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.

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

For those interested in viewing previous Probate Law Case Summaries, click on the link below. http://www.kempklein.com/probate-summaries.php

DT: August 10, 2010

RE: Anthony Edward Vogel, Sr. Living Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

I held up on my Probate Review to wait until Alex Rodriguez got his 600th lifetime homerun. This should show you what's more important to me.

On Wednesday afternoon, August 4th, in Boston, Alex hit his 600th homerun. Immediately on Yahoo a statistical analysis was done with projections. Yahoo compared A-Rod's homerun total with Barry Bond's, Hank Aaron, Babe Ruth, Willie Mays, Ken Griffey, Jr. and Sammy Sosa, all above 600.

Yahoo projected that A-Rod would reach 825 homeruns after 22 seasons in major league baseball. A-Rod is only in his 17th season; that would mean he would have to play another 6½ years. A-Rod turned 35 in late July, 2010. This would mean he would have to play past his 41st birthday. It is true he is the youngest to reach 600 homeruns, but I find 225 homeruns over the next 6½ years to be quite problematic. Although the yearly total of 37 homeruns is not insurmountable for him, I think this is going to be quite difficult in the later part of his career.

Hank Aaron did not use steroids and, supposedly, A-Rod stopped. Looking at Hank Aaron's last 7 years, Aaron hit 201 homeruns.

Examining Willie Mays statistics, if we throw out his last 4 very meager years and look at the last 7 years before that, he hit 193 homeruns including a league leading 52 in 1965.

My prediction for Rodriquez is 175 which will put him number one past Barry Bonds.

A more interesting projection is Albert Pujols. Albert has played 10 years in the majors and is 30 years of age. Let us assume that he has 8 more years, which is probably conservative. Let's assume that he hits another 15 homeruns this year, in addition to his current 26. This would bring him to 407. If, during the balance of his 8 years, he averages 35 homeruns he would finish with 687 homeruns and not pass Barry Bonds. To pass Bonds, Pujols would, each year, have to be plus nine (9) over the bogy of 35. I believe this would be problematic.

REVIEW OF CASE:

Reference Files: Attorney/Client Privilege
No Contest Provision

A beneficiary challenged the administration of a Trust by a trustee.

Trustee made certain intra-family transfers in his capacity as trustee. Other transfers were favorable to the transferee.

The Trial Court 'no caused' the party challenging the administration, and invoked the no contest provision and forfeiting the share of the contesting party.

Attorney/Client Privilege

Even though an attorney testifies at a deposition that does not constitute a waiver of the privilege, only the client can waive the privilege. As the defendant was the fiduciary and could have waived the privilege, merely allowing the attorney to testify did not constitute a waiver. In fact, the defendant fiduciary did raise proper objections when the attorneys tried to go into conversations between himself and the deceased. In any case, attorney's testimony would not constitute a waiver only the client or the fiduciary could make the waiver.

The Court of Appeals found ample evidence of wrongdoing, even though the trial court did not. The intra-family transfers were referred to by the Trial Court as recognition that, in familial situations, people played "fast and loose." The Court of Appeals disdained the adoption of the fast and loose standard.

The Court of Appeals found, that because there was ample evidence to remove the trustee, that the Trial Court abused its discretion.

The Court of Appeals found the invocation of the no contest clause inappropriate. The Court of Appeals said a party had a right to challenge the actions of a trustee in a removal petition. The Court of Appeals cited the trust itself that said 'provisions of the trust had to be challenged in order to invoke the no contest provision.' The successor's lack of success of the underlying cause of action had no relevance to the invocation or non invocation of the no contest provision. The Court of Appeals merely pointed out that since it had reversed the Trial Court, on the underlying cause of action, that the underlying cause of action was now successful.

AAM:jv:#668474v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Anthony Edward Vogel Sr. Living Trust.

MARK EUGENE VOGEL,

Appellant,

v

MICHAEL LEVI VOGEL as Trustee and Individually for the ANTHONY EDWARD VOGEL, SR. LIVING TRUST, NOREEN S. VOGEL, PAUL A. VOGEL, KATHLEEN M. VOGEL, RONALD YOUNG, VALERIE D. YOUNG, GLORIA ANN GOVITZ and PHIL VOGEL,

Appellees.

UNPUBLISHED
May 27, 2010

No. 288837
Gladwin Probate Court
LC No. 08-013477-TV

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's finding of no cause of action following a bench trial in this matter concerning a beneficiary's challenge to the administration of the Anthony Edward Vogel, Sr. Living Trust. Plaintiff also challenges the trial court's determination that his suit violated the trust's no-contest provision, resulting in the forfeiture of his distributive share of the trust. We reverse and remand for further proceedings.

I. FACTS

The dispute in this matter relates to distributions of real property made by defendant Michael Vogel, who was named successor trustee following Anthony Vogel, Sr.'s (grantor's) death. The trust contained a provision, providing for distribution of the residuary assets of the trust following the death of the grantor in equal shares to his surviving children. At the time of grantor's passing, the Vogel farm consisted of approximately 300 acres, with little frontage.

Grantor's surviving children included plaintiff Mark Vogel, defendant Michael Vogel, Paul Vogel, Valerie Young, and Gloria Govitz.[1]

Acting as trustee, defendant sold a portion of the trust property to his son, Phil Vogel, by land contract. The terms of the land contract referenced 48 acres, which included five acres that the parties agree had been paid for prior to grantor's death. Defendant maintained that he was simply honoring grantor's wishes by completing the sale. To support the alleged prior agreement between Phil Vogel and grantor, defendant relied on a copy of a land survey that included handwriting stating that five acres had been paid for on June 17, 2003, and also included language that stated Phil Vogel was to be credited $5.00 per hour for work on the farm toward the purchase of 68 acres. Defendant credited his son with $15,500 toward the purchase on his land contract for hours the son had worked on the farm. Defendant testified that he recognized grantor's signature on the document, but acknowledged that the rest of the writing was not grantor's.

Defendant also transferred the homestead and six acres to Valerie Young and her husband. Defendant explained that he transferred this property in order to satisfy a $20,000 claim Young allegedly had against the trust as a result of money that had been loaned to grantor prior to his passing. Defendant maintained that he believed the transfer of property was fair in light of home's poor condition. Defendant also transferred an additional piece of trust property by land contract consisting of 20 acres to the north of the six-acre homestead parcel. Defendant testified that the 20 acres sold to Young on land contract had been "released" by his son, who had been promised a total of 68 acres. The terms of the land contract required Young to pay $766.80 per year for thirty years with no interest. Defendant explained that the property transferred by land contract provided access to Young's distributive share of the trust, a piece of property that would otherwise be landlocked. In addition, defendant sold approximately 16 acres of trust property to Paul Vogel and his wife on land contract. The terms of the land contract required payments of $643.20 per year for thirty years, with no interest. Thereafter, defendant made distributions of parcels of the remainder of trust property consisting of approximately 42 acres to each of the named beneficiaries.

Plaintiff brought suit alleging that defendant had violated his duties as trustee and requested that certain property transfers defendant had effectuated as trustee be voided and the property be returned to the trust. Following a two-day bench trial, the trial court found no cause of action against plaintiff, and further ordered that plaintiff's share in the trust forfeit for violating a no-contest provision of the trust.

II. DECISION TO LIMIT TESTIMONY

Plaintiff first argues that the trial court's decision to limit the testimony and exhibits of plaintiff's expert witness at trial constituted error. We disagree.

[1] For ease of reference, the singular "defendant" will refer to the successor trustee, Michael Vogel, unless otherwise noted.

This issue is unpreserved, given that plaintiff's counsel never disputed the trial court's ruling that the failure to provide the document at issue constituted a violation of the court's pretrial discovery order. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Consequently, we will review this unpreserved evidentiary issue for plain error affecting substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

During trial, plaintiff called witness Kyle Kigar, an appraiser and real estate broker, to testify regarding land values of certain property involved in this case. Kigar explained that, in addition to the property descriptions he received from plaintiff's counsel, he visited the property and reviewed comparable sales in the area. The trial court declined to allow the information on comparable sales to be introduced at trial because plaintiff had failed to abide by the terms of the pretrial order, but allowed the admission of the limited use appraisals.

Pursuant to MCR 2.313(B)(2)(b), a trial court may sanction a party who fails to comply with discovery orders by preventing that party from "support[ing] or oppos[ing] designated claims or defenses, or prohibiting the party from introducing designated matters into evidence." A pretrial order related to this matter contained the following provision: "The parties shall review all anticipated exhibits and exchange and file lists of them within 100 days of this order." There is no dispute that the materials at issue were not provided to opposing counsel within the 100-day period. Plaintiff argues on appeal that the language of the pretrial order should be read to require only that a list be exchanged within the 100-day period set forth in the order, rather than that the actual exhibits themselves be exchanged. Defendant disagrees and maintains that the exhibits themselves were required to be exchanged, the view taken by the trial court. We find that the trial court's interpretation of this language was reasonable. Thus, plaintiff has failed to demonstrate plain error.

III. ATTORNEY-CLIENT PRIVILEGE

Plaintiff next argues that the trial court erred in excluding certain trial testimony of grantor's prior attorney concerning conversations the attorney had with defendant pursuant to the attorney-client privilege rule. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Whether the attorney-client privilege applies to a communication is a question this Court reviews de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002).

The scope of the attorney-client privilege is narrow and attaches only to confidential communications by the client to his attorney that are made for the purpose of obtaining legal advice. *In re Costs & Attorney Fees*, 250 Mich App 89, 99; 645 NW2d 697 (2002). In this case, plaintiff argues that the privilege had been waived when the attorney testified at a deposition in this matter. We do not find this argument persuasive.

"While either the attorney or the client can raise the privilege, only the client can waive the privilege." *Kubiak v Hurr*, 143 Mich App 465, 473; 372 NW2d 341 (1985) (citations omitted). Plaintiff does not argue that the client waived the privilege, only that the attorney's appearance and answers during an earlier deposition effectively waived the privilege. While a

general proposition exists that the attorney-client privilege is waived when a client testifies concerning the contents of a privileged communication, *McCarthy v Belcher*, 128 Mich App 344, 348; 340 NW2d 848 (1983), we do not find that this proposition necessitates the conclusion that the privilege is also waived when the attorney testifies. Here, there is no indication that defendant, the client, agreed to waive the privilege.

Plaintiff acknowledges that the privilege is defendant's to waive. Nevertheless, citing *Franzel v Kerr Mfg Co*, 234 Mich App 600; 600 NW2d 66 (1999), he argues that defendant implicitly waived this privilege through his acquiescence in permitting the attorney to testify at an earlier deposition. However, we find that plaintiff's argument contains at least one fatal flaw. Plaintiff did not provide below, nor has he now provided, a copy of the attorney's deposition. The attorney, Gregory Michael Simon, did testify about matters concerning conversations with the grantor regarding the estate and the trust, including the grantor's wishes concerning division of the property, and defendant's future duties as trustee. It was only when plaintiff's counsel attempted to question Simon about his personal conversations with defendant after the grantor's death, that defendant asserted the privilege. Defendant's assertion of the privilege runs to defendant personally, or perhaps as the trustee, not to conversations Simon might have had with grantor or others. Although the parties do not dispute that a deposition occurred, plaintiff has not shown that defendant was present during the deposition and provided permission for Simon to testify about his conversations with defendant. Nor has plaintiff provided any evidence that Simon made any statements during the deposition that concerned these conversations. It is not enough for plaintiff to assert error and then leave it up to this Court to discover the basis for his claims. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Plaintiff has not shown that the trial court abused its discretion here.

IV. REMOVAL OF DEFENDANT AS TRUSTEE

Plaintiff next argues the trial court erred in denying his request for the removal of defendant as successor trustee. We agree.

A probate court's decision whether to remove a trustee is reviewed for an abuse of discretion. *Comerica Bank v City of Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). The probate court has jurisdiction to appoint or remove a trustee upon a showing of negligence or a violation of duty. MCL 700.1302(b)(i). Our Supreme Court has stated "a trustee must show the utmost good faith." *Michigan Home Missionary Soc v Corning*, 164 Mich 395, 402; 129 NW 686 (1911). See also former MCL 700.7301 and MCL 700.7302, amended effective April 1, 2000; MCL 700.7801.[2]

---

[2] Former MCL 700.7301 provided that a trustee has a general duty to administer a trust expeditiously for the benefit of the beneficiaries of the trust. Former MCL 700.7302 provided that a trustee is required to act "as would a prudent person in dealing with the property of another . . . ." These provisions have now been replaced with similar requirements outlining the duties of trustees in MCL 700.7801; MCL 700.7802, and MCL 700.7803, effective April 1, 2010. MCL 700.7801 now provides, [u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust

(continued...)

In the instant case, the trust document ordered that the residuary assets of the trust be distributed to the grantor's remaining children in equal shares. As will be discussed in more detail below, defendant, in his capacity as trustee, made improper transfers of trust property to his own son and to two of the named beneficiaries prior to the distributions to each of the beneficiaries, to the detriment of the other trust beneficiaries. Defendant violated his duty as trustee by conducting these transfers.

Moreover, defendant himself testified that, in 2005, a 10-acre parcel of land belonging to a local farmer was leased in the trust's name to farm hay, but that defendant then leased the property in his own name the following year, used trust equipment to farm the parcel, and did not include the resulting income from 2006 in the trust's accounting. This testimony demonstrates that defendant personally benefited from an opportunity originally belonging to the trust. Such conduct constitutes a violation of defendant's fiduciary duty to the trust and its beneficiaries.

In addition, defendant failed to create and provide annual accountings related to the trust. In fact, no accounting was created until plaintiff's suit was instituted.

The trial court itself acknowledged that "[t]here was a lot of playing fast and loose," but apparently excused the conduct for reason that it was a "familial situation" and "[t]hat's the way some families are." We find no authority to support the trial court's proposition that "family situations" are excused from judicial scrutiny to ensure that a trustee's conduct reflects the intent of a grantor as evidenced by the provisions of his or her trust. Furthermore, given that trusts are often set up in lieu of wills, the adoption of such a premise would result in beneficiaries being able to circumvent the plain language of a trust so long as enough of them "agree" that their recollection is consistent with the grantor's intent. Indeed, defendants appear to advance such an argument in this case, noting that all of the other beneficiaries had no problem with the trustee's actions. That the other beneficiaries agreed with defendant's actions cannot render valid those actions that are inconsistent with the trust language. Plaintiff presented ample evidence that defendant had violated his duty as trustee. Therefore, the trial court abused its discretion in denying plaintiff's request to remove defendant as trustee. On remand, the trial court shall remove defendant as trustee and appoint an independent, non-family member trustee.

V. TRANSFER OF TRUST PROPERTY PRIOR TO DISTRIBUTION TO BENEFICIARIES

Plaintiff next argues the trial court erred in approving the initial real property transfers made by defendant as trustee to Phil Vogel. Again, we agree.

(...continued)

beneficiaries, and in accordance with this article." MCL 700.7802 outlines further responsibilities and duties of trustees to administer the trust *solely* for the benefit of the trust's beneficiaries. MCL 700.7803 provides; "The trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills."

Following a bench trial, a trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

As noted above, a trustee has a general duty to administer a trust expeditiously for the benefit of the beneficiaries of the trust. Former MCL.700.7301; MCL 700.7801; MCL 700.7802. Moreover, it is well established that a trustee's duties to beneficiaries are determined by the trust agreement and the intent of the settlor. *In re Butterfield Estate*, 418 Mich 241, 259-260; 341 NW2d 453 (1983). Here, the trust specifically ordered that residuary assets be distributed evenly among the beneficiaries after the death of the grantor and after "the payment of the Grantor's just debts, funeral expenses and expenses of last illness. . . ."

Defendant argues, and the trial court apparently agreed, that his actions were permissible under the broad enumerated trustee powers of the trust. Indeed, the trust provided the trustee with authority to retain assets, settle claims, dispose of or encumber assets, enter contracts, and distribute property. The provision allowing for the distribution of property also authorizes the trustee to "make division or distribution in money or kind, or partly in either including disproportionate in-kind distributions, at values to be determined by the trustee, and the trustee's judgment shall be binding upon all interested parties."

However, to the extent this provision conflicted with the residuary clause, the trial court was required to read and construe the trust as a whole. *Detroit Trust Co v Rivard*, 315 Mich 62, 70-71; 23 NW2d 206 (1946). We note that, in addition to the two provisions above, the trust contained the following language, "The purpose of this Agreement is to establish a Trust to receive and manage assets for the benefit of the Grantor during the Grantor's lifetime, and to further manage and distribute the assets of the Trust upon the death of the Grantor." When these three provisions are viewed in this context, they evidence an intent on the part of the grantor that, while defendant, as trustee, had the power to effectuate the grantor's wishes to divide his estate equally, defendant was not free to play favorites among the beneficiaries, or among non-beneficiaries, at the expense of the other beneficiaries. We find that it was grantor's intent that defendant utilize the powers enumerated in the trust, including authorizing disproportionate distributions of property, to immediately distribute the trust assets equally among the beneficiaries after the decedent's outstanding obligations were satisfied and after payment of funeral or last medical expenses.

Defendant's son, Phil Vogel, was not a named beneficiary of the trust. In addition, while some evidence was presented to show what might be characterized as a "just debt" of grantor's to defendant's son, plaintiff argued that the evidence presented to support the debt did not meet the requirement of the statute of frauds for a valid claim against the trust. However, the trial court responded to this objection with the following:

> "You're overruled; I'll tell you why. This is a familial situation; it's quite obvious to me. There was a lot of playing fast and loose. That's the way some families are."

Following the close of proofs, the trial court found that Phil Vogel provided credible testimony. However, it did not make specific findings that he had already paid the grantor for five acres; that his account of his hours of farm work was reasonable; or, that the prior agreement between

Phil and the grantor was valid or enforceable against the trust. To the contrary, at the end of trial, the trial court appeared to concede that the transfer or agreement between grantor and Phil Vogel could not satisfy the statute of frauds. Nevertheless, it found that defendant had the power to effectuate the transfer anyway due to his broad powers as trustee.

We hold that the trial court erred when it upheld the land contract transfer made by defendant to his son. If the prior agreement does not satisfy the statute of frauds, but some of the claimed debt is valid due to Phil Vogel's farm work or a prior payment, Phil Vogel did not have any right to specific performance, but can still claim that he should be compensated for services rendered. See *King v First Michigan Bank & Trust Co of Zeeland*, 11 Mich App 144, 146; 160 NW2d 721 (1968). We thus reverse the trial court's decision upholding this transfer and remand for a determination of the amount of "just debt" enforceable against the trust, if any, the value of the property transferred to Phil Vogel,[3] and whether this transfer was in the best interests of the trust's beneficiaries. To the extent that the parties do not dispute that Phil Vogel paid for five acres prior to the grantor's death, the transfer of those five acres remains valid. Whatever remains of the other 43 acres after distribution to Phil Vogel of the value of the "just debt" shall be returned to the trust res to be reincorporated into the overall properties to be distributed equally among the beneficiaries.

In addition, we find that the trial court erred when it upheld the land contracts defendant entered into as trustee with Valerie Young and Paul Vogel. The parties do not appear to dispute that Valerie Young had loaned grantor $20,000. However, we find the trial court's reliance on defendant's personal testimony that value of the transferred six acres of land and the house was equal to this debt clearly erroneous and due to its unfounded decision not to require adequate appraisals of the grantor's property. We thus remand for further factual proceedings concerning this transfer.

Further, the trial court should have invalidated the remaining land contracts to Valerie Young and Paul Vogel. Although the 20-acre land contract to Valerie Young was ostensibly made in order for Young to have access to her "other" distributive share of the trust property, this was improper. So too was the additional 16-acre land contract to Paul Vogel. Under the terms of the trust, once the "just debts" were satisfied, the remaining property, which includes these two parcels, should have been divided equally. While presumably Valerie Young and Paul Vogel could have still properly received some or all of these parcels as their distributive share,

[3] In reaching our decision, we specifically disapprove of the trial court's reliance on defendant's personal valuations of all of the pieces of property involved. No reasonable basis for these valuations was presented to the court. Nor did the trial court discuss defendant's qualifications to make them. The trial court apparently decided to reduce the trustee's burden of performance in this respect based on the fact that the "underfunded" trust, containing over 300 acres of prime farmland, could not afford to pay for "adequate appraisals." We submit that either the trial court could have ordered part of the property sold to pay for these and other necessary expenses, or that the trustee, or the beneficiaries, could have advanced the trust sufficient funds, given that they all had a direct interest in the valuations.

the parcels, or the value thereof, should have been offset by a reduced remaining distributive share, and an increased relative distributive share to plaintiff and defendant.

The trial court made numerous references to the instant case being a "family situation" and refused to scrutinize defendant's decisions to transfer trust property because "it's within the family and because the Court concludes it was the moral and absolute right thing to do." As already noted, we reject the premise that "family situations" are exempt from judicial oversight to ensure that the intentions of the grantor of a trust are followed or should be judged in light of the "moral" thing to do. Instead, courts are mandated to look to the plain language of the trust to determine a grantor's intent. *In re Woodworth Trust*, 196 Mich App 326, 327; 492 NW2d 818 (1992). Nothing in the trust provided for "pre-distribution" land contracts to beneficiaries at the expense of the interests of the remaining beneficiaries.

We thus reverse the trial court's holding concerning the specific land contracts challenged by plaintiff and remand for further proceedings consistent with this opinion.

VI. FORFEITURE OF PLAINTIFF'S DISTRIBUTIVE SHARE

Finally, plaintiff argues that the trial court erred in ordering his share under the trust forfeit pursuant to the trust's no-contest provision. We agree.

The trust in the instant matter contains a no-contest provision in Section XIII (G) that reads as follows:

> Unsuccessful Contest Invalidates Contestor's Devise: Should any of the beneficiaries unsuccessfully contest *any of the provisions of this Trust*, [t]he distributive share of the contesting beneficiary under paragraph V(a) of this Trust shall be void as to the contesting beneficiary. Said contesting beneficiary's share shall be distributed according to paragraph V(a) of this Trust as though said contesting beneficiary had predeceased Grantor. (emphasis added)

Following the close of proofs, the trial court stated that in addition to finding no cause of action plaintiff's share of the trust should be forfeit according to the above referenced provision. This decision constituted error because plaintiff's suit served to contest the propriety of the trustee's actions, rather than a challenge to the provisions of the trust itself. See *In re Payment Estate*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2009 (Docket No. 282529) (holding that the defendant's challenges to the personal representative's performance of his duties was not a direct or indirect contest or attack, such that the no-contest clause was not invoked).

The provision mandating forfeiture in the event of an unsuccessful contest specifically identified that the unsuccessful contest must relate to the provisions of the trust. The gist of plaintiff's complaint related to his assertions that defendant had failed to execute his duties as trustee in conformity with the trust. Thus, plaintiff filed suit in an effort to *enforce* the trust, not contest it. Consequently, even though plaintiff was unsuccessful in the pursuit of his claim

below, the no-contest provision was not implicated in the instant matter. In any event, because we find that the trial court erred in its analysis below, plaintiff's contest is not "unsuccessful."[4]

VII. CONCLUSION

On remand, the trial court shall remove defendant as trustee and appoint a new, independent trustee. The trial court shall also reinstate plaintiff as a beneficiary under the trust and void all property transfers and land contracts made by defendant on behalf of the trust as necessary to comply with the following instructions.

All distributions made to the beneficiaries pursuant to the trust (i.e. the "42"-acre parcels) shall be voided and all property returned to the trust res for redistribution. To the extent that land valuations are necessary, the trial court may order part of the property sold to pay for these and other necessary expenses, or the trustee, or the beneficiaries, may advance the trust sufficient funds. The trial court shall not consider that this is a "family matter" in making any of its rulings.

The trial court shall determine what amount, if any, is enforceable as a "just debt" against the trust for Phil Vogel's work on the farm, the value of the property transferred to Phil Vogel, and whether the transfer was in the best interest of the trust's beneficiaries. To the extent that the value of the property transferred was more than the value of the debt, that property shall be placed back into the trust. Additionally, Phil Vogel shall either be awarded land in an amount equal to the payments he has made under the voided land contract, or the trustee may elect to reimburse him for the payments and retain the land within the trust.

The trial court shall also determine the value of the land that Young received in exchange for the $20,000 debt. To the extent that the land has a higher value than $20,000, Young may select which of the homestead acres she receives up to a value of $20,000, with the remaining acreage being returned to the trust res. To the extent that the land is worth less than $20,000, Young may receive additional acreage in an amount sufficient to repay the debt that is contained within the land she received pursuant to the voided land contract. Young shall also receive the value of the monies paid the trust under the land contract, either in cash or land at the discretion of the trustee. All of the remaining land under the voided land contract shall be returned to the trust res.

---

[4] We note that the Legislature has recently enacted MCL 700.7113, effective April 1, 2010, which specifically provides:

> A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Due to its effective date, this statute does itself not invalidate the trial court's decision. However, because it may be implicated on remand, we reference it for future guidance.

The trial court shall award to Paul Vogel his two acres, for which he paid $2,000. Paul Vogel shall also receive the value of all monies paid to the trust under the land contract, either in cash or additional land at the discretion of the trustee. The remaining land under the voided land contract shall be returned to the trust res.

After the property has been valued and Phil Vogel, Young, and Paul Vogel have received their property as established above, the trustee shall divide the remaining land in the trust into equal shares. We note that equal shares may, but does not automatically, necessitate equal acreage. Thus, for example, to the extent that a 30-acre parcel has the same value as a 40-acre parcel, those different-sized parcels would reflect equal shares of the assets. If equal land distribution is not possible, the trustee is permitted to use whatever powers are provided under the terms of the trust to create equal distributions to the beneficiaries, including selling the property.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio