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 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: May 19, 2010

RE: Kenneth A. Hope Trust No. 1
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

Now that April is gone, let's see how things have progressed since the prognostication in my "hot stove" issue of February 11, 2010.

Albert Pujols started the season with 366 homeruns and I predicted that he would pass 400. He is now up to 373 and I still believe, in the absence of a major injury, that he will hit at least 27 more homeruns. I did not think that Ken Griffey Jr. would progress very far and he has hit no homeruns for the season and is still stuck at 630.

I predicted that Alex Rodriguez would pass 600 homeruns and I still hold to my prediction. He has gone from 583 to 585, and now the little cheater is two homeruns ahead of Mark McGuire, the big cheater.

Jim Thome is still in 12th place and has moved from 564 homeruns to 568. I believe that he will still pass Rafael Palmeiro and Harmon Kilebrew. Manny Ramierz had 546 homeruns to start the season and is now tied with Mike Schmidt at 548.

Regarding lifetime batting averages Albert Pujols was tied for 17th and still remains tied for 17th with a .334 batting average. Ichiro Suzuki is still in 20th place with a .333 average. Magglio Ordonez has edged up slightly and although he still maintains a lifetime average of .312 he has moved from 70th place to 69th place. (He has gotten his 2000th hit)

Joe Mauer is batting .346 for the season and still maintains his .327 lifetime batting average, although he still lacks sufficient at-bats to be considered.

REVIEW OF CASE:

Reference Files: Extrinsic Evidence

The Probate Court agreed to reform a trust based on the use of extrinsic evidence to establish latent defect. The testimony was that a paragraph in the trust was contrary to intent of Settlor as expressed to Scrivener. This was supported by testimony of others, in addition to the Scrivener.

The Court of Appeals panel agreed that extrinsic evidence may be used to show a latent ambiguity, but fell back upon the case of *Burke v Central Trust Company*, 258 Mich 588 (1932), wherein the court stated:

> "Testimony of the Scrivener of a mistake in drafting the will or of the intention of testator different from that expressed in the will is not admissible in the absence of ambiguity or mistake appearing on the face of the will."

Many would say that this decision conflicts with the Court of Appeals' Decision of March 16, 2010, in the *Estate of William Dudley* (three different judges in that panel).

I would say that there is a potential conflict between the cases. *Dudley* specifically talked about Scrivener error in placing a decimal point in the wrong spot. To that extent, *Dudley* differs from *Burke* and allows evidence of Scrivener error. *Dudley* places primary reliance on Settlor's intent and *Hop*e, although they give credence to Settlor's intent, prevented that intent from being reached, unless the Scrivener error adduced through extrinsic evidence shows potential differences in meaning of the words of the trust itself. The cases are distinguishable as *Dudley* is a trust case and *Hope* and *Burke* are Will cases. Trusts are often reformed; Wills hardly ever, except in unique circumstances.

I am mindful that a total reversal of *Burke v Central Trust Company* would certainly open the door to create latent ambiguity, based on Settlor's purported intent through extrinsic evidence. I would deal with it by limiting it to cases where Scrivener admitted an error to trust cases.

I think the status of the law is now that *Burke* would not apply to situations where a phrase(s) in a will is capable of more than one meaning. The will, under those circumstances, is not being reformed but interpreted. I believe *Dudley* is a correct ruling on trust law and *Burke* should not apply to trust cases.

AAM:jv:660892v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KENNETH A. HOPE TRUST NO. 1.

RONALD HOPE, Trustee,

Appellee,

v

JAMES DART,

Appellant.

UNPUBLISHED
April 20, 2010

No. 290084
Ingham Probate Court
LC No. 08-000542-TV

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Appellant James Dart appeals as of right from a probate court order granting the motion for summary disposition of appellee Ronald Hope, Trustee of the Kenneth A. Hope Trust No. 1, ordering that the trust be modified to delete ¶ 3.3. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

This case involves the terms of the Kenneth A. Hope Trust No. 1, which was executed by Kenneth Hope ("Ken") in 2005. Appellee Ronald Hope ("Hope") is Ken's son and trustee of the trust. According to evidence submitted by Hope, Ken executed a trust agreement in 1990 that included a provision whereby each niece and nephew was to receive $2,500 upon Ken's death. In late 2005, Ken met with his attorney, John Bos, to revise his estate plan. In order to draft the revised trust agreement, Bos requested the names and addresses of Ken's nieces and nephews. Ken responded, "I cannot get names and addresses of all nieces and nephews and will remove this from consideration." According to affidavits from Bos and other witnesses, Ken intended to delete the gift to his nieces and nephews. Nonetheless, the revised trust agreement contained the following provision in ¶ 3.3:

> ***Distribution to Nieces and Nephews.*** At my death Trustee shall distribute the sum of $2,500.00 to each niece and nephew of mine and each niece and nephew of my deceased wife, Margaret D. Hope, who are then living, and not to the descendants of a deceased niece or nephew. Gary McGowan shall be considered as a nephew for purposes of this distribution. If Trustee is unable to

locate a niece or nephew within 90 days after my death, the gift to such niece or nephew shall lapse.

Just before Ken's signature is verification that Ken swore under oath that "the statements in this Agreement are true," and that he signed it willingly and voluntarily.

After Ken's death, Hope filed a petition to reform the trust to conform to Ken's alleged intention to eliminate the gift for the nieces and nephews. Dart, one of Ken's nephews, objected. After Hope filed a motion for summary disposition under MCR 2.116(C)(10), the probate court found that Hope's evidence clearly and convincingly established a scrivener's error and granted the motion, eliminating ¶ 3.3 from the trust.

II. ANALYSIS

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Questions of law are also reviewed de novo. *Minority Earth Movers, Inc v Walter Toebe Constr Co,* 251 Mich App 87, 91; 649 NW2d 397 (2002).

"In resolving a dispute concerning the meaning of a will or trust, the court's sole objective is to ascertain and give effect to the intent of the testator or settlor." *In re Nowels Estate,* 128 Mich App 174, 177; 339 NW2d 861 (1983).

In determining the settlor's intent under Michigan law, the court must "first look to the expression of the intent in the instrument in question and construe the instrument so that each word contained therein has meaning, if it is possible so to do." *Detroit Bank & Trust Co v Grout,* 95 Mich App 253, 268-269; 289 NW2d 898 (1980).[1] Absent a patent or latent ambiguity in a will, the testator's intent is to be determined from the will itself, but where an ambiguity exists, extrinsic evidence can be considered.[2] *In re Kremlick Estate,* 417 Mich 237, 240; 331 NW2d 228 (1983). Thus, in *Burke v Central Trust Co,* 258 Mich 588, 591-592; 242 NW 760 (1932), a case involving an alleged scrivener's error in a will, the Court stated, "Testimony of the scrivener of a mistake in drafting a will or of an intention of testator different from that

[1] According to one authority, wills and trusts "can be reformed if it is established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was." 2 Restatement Property 3d, Wills and Other Donative Transfers, § 12.1, Comment c, p 354. A mistake of fact can include a mistake of expression, as where the donative document "includes a term that was not intended to be included . . . ." *Id.,* Comment i, p 358. This is true even when the document is not ambiguous and extrinsic evidence is admissible to prove that the testator's intent is something other than what is plainly expressed in the document. *Id.,* Comment b, p 354; Comment d, pp 355-356.

[2] Extrinsic evidence is also admissible to prove the existence of a latent ambiguity. *In re Kremlick Estate,* 417 Mich 237, 241; 331 NW2d 228 (1983). "A latent ambiguity exists where the language and its meaning is [sic] clear, but some extrinsic fact creates the possibility of more than one meaning." *In re Woodworth Trust,* 196 Mich App 326, 328; 492 NW2d 818 (1992).

expressed in the will is not admissible, in the absence of ambiguity or mistake appearing upon the face of the will." See also *Newland v First Baptist Church Society of Bellevue,* 137 Mich 335, 336-339; 100 NW 612 (1904) (allowing extrinsic evidence to establish grantors' intention when a deed given in lieu of a bequest by will had certain words crossed out in some places but not in others thereby creating an ambiguity regarding the grantors' intent). The same general rules are applicable to the interpretation of trusts. *In re Maloney Trust,* 423 Mich 632, 639 (opinion by Cavanagh, J.); 377 NW2d 791 (1985).

In this case, there is no claim that ¶ 3.3 conflicts with another provision of the trust or is otherwise ambiguous on its face. Nor is their any claim that ¶ 3.3 contains a latent ambiguity, and there is nothing on the face of the trust as a whole to indicate that there was a scrivener's error. Therefore, extrinsic evidence was not admissible to show that Ken meant the opposite of what is expressly stated in ¶ 3.3, and Ken's intention must be determined from the trust agreement itself. Because that agreement expresses an intent to distribute $2,500 to each surviving niece and nephew, the trial court erred in granting Hope's motion to reform the trust to delete ¶ 3.3.

Reversed.

Costs to appellant, having prevailed in full. MCR 7.219(A).

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray