Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

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DT: June 17, 2011

RE: In Re Marvin L. Clark Trust
Betty Clark, Petitioner-Appellant v Comerica Bank, Respondent-Appellee
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE COMMENTARY:

Justin Verlander's no hitter led me to write an analysis of no hitters by month. Please recall that Justin went 5 1/3 innings without allowing a hit in his next game.

There has only been one man, in the history of baseball, to throw two consecutive no hitters. It happened in 1938 when Johnny Vander Meer, pitching for the Cincinnati Reds, did it against Boston and Brooklyn. Many say that the dim lights of Ebbets Field came to his assistance in the second game.

But, who came next closest? The answer is another Cincinnati pitcher by the name of Ewell "The Whip" Blackwell. Standing 6 ft. 6 inches, at a time when that kind of height was most unusual, he threw a wicked side arm fastball. On June 18, 1947, he too beat the Braves, and who did he face next? Just like Vander Meer, he faced Brooklyn. With two outs in the bottom of the 9th he faced Eddie "The Brat" Stankey. The Brat singled off the Whip.

One of the best ways to judge how frequent no hitters occur is to compare them to other phenomena. There have been 271 no hitters. Compare this to hitters who have hit three homeruns in one game. That has been done 472 times by 345 different players. This is a little less than a 2-to-1 ratio. Since 1920 there have been 29 occasions in which a player has hit three triples in one game. This shows how odd that phenomenon is. The closest statistic to no hitters is a compilation of those players who have hit for the cycle. There have been 291 players who have hit for the cycle, which closely parallels the 271 no hitters. There have been 672 triple plays.

Thus we have a statistical rarity, but not the most rare.

REVIEW OF CASE:

Reference Files: Interest on Bequest(s)
Settlement Agreement

This is a neat little case with the proper result and good reasoning by both the Lower Court and the Court of Appeals.

Appellant entered into a settlement agreement. Although it doesn't say so, one assumes that the $400,000 due Appellant under the Settlement Agreement was a reduction from her claim. The Settlement Agreement provided for payment after the resolution of tax issues. Appellant sought interest based on EPIC, which provides for interest on a bequest one year after death; the Probate Court declined to impose interest because of stay orders and because of the terms of the contract which provided for payment only after the extinguishing of tax liabilities. Hence, interest would only run one year from that date and not from the date of death.

The Court of Appeals affirmed and said that if there were to have been an award of interest that the Lower Court's reasoning was proper as to tolling. The Court of Appeals went on to say that because the agreement did not provide for interest, and because the agreement was a contract, it should be enforced according to its terms and since it did not provide for interest – there should be no interest.

The statement that no interest is due because it was not provided for in the contract is one with which I could not totally agree. If the contract failed to provide for interest, I believe we should look at other law to find out if interest would be due, as did the Wayne County Probate Court. Suppose Comerica had held up payment for 10 years – would there be no interest?

Trusts like Settlement Agreements are contracts and even if a Trust does not provide for the payment of interest, EPIC does, and interest is due. Therefore, we would apply EPIC to the Settlement Agreement just as we would apply it to the Trust. This would prevent a wayward trustee from holding the money in perpetuity, as value of the dollar declined. I don't think we can draw an inference in this case from the absence of language in a Settlement Agreement.

Using the above methodology would alleviate the necessity of an ad hoc rationale of looking at what is proper under the circumstances. Under Michigan Law, Settlement Agreements are read to be part of the Trust and the Settlement Agreement in the instant matter merely delayed the time of payment. Hence, the Settlement Agreement should be deemed part of the Trust and interest due, except for the reason set down by the Lower Court.

AAM:jv:690910v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re MARVIN L. CLARK TRUST.

BETTY CLARK,

Petitioner-Appellant,

v

COMERICA BANK,

Respondent-Appellee.

UNPUBLISHED
May 17, 2011

No. 296041
Wayne Probate Court
LC No. 03-664463-TV

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Betty Clark challenges the probate court judge's denial of her request for the imposition and payment of interest on the delinquent payment of a pecuniary trust bequest. Clark further contends that Comerica Bank, as a fiduciary of the trust, should be "personally" responsible for payment of the interest based on their failure to timely distribute her share of the trust. We affirm.

Clark contends that she is entitled to interest on her beneficial share of the trust due to delays in distribution of trust assets. In support of her assertion, Clark relies primarily on MCL 555.601(c) to demonstrate her entitlement to an accrual and payment of interest from the date of the decedent's death. In evaluating this claim, the probate court addressed the relationship between MCL 555.601(c) and MCL 700.3904 and determined that any interest accrual would not begin until one year after verification of potential tax liabilities as a result of the testator's distribution of trust assets without modification of the trust document. While the probate court concurred that Clark would theoretically be entitled to interest it further determined that due to threatened litigation by other beneficiaries and the issuance of a court-ordered stay, that any delay in payment to Clark by Comerica Bank was reasonable and served as a valid basis for tolling.

We find no fault with the reasoning of the probate court regarding the interaction of the statutory provisions and their application in general. Under the circumstances of this case, we find that reliance on these statutory provisions is unnecessary because the settlement agreement

executed by Clark, the other beneficiaries and the fiduciaries resulted in a contractual agreement that did not include the accrual or payment of interest as a term or condition.

Specifically, due to concerns regarding the sufficiency of the trust assets to fully fund all of the trust bequests and potential tax liabilities, the beneficiaries and fiduciaries entered into a settlement order, approved by the probate court on October 8, 2003. The various parties "agree[d] to be bound by the terms of the . . . settlement," which reduced Clark's share to $400,000 "in lieu of her beneficial interest" of the Marvin Lee Clark Trust. Payment was contingent on receipt of verification by state and federal tax authorities of the absence of any tax liability by the Trust. Specifically, Clark and the others agreed:

> The undersigned, being all of the beneficiaries of the captioned Trust, do hereby consent and agree in accordance with MCL 700.7207, that immediately upon acceptance by the IRS of the Marvin Lee Clark Federal estate tax return as filed requiring no tax due, the Trustees shall pay to Betty Clark the sum of $400,000.00 *in full satisfaction of her beneficial interest in the Trust.* [Emphasis added.]

At the time of entry into the agreement, the cited statutory provision[1] provided:

> (1) On petition of an interested person, the court may approve an interpretation, construction, modification, or other settlement that is agreed upon in writing by all presently identified and competent beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust.
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> * * *
>
> (3) The court shall approve an agreement described in subsection (1) if it appears to have been reached in good faith and its effects are just and reasonable under all of the relevant facts and circumstances.
>
> (4) The order in response to a petition under subsection (1) is binding on each party who is represented in the proceeding and on others in accordance with [MCL 700.1403(b)]. After issuance of the order, the agreement as approved by the court shall be considered a part of the governing instrument of the trust.

"[A] settlement agreement . . . is a contract and is to be construed and applied as such. Absent a showing of fraud or duress, courts act properly when they enforce such agreements."[2]

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[1] MCL 700.7207, subsequently amended by 2009 PA 46.

[2] *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

Settlement agreements are construed in the same manner as contracts.[3] When "interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning."[4] "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law."[5] As Clark does not contend any fraud or duress in securing her acquiescence to reduce her beneficial interest in the trust, on fulfillment of the condition precedent of verification of the absence of tax liability, the settlement agreement was subject to enforcement as written. Notably neither the trust document nor the subsequent settlement agreement make any reference to an entitlement to or award of interest. Because the settlement agreement is unambiguous and does not reference or include an interest provision, it was necessary to honor the language of the contract as reflecting the intent of the parties.[6] This is supported by the statutory provision that recognized the settlement agreement as being incorporated as part of the "governing instrument of the trust."[7]

Clark's alternative argument regarding the applicability of MCL 600.6013 to determine an award of interest is without merit as this case was not initiated by the filing of a complaint and is not an adjudication of an action for money damages.

Because we conclude that Clark is not entitled to interest, this Court need not address her assertions regarding the propriety of tolling the accrual. Having reviewed the lower court file we concur with the probate court that, had we determined interest to be due, the filing of additional litigation by other beneficiaries and the issuance of a stay order would toll the accrual of interest and preclude the distribution of trust assets by the fiduciaries.[8] To the extent that Clark failed to preserve certain of her claims pertaining to tolling or failed to provide citation to legal authority, we decline to address these issues.[9]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens

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[3] *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994).

[4] *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

[5] *Id.*

[6] *Id.*

[7] MCL 700.7207(4).

[8] See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009); *In re Doty's Estate*, 231 Mich 115, 121-122; 203 NW 865 (1925).

[9] *In re Coe Marital and Residuary Trusts*, 233 Mich App 525, 536; 593 NW2d 190 (1999).