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 2007-2014 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*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 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: March 16, 2015

RE: In Re John Markoul Living Trust
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

ERRATA

A story reported by Jim Bouton in his work Ball Four may be apocryphal. The story goes as follows:

> Norm Miller was doing the broadcast bit in the fourth inning when Joe Morgan came back to the dugout after missing a big curve ball for strike three.
>
> "Joe, Joe Morgan, may I have a word with you?"
>
> "Sure, Norm, how's it going?"

> "Fine, Joe, fine. We wanted to ask you about that pitch you missed. What was it?"
>
> "Norm, that was a motherfucking curve."
>
> "Can you tell our listeners, Joe, what's the difference between a regular curve and a motherfucking curve?"
>
> "Well, Norm, your regular curve has a lot of spin on it and you can recognize it real early. It breaks down a little bit, and out. Now, your motherfucker, that's different. It comes in harder, looks like a fastball. Then all of a sudden it rolls off the top of the table and before you know it, it's motherfucking strike three."
>
> "Thank you very much, Joe Morgan."
>
> This was also reported word for word in *Baseball A Literary Anthology*.

Professor Baseball, however, Edwin Amenta, places a different spin on it. According to Professor Baseball, the Hall of Fame second baseman, while with the Houston Astros, came back to the dugout and in a mock interview conducted by one of the other Astros players. Amenta does not identify the player, but Norm Miller did play for the Astros with Joe Morgan. Each player later became a sports media person.

The term seemed to develop a life on its own and has been referred to publicly as a synonym for a bad thing happening in your life, a method of grading which caused you to fail on an exam and a sharp turn on a road.

Where is Eddie Brinkman when you need him?

REVIEW OF CASE:

Referenced Files: Entireties Property and Marital Trust
Spouses Ability to Get Exempt Property from Trust

Spouse sought to have tenancy by the entireties property declared outside the scope of a marital trust formula claiming it was outside the scope of gross federal estate. Spouse also sought exempt property. Probate Court determined that the entireties property should not be considered in the formula for determining what went into a marital trust and granted the spouse her exempt property.

The Court of Appeals said that since the spouse was already the owner of entireties property it did not "pass" as part of the estate. This is because of the legal fiction that one tenant by the entireties has no interest separable from that of the other. *Tkachik v Mandeville*, 487 Mich 38 (2010).

Any time I feel that there has been a gross error in an appellate decision, I ask others in whose opinion I have faith. I start with the presumption that I have made an error. In this case, I don't think I have made an error.

Respondent alleged that pursuant to MCL 700.7605(1) and MCL 700.7606(1) the failure of the spouse to apply timely barred her claim for exempt property.

The Court of Appeals ruled in favor of the spouse and said that the language in 7605, which allowed for an exempt property to a spouse if there assets of the probate estate were insufficient. Only referred to a trust "over which a settlor has the right….at his death or her death either alone or in injunction with another person to revoke the trust…." The Court of Appeals said that because this trust became irrevocable at death, that that statute did not apply. I don't believe that this is correct reasoning. I think that the language quoted by the Court of Appeals refers to the moment

before the settlor's death, because there is no such thing as a revocable trust postmortem. Thus, I do think the claims period of 4 months is pertinent.

For the readers, please tell me if you think I am wrong.

AAM:kjd
Attachment
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STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN MARKOUL LIVING TRUST.

SANDIE SARHAN,

Petitioner-Appellant,

v

GEORGIA MARKOUL,

Respondent-Appellee,

and

JAMES MARK HEPPARD, NICHOLAS HEPPARD, and MICHELLE HEPPARD,

Intervening Parties.

UNPUBLISHED
January 29, 2015

No. 316892
Oakland Probate Court
LC No. 2013-348604-TV

Before: CAVANAGH, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Petitioner appeals by right in this case involving the construction of a trust. Petitioner is decedent's daughter and respondent is decedent's surviving spouse. The intervening parties are three of decedent's stepchildren. We affirm.

On April 7, 1981, decedent created a living, revocable trust, which became irrevocable upon his death on March 12, 2012. Upon decedent's death, the trust was divided into two separate trusts, designated as the Marital Trust and the Family Trust. Article 8 of the trust instrument governs the manner in which funds are to be allocated between the two separate trusts:

a. Creation of the Marital Trust

The Marital Trust shall consist of a dollar amount equal to fifty (50%) percent of the value of my gross estate as defined for Federal Estate Tax purposes, less all allowable federal estate deductions other than the marital deduction.

The Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse other than under this Article.

The marital deduction amount determined under this Paragraph a. shall be a pecuniary amount and not a fractional share.

* * *

c. Creation of the Family Trust.

The Family Trust shall consist of the balance of the trust property.

On September 17, 2008, decedent amended Article 8 of the trust instrument to provide as follows:

The Marital Trust shall consist of my primary residence (subject to any mortgages thereon) at the time of my death, plus a dollar amount equal to fifty (50%) percent of the values of the balance of my gross estate as defined for Federal Estate Tax purposes, less all allowable federal estate deductions other than the marital deduction.

The Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse other than under this Article.

The marital deduction amount determined under this Paragraph a. shall be a pecuniary amount and not a fractional share.

At the time of decedent's death, he and respondent owned a home as tenants by the entireties. When decedent died, respondent became the sole owner of the home by right of survivorship. Nearly one year later, the acting trustee filed a petition for clarification, asserting that "[b]y not changing the title and funding of the Trust with the Residence, the value of the Residence becomes an issue." Accordingly, petitioner asked the court for clarification on the following points:

B. Determining whether the value of the Residence is to be included in the creation of the Marital Trust;

C. Determining whether the value of the Residence reduces the value of the Marital Trust and, if so, by how much[.]

The probate court found that the marital home was never included in the trust and never "passed" to respondent because it was owned by respondent before and after decedent's death. As a result, it found that the value of the Marital Trust should not be reduced by the value of the marital home. Petitioner disagreed and requested an evidentiary hearing on the issue. The probate court denied petitioner's request, explaining that its ruling was made as a matter of law and that no factual dispute existed between the parties. Petitioner also argued that respondent was not entitled to her exempt property allowance because she failed to file a claim with the estate within four months of decedent's death. Again, the probate court disagreed.

We review de novo the probate court's interpretation of language in a trust document. *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005). The court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). The probate court does not abuse its discretion when it makes a decision that falls within the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

When interpreting the meaning of a trust, the probate court must ascertain and give effect to the intent of the settlor. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). In doing so, the court must look to the words of the trust document itself. *Id.* Only if the language is ambiguous may the probate court look outside the trust language and consider the circumstances surrounding its creation. *Id.*

The relevant language of Article 8 of the trust is unambiguous. It provides that "[t]he Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse . . . ." The value of the marital home is not to be deducted from the Marital Trust because it did not "pass" from decedent to respondent. Again, decedent and respondent owned their home as tenants by the entireties. In *Tkachik v Mandeville*, 487 Mich 38, 46; 790 NW2d 260 (2010), our Supreme Court explained that a tenancy by the entireties "is a type of concurrent ownership in real property that is unique to married persons." A defining trait of such a tenancy is " 'that one tenant by the entirety has no interest separable from that of the other.' " *Id.* (citation omitted). In addition, "both spouses have a right of survivorship, meaning that, in the event that one spouse dies, the remaining spouse automatically owns the entire property." *Id.* at 46-47. As a result, "entireties properties *are not part of a decedent spouse's estate*, and the law of descent and distribution does not apply to property passing to the survivor." *Id.* at 47 (emphasis added).

Because decedent and respondent owned their home as tenants by the entireties, respondent was a full owner of the property before and after her husband's death. When decedent died, respondent became the sole owner automatically, not because the property "passed" as part of the estate. The property never was part of the estate. Furthermore, because the language of the trust instrument was clear and unambiguous, the probate court did not err by denying petitioner's request for an evidentiary hearing. See *Kostin*, 278 Mich App at 53.

Nor did the probate court err by ruling that respondent was entitled to her exempt property allowance. Petitioner cites MCL 700.7605(1) and MCL 700.7606(1) for the proposition

that respondent was required to submit a formal claim for her exempt property allowance within four months of decedent's death. MCL 700.7605(1) states:

> The property of a trust over which the settlor has the right without regard to the settlor's mental capacity, at his or her death, either alone or in conjunction with another person, to revoke the trust and reinvest principal in himself or herself is subject to all of the following, but only to the extent that the settlor's property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:
>
> (a) The administration expenses of the settlor's estate.
>
> (b) An enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor's funeral and burial expenses.
>
> (c) Homestead, family, and exempt property allowances.

MCL 700.7606(1) states in relevant part:

> If a personal representative is not appointed for the settlor's estate within 4 months after the date of the publication of notice to creditors, a trust described in section 7605(1) is not liable for payment of homestead, family, or exempt property allowances. . . .

First, neither of these statutory provisions applies to the trust in this case. As stated in MCL 700.7605(1), this portion of the Michigan Trust Code applies only to trusts that remain revocable at death. The trust in this case became irrevocable upon death. Second, the probate court correctly construed the language regarding exempt property. Article 8, § 1 of the trust instrument provides in pertinent part:

> The provisions made herein and in my Will for my spouse shall be in lieu of my spouse's marital rights and all other rights in my estate *except for exempt property* and, in the event my spouse validly elects to take against my Will, then the trust property shall be administered and distributed in the manner provided herein as though my spouse had predeceased me. [Emphasis added.]

The language is clear that exempt property, such as a property allowance, is not subject to Article 8, § 1.

Affirmed. As the prevailing party, respondent Georgia Markoul may tax her costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Amy Ronayne Krause