the trial court if [she] had been given the opportunity.”” *Azhar v. Town of Fishers*, 744 N.E.2d at 951 (quoting *Ayres v. Indian Heights*

Volunteer Fire Dep't, 493 N.E.2d 1229, 1233 (Ind. 1986)).

After reviewing the Estate's Petition for Relief and Coffee's Motion to Dismiss, we conclude the trial court did not commit reversible error in essentially converting those motions into a T.R. 56 motion for summary judgment, and ruling in favor of the Estate without conducting an evidentiary hearing.

The Petition for Relief presented three questions: (1) Can a valid trust be created without the settlor's signature? (2) To whom did the deed purport to convey decedent's interest in the subject property? (3) What is the effect of a deed conveying interest to a nonexistent trust? To summarize, the Estate contended that the attempt to create a trust via the Trust Agreement was ineffective because the purported trust instrument lacked the decedent's signature as settlor. The Estate next contended the Warranty Deed conveying the property to Coffee "as Trustee and not personally under the provision of a trust agreement" conveyed the property to a named trust (i.e., the Trust Number 7410), not to Coffee. *Appellants' Appendix* at 22. Finally, with this in mind, the Estate contended the Warranty Deed failed because the law does not permit conveying property to a nonexistent trust.

In her motion to dismiss, Coffee challenged each of those assertions on legal grounds. In doing so, Coffee cited the same exhibits offered by the Estate (the Warranty Deed and the Trust Agreement), plus one of her own (records of the Vanderburgh County Assessor's Office identifying the owner of the property as "Coffee Theresa L TR The Mystical Rose V.G. Trust"). *Id.* at 31. In her motion, Coffee claimed (1) the Trust Agreement created a valid trust because the decedent's signature as settlor was not required; (2) the Warranty

Deed conveyed the property to Coffee, not a trust, and (3) in any event, the September 18 conveyance was effective because the “[d]eed of conveyance was absolute on its face and complete”, *id.* at 25-26, and “[w]hether the Trust Agreement has any validity is a question for determination between the Trustee and the beneficiaries thereof since the decedent clearly relinquished title by the Deed of conveyance.” *Id.* at 26.

The foregoing reveals that the questions presented in the Petition for Relief and Motion to Dismiss were pure questions of law, i.e., did the decedent create a valid trust in light of the fact that the trust instrument did not bear his signature, did the Warranty Deed purportedly convey the decedent’s property to Coffee or a trust, and, if the latter, what is the effect of a deed conveying property to a non-existent trust? With respect to those questions, the court determined the Trust Agreement was ineffective because it lacked the settlor’s, i.e., decedent’s, signature. That conclusion is correct. *See* Ind. Code Ann. § 30-4-2-1(a) (West, PREMISE through 2008 2nd Regular Sess.) (“[a] trust in either real or personal property is enforceable *only if there is written evidence of its terms bearing the signature of the settlor or the settlor’s authorized agent*”) (emphasis supplied). The court also determined that the Warranty Deed purported to convey the property in question to a trust, not Coffee personally. That point seems inarguable, as the deed itself identified Coffee by name, but only in her capacity “*as Trustee and not personally*”. *Appellants’ Appendix* at 22 (emphasis supplied). Significantly, the Warranty Deed identified the purported trust by name. From this, the trial court correctly determined that Coffee was merely an agent of the purported trust. This brings us to the final conclusion drawn by the court, which was that the Warranty Deed

purported to pass title of the property to a non-existent trust; therefore, the deed was a nullity. This conclusion was also correct. *See Le Roy v. Wood*, 113 Ind.App. 397, 47 N.E.2d 604, 605 (1943) (“[a] deed naming a non-existent grantee is a nullity and passes no legal title to anyone”); *see also Harwood v. Masquelette*, 95 Ind.App. 338, 181 N.E. 380, 381 (1932) (“[t]his contention is in accord with the almost universally accepted rule that a deed to an immediate estate in land, made to a person not in being, or a corporation not yet organized, or having a valid existence, is a nullity and passes no title to any one”).

Returning once again to the factors in *Azhar*, both the Estate and Coffee relied on evidence outside the pleadings in support of their respective motions. Both motions focused upon the same critical questions: Was a trust created by the Trust Agreement? Was the purported conveyance to Coffee as trustee of the Trust Number 7410 valid? The answers to these questions of law depended entirely upon the legal implications of the materials submitted in conjunction with the respective motions and needed no further factual development. We note especially that the evidence Coffee would present if given the chance would not affect the decision.³ As such, it should have been readily apparent to the parties that the conversion of the motion to dismiss into a motion for summary judgment was

³ In paragraph 9 of her motion to correct error, Coffee advised the court:
No evidence was produced at the hearing on the Motion to Dismiss the Petition, and the Petitioner did nothing to satisfy its burden of proof to have its Petition granted. The Defendants were not given an opportunity to present any evidence *regarding the knowledge of the Warranty Deed to the Trustee or any of the circumstances regarding the same*. The Deed was clearly executed by Jon Miller prior to his death before a Notary Public. *The Defendants were not afforded any opportunity to bring to Court witnesses regarding the execution of the Deed or put forth any other evidence of investment in the property.* *Appellants' Appendix* at 45-46 (emphasis supplied). The evidence she describes, emphasized above, would not have altered the legal conclusions regarding the validity of a trust agreement that did not bear the settlor's

mandated by T.R. 12(B). *Azhar v. Town of Fishers*, 744 N.E.2d 947. Moreover, there was ample time after the motions were submitted for the parties to move to exclude the evidence relied upon by the other in support of their motion or to submit T.R. 56 materials in response thereto. *See id.* Finally, Coffee has not presented “substantiated argument” setting forth how she “would have submitted specific controverted material factual issues to the trial court if [she] had been given the opportunity.” *Id.* at 951. Simply put, Coffee has not indicated what facts she would have placed in issue had she be given the opportunity to present evidence at a hearing in addition to the documents and arguments submitted with her Motion to Dismiss. Therefore, Coffee has not demonstrated that she was prejudiced by the failure to conduct an evidentiary hearing. The trial court did not err in ruling on the parties’ respective motions without conducting an evidentiary hearing.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.

signature or the validity of a conveyance of land to a non-existent trust. In short, the evidence Coffee alludes to would have no relevance regarding the questions of law upon which ownership of the property hinges.