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 2007-2012 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2013 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2012 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

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

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DT: January 31, 2013

RE: **In re Gwendoline Louise Stillwell Trust**
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

How will Miguel Cabrera do in 2013 having won the MVP in 2012?

Let us do an analysis; certainly not scientific, but certainly suggestive. Readers will remember my analysis of the sophomore jinx; players excelling in their first year drop precipitously their next year. If you have read Daniel Kahneman's "Thinking Fast Thinking Slow" he explains such phenomena as "returning to the mean", and shows it as a near statistical certainty. Let us apply the theory to MVPs and see if the results are the same when the players are superlative. How did MVPs do the year after their award?

I took all MVP players from 1931 to the present to obtain a random sample. I started in the American League and switched to the National five years later and went back and forth at five year intervals. I made certain exceptions. I looked at 1939 rather than 1940, as Greenberg won in 1940 but barely played in `41. I exclude Bonds in 2002 because he was juiced, and went to Miguel Tejada in the American League. For batters, I used batting average as a touchstone.

The results were:

Lefty Grove- Pitcher went 31 and 4 in 1931; 25 and 10 in 1932.
Gabby Hartnett - .344 to .307
Joe Dimaggio - .381 to .352
Phil Cavarretta - .355 to .294
Phil Rizzuto - .324 to .274
Roy Campanella - .318 to .219
Roger Maris - .283 to .269 (yet the second year he won the MVP and hit 61 homers)
Willie Mays - .317 to .288
Boog Powell - .297 to .256
Steve Garvey - up .312 to .319 but dropped in RBIs and homers
Don Baylor - .296 to .250
Dale Murphy - .281 to .302 (when he won a second time-then dropped to .290)
George Bell - .308 to .269
Barry Bonds - 1992- non juice year .336 to .312
Ken Griffey Jr. - .304 to .284
Miguel Tejada - .308 to .278
Ryan Howard - .313 to. 268
Justin Verlander - 24 and 5 to 17 and 8.

In all but two instances, there was a decrease in batting average.

Add to this, only nine players repeated in consecutive years.

Thus, even among the great players, Kahneman's theory applies.

The unenlighted opinion of this author is that Miggy will not have a higher average in 2013 than in 2012.

REVIEW OF CASE:

Reference Files: Unsigned Documents – Effect as Trust Amendment
Class Gifts – Time of Determination
Plain Meaning – Must be Determined in Light of Prevailing Law
Substantial Compliance
Precedent

This published case is a guideline for Scrivener/practitioner in the use of language. It is also of value to the bench and bar in interpreting that language. The case speaks to the effect of an unsigned document and the time to adjudge the closing of a class for purposes of distribution.

Settlor left a Trust. Settlor left handwritten unsigned documents which changed the disposition of her Trust without using the word "amendment". She handed them, in an envelope, to her grandson with directions to deliver them to the trustee, post mortem. Included in the envelope

were references to personal property disposition, which the trust-in-chief called for. The trust-in-chief called for a division to a class of children and grandchildren "including future born or adopted grandchildren". Six days post mortem a great grandchild was adopted by his grandparents; making him a grandchild.

The Lower Court found the documents to be valid Trust amendments, and the adoptee, a grandchild, within the meaning of the term "future" found in the primary Trust. The Court of Appeals properly sustained the first ruling and reversed the second.

Unsigned Documents

One might argue that this case could be restricted to its facts. However, the court propounds a theory to which other facts may reasonably fit. First the Court of Appeals cites the *Reisman Estate*, 266 Mich App 527 to the effect that general rules of construction to Wills and Trusts apply equally. The court cites *In re Temple Marital Trust*; citing also MCL 700.7602(3)(a), that the Settlor may amend a written Revocable Trust "by substantial compliance with a method provided in the terms of the Trust." The court then reviews the terms of the Trust which provide that the terms can be amended "in any manner", and presto the unsigned documents, dated in the handwriting of the deceased, Settlor, constitute an amendment. (Note the broad construction of "in any manner").

Class Gifts – Time of Determination

Although the Trust defined grandchildren as "those adopted now or in the future" the Court of Appeals said you determine the class at the time of Settlor's death and cites *In re Fitzgerald*, 159 Mich App 120, 128 (1987). Why a broad interpretation in the case of "in any manner", and a narrow interpretation in the case of "now or in the future"?

First simple logic, would the future mean 10 years, 50 years? The lack of certainty would prevent orderly distribution.

Second "in any manner" does not conflict with prevailing law. In fact, it has an affinity with the words "substantial compliance." "Now or in the future" conflicts with law on when to determine a class *(Fitzpatrick*).

Footnote by the Court

The Court of Appeals correctly cites in a footnote MCR 7.215(J)(1) to the effect that cases decided before November 1, 1990 are not binding precedent, but are to be considered "persuasive authority". One does not see this particularity often. It is refreshing to see that the rules to be followed are being followed. However, a huge amount of Will and Trust law predates November 1, 1990. This law is not arcane, but is so well settled that it does not find its way into recent Decisions which are published. Most Decisions of the Court of Appeals are not published. These older cases have never been overruled. Hopefully, Appellant Courts will recognize this and not use MCR 7.215(J)(1) to wiggle out of established precedent by saying "we are not persuaded."

AAM:jv:731133
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re GWENDOLINE LOUISE STILLWELL TRUST.

DAVID N. MCPHAIL, Trustee of the GWENDOLINE LOUISE STILLWELL TRUST,

Appellee,

v

CHRISTINE ANN DUDLEY-MARLING, IAN DUDLEY-MARLING, and ANNE DUDLEY-MARLING,

Appellants.

UNPUBLISHED
November 29, 2012
APPROVED FOR PUBLICATION
January 24, 2013
9:05 a.m.

No. 307822
Clinton Probate Court
LC No. 11-027722-TV

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Respondents/appellants Christine Ann Dudley-Marling, Ian Dudley-Marling, and Anne Dudley-Marling appeal as of right a December 5, 2011 probate court order wherein the court held that certain handwritten notes constituted both a valid amendment to the Gwendoline Louise Stillwell Trust ("Trust"), and a list governing the disposition of the settlor's personal property, and held that Avery McPhail was a grandchild-beneficiary of the Trust. For the reasons set forth in this opinion, we affirm the probate court's order in part and reverse the order in part.

I. FACTS & PROCEDURAL HISTORY

During her lifetime, the settlor, Gwendoline Stillwell had two children, Mary McPhail and Christine Dudley-Marling. Mary married appellee/petitioner-trustee David McPhail. Together, Mary and petitioner had three children, David Maxwell McPhail, Jacob McPhail and Dessa McPhail, and one grandchild, Avery McPhail (daughter of Dessa). Christine also had two children, Ian Dudley-Marling and Anne Dudley-Marling.

On July 16, 2001, Stillwell executed the Trust, a revocable trust. Stillwell conveyed all of her property, excluding joint accounts, into the Trust. The Trust provided that, upon Stillwell's death, "my children and grandchildren (including future born or adopted grandchildren) are the beneficiaries of this Trust." The Trust contained specific provisions regarding the distribution of real property, and it provided for the distribution of personal property pursuant to a written list that would be prepared and signed by Stillwell. The Trust provided that any remaining property would be distributed in equal shares to the beneficiaries. Finally, the Trust contained a clause that provided: "[t]he Grantor may by instrument in writing delivered to the Trustee . . . modify or alter this Agreement in any manner. . . ."

Stillwell died in May 2010. Sometime before her death, Stillwell instructed her grandson Jacob, age 27, that he was to take a large envelope to petitioner-trustee if anything ever happened to her. The envelope was addressed to petitioner, and stated "[i]n the event of my death [or] if I happen to become incapacitated so that living alone is futile, open this envelop [sic]. There in [sic] lies a summary of my estate and instructions." The envelope contained several pages of handwritten notes in sequential order with the most recent document on top. The notes were unsigned, but were dated. Many of the writings included lists and descriptions of personal property; however, Stillwell made several entries that were inconsistent with the terms of the Trust. Specifically, Stillwell instructed that petitioner was to share in the distribution of her personal property, and that both Jacob and Dessa's college tuition was to be paid from the estate before the estate was distributed to the beneficiaries.

On August 17, 2011, petitioner petitioned the probate court to construe the Trust in light of Stillwell's notes and determine the effect the notes had on the disposition of the assets in the Trust. In addition, at a hearing, petitioner indicated that he and Mary had adopted Avery (daughter of Dessa) six days after Stillwell's death. Petitioner argued that the adoption made Avery one of Stillwell's grandchildren, entitling her to a share of the estate. Respondents objected, arguing that the notes had no impact on the distribution of the estate because they were unsigned and did not reference the Trust or contain the word "amendment." Respondents also argued that Avery was not a beneficiary of the Trust because she was not a member of the grandchildren class of beneficiaries at the time of Stillwell's death.

Following an evidentiary hearing, the probate court entered an opinion and order on December 5, 2011, wherein the court held that the handwritten notes constituted both a valid amendment to the Trust and a list governing the disposition of Stillwell's personal property. The court concluded that, pursuant to the handwritten notes, petitioner was to share in the distribution of personal property and that Jacob and Dessa's student loans (approximately $76,244) were to be paid in full from the Trust assets before the remainder was distributed to the beneficiaries. Finally, the probate court concluded that Avery was a beneficiary of the Trust where the Fourth Paragraph of the Trust provided that "grandchildren" beneficiaries included "future born and adopted grandchildren." This appeal ensued.

II. ANALYSIS

Respondents raise two issues on appeal. Respondents contend that the handwritten notes did not have any lawful effect on the distribution of the Trust estate because they were unsigned

and did not contain the word "amendment." Respondents also contend that the probate court erred in holding that Avery was a beneficiary of the Trust.

We review de novo a probate court's construction and interpretation of the language used in a will or a trust. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). When construing a trust, "a court's sole objective is to ascertain and give effect to the intent of the settlor." *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust. *Id.* A probate court's factual findings are reviewed for clear error. *In re Raymond Estate*, 482 Mich 48, 52-53; 746 NW2d 1 (2009).

With respect to amendment of a trust, the Estates and Protected Individuals Code (EPIC), MCL 700.1101, *et seq.*, governs the application of a trust in Michigan. *In re Temple Marital Trust*, 278 Mich App 122, 127-128; 748 NW2d 265 (2008). MCL 700.7602(3)(a) provides that a settlor may amend a written revocable trust agreement "[b]y substantially complying with a method provided in the terms of the trust."

In this case, the Ninth Paragraph of the Trust governed amendment and it provided that, "[t]he Grantor may by instrument in writing delivered to the Trustee . . . modify or alter this agreement *in any manner* . . ." (emphasis added). The paragraph did not require a signature. There is no dispute that Stillwell had the mental capacity to amend the Trust and there is no evidence of undue influence. Further, there is no dispute that the notes are in Stillwell's handwriting. Essentially, at issue is whether the lack of a signature and absence of the word "amendment" are fatal to Stillwell's attempt to alter the disposition of her estate. A review of the contested notes shows that, although the notes were unsigned and were not entitled an "amendment," Stillwell nevertheless clearly intended to create a list disposing of her personal property and intended to amend the Trust.

Here, Stillwell placed the notes inside a large envelope that had specific directions to the successor trustee regarding her entire estate, indicating that she intended the documents to constitute more than just a list disposing of her personal property. In particular, Stillwell referred to the notes as "a summary of my estate and instructions," and she summarized her entire estate on the outside of the envelope to include real property, gold, bank accounts and stocks. In the notes, Stillwell again referenced not only personal property, but also all of her assets. Stillwell clearly evinced her intent that the contents of the notes constitute her final directive on the distribution of her entire estate. For example, Stillwell directed how her real property should be distributed in the event that any of her heirs lived with her and provided care. She directed the successor trustee to divide all of her assets. In one entry, she stated, "given my age, however, all property must be up to date. Some stipulations are in order." On April 17, 2010, Stillwell stated, "my latest directions are as follows" and then dictated how she wanted her assets to be divided. In addition, on October 4, 2009, she stated, "this is my latest directive to the family."

Moreover, Stillwell modified how her assets were to be distributed. In the Trust, apart from specific instructions with respect to her real property, Stillwell directed that her assets be divided evenly among the beneficiaries. In contrast, in the notes, Stillwell clearly indicated that Jacob and Dessa's college tuition was to first be paid before any other distribution of her assets. Specifically, on November 3, 2010, Stillwell made two written entries that read as follows:

> When the assets are assembled and before dividing begins pay all college debts for Jake McPhail and Dessa McPhail.
>
> * * *
>
> Dessa McPhail and Jake McPhail's college loans must be paid ahead of any divisions of the estate.

These entries clearly show that Stillwell intended to alter the disposition of the Trust assets by providing that both Jacob and Dessa's tuition would be paid before any other distribution.

Furthermore, Stillwell modified the distribution of her personal property. In the Trust, Stillwell provided that her personal items were to be distributed to the beneficiaries. In the notes, Stillwell indicated that she wanted petitioner to share in the distribution of her personal property. Specifically, on November 3, 2010, Stillwell wrote, "give all heirs and include David N. McPhail the opportunity to choose personal items . . ." and "David N. McPhail is to be included in the divisions of personal items . . . ." Near the last entry, Stillwell included an asterisk in the margin and wrote, "change from previous." On October 4, 2009, Stillwell referenced her personal possessions and wrote: "I wish all of the heirs to choose as they wish" and in the margin on the same page she drew an arrow to that sentence and wrote "[a]lso include David N. McPhail as he was a wonderful soninlaw [sic]."

In sum, Stillwell substantially complied with the terms of the Trust that governed an amendment when she drafted the handwritten notes and ensured that they were delivered to the successor trustee upon her incapacitation. MCL 700.7602(3)(a). Accordingly, the probate court properly held that the notes constituted an amendment to the Trust such that Jacob and Dessa's tuition should be paid from the assets of the Trust and that petitioner should participate in the distribution of personal property.

In addition, we find that the notes govern the disposition of Stillwell's personal property. The Trust provided that Stillwell either prepared or would prepare a signed written list designating certain personal property to certain persons. Here, although the handwritten notes were unsigned, aside from an amendment discussed above, the crux of the notes was to dispose of personal belongings. In the notes, Stillwell clearly evinced her intent to distribute her personal property in accord with her directives therein. Moreover, the signature requirement was to ensure validity of the document; here, no one questioned the validity of the notes. It is undisputed that the notes were in Stillwell's handwriting, that Stillwell included the notes in an envelope with instructions to the successor trustee, and that Stillwell had the notes delivered to the successor trustee upon her incapacitation. In taking these steps, Stillwell clearly evinced her intent that the notes constitute a final list governing the distribution of her personal property. Furthermore, Stillwell arguably satisfied the signature requirement where the notes were in Stillwell's own handwriting, and she made identifying statements about herself regarding her health and wellbeing. In sum, the probate court did not err when it ordered petitioner to distribute the personal property in accord with the directives in the handwritten notes.

Next, respondents contend that the probate court erred in concluding that Avery was a beneficiary of the Trust. The Fourth Paragraph of the Trust was entitled "Provisions Applicable Upon Death of Grantor," and it provided in relevant part as follows:

> A. Beneficiaries upon Death of Grantor.
>
> * * *
>
> 2. I have only two children: *Mary Denise McPhail* and *Christine Ann Dudley-Marling*. I have five grandchildren: *David Maxwell McPhail, Jacob Preston McPhail, Dessa Rose McPhail, Ann Dudley-Marling*, and *Ian Dudley-Marling*.
>
> 3. It is my intent . . . that my children and grandchildren (including future born or adopted grandchildren) are the beneficiaries of this Trust. After my death if the Trustee makes any distributions . . . they shall be in equal portions, per capita, to all of my grandchildren and children. [Emphasis in original.]

Petitioner contends that Avery is a beneficiary of the Trust because she became Stillwell's "grandchild" when, six days after Stillwell's death, petitioner and Mary adopted Avery. Respondents counter that Avery was not a class member at the time of Stillwell's death.

The language of the Trust shows that Stillwell created a class gift to her grandchildren. Absent clear indication to the contrary, generally, membership in a class is to be ascertained at the death of the testator. *In re Fitzpatrick Estate*, 159 Mich App 120, 128; 406 NW2d 483 (1987)[1]; *Veeser v Stenglein*, 314 Mich 29, 35; 22 NW2d 59 (1946); *In re Churchill's Estate*, 230 Mich 148, 158-159; 230 NW 118 (1925). See *In re Reisman Estate*, 266 Mich App at 527 (general rules of construction applicable to wills also apply to trusts).

Here, the plain language of the Trust shows that Stillwell intended her estate to vest and the class of grandchildren-beneficiaries to close at her death. In particular, the Fourth Paragraph of the Trust, is entitled "Provisions Applicable *Upon Death of Grantor*" (emphasis added). The paragraph subsequently identifies beneficiaries of the Trust in a clause that contains the header, "Beneficiaries *Upon Death of Grantor*" (emphasis added). Moreover, although the Trust defined "grandchild" to include "future-born and adopted grandchildren," that definition did not change the fact that the class closed at Stillwell's death. Instead, the definition was in place so that in the event Stillwell had additional grandchildren during her lifetime, they would also be included as beneficiaries with the other named grandchildren. In sum, Stillwell's estate vested and the class of beneficiaries closed at her death. Accordingly, given that Avery was not Stillwell's grandchild at that time, she was not a class member and is not entitled to a share of the estate; the probate court erred in concluding otherwise.

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[1] Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority. *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 444 n 4; 773 NW2d 29 (2009).

For the reasons set forth in this opinion, the probate court's order is affirmed in part and reversed in part. We do not retain jurisdiction. Both parties having presented valid arguments on appeal, neither party may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens