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 and 2012 compilations 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.

He is a member of the Society of American Baseball Research (SABR).

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DT: September 27, 2011

RE: Helen Mlynarczyk Living Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE WAR:

This one is for Earle.

Remember when we left our gloves on the field when we came in to bat? We did because the pros did.

This practice ended with a rule preventing leaving your glove on the field in 1954. The reason for making the change seems to be obvious – interference. In 1952 the Senators played the White Sox and Sam Dente tripped over Pete Runnels' glove. The play influenced the outcome of the game. (Sam had been on the Senators up until 1954) Also, there is a rumor that Jim Piersall twisted an ankle in practice, stepping on a glove. I don't know how we know this because Jim Piersall was so twisted up we wouldn't be able to make the judgment that the mitt

affected him. Eddie Stankey was thrown off stride while fielding a pop-up in the World Series but caught the ball anyway.

Why did these unique practices start in the first place? Hugh Duffy told Baseball Digest, in 1952, the reason was "It was the thing to do." (Enlightening) "It was a matter of convenience." He went on to say "when you went into the dugout if you took your glove with you it would be thrown into a pile and it would take time to find your own glove between innings." Ted McGrew, a Boston scout, said "If a player made an out at second base and it was the last out of the inning he would have to go all the way back to the dugout to get his mitt." There is also a rumor that players shared mitts between teams in the old days but there is no proof of this.

Fans also were closer to benches "in the old days." Hugh Duffy and Satchel Paige thought that by leaving the gloves on the field that this prevented theft.

REVIEW OF CASE:

Reference Files: Removal of Trustee – Grounds
Appointment of Trustee – Grounds

This is a fact based case where the Court of Appeals affirmed the Probate Court's removal of a nominated successor trustee and the appointment of an independent trustee.

This was a Grantor Trust. A Grantor trustee started to suffer from Alzheimer's. The named successor trustee exercised a clause of the Trust to take over the Trust and become successor trustee. The family split into factions. One person adverse to the successor trustee filed, in court, to remove that successor trustee. The court appointed an independent successor trustee.

Appellee, on appeal, raised the issue "was the successor qualified in the first place?" The Trust had a very interesting provision. As far as succession due to mental decline, there was the normal phraseology relative to letters from two physicians, but there was also the following phrase:

> "If the next designated successor trustee determines by any other means {emphasis added} that the Settlor is unable to care for the Settlor's personal needs or finances then the next designated successor trustee or co-trustee will succeed the Settlor until such time as the Settlor is no longer incapacitated."

Since there was only one letter tendered to the trial court, the Court of Appeals affirmed that the successor trustee validly became successor trustee under this very broad language.

The next question dealt with removal. The Court of Appeals and the trial court cited the new Trust Code and specifically mentioned MCL 700.7706 (D). A trustee can be removed if:

> "there has been a substantial change in circumstances; the court finds that removal of the trustee best serves the interest of the Trust beneficiaries and is not inconsistent with the material purpose of the Trust and a suitable co-trustee or successor trustee is available."

The lower court and the Court of Appeals said Section D allowed removal and appointment of an independent successor trustee, when, and here we get into the fact base:

A. The Settlor did not envision factions developed that greatly disturbed her.

B. She liked the independent trustee.

Appellant argued a clause of the Trust which, in essence, said that if certain children didn't like the way the successor trustee was handling things that a lawyer was appointed to resolve the situation relative to removal; in actuality this is a Trust protector provision.

The Court of Appeals pointed out that this was a post mortem power and, therefore, did not apply.

Query: Doesn't the inclusion of this post mortem power which envisions conflicts developing challenge the lower court's rationale that there has been a change of circumstances not anticipated by the Grantor?

The Court of Appeals points out that this was a pre mortem situation and the post mortem did not apply. This is true, but isn't it evidence of the intent of the Settlor?

Finally the court said that evidence of priority is not a defense to removal if grounds for removal lie.

AAM:jv:698052v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re HELEN MLYNARCZYK LIVING TRUST.

PATRICE M. MILLS,

Appellant,

V

PATRICIA PATTERSON, Independent Successor Trustee,

Appellee.

UNPUBLISHED
September 15, 2011

No. 302877
Wayne Probate Court
LC No. 2010-758747-TV

Before: SAWYER, P.J., and JANSEN and DONOFRIO, J.J.

PER CURIAM.

Appellant, Patrice M. Mills, appeals as of right the probate court's order removing her as trustee of the Helen Mlynarczyk Living Trust ("the Trust"), appointing appellee, Patricia Patterson, as the independent successor trustee, and directing that the Trust be registered with the probate court. Because the probate court did not abuse its discretion by removing Mills as the successor trustee, appointing Patterson as the independent successor trustee, and directing that the Trust be registered with the court, we affirm.

Mlynarczyk, who turned 82 years old on March 3, 2010, gave birth to eight children: John Mlynarczyk, Cheryl Montalbano, Karen Milner, Marianne Mlynarczyk, Nancy Mlynarczyk, Judy Mlynarczyk, Michele Parrish, and Mills. Mlynarczyk created the Trust on January 19, 1985, and amended and restated the Trust on April 14, 1997, and again on November 7, 2007. Subsequently, she was diagnosed with "Alzheimer's type dementia," and her husband cared for her and maintained their home until his death on June 18, 2009. This appeal stems from the Trust that Mlynarczyk created and events that occurred after her husband's death mainly involving disagreement amongst the children about Mlynarczyk's capacity, her care, and administration of the Trust. After appointment of a guardian as litem and a series of hearings, the probate court determined that it was in Mlynarczyk's best interests for an independent party to serve as the successor trustee. The probate court entered an order removing Mills as trustee of the Trust, appointing Patterson as the independent successor trustee, and directing that the Trust be registered with the probate court. It is from this order that Mills appeals as of right.

We review for an abuse of discretion a probate court's decision whether to remove a trustee. *In re Duane V Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007). An abuse of discretion occurs when the lower court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 397. When the probate court sits without a jury, we review its factual findings for clear error. *Id.* at 396. Further, we review de novo, as questions of law, issues involving the interpretation of both statutory language and language used in a trust. See *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001) (involving statutory interpretation and interpretation of a will).

Initially, Patterson argues that it is unclear from the record whether Mills was ever properly appointed as the successor trustee of the Trust because there was no judicial finding that Helen Mlynarczyk was incapacitated before Patterson was appointed as the successor trustee and the power of attorney that Mlynarczyk granted to Mills did not give Mills the authority to remove Mlynarczyk as the trustee of her own trust. Article 10.3 of the Trust sets forth the procedure for removing Mlynarczyk as the trustee upon her incapacitation. That provision states, in relevant part:

> If any person having an interest in the Trust (including any of the designated successor Co-trustees) believes that the Settlor is incapacitated, he or she may allege in a document signed by him or her and delivered to the next designated successor Trustee that the Settlor is incapacitated through illness, age or other cause and that the Settlor is unable to care for the Settlor's personal needs or finances. If (1) this allegation is accompanied by the certificates of two licensed physicians, one of whom is the Settlor's family or attendant physician if available, that the Settlor is unable to care for the Settlor's personal needs or finances, or (2) if the next designated successor Trustee determines by any other means that the Settlor is unable to care for the Settlor's personal needs or finances, then the next designated successor Trustee or Co-trustees will succeed the Settlor until such time as the Settlor is no longer incapacitated.

Here, Mills, as the next designated successor trustee, invoked Article 10.3 to remove Mlynarczyk as the trustee effective July 21, 2010. An August 12, 2010, letter from Mills's attorney to her siblings stated that two experts had concluded that Mlynarczyk suffered from Alzheimer's or dementia. The record contains a June 29, 2010, letter from Dr. Parimala Dommeti stating that Mlynarczyk has mild to severe dementia, which renders her incapable of taking care of her personal or financial needs. The lower court record does not contain a second letter, dated before July 21, 2010, in which a physician opined that Mlynarczyk was incapable of providing for her personal or financial needs. Thus, option (1) in Article 10.3 does not appear to have been satisfied.

Option (2) of Article 10.3 gave Mills broad discretion and allowed her to act as the trustee of the Trust if she determined "by any other means" that Mlynarczyk was unable to care for her personal needs or finances because of her incapacitation. The language of Article 10.3 is clear and unambiguous and, as such, evidenced Mlynarczyk's intent as the settlor of the Trust as a matter of law. See *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992). The record clearly demonstrates that Mills determined that Mlynarczyk was unable to care for her personal needs or finances. Therefore, option (2) of Article 10.3 was satisfied and

Mills was authorized to assume the role of successor trustee. There was no requirement that Mlynarczyk be judicially determined to be incapacitated before Mills became the successor trustee.

The Michigan Trust Code, MCL 700.7101 *et seq.*, effective April 1, 2010, applies to this case. Under MCL 700.8206(1)(a) and (b), the Code applies to trusts created before the effective date of the Code and "to all judicial proceedings concerning trusts commenced on or after that effective date." Here, both circumstances are met. Mlynarczyk created the Trust before April 1, 2010, and this litigation commenced after that date.

MCL 700.7706 of the Trust Code pertains to the removal of a trustee. That provision states, in relevant part:

> (1) The settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (2) The court may remove a trustee if 1 or more of the following occur:
>
> (a) The trustee commits a serious breach of trust.
>
> (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.
>
> (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.
>
> (d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Subsections (a) and (c) are inapplicable because there was no allegation that Mills committed a serious breach of trust or was unfit, unwilling, or persistently failed to administer the Trust effectively. Similarly, subsection (b) does not apply because there were no cotrustees. Thus, only subsection (d) is applicable.

The probate court did not abuse its discretion by removing Mills as the trustee pursuant to MCL 700.7706(1)(d) because a change of circumstances arose after Mlynarczyk created the Trust. Mlynarczyk's children divided into two factions after the death of Mlynarczyk's husband. Before his death, he was Mlynarczyk's primary caregiver and took care of their home. After his death, the children disagreed regarding Mlynarczyk's care and began feuding with each other. At one point, Patterson had to terminate the children's visits with Mlynarczyk because of their conduct. In fact, it was the dissension among her children that prompted Mlynarczyk to file her petition to register the Trust, remove Mills as trustee, and appoint an independent successor trustee.

Mills argues that the sibling conflict does not constitute a change of circumstances because Mlynarczyk anticipated such conflict. Mills relies on Article 9.4(4)(iii) of the Trust, which provides:

> If Judith Mlynarczyk is of the opinion she is treated unfairly by any of the Trustees and presents the facts to Dennis C. Modzelewski, he will have the full authority to remove the existing Trustees and name any other person or financial institution to continue to be the Trustee of the portion held for Judith and her issue.

Pursuant to Article 9.1, this provision will take effect only on Mlynarczyk's death. Thus, the language of the Trust reveals that Mlynarczyk envisioned that Judith may disagree with the terms of the Trust that will take effect after Mlynarczyk's death. Nothing in the Trust shows that Mlynarczyk envisioned that her children would divide into factions and feud with each other while she is still alive. Thus, the sibling conflict constituted a change of circumstances.

Further, the probate court did not clearly err in determining that removing Mills as the trustee best served Mlynarczyk's interests, as the trust beneficiary, and was not inconsistent with a material purpose of the Trust. MCL 700.7706(2)(d). The record shows that the feud among her children was very upsetting to Mlynarczyk. She testified that she "cried everyday" and she began crying on the witness stand while testifying about the siblings' dispute. Mills argues that the probate court clearly erred by determining that Mlynarczyk made her preference for an independent successor trustee "very, very clear" and that the court allocated undue weight to her testimony. Mlynarczyk repeatedly stated that she wanted Patterson to continue serving as the trustee. Mlynarczyk testified that Patterson is "a good person," "will do everything okay," and that she "absolutely" trusted Patterson. Mlynarczyk acknowledged that she had previously named Mills as the successor trustee but that she changed her mind because she believed that the conflict would continue if Mills remained the trustee and it was better to have "somebody out of the family" serve as the trustee. Contrary to Mills's contention, Mlynarczyk did not "d[o] a complete about-face" on cross-examination. Rather, Mlynarczyk testified as follows:

> *Q.* If Pat Patterson, the nice lady to your right, was your guardian and took care of you and just talked to Patrice about the money and those two professionals interacted without involving any of the other siblings, without involving Michele or Judy, would that be okay with you if just Pat and Patrice handled that stuff?
>
> *A.* Yes.

Mlynarczyk's testimony cannot be interpreted as expressing an intent that Mills act as successor trustee in lieu of Patterson. Thus, the probate court did not clearly err by relying on Mlynarczyk's testimony and determining that removing Mills as the trustee best served Mlynarczyk's interests and was not inconsistent with a material purpose of the Trust. Further, a suitable successor trustee was available as required by MCL 700.7706(2)(d).

Mills also asserts that the probate court erred by effectively modifying the terms of the Trust, contrary to MCL 700.7412. Generally, a court's objective is to ascertain and give effect to

the settlor's intent and carry out that intent as nearly as possible. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). Absent ambiguity, a settlor's intent is derived from the trust document itself. *Id.* "The powers and duties of the trustees, and the settlor's intent regarding the purpose of the trust's creation and its operation, are determined by examining the trust instrument." *Id.* MCL 700.7412 pertains to modification of a trust's terms and provides, in relevant part:

> (1) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
>
> (2) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose or, if there is no stated purpose, the settlor's probable intention.

Mills contends that the probate court failed to abide by the unambiguous terms of Article 20.5 of the Trust and failed to adhere to MCL 700.7412 in modifying the Trust's terms. Article 20.5 provides:

> **Court Registration Not Required.** This Agreement and any trusts created by it need not and will not be registered with any court unless the Trustee, in the Trustee's sole discretion, believes it advisable or unless the laws of any state having jurisdiction do not permit the Trust to be exempted from registration.

Mills's argument lacks merit. Article 20.5 explicitly states that the Trust will not be registered unless the Trustee believes that registration is advisable. Patterson was appointed temporary independent successor trustee on August 30, 2010, and believed that registration of the Trust was advisable. Further, her opinion comports with that of Mlynarczyk, the settlor and beneficiary of the Trust. Thus, the trial court's order directing that the Trust be registered did not contravene the unambiguous terms of the Trust.

Mills argues that the probate court also failed to abide by MCL 700.7412 when it removed Mills as the successor trustee contrary to Articles 10.1(2) and 10.3 of the Trust, which named Mills as the successor trustee. As we previously discussed, Mills's removal as successor trustee complied with MCL 700.7706, pertaining to the removal of a trustee. And as discussed with respect to MCL 700.7706, the dispute among Mlynarczyk's children constituted a change in circumstances that Mlynarczyk did not anticipate. The same is true regarding MCL 700.7412, and modification of the Trust's terms furthers Mlynarczyk's stated purpose. Accordingly, the removal of Mills as the successor trustee and appointment of Patterson as the independent successor trustee comports with MCL 700.7412.

Finally, Mills argues that the probate court's decision violated MCL 700.7704(3), which states, in pertinent part:

> If a vacancy in a trusteeship of a noncharitable trust is to be filled, the vacancy shall be filled in the following order of priority:

(a) In the manner designated by the terms of the trust.

(b) By a person appointed by the court.

The terms of the Trust directed that Mills act as the successor trustee on Mlynarczyk's incapacitation. The probate court, however, removed Mills as the trustee and did not abuse its discretion in doing so. Article 10.1(2) of the Trust designates Marianne E. Mlynarczyk as the next successor trustee after Mills. Thus, under MCL 700.7704(3), Marianne was first in priority to fill the trusteeship vacancy. Because the purpose of removing Mills, however, was to appoint an independent trustee outside of the family, the probate court appointed Patterson as permitted by MCL 700.7704(3)(b). Therefore, Mills's argument fails.

Affirmed. Appellee, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio