*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**: November 5, 2012

**RE**: In re Luin Gyle Atterberry Revocable Trust
STATE OF MICHIGAN COURT OF APPEALS

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**BASEBALL STATS:**

Which was the worse team in baseball?

When people try to answer that question, they look at single years. The answer of course, if you look at single years, is the Cleveland Spiders, of the National League, who won 20 games and lost 134 for a percentage of .130. They finished 84 games behind the league leaders. All those statistics are certainly records.

There are five teams which finished without 40 wins in a 154 game season. When the season was extended to 162 games, the New York Mets are the winner, with 40 wins and 120 losses, for an even .250. You will recall under Alan Trammel, the 2003 Tigers went 43 and 119.

The answer that I wanted to explore is the worst team in its franchise history. I will admit that I have not taken into consideration all 30 teams or their predecessors. But, for me, the worst team in baseball was the Saint Louis Browns. Transferring from Milwaukee in 1901, they began their existence in 1902; becoming the Baltimore Orioles in 1954.

During that time (52 years) the club's winning percentage was .434. Although I have not research all 30 teams, I believe this is the lowest. I also have not included the one year where the Browns were the Milwaukee Brewers and the many years after 1953 where they were the Baltimore Orioles.

The Saint Louis Browns never won a World Series, and only played in one in 1944, and lost in six games. (This, of course, was a weakened league because of the WWII) The Browns also finished in last place 11 times. In 52 years they only were greater than .500 – 12 times being under 500 40 times. Of those 12 times, only two were consecutive, 1921 and 1922 when George Sisler was their first baseman in 1944 and 1945, two war years.

If anyone has any other nominees I would love to hear from you.

**REVIEW OF CASE:**

Reference Files: Reformation
Assets Owned by Corporation

Decedent was an accountant. Decedent did an estate plan wherein he transferred the stock of his corporation to his Trust to avoid probate. The corporation owned two cars. There is some extrinsic evidence that he meant the cars to pass under the 'personal property' paragraph of his Trust rather than the 'residuary' paragraph which included the stock of the corporation. The Probate Court found otherwise.

As the action was brought in the nature of reformation, rather than interpretation, extrinsic evidence was admissible to determine whether it was the clear intent of the decedent to do other than the document specified.

The Lower Court found that there was insufficient evidence to make a change in the document. The Court of Appeals affirmed. The only oddity of the case is that the Court of Appeals seems to vary when applying standards. In the opening paragraph they say "Because we conclude that there was sufficient evidence supporting the probate court's finding, we affirm."

In the standards of review they quote the "clearly erroneous" standard because there is a question of fact. We must read these together for consistency. What the Court of Appeals is actually saying is, because there was sufficient evidence, there was no clear error. Later on, however, the Court, before it states its' conclusion not only mention clear error – but clear and convincing evidence; which may also be an interpretation of clear error. I think there should have been more consistency in defining the standard of review.

The distinction between the two paragraphs in the Will is relevant only for evidentiary purposes. This is not a question as to which paragraph applies, that would be brought under a petition for

construction. This is an action for reformation, and the paragraph referring to personal property was merely one additional piece of information as to what the Decedent's intent was.

I am pleased that the decision turned out the way it did. I am sure that the corporation also had desks, pens and books which were tangible personal property. To have made a decision otherwise might have made this case a touchstone for impairing the rights of corporations in other cases.

AAM:jv:725640
Attachment

# STATE OF MICHIGAN

# COURT OF APPEALS

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In re LUIN GYLE ATTERBERRY REVOCABLE TRUST.

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LISA ATTERBERRY,

Appellant,

v

ISABELLA BANK, Trustee, f/k/a ISABELLA BANK AND TRUST, DENNIS ATTERBERRY, and KENNETH ATTERBERRY,

Appellees.

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UNPUBLISHED
October 11, 2012

No. 307850
Isabella Probate Court
LC No. 2011-024344-TV

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Appellant Lisa Atterberry appeals by right the probate court's order distributing the proceeds of a Lexus automobile and a Cardinal trailer among beneficiaries under Paragraph 5.4 of the Luin Gyle Atterberry Revocable Trust (the Trust). Because we conclude there was sufficient evidence supporting the probate court's finding, we affirm.

## I. BASIC FACTS

In 2006, Luin Atterberry created the Trust with the assistance of his lawyer, William McClintic. In order to avoid probate, McClintic transferred Luin Atterberry's personal property and assets to the Trust. Included among the transfer were Luin Atterberry's shares of his accounting corporation, Atterberry Consulting. When Luin Atterberry died in 2011, a 2004 Lexus automobile and a 2008 Cardinal Trailer were registered to Atterberry Consulting. The beneficiaries disputed the proper interpretation of the terms and conditions of the Trust as it related to the disposition of the Lexus and Cardinal trailer. The disputed Paragraphs provided:

> **5.3 Remaining tangible personal property.** Trustee shall distribute all remaining tangible personal property to Lisa Atterberry. If Lisa Atterberry does not survive me, I give my tangible personal property not effectively disposed of above to Virginia Atterberry, Kenneth Atterberry and Dennis Atterberry, in as

nearly equal shares as possible, or to the survivors thereof if any of said beneficiaries should precede me in death.

**5.4 Balance of the trust property.** Trustee shall divide all other remaining trust assets into shares, one share each to Lisa Atterberry, Virginia Atterberry, Kenneth Atterberry and Dennis Atterberry, who survive me in as nearly equal shares as possible, or to the survivors thereof if any of said beneficiaries should precede me in death.

The beneficiaries of the Trust were unable to reach an agreement as to the proper interpretation of the Trust. For that reason, appellee Isabella Bank and Trust, acting as the Trust's trustee, petitioned the probate court for assistance. At the hearing on the petition, appellant Lisa Atterberry argued that, because the Lexus and Cardinal trailer were personal property, the Lexus and trailer should be distributed to her under Paragraph 5.3. Appellees, Kenneth Atterberry and Dennis Atterberry, argued that the Lexus and trailer should be distributed in nearly equal shares under Paragraph 5.4.

The probate court examined Luin Atterberry's will, which provided that Luin Atterberry's tangible personal property, including motor vehicles, was to be left to Lisa Atterberry. The probate court also heard from Luin Atterberry's close friend, Cherrie Gasper, who testified that Luin Atterberry intended to leave Lisa Atterberry his 2004 Lexus. Additionally, the court heard from William McClintic, Luin Atterberry's lawyer, who testified, based on his routine practice, that he likely informed Luin Atterberry to change his vehicles' registration from Atterberry Consulting to his own name. At the conclusion of the hearing, the probate court determined there was not clear and convincing evidence that Luin Atterberry intended to convey his Lexus and Cardinal trailer to Lisa Atterberry according to terms of Paragraph 5.3. The probate court ordered the proceeds of the Lexus and Cardinal trailer to be divided among the beneficiaries with the shares of Atterberry Consulting under Paragraph 5.4.

## II. REFORMING TRUSTS

### A. STANDARDS OF REVIEW

On appeal, Lisa Atterberry argues that the trial court erred when it refused to reform the Trust under MCL 700.7415. We review the proper interpretation of a statute de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, we review the probate court's underlying findings for clear error. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1, 4 (2009). A finding of fact is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *In re Matter of Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492, 497 (1988).

### B. ANALYSIS

When parties disagree over trust terms, "a court's sole objective is to ascertain and give effect to the intent of the settlor" and "[t]he intent of the settlor is to be carried out as nearly as possible." *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The settlor's intent "is gauged from the trust document itself, unless there is ambiguity." *Id.* If, however, a court finds "by clear and convincing evidence that both the settlor's intent and the terms of the trust were

affected by a mistake of fact or law" in the expression or the inducement, "[t]he court may reform the terms of the trust, even if unambiguous, to conform to the settlor's intent[]." MCL 700.7415. Clear and convincing evidence is evidence that is "'so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009), quoting *In re Martin*, 450 Mich 204, 227; 538 NW2d 265 (2008). A mistake of law is a mistake by one side or the other regarding the legal effect of an agreement. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). A mistake in fact is "a misunderstanding, misapprehension, error, fault, or ignorance of a material fact." *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951).

Because the Trust was ambiguous as to whether the Lexus and trailer are assets subject to distribution under Paragraph 5.4 of the Trust or tangible personal property subject to Paragraph 5.3 of the Trust, the probate court looked outside the Trust document to ascertain Luin Atterberry's intent. In ascertaining Luin Atterberry's intent, the probate court found that there was not clear and convincing evidence that he intended the Lexus and Cardinal trailer to be distributed according to Paragraph 5.3 of the Trust. Additionally, the probate court found that there was not clear and convincing evidence that Luin Atterberry's intent and the terms of the Trust were affected by a mistake of fact or law. Thus, the probate court did not find it necessary to reform the terms of the Trust.

Even though the record suggests that Luin Atterberry may have intended to leave his Lexus and Cardinal trailer to Lisa Atterberry, we cannot conclude that the trial court clearly erred in its findings. Luin Atterberry created his Trust in 2006 and died in 2011. Evidence showed that he was an intelligent accountant and businessman. Yet, during that time period, he failed to change the title to the Lexus or Cardinal trailer to his own name. Nevertheless, he did update his will with a supplement that left specific items of personal property to specific persons. Thus, the evidence supports the probate court's finding that there was not clear and convincing evidence indicating either Luin Atterberry's true intention or that a mistake was made.

## C. CONCLUSION

Given the record evidence, we cannot conclude that the trial court clearly erred when it found that there was not clear and convincing evidence to warrant reforming the trust. Therefore, the trial court did not err when it ordered the distribution of the car and trailer under Paragraph 5.4.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly