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 2009 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and 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.

DT: February 11, 2010

RE: Elmer M. Dobson Trust
STATE OF MICHIGAN COURT OF APPEALS

My annotations are being sent to members and friends of the firm whom I feel have an interest in keeping up with the latest decisions in the areas of probate law, Wills and Trusts. Despite your apparent interest, some of you must feel that these annotations are a wee bit boring. To remedy this situation, I am going to put on another hat, that of my being a member of SABR, the Society of American Baseball Researchers. I will open each legal review with an overview of a statistical issue in the same, overly opinionated, way I approach the law.

MAJOR LEAGUE STATS:

It is mid-winter of 2010 and the 'hot stove league' is heating up. The time has passed to stop speaking of last season and to look forward to next season. One of the things that interest me most are the top 20 home run hitters of all time, and what current players are moving into that category. This year no new players will pass the 500 home run barrier. One new barrier which should be passed is by Albert Pujois, who now has 366 dingers and should pass 400.

Ken Griffey, Jr. now has 630 homeruns and is 5th on the list, but is unlikely to catch Willie Mays who has 660. This could be Junior's last year. Alex Rodriquez has 583 homeruns and should pass 600. If he passes 609, which he should, this will put him in 6th place, ahead of Sammy Sosa and behind Griffey. Jim Thome is in 12th place with 564 homeruns and is likely to move into 9th place, passing Rafael Palmeiro and Harmon Killebrew and possibly even Mark McGwire. Manny Ramirez has 546 homeruns and could rank as high as 12th if he passes 563 homeruns.

One other interesting note, of which I am sure you are aware, when Babe Ruth hit his 60 homeruns in 1927 ground rule doubles counted as homeruns. Babe Ruth hit none, but in 1961 Roger Maris hit two (2).

REVIEW OF CASE:

Reference Files: Constructive Trusts
Unconscionable Circumstances
Extrinsic Evidence
Improper Distributions
Innocent Misrepresentations
Acquiescence
(Kudos to Tom Trainer and Joseph Buttiglieri of this firm who prevailed in this case.)

This case arose out of an alleged improper distribution, by a bank Trustee to individuals from a marital trust of a deceased Settlor which should not have been funded ab initio. The Court of Appeals affirmed the lower court's ruling imposing a constructive trust on the funds held by the distributee:

1. Grantor of an initial trust died. His trust bifurcated into a martial and family trust to a full extent of the tax credit "if" it would save estate taxes; if not, all was to go to the family trust.

2. The found fact was that there would have been no tax savings.

3. The marital trust was funded anyway, improperly.

4. Successor trustees transferred monies out of the marital to spouse's own trust; thence to Respondents.

5. Surviving spouse died and the family trust distributees objected and plead against the bank for surcharge and recipients to impose a constructive trust.

6. The lower court did not surcharge the bank, but imposed a constructive trust on the recipients and the proceeds.

The Court of Appeals reiterated well settled law, the fact finding is reviewed under the standard of "clearly erroneous" and interpretation is reviewed "de novo." The Court cites *Kremlick* to allow trial courts to use extrinsic evidence to establish ambiguities. The Court of Appeals found no ambiguity and said "…'if' estates taxes will be reduced" was a condition precedent to funding the marital trust and, therefore, the funding of the marital trust was erroneous.

The Court of Appeals then goes on to consider extrinsic evidence, though not necessary, and finds the extrinsic evidence as to the Settlor's intent supportive. I do not believe it is

advisable for an Appellant Court to do this, because a future court might be tempted to use unnecessary extrinsic evidence if it attempted to mitigate against what was, apparently, a clear object of Settlor.

The Court of Appeals next summarizes the pertinent established law in a cogent manner.

1. Property need not be wrongfully acquired for the imposition of a constructive trust. It is sufficient that it be "unconscionably withheld OR that the recipient is unjustly enriched." Unjust enrichment is defined as the receipt of a benefit which would be inequitable to retain.

2. The Court of Appeals then gives us some basis for future applicable of the Doctrine of Unconscionable Circumstances. The reader might recall my annotation of the Philip Payment matter, which is dated/sent January 7, 2010. In that annotation I review two Supreme Court cases, cited by the Payment court. The first is so overly malignant, as to not be of value, because no one could act in such an unconscionable manner and the second in which the defendant was too blameless, as to not be unconscionable. The instant court:

A. Found that since the bank made a mistake in funding the marital, and not the family trust that there was an improper payout.

B. Wrongful payment was the issue and not wrongful acquisition.

C. Yet the actual ruling:

> "Moreover we conclude that the trial court correctly ruled that the Petitioner's share of the property should be placed in a constructive trust because Respondents were unjustly enriched and if not returned would be unconscionably withheld."

What the Court of Appeals is doing is saying because there is an improper payout by the bank there is a rightful acquisition by the distributees and retention would be unconscionable. This is guidance. In the previous cases, you had wrongful acquisition and wrongful's retention. The court is blending the 'OR' of unjust enrichment and unconscionable circumstances and is finding that unjust enrichment is an unconscionable circumstance for which a constructive trust will be imposed.

The Court of Appeals also cites another Michigan Supreme Court case which is better than the two cases cited by the Philip Payment court, because it does add some meat to the definition of unconscionable circumstances. The Court of Appeals, here, cites *Bruso v Pinquet*, 321Mich 630 (1948). The *Bruso* case gives credit for the Doctrine of Unconscionable Circumstances to Pomroy on Equity and the use of constructive trusts, even when there is a legal remedy. The unconscionable circumstance in the *Bruso* case was the withdrawal, by the wife, from a joint account she had with her husband (no reference is made to an account of convenience) which she had a legal right to do. Wife then transferred the monies to herself and a niece, who "induced this fraud." There is good language on one spouse's duty to another and the failure to observe that duty. Also, the Court makes an interesting statement that silence is a badge of fraud. "It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance."

True the Defendants shipped the Plaintiff off to a nursing home and left him without funds. In light of the fact that the spouse had a legal right to withdraw, one can justify this

decision only by looking upon this as a wrongful retention case rather than a wrongful acquisition case, though the Court lay emphasis upon both.

3. Innocent Misrepresentation does not apply to this case, as the fraud must be in the making of the contract (esse contractus) and not in the carrying out of the contract.

4. Any bank wrongdoing was not presented in the statement of questions presented. This is too bad. What if Respondents were impecunious? The practitioner should not abandon this issue if applicable to their own cases. The bank should have known better. The Court of Appeals should have mentioned, at least, Probate Judge Wood's proper imposition of fees charged against the bank for the attorney fees wrought by the mistake of the bank. (Lower court action related to me by Tom Trainer).

5. One cannot rely on a document one denies existed. This is a good equitable doctrine.

6. The time period in question, a few years, did not amount to legal acquiescence which would have barred relief. The case cited by the Court of Appeals found acquiescence after a 30 year delay.

AAM:jv:654054v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re ELMER M. DOBSON TRUST.

DANIEL W. DOBSON and STEVEN M. DOBSON,

Petitioners-Appellees,

v

SOUTHERN MICHIGAN BANK & TRUST,

Respondent-Appellee,

and

AUTUMN L. IVEY and CHARITY IVEY TAYLOR,

Respondents-Appellants.

UNPUBLISHED
January 19, 2010

No. 285248
Branch Probate Court
LC No. 06-032131-TV

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Respondents Autumn Ivey and Charity Taylor, hereafter respondents, appeal by right from the April 16, 2008, judgment ordering distribution of Elmer Dobson's estate pursuant to the provisions set forth in the family trust. We affirm.

The Elmer M. Dobson Trust ("Trust") was established in 1975 and amended in 1976. Under the terms of the Trust, upon Elmer Dobson's death in 1986, his spouse, Dorothy Dobson, and the Southern Michigan Bank and Trust ("Bank") became the successor co-trustees of the Trust. Dorothy Dobson resigned as co-trustee in 1995, leaving the Bank as the sole trustee of the Trust. In 2001, at Dorothy Dobson's request, all assets (including real properties) in the Trust were transferred into an account in the name of the Dorothy Dobson Trust. Upon Dorothy Dobson's death in 2005, most of the funds held in the name of the Dorothy Dobson Trust were distributed pursuant to the trust documents—primarily to respondents. In 2006, petitioners sought to remove or surcharge the Bank as a trustee for breach of the Trust.

Petitioners' position throughout this matter was, essentially, that the Bank improperly funded a separate martial trust fund (using the Trust assets) upon Elmer's death, when, pursuant to section 11 of the Trust, it was supposed to have used the Trust assets to first fund a separate family trust. According to petitioners, the Bank then improperly allowed Dorothy Dobson to withdraw the Trust assets from the marital trust, thereby breaching its duty to act in the best interests of the Trust beneficiaries. The Bank denied any wrongdoing and respondents agreed with the Bank's position. After a hearing held on the matter, the trial court entered a judgment distributing the Trust assets, in part, to petitioners. This distribution appears to have been based on a finding that the Trust assets had not been dispersed in a manner consistent with Elmer's intentions and the Trust language; i.e. that the Trust assets should have been used to fund the family trust first and the assets then distributed according to additional Trust language. Respondents appeal the judgment.

On appeal, respondents first argue that section 11 of the Trust is unambiguous and that the plain language of the Trust instrument shows that Elmer's intent was to first fund the marital trust and to only place the residual amount into the family trust. We disagree.

We review the language used in trusts de novo as a question of law, *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005), while we review the trial court's findings of fact under the clearly erroneous standard, *In re Coe Marital and Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999). "The rules of construction applicable to wills also apply to the interpretation of trust documents." *Reisman*, 266 Mich App at 527. "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Allen Estate*, 150 Mich App 413, 416; 388 NW2d 705 (1986). Where "'there is no patent or latent ambiguity in the provisions of a will, the intention to be ascribed to the testator is that intention demonstrated in the will's plain language.'" *In re Dodge Trust*, 121 Mich App 527, 542; 330 NW2d 72 (1982), quoting *In re Willey Estate*, 9 Mich App 245, 249; 156 NW2d 631 (1967). "A court may not construe a clear and unambiguous will in such a way as to rewrite it," *In re Allen Estate*, 150 Mich App at 417, and each word should be given meaning, where possible, *Detroit Bank and Trust Co v Grout*, 95 Mich App 253, 268-269; 289 NW2d 898 (1980). "However, presence of an ambiguity requires a court to look outside the four corners of a will in order to carry out the testator's intent." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). Accordingly, under such circumstances, a court may establish intent by considering surrounding circumstances and rules of construction. *Id.* "[We have] held that in interpreting contracts where an ambiguity *may exist*, extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the actual intent of the parties; and, (3) to indicate the actual intent of the parties as an aid in construction." *Id.* at 241.

Here, the plain language of the Trust provides that the marital trust would be funded up to the marital deduction under the Federal Estate Tax Law "if and to the extent that the Federal Estate Tax will thereby be reduced." *Random House Webster's College Dictionary* (1997) defines "if" as meaning: "in case that; granting or supporting that; on condition that." The "if" in this provision thus creates a necessary condition that must be satisfied before the marital trust can be funded. Thus, the plain language of the Trust provides that the marital trust would be funded on the condition that it would result in the federal estate tax being reduced. *In re Dodge Trust*, 121 Mich App at 542. Because the marital trust would only be funded on the condition that federal estate tax would be reduced, the plain language of the Trust provides that the family

trust must be funded first, up to the point where federal estate tax would begin to be incurred, then the marital trust would be funded only "if" and to the extent that federal estate tax would be reduced. *Id.* This provision is not ambiguous.

Respondents also argue that the extrinsic evidence established Elmer's intent that the marital trust be funded first. Though we need not look to extrinsic evidence to determine Elmer Dobson's intent, due to the unambiguous language employed in the Trust documents, we will briefly consider this argument.

James Cole, the former trust department manager at the Bank, testified that he initially set up the Trust, after Elmer Dobson died, as a family trust because that is how he believed the Trust documents directed that the Trust be set up, and because it would not make sense to try to take advantage of the federal estate tax exemptions and to fund a marital trust. The marital trust was never set up while he worked at the Bank. John Bos, an attorney admitted as an expert in estate planning, tax issues, and trust administration, testified that based upon the Trust language, the Trust should have been set up by the bank as a family trust. Mr. Bos further testified that the type of trust funding found in the Trust at issue (first funding a family trust with the amount that would escape taxation, then funding a marital trust with the remainder) was formatted in a fairly common arrangement used for estate tax planning. Wayne Haupt, the drafter of the Trust documents, testified that Elmer Dobson's primary focus in setting up the Trust was to avoid paying estate taxes. Petitioner Steven Dobson also provided testimony that reflected Elmer's intention to have all his children share equally in his estate. The above testimony supported an inference that Elmer wanted to have the family trust funded first where his property would be equally distributed to his children, while still providing for his wife, without funding the marital trust, unless it would reduce the federal estate tax. Based on the foregoing, we find that the trial court did not clearly err when it determined, based on the evidence, that Elmer intended the family trust to be funded first. *In re Coe Marital and Residuary Trusts*, 233 Mich App at 531.

Respondents next argue on appeal that because they are not distributees within the clear meaning of MCL 700.1103(p), and they received no improper distributions under MCL 700.7410, they should not be required to give up the property they received. We disagree.

The trial court ordered that the property be placed in a constructive trust and be distributed according to its ruling. A constructive trust is an equitable remedy. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). We review equitable decisions de novo and findings of fact in support of the decision for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

> Constructive trusts are creatures of equity and their imposition makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by operation of law. Constructive trusts, while infinite in their variety, are imposed only where it would be inequitable to do otherwise. [*Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978) (internal citations omitted).]

Actions that would warrant a constructive trust remedy are: fraud, misrepresentation, concealment, mistake, undue influence, duress, and breach of fiduciary or confidential relations.

Chapman v Chapman, 31 Mich App 576, 580; 188 NW2d 21 (1971). However, property need not be wrongfully acquired for imposition of a constructive trust. *Kent v Klein*, 352 Mich 652, 657; 91 NW2d 11 (1958). Rather, it is sufficient that the property is unconscionably withheld or that a person is unjustly enriched *Id.* Unjust enrichment occurs when (1) the defendant received a benefit from the plaintiff, and (2) it would be inequitable to the plaintiff if the defendant retained the benefit. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

> [W]henever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. *Bruso v Pinquet*, 321 Mich 630, 639; 33 NW2d 100 (1948).

We first note that it is irrelevant whether respondents perfectly fit within the confines of MCL 700.1103(p) and MCL 700.7410, because the trial court in equity had jurisdiction to reach the property even though the property was held by subsequent parties, *Bruso*, 321 Mich at 639; *Kent*, 352 Mich at 658, and to reach it in whatever form that that property was then held, *In re Swantek Estate*, 172 Mich App at 517-518. Moreover, we conclude that the trial court correctly ruled that petitioners' share of the property should be placed in a constructive trust, because respondents were unjustly enriched, and if petitioners' share of their property was not returned to them by respondents, that property would be unconscionably withheld. *Belle Isle Grill Corp*, *supra* 256 Mich App at 478; *Kent*, 352 Mich at 658.

Respondents also argue that it is inequitable for them to have to return the property distributed to them from Dorothy's estate when the Bank was completely responsible for any error, and Dorothy detrimentally relied on the Bank's statement that the Trust was a marital trust in formulating her own estate plan and not exercising her right to make withdrawals from the family trust. Respondents appear to be making a claim for innocent misrepresentation, although they do not set forth any case law in their brief regarding the same. We will not search for authority to sustain or reject a party's position, and the failure to cite authority in support of an issue results in it being deemed abandoned on appeal. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995).

Nevertheless, innocent misrepresentation exists when a "party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). Further, the false representation must be made in connection with the making of a contract, and the plaintiff and the defendant must be in privity of contract. *M&D, Inc v McConkey*, 231 Mich App 22, 28; 585 NW2d 33 (1998). Here, respondents' apparent claim of innocent misrepresentation fails because the misrepresentation did not cause Dorothy to lose a portion of the property and the

Bank to gain that portion of the property. *Id.* Moreover, the alleged false representation was not made in connection with the making of a contract, and Dorothy was not in privity of contract with the Bank in relation to the Trust. Dorothy was merely a beneficiary at the time the Bank indicated that the Trust was a marital trust. Respondents' argument fails.

Respondents next argue that the Bank breached its fiduciary duties and because respondents, as third parties, did not participate in the breaches, they should not be liable for the breaches. This issue, and the remainder of the issues raised by respondents, were not presented in their statement of questions presented, other than to the extent of the assertion that the Bank was completely responsible for any errors. "An issue not contained in the statement of questions presented is waived on appeal." *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Regardless, we find that the issue that respondents should not be liable for any breach of fiduciary duty has no merit because, as already stated above, property need not be wrongfully acquired for imposition of a constructive trust, only that it is unconscionably withheld. *Kent*, 352 Mich at 658.

Respondents also argue that laches should result in the Bank being surcharged the value of the property rather than respondents having to give back part of the property because the Bank took no action to set aside the transfers for five years. Laches is an equitable affirmative defense that is applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). The unreasonable delay must cause a change in a material condition, which results in prejudice to the other party. *Id.* at 612. The defendant bears the burden of proving that a lack of due diligence by the plaintiff to file a claim caused him prejudice. *Id.* Here, the Bank did not unreasonably delay the filing of a claim against Dorothy's trust because the Bank did not know that it made a mistake in interpreting the language of the Trust. Moreover, respondents have not proved prejudice. *Id.* at 612. Based on the foregoing, we find that respondents' argument has no merit.

Finally, respondents argue that the Bank should be estopped from initially asserting that there was no improperly distributed property, then subsequently arguing that if property was improperly distributed, respondents should return the property, rather than the Bank being surcharged for the value of the property. Respondents cite *Aiken v Gonser*, 342 Mich 29, 35; 69 NW2d 180 (1955), and *Baios v Clark*, 304 Mich 159, 163; 7 NW2d 255 (1943), in support of their position. The instant matter is distinguishable from *Aiken* and *Baios*.

In *Baios*, 304 Mich 159, an insurance company concealed the existence of an insurance policy for a period of time, and then sought to avoid liability by relying upon a provision in the policy that it had formerly claimed was nonexistent. Our Supreme Court held that, "[h]aving in bad faith denied the existence of the policy, the Insurance Company was estopped from asserting or relying upon any limitation in the policy affecting the time within which suit should be brought." *Id.* at 163. Here, on the other hand, the Bank did not argue that there was no Trust, then later try to take advantage of a Trust provision to absolve itself of some liability. Rather, the Bank argued that it properly interpreted the language of the Trust, and thus properly distributed the property in the marital trust. It was only then that the Bank raised an alternative argument—that if the trial court found that the Bank improperly interpreted the Trust, respondents should return the improperly distributed property rather than the Bank being surcharged for the value of the property. These arguments are not contrary to each other.

In *Aiken*, 342 Mich at 35, the plaintiffs lived under and acquiesced in the terms of a will, (including dividing property under the will terms) for approximately 30 years. They then challenged the property division under the will. Our Supreme Court determined that, "plaintiffs may not now deny the validity of the division of the property under the terms of the will which has been acquiesced in for some 30 years." Again, the facts in the instant matter are dissimilar. The Bank maintained its primary position that it properly interpreted and administered the Trust throughout this litigation. That the Bank offered an opinion as to what the proper remedy should be if the trial court determined that it had misinterpreted the Trust did not alter, and was not inconsistent with, its primary position. Respondents' estoppel argument fails. The petitioners-appellees, being the prevailing parties, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey