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 compilation 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: August 24, 2011

RE: Mildred Wendt Revocable Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE MEMORIES:

Breaking the heart of an 8 year old…

Written for Stoney

I loved the 1950 Tigers. They were in a 3-way race for the pennant for the whole season and would have won it were it not for our catcher Aaron Robinson. The Tigers had a great outfielder in Wertz, Evers and Groth. Wertz batted .309 with 27 homers. Evers .323, 21 homers, 11 triples and a .997 fielding average. Groth .306 and played 157 games. The infield had Kell who batted .340, Johnny Lipon .293, Gerry Priddy .277 with 26 doubles in 157 games and Don Kolloway at first with .289. Houtteman, Hutchinson, Newhouser, Trout and Gray were great. The hole was at catcher.

Robinson was in the words of my dad – "a dog." You could have tolerated his .226 average if it weren't for a bone head play in late September against Cleveland. With the bases loaded and one out, an easy grounder was hit to first. Kolloway stepped on the bag removing the force play and threw home. Robinson stepped on home and didn't tag the runner. Tigers lose and after such a bone headed play couldn't come back to gain first.

Robinson's excuse – Jerome Kern, from the 1930 musical Roberta, "Smoke got in his eyes." There was a fire in Windsor and Robinson claimed he didn't see Kolloway touch first.

REVIEW OF CASE:

Reference Files: Ambiguities
Remainder Interests
Future Interests
Standard on Appeal – Trust Terms Interpretation de novo

This 2½ page Opinion raise issues of importance and is correctly decided.

Patricia created a Trust; in the Trust she gave two farms to Richard, provided that if he sold the farms half the proceeds should be payable to Jean. Richard sold one of the farms after Jean passed away. Richard claimed the money, presumably on behalf of Patricia's Trust and Jean's estate claimed the money.

The issue of fact was whether the interest granted by Settlor was personal to Jean and was thereby extinguished at her death or whether it was not personal to her and left a remainder to her estate. The trial court found that there was an ambiguity which it regarded as patent, that is, that the Trust provision was capable of two constructions, "personal to Jean" or "not personal to Jean." The trial court conducted an evidentiary hearing and determined that it was personal.

The Court of Appeals, citing *In re Woodworth Trust*, 196 Mich App 327-328, said that when a Trust is capable of two constructions it is patently ambiguous. Thus, the ruling of trial court was sustained. The Court of Appeals believed two interpretations were possible and sustained the trial court.

The Court of Appeals makes a good observation in its second footnote. The court says that there was no future interest vested in Jean, because a future interest is one in real estate and there was no chance that Jean could have ever obtain possession – only the proceeds of sale. The Court of Appeals makes another observation that proper draftsmanship would have said either "and her heirs" or "so long as she is living." A lesson for the drafter.

QUERY: The court does not address the plurality of the word 'farm.' Wouldn't a strict construction mean that both farms would have to be sold?

What would have happened if intestacy would have been created because of the trial court's construction? Would then the presumption against intestacy have had any effect influencing the lower court as to its finding on intent, even with the evidentiary hearing?

AAM:jv:695759v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re MILDRED WENDT REVOCABLE TRUST.

RICHARD WENDT, as the Successor Trustee of the MILDRED WENDT REVOCABLE TRUST,

Appellee,

v

MICHAEL BISSETT, as the Personal Representative of the Estate of JEAN WENDT,

Appellant.

UNPUBLISHED
July 21, 2011

No. 298391
St. Clair Probate Court
LC No. 2009-000300-TV

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Michael Bisset, as personal representative of the Estate of Jean Wendt (petitioner), appeals as of right the probate court's denying petitioner a portion of the proceeds from the sale of a parcel of real property known as the Kellys Farm. Because we conclude that there were no errors warranting relief, we affirm.

~~Patricia Mildred Wendt executed a revocable trust agreement in October 1995. She~~ amended the trust several times before her death in February 2008. In the final version of the trust, Patricia Wendt gave Richard Wendt two farms, but provided that, should he sell the farms, he must pay Jean Wendt a portion of the proceeds: "[The Duck and Kellys Farm] to my grandson **Richard Wendt**, provided, however, that in the event Richard Wendt shall sell the farms he shall pay over and deliver one half of the net proceeds thereof to **Jean Wendt**."

Patricia Wendt died in February 2008, and Jean Wendt died in December of that same year. In March 2009, Richard sold the Kellys Farm on land contract for $217,500.

In June 2009, petitioner filed a petition for supervision of the trust agreement. Petitioner alleged that it was entitled to one-half of the proceeds Richard Wendt received from the sale of the Kellys Farm. Richard Wendt, as successor trustee of the Mildred Wendt trust (respondent), responded that petitioner's interest was extinguished at Jean Wendt's death, which was before the sale took place and her heirs were otherwise not entitled to a share of the proceeds.

Petitioner moved for summary disposition under MCR 2.116(C)(10). The trial court determined that the trust agreement contained a "patent ambiguity" regarding "whether Jean's interest is personal to her (i.e., it would terminate on her death) or whether it was intended to pass to her descendants." For that reason, it denied the motion. Thereafter, it held an evidentiary hearing in order to hear evidence concerning whether Patricia Wendt intended Jean Wendt's interest to be personal. After receiving testimony, the trial court found that it was Patricia Wendt's intent that the interest be personal to Jean Wendt. For that reason, it concluded that petitioner was not entitled to any proceeds from the sale of the Kellys Farm.

On appeal petitioner sole argument concerns whether the trial court erred when it determined that the language of the trust was ambiguous. Petitioner argues that the language in the trust is plain and unambiguous on its face, and that the unambiguous language clearly provides that Jean Wendt's interest would pass to her heirs upon her death.[1]

This Court reviews de novo, as a question of law, the proper interpretation of a trust. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

An ambiguity can be either patent or latent. *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992). "A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." *Id.* "A latent ambiguity exists where the language and its meaning [are] clear, but some extrinsic fact creates the possibility of more than one meaning." *Id.* at 328.

The probate court correctly determined that the trust provision at issue here was ambiguous.[2] As the trial court noted, what is unclear from the language is whether Patricia Wendt intended Jean Wendt's right to the proceeds to be personal to Jean—that is, to terminate after Jean's death—or whether she intended Jean's right to pass to her heirs. If Patricia Wendt provided in the trust that the proceeds were to go to Jean Wendt *and her heirs*, it would be clear that Patricia intended the interest to pass to Jean's heirs. Likewise, had Patricia Wendt provided that the proceeds should go to Jean Wendt *so long as she is living*, it would be clear that Patricia

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[1] Petitioner does not argue that the trial court clearly erred when it found that Patricia Wendt intended the bequest to be personal to Jean Wendt.

[2] While the trust language mirrors somewhat a grant of a future interest in the farm to Jean Wendt, which would require us to ascertain what type of interest she received and whether it was devisable, this is not actually the case. Jean Wendt's interest in one-half of the proceeds from a potential, future sale of the farm does not constitute a future interest in real property, because there is no circumstance where Jean could ever come into possession of the property. The trust provides that the property must be sold in order for Jean to take anything. Accordingly, the question here does not involve a right in real property, but instead the determination of whether the settlor intended for Jean Wendt's heirs to receive money from any future sale of the property in the event Jean died before the sale.

intended the interest to be personal to Jean. Because the trust is silent as to whether the bequest is personal, it is susceptible to either construction and, therefore, is patently ambiguous. See *In re Woodworth Trust*, 196 Mich App at 327-328.

We also do not agree that *In re Jamieson's Estate*, 374 Mich 231; 132 NW2d 1 (1965), is applicable here. Unlike the trust language in *Jamieson*, the bequest at issue in this case contains no express language to indicate that Jean Wendt's share was to go to her heirs if Jean died. In other words, there are no specifically delineated secondary remaindermen. Given that petitioner does not claim error with the trial court's factual determination regarding Patricia Wendt's intent, and the evidence presented supports the probate court's finding, we affirm its determination concerning the proceeds from the sale of Kellys Farm.

Affirmed. As the prevailing party, respondent may tax its costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto