



*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

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**DT:** April 13, 2015

**RE:** **In Re Darrell V. Wright Trust Agreement**  
STATE OF MICHIGAN COURT OF APPEALS

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### **BASEBALL STATS:**

#### BASEBALL TERMS I’LL BET YOU DON’T KNOW

In addition to being a great attorney, Don Gillis is an avid and learned baseball fan. He loves to give me books on baseball and his most recent offering is “The Dickson Baseball Dictionary – Third Edition”. This 974 page reference is a kick. Allow me to share some definitions of baseball lingo:

“Ned” – A name used by Casey Stengel for a dumb player – “Ned standin’ up in class” (a dumb player ruining a play).

- “Fagot” – Baseball bat – from a word for a bundle of sticks. (Remember when aids was a dietetic candy and ISIS a Greek goddess?)
- “Twig” – Bat for a small guy.
- “Mullion” – An ugly person.
- “Minnion” – A ballplayer who is uglier than a mullion.
- “Outer Gardener” – Outfielder.
- “O’Sullivan Sleeper” – Day coach with no sleeping accommodations.
- “Wild Duck” – Bat that leaves batters hands when he swings.
- “Duck Fart” – Sound coming from bat on a bloop single.
- “Cunny Thumber” – A player who throws like a woman.

**REVIEW OF CASE:**

Referenced Files: Right of State to Recover Costs of Incarceration  
What is a Discretionary Trust?

Settlor established a trust. A part of which ultimately would flow to an incarcerated individual or his estate. The key section granted discretion as to timing of a distribution to this individual, but not a total withholding. The Lower Court ruled that this was a discretionary trust and barred the State of Michigan Department of Treasury from claiming the money, which had been under injunction against distribution by the Houghton County Circuit Court. The cases were combined and the Court of Appeals reversed saying *inter alia*:

1. The trustee had discretion over the manner of timing of the payments, but could not refuse to apply the trust benefits for the incarcerated person.
2. A trust providing that the trustee may pay to the beneficiary so much of the income or principal as he and his discretion determines is called a discretionary trust. *Miller v Dep’t of Mental Health*, 432 Mich 426 (1989).
3. “[I]mportantly discretionary trusts are exempt from a claim of the United States or of a state.”
4. Ultimately, the trust would vest in the beneficiary’s estate, if not in the beneficiary.
5. Nowhere in the trust could the trustee disregard or bypass the named beneficiary. He only had discretion as to how the payment would be made. The former would be truly a discretionary choice while the latter is a mandatory action with some option as to how to accomplish that choice. *DeBeaussaert v Shelby Twp*, 122 Mich App 128 (1982).
6. Upon the incarcerated person’s death, his interest would go to his estate. The ownership aspect makes this distinguishable from other typical discretionary trusts. *Coverston v Kellogg*, 136 Mich App 504 (1984).

7. The right to determine what is reasonable for support, comfort and education does not divest the beneficiary of his infeasible vested interest in the corpus. The allocation of “zero” would be patently unreasonable.

For the scrivener, it is always a question as to how much discretion to give. Normally, people who take the time to set up a trust do not anticipate the incarceration of their offspring. It is something to be noted for a scrivener of a settlor.

Query: Disclaimer? Probably not. Please see *State Treasurer v. Wayne Synder*, 294 Mich. App. 641 (2011). In that case the Court of Appeals ruled that our statutes must be read *in para materia* and the prison reimbursement act must be read broadly. It was the intent of the legislature to pass the burden of an incarcerated individual from the taxpayer to the prisoner. Also, the prison reimbursement act defines an asset not only as something you have, but also as something that is “due” you.

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STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* DARRELL V. WRIGHT TRUST  
AGREEMENT.

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GARY WRIGHT,

Petitioner-Appellee,

and

DONALD S. WRIGHT, PATRICIA WRIGHT,  
ROBIN WRIGHT, DONALD V. WRIGHT,  
SUZANNE M. WRIGHT, DARRELL E.  
WRIGHT, NATASHA R. WRIGHT, ANDREA  
WRIGHT, SHEILA S. ROBERTSON, JOHN D.  
ROBERTSON, SHAWN D. ROBERTSON, and  
KYLE J. ROBERTSON,

Intervening Parties,

v

DEPARTMENT OF TREASURY,

Appellant.

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*In re* BLANCHE S. WRIGHT TRUST  
AGREEMENT.

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GARY WRIGHT,

Petitioner-Appellee,

and

DONALD S. WRIGHT, PATRICIA WRIGHT,  
ROBIN WRIGHT, DONALD V. WRIGHT,  
SUZANNE M. WRIGHT, DARRELL E.

UNPUBLISHED  
March 17, 2015

No. 319832  
Macomb Probate Court  
LC No. 2013-210763-TV

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WRIGHT, NATASHA R. WRIGHT, ANDREA  
WRIGHT, SHEILA S. ROBERTSON, JOHN D.  
ROBERTSON, SHAWN D. ROBERTSON, and  
KYLE J. ROBERTSON,

Intervening Parties,

v

DEPARTMENT OF TREASURY,

Appellant.

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No. 319834  
Macomb Probate Court  
LC No. 2013-210764-TV

Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

In these consolidated appeals, the State Department of Treasury appeals as of right from the order of the probate court holding that the State Treasurer could not reach trust assets under the State Correctional Facility Reimbursement Act (“SCFRA”), MCL 800.401 *et seq.* Because the trusts at issue are not discretionary trusts, they are reachable by the state, and we reverse and remand.

The Blanche S. Wright Trust Agreement and the Darrell V. Wright Trust Agreement were executed in 1996. Blanche S. Wright died in 1999. In 2000, Darrell V. Wright executed a trust amendment naming appellee Gary Wright as successor trustee. After Darrell V. Wright’s death in 2013, appellee filed petitions for instruction and interpretation of the trusts.

The two trusts were virtually identical, and each called for the creation of an “A” trust that passed directly to the surviving spouse, free from trust, and a “B” trust that was to be used for the benefit of the surviving spouse while living and then for equal distribution to the Wrights’ four children and stepchildren—appellee Gary Wright, Darrell E. Wright, Donald Wright, and Sheila Robertson. Under the terms of both trusts, if any of the named children beneficiaries predeceased the last surviving spouse, that deceased beneficiary’s named offspring would get, at least, a portion of that deceased beneficiary’s share.<sup>1</sup> Three of the designated beneficiaries survived Darrell V. Wright, but Darrell E. Wright did not because he died in 2012. Suzanne Wright is his surviving spouse. Suzanne and Darrell E. Wright had one child, Darrell E. Wright

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<sup>1</sup> Darrell V. Wright’s trust actually gave \$12,500 of deceased Darrell E. Wright’s share to Darrell E. Wright’s surviving spouse with the remainder going to their son, Darrell E. Wright II, while Blanche’s trust had the decedent Darrell E. Wright’s entire share going to Darrell II. But this distinction has no practical bearing on the issue before us.

II ("Darrell II"), who was incarcerated when the petitions were filed. Darrell II had one child, Natasha Wright, born in 1997, who was a minor and lived with her mother.

In the petitions he filed, appellee claimed that the trusts were discretionary trusts that created no ascertainable interest in Darrell II. Appellee sought to divide trust assets into four equal shares, one for each child or stepchild of Darrell V. Wright, with Darrell E. Wright's share being divided with a portion going to his widow, Suzanne Wright, and the balance being placed in a separate trust for the benefit of Darrell II and Natasha, with appellee as trustee.

The Darrell V. Wright Trust and Blanche S. Wright Trust each contained spendthrift clauses and a clause dealing with beneficiaries who were minors, legally disabled, or incapable of managing trust assets:

**5.2 Beneficiary Under Disability.** If a beneficiary is under the age of 21, or legally disabled, or, in Trustee's opinion incapable of managing a trust distribution, Trustee either may expend directly any income or principal which it is authorized to use for any beneficiary, or may pay it over to or for use of the beneficiary, or to the beneficiary's conservator, if any, or any adult with whom the beneficiary is residing, without responsibility for its expenditure. If Trustee is directed to distribute any portion of the trust principal to that beneficiary, the trust principal shall vest in interest in the beneficiary indefeasibly, but Trustee, in its discretion, may distribute the portion to a custodian under an[sic] Uniform Gifts to Minors Act or Uniform Transfer to Minors Act or hold the portion as a separate trust for the period of time Trustee deems advisable but not after the time (a) the beneficiary reaches the age of 30 years, or (b) after the removal of the legal disability, or (c) after the time Trustee deems the beneficiary is capable of managing a final trust distribution, whichever is latest. If Trustee holds the portion as a separate trust, Trustee may pay to or use for the beneficiary so much of the income and principal as Trustee determines to be required for the reasonable support, comfort and education of the beneficiary and the beneficiary's spouse and descendants.

Appellee argued that, under the above provision, because Darrell II was under a disability and incapable of managing a trust distribution, his share could be split off into a separate trust to be held for the benefit of Darrell II and his daughter, Natasha. Appellant Department of Treasury, in response, noted that it had filed an action in Houghton Circuit Court under the SCFRA seeking reimbursement for the costs of Darrell II's care due to his incarceration. The Houghton Circuit Court issued orders freezing Darrell II's portion of the trust. Appellant contended that the trusts were reachable because they were not "discretionary trusts" since the beneficiary ultimately would be entitled to a part of the trusts' corpora.

A hearing was held on the trustee's petitions. In its written opinion, the probate court found as follows:

The trust in this case clearly gives the trustee the discretion not to make any distribution at all to Darrell Edward Wright, II during his lifetime. For that reason, it is a discretionary trust and its assets are beyond the reach of the State Treasurer and the SCFRA.

The trustee is free to disregard [Darrell II] under several scenarios. Under section 5.2, if the trustee is of the opinion that a beneficiary is incapable of managing a trust distribution, the trustee may distribute the entire portion that would have gone to the beneficiary to a minor under the Uniform Gifts to Minors Act or Uniform Transfer to Minors Act. If this option were exercised, there is no part of the corpus of the trust that would be distributed to Darrell Edward Wright, II. Also, under section 5.2, the trustee could create a trust for the benefit of Darrell Edward Wright, II, and his daughter. Under such a trust, the trustee could, in the exercise of his discretion, refrain from making any distribution until Darrell Edward Wright, II, dies. Under either scenario—and even more are possible—there is no present ascertainable right that Darrell Edward Wright, II, has to anything. He is simply not entitled to any part of the trust corpus.

On appeal, appellant argues that the trusts are not discretionary trusts shielded from state creditors, maintaining that although the trustee has discretion over the manner and timing of payments, he cannot refuse to apply trust funds for Darrell II's benefit. Moreover, appellant argues that Darrell II's estate will receive the benefit of the trusts when he passes away, and his daughter Natasha may never become an actual beneficiary. Appellee, on the other hand, argues that the probate court did not err in finding the trusts to be discretionary trusts. Appellee calls attention to the operative clause in § 5.2, noting that it contains five distinct phrases granting the trustee discretion regarding distributions to beneficiaries, including Darrell II. Appellee also maintains that Darrell II was properly found incapable of managing a trust distribution and that he is not entitled to anything under the trust language.

This Court's review of a probate court's decision generally is on the record and is not *de novo*. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008); see also MCL 600.866(1). The probate court's findings of fact are reviewed for clear error and its dispositional rulings are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128. However, interpretation of trusts is a question of law, which is reviewed *de novo*. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009); *In re Estate of Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005). The court's object is to ascertain and effectuate the settlor's intent, which is to be determined from the four corners of the trust. *In re Estate of Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). If the trust contains ambiguity, then the court must look outside the trust to discover the settlor's intent. *Id.*

There are, for purposes of this discussion, three kinds of trusts. Firstly, a trust vesting in the beneficiary the right to receive some ascertainable portion of the income or principal. Secondly, a trust providing that the trustee shall pay so much of the income or principal as is necessary for the education or support of the beneficiary, called a support trust. Thirdly, a trust providing that the trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines, called a discretionary trust. [*Miller v Dep't of Mental Health*, 432 Mich 426, 429; 442 NW2d 617 (1989) (footnotes omitted).]

The type of trust dictates whether a creditor can reach the trust:

Where the beneficiary is entitled to receive an ascertainable portion of the income or principal, creditors can reach the beneficiary's interest unless there is a spendthrift clause providing that the beneficiary's interest shall not be transferable or subject to the claims of creditors. Without regard to whether there is a spendthrift clause, ordinary creditors cannot reach a beneficiary's interest in a support trust because the nature of the beneficiary's interest, being limited to such amount as is necessary for education or support, precludes recognition of the claims of creditors that would defeat the object of the trust. Similarly, without regard to whether there is a spendthrift clause, creditors cannot reach a beneficiary's interest in a discretionary trust because of the nature of the beneficiary's interest. The beneficiary's receipt of any amount depends on the trustee's exercise of his discretion, and thus the beneficiary does not have an ascertainable interest in the assets of a discretionary trust. [*Id.* at 430 (footnotes omitted).]

However, “[a]lthough ordinary creditors cannot reach the ascertainable interest of the beneficiary of a trust with a spendthrift clause or the interest of a beneficiary of a support trust, the interest of a beneficiary of such a trust can be reached to enforce claims . . . to satisfy a claim of the United States or of a state.” *Id.* at 431. But, importantly, discretionary trusts are exempt from a claim of the United States or a state. *Id.* Thus, because the state is seeking reimbursement for the costs of Darrell II's incarceration under the SCFRA, whether the instant trusts are discretionary is the dispositive question.

At the outset, § 3.5(c) of the trusts<sup>2</sup> required a disbursement to each of the couple's surviving children because the last survivor between Darrell V. Wright and Blanche S. Wright died in 2013. But because one of the listed beneficiary children, Darrell E. Wright, passed away before 2013, his share went to his son, Darrell II. However, § 5.2 of the trusts, entitled “Beneficiary Under Disability,” gives the trustee some discretionary powers. The issue here is whether the language in § 5.2 creates discretionary trusts or support trusts.

**5.2 Beneficiary Under Disability.** If a beneficiary is under the age of 21, or legally disabled, or, in Trustee's opinion incapable of managing a trust distribution, Trustee either may expend directly any income or principal which it is authorized to use for any beneficiary, or may pay it over to or for use of the beneficiary, or to the beneficiary's conservator, if any, or any adult with whom the beneficiary is residing, without responsibility for its expenditure. If Trustee is directed to distribute any portion of the trust principal to that beneficiary, the trust principal shall vest in interest in the beneficiary indefeasibly, but Trustee, in its discretion, may distribute the portion to a custodian under an [sic] Uniform Gifts to Minors Act or Uniform Transfer to Minors Act or hold the portion as a separate

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<sup>2</sup> Section 3.5(c) provides, “At my spouse's death, Trustee shall divide the remaining trust property whether real, personal, or mixed, into four (4) equal shares and distribute it [with equal shares going to the four children of Darrell V. and Blanche].”



trust for the period of time Trustee deems advisable but not after the time (a) the beneficiary reaches the age of 30 years, or (b) after the removal of the legal disability, or (c) after the time Trustee deems the beneficiary is capable of managing a final trust distribution, whichever is latest. If Trustee holds the portion as a separate trust, Trustee may pay to or use for the beneficiary so much of the income and principal as Trustee determines to be required for the reasonable support, comfort and education of the beneficiary and the beneficiary's spouse and descendants.

Breaking this section down, it is clear that there are two main conditions:

**Condition #1:** If a beneficiary is under the age of 21, legally disabled, or, in Trustee's opinion, incapable of managing a trust distribution.

**Condition #2:** If the trustee is directed to distribute any portion of the trust principal to a beneficiary that meets the conditions set forth in Condition #1.

**Outcome:** the trust principal shall vest in interest in the beneficiary indefeasibly,

but Trustee, in its discretion, may

[1] distribute the portion to a custodian under an [sic] Uniform Gifts to Minors Act or Uniform Transfer to Minors Act or

[2] hold the portion as a separate trust for the period of time Trustee deems advisable but not after the time (a) the beneficiary reaches the age of 30 years, or (b) after the removal of the legal disability, or (c) after the time Trustee deems the beneficiary is capable of managing a final trust distribution, whichever is latest. If Trustee holds the portion as a separate trust, Trustee may pay to or use for the beneficiary so much of the income and principal as Trustee determines to be required for the reasonable support, comfort and education of the beneficiary and the beneficiary's spouse and descendants.

Here, both conditions are satisfied because the trustee has determined, in his opinion, that Darrell II is incapable of managing a trust distribution and because § 3.5(c) of the trusts is directing the trustee to make a distribution to Darrell II. And the fulfillment of both of these conditions then triggers the following: "the trust principal *shall vest in interest in the beneficiary indefeasibly.*" (Emphasis added.) Furthermore, the trustee may, in his discretion, either (1) distribute the amount to a custodian under the Uniform Gifts to Minors Act or Uniform Transfer to Minors Act or (2) hold the amount in a separate trust. If the trustee elects to hold the money in a separate trust, the trustee "may *pay to or use for the beneficiary* so much of the income and principal as the trustee determines to be required for the reasonable support, comfort, and education of the beneficiary *and the beneficiary's spouse and descendants.*" (Emphasis added.)

Contrary to the probate court's ruling, nowhere in § 5.2 does it allow a trustee to "disregard" or bypass a named beneficiary. At best, § 5.2 allows a trustee discretion in how the payment is made, but the beneficiary nevertheless has an *indefeasible* interest in the corpus. Appellee's reliance on the term "may" in "may pay to or use for the beneficiary" is misplaced. The use of "may" here does not give the trustee discretion to withhold payment; instead, the use of the term simply indicates that the trustee has the *option* to either "pay to" the beneficiary *or* to "use for" the beneficiary. This use of "may" is distinguishable from the use of "may" earlier, where it states that the "Trustee, *in its discretion*, may" either distribute the funds to a custodian or hold the funds as a separate trust. The earlier use denotes a truly discretionary choice, while the latter use denotes a mandatory action with the trustee having the option of how to accomplish it. See *DeBeaussaert v Shelby Twp*, 122 Mich App 128, 131-132; 333 NW2d 22 (1982) (noting that term "may" does not always denote discretion and can, in fact, denote mandatory action).

Furthermore, the amount set aside in a separate trust is to be used "for the reasonable support, comfort and education of the beneficiary *and* the beneficiary's spouse *and* descendants." (Emphasis added.) The probate court erroneously interpreted the term "and" as meaning the same thing as the term "or" when it concluded that the trustee could simply provide support for Darrell II's daughter and ignore Darrell II's support, comfort, and education. See *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 319; 683 NW2d 148 (2004) (stating that "and" and "or" should be given their strict meaning when their accurate reading does not give the text a dubious meaning). We also note that the probate court erred when it surmised that § 5.2 allowed a trustee to simply hand an incapable beneficiary's disbursements to any minor. The intent of the settlors' reference to the Uniform Gifts to Minors Act and the Uniform Transfer to Minors Act clearly is in the context of *the beneficiary being the minor*.<sup>3</sup> It would be absurd that a settlor would intend a disbursement to any random, unrelated minor in lieu of the money going for the benefit of the named beneficiary.<sup>4</sup>

Moreover, even if the resulting trust could be viewed as a discretionary trust, the state still could reach it for reimbursement. That is because even if the trustee had the discretion to withhold disbursing payments to Darrell II, there is no question that Darrell II nonetheless possessed an "indefeasible" vested interest in the funds.<sup>5</sup> Thus, upon Darrell II's death, that interest would go to his estate. This ownership aspect makes this distinguishable from other typical discretionary trusts. See *Coverston v Kellogg*, 136 Mich App 504, 510; 357 NW2d 705 (1984) (noting that the trust was not a discretionary trust because, in part, the beneficiary "or his estate" ultimately was entitled to the corpus of the trust).

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<sup>3</sup> Recall that one of the conditions that the settlors established was if a beneficiary was less than 21 years of age.

<sup>4</sup> While we presume that such a scenario could happen in theory, we do not read that scenario in the text contained in the trusts.

<sup>5</sup> These seemingly contrary positions are further support for concluding that any resulting trust is a support trust, and not a discretionary trust.

In sum, while the trusts give the trustee some discretion in carrying out the mandates of the trust, there is no discretion to withhold making any payments to a beneficiary because that beneficiary is deemed to be incapable of managing a trust disbursement. In that event, a trust can be set for the adult beneficiary whose purpose is to support both him and any spouse and descendants. Therefore, under the circumstances in the present case, accepting that the trustee determined that Darrell II is incapable of managing a trust disbursement, the resulting trust is for the support of Darrell II and his daughter. Being a support trust and not a discretionary trust, the state may invade it. *Miller*, 432 Mich at 431.

It is important to stress that in the resulting trust, the trustee has no discretion to withhold payments based on the beneficiary's identity. The trustee is tasked with determining how much amount of support, comfort, and education would be "reasonable," but that does not divest the beneficiary of his indefeasibly vested interest in the corpus. Also, we note that an allocation of "zero" for someone's support, under virtually all circumstances would be patently unreasonable, but we are not faced with that question because here, the trustee bases his exclusion of Darrell II from receiving any proceeds because of the beneficiary's identity, not because the trustee determined that no money is reasonably needed for Darrell II's support.

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

/s/ Pat M. Donofrio  
/s/ Michael J. Riordan  
/s/ Michael F. Gadola