



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



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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.

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DT: June 27, 2011

RE: Hill Estate
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL COMMENTARY:

WOMEN IN PROFESSIONAL BASEBALL

A recent article in Sports Illustrated about the first young lady to break the Little League glass ceiling in 1950 prompted this commentary.

Has there ever been a woman who played in the major leagues? The traditional answer is no, but I believe yes is acceptable. I consider the Negro League to be major league baseball. I am lead to that opinion because of the number of barnstorming victories of black teams over white teams and the first hand observations of many white players. After the Negro League was depleted with integration, while they lasted were they still major leagues? Yes is a reasonable answer

because some remained in the Negro League and made the switch in the 50's. Also, even if the 1950's Negro League players dropped to Triple A talent level, they were certainly as good as some of the diluted 30 major league teams of today, many of whom I compare to pre-expansion Triple A. In addition, the Negro League was consolidated to four teams, increasing their overall talent level.

That said, from 1953 to 1955 the Indianapolis Clowns had three women players: Mamie "peanut" Johnson, Toni Stone and Connie Morgan. "Peanut" was a pitcher. She had a 33-8 record and batted .260. "Peanut" attempted to play in "a league of their own," but in 1953 the white women, six years after Jackie Robinson, wouldn't admit blacks.

Could a woman play today? Maybe. The influx of Asian players, of lesser physical stature, show that size is less of a barrier. Anyone who watches women's softball can gauge throwing speed and fielding. Eri Yoshida pitched for the Chico (California) Outlaws. She now plays for the Samurai, all Japanese team. Now that's a barrier worth breaking.

REVIEW OF CASE:

Reference Files: Funding of Trust
 Conveyance of Real Property

Decedent created a Trust; he did not make a formal assignment of the stock of a corporation, which owned a liquor license and a tavern, to the Trust. The Trust had the following language of assignment:

"The settlor hereby irrevocably assigns and transfers to the trustee all the rights, title, and benefits which he now has in said stock of Hill's Tavern Incorporated for the term expressed above and without limitation to receive the proceeds thereof." [Capitalization and boldface removed from original.]

The Lower Court ruled that there was no assignment because a Liquor Control Commission required their approval to make the assignment efficacious. The Lower Court cited MCL 436.1529 (1) as follows:

"A license or an interest in a license shall not be transferred from 1 person to another without the prior approval of the commission. For purposes of this section, the transfer in the aggregate to another person during any single licensing year of more than 10% of the outstanding stock of a licensed corporation or more than 10% of the total interest in a licensed limited partnership shall be considered to be a transfer requiring the prior approval of the commission."

Regarding the real estate at issue, a Deed was prepared to son Randall and given to Grantor's agent attorney to be delivered at Grantor's death. The Lower Court and the Court of Appeals ruled that there was no delivery. Grantor retained the monthly rental benefits until his death.

The tavern was affirmed to be *not* in the trust, but in the estate as was the real estate.

I will make no mention of the partnership and time bar issues, as they have nothing to do with probate.

The Court of Appeals ruling is reasonable. Instead of reviewing the case by critique, positive or negative, I thought it might be fun to cite the same facts and cases as recited by the Court of Appeals and come to the opposite conclusion.

I. FACTS

The trust document said:

“The settlor hereby irrevocably assigns and transfers to the trustee all the rights, title, and benefits which he now has in said stock of Hill’s Tavern Incorporated for the term expressed above and without limitation to receive the proceeds thereof.” [Capitalization and boldface removed from original.]

“No particular form of words is required to create an assignment. *Burkhardt v Bailey*, 260 Mich App 636, 654-655; 680 NW2d 453 (2004). Rather, the intent of the assignor must be such to transfer without retaining any control of power of revocation. *Id*”

“Section IV of the trust does indicate an intent to fund the trust with stock from the corporation at the time the trust document was created (i.e., “during the settlor’s lifetime”). However, no evidence established that approval was sought to transfer the shares to the trust as required by the LLC.”

MCL 436.1529 (1) provided:

“A license or an interest in a license shall not be transferred from 1 person to another without the prior approval of the commission. For purposes of this section, the transfer in the aggregate to another person during any single licensing year of more than 10% of the outstanding stock of a licensed corporation or more than 10% of the total interest in a licensed limited partnership shall be considered to be a transfer requiring the prior approval of the commission.”

II. TRUST

This court states that an assignment took place separate from the corporate certificate. At worst, the assignment conveyed all but the liquor license. The trust preceded and succeeded death. Therefore, if formal LLC approval is necessary, the trust can apply for LLC approval. This court, however, does not deem same to be necessary, as one’s own trust is not “another person” in common parlance. This matter is remanded to the Lower Court for further ruling, consistent with this ruling, with directions to the Lower Court to direct the LLC to register the trust as the owner.

III. REAL PROPERTY

“As a general rule, delivery of a deed to one acting exclusively as the grantor’s agent is ineffectual to transfer title to the grantee. *Hooker*, 335, Mich at 436. Nonetheless, valid delivery of the deed to Randall could have occurred after Norman’s death, provided

that it was Norman’s intent to convey title when he signed the deed. *Id.*”

We do find that such intent exists based on the assignments in the trust and the testimony of Anagost to deliver the Deed at death. We find that the retention of rentals only evidence a reservation of a life estate. Decedent suffered from a mistake of law. Under the facts reformation would lie, but in light of the testimony we deem that the facts are sufficient to determine title in Randall.

As to the trust and real property, we reverse the Opinion of the Lower Court as set forth above.

I suggest that this is a valuable exercise for skill development.

AAM:jv:691658v2
Attachment

**STATE OF MICHIGAN
COURT OF APPEALS**

IN RE HILL ESTATE

RICHARD HILL and RANDALL HILL,
Petitioners-Appellants,

UNPUBLISHED
May 26, 2011

v

BONITA L. HILL, Personal Representative of the
Estate of NORMAN C. HILL,
Respondent-Appellee.

No. 294925
Saginaw Probate Court
LC No. 08-123618-DE

IN RE NORMAN C. HILL TRUST

RICHARD HILL and RANDALL HILL,
Petitioners-Appellants,

No. 294926
Saginaw Probate Court
LC No. 09-124308-TV

v

BONITA L. HILL, Successor Trustee of the
Norman C. Hill Trust,
Respondent-Appellee.

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

In these consolidated appeals, petitioners appeal as of right from the probate court's decisions denying petitioners' request for a partnership accounting, denying petitioners' petition to enforce the Norman Hill trust, and granting summary disposition in favor of respondent pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) and 2.116(C)(7) (time-barred

claim). The issues on appeal concern a business known as Hill's Tavern and the real estate on which the tavern is situated. We affirm.

I. STANDARD OF REVIEW

We review de novo a decision on a motion for summary disposition. *In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004); *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

II. TRUST

In addressing a dispute concerning the meaning of a trust, a court's sole objective is to determine and carry out the intent of the settlor. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985); *In re Nowels Estate*, 128 Mich App 174, 177; 339 NW2d 861 (1983). The settlor's intent is ascertained from the trust document itself, unless there is an ambiguity. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

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. A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning. [*In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992) (internal citation omitted).]

Petitioners first argue that the trial court erred in granting summary disposition in favor of respondent after finding that the trust was ambiguous. According to petitioners, any ambiguity in the trust should have been resolved by a jury. Petitioners' argument could be persuasive if the trust had been operative. However, in addition to finding that the trust was ambiguous, the trial court also found that the trust was not funded. This finding is consistent with the affidavit of accountant Arthur Pullen, who investigated transferring the liquor license to the trust and was informed by Norman Hill, as well as by Norman's attorney Christ Anagnost, that the trust was not completed (apparently because of a fee dispute between Norman and Anagnost). At Norman's request, Pullen informed the Liquor Control Commission (LCC) in writing that the trust should be disregarded.

Petitioners argue that the trust was funded with the stock of Hill's Tavern, Inc. Section IV of the trust stated:

The settlor hereby irrevocably assigns and transfers to the trustee all the rights, title, and benefits which he now has in said stock of Hill's Tavern Incorporated for the term expressed above and without limitation to receive the proceeds thereof. [Capitalization and boldface removed from original.]

Section 7401 of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, addresses the requirements to create a trust, as follows:

(1) A trust may be created by any of the following:

(a) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death.

(b) Declaration by the owner of property that the owner holds identifiable property as trustee.

(c) Exercise of a power of appointment in favor of a trustee.

(d) A promise by 1 person to another person, whose rights under the promise are to be held in trust for a third person.

(2) The instrument establishing the terms of a trust is not rendered invalid because property or an interest in property is not transferred to the trustee or made subject to the terms of the trust concurrently with the signing of the instrument. Until property or an interest in property is transferred to the trustee or made subject to the terms of the trust, the person nominated as trustee has no fiduciary or other obligations under the instrument establishing the terms of the trust except as may have been specifically agreed by the settlor and the nominated trustee. [MCL 700.7401.]¹

No particular form of words is required to create an assignment. *Burkhardt v Bailey*, 260 Mich App 636, 654-655; 680 NW2d 453 (2004). Rather, the intent of the assignor must be such to transfer without retaining any control or power of revocation. *Id.*

Section IV of the trust does indicate an intent to fund the trust with stock from the corporation at the time the trust document was created (i.e., "during the settlor's lifetime"). However, no evidence established that approval was sought to transfer the shares to the trust as required by the LCC.² Indeed, correspondence in 2004 between Anagnost and the LCC stated

¹ Section 7401 became effective April 1, 2010. 2009 PA 46. However, the section applies to trusts created before the effective date. MCL 700.8206.

² MCL 436.1529(1) provides:

A license or an interest in a license shall not be transferred from 1 person to another without the prior approval of the commission. For purposes of this section, the transfer in the aggregate to another person during any single licensing year of more than 10% of the outstanding stock of a licensed corporation or more than 10% of the total interest in a licensed limited partnership shall be considered to be a transfer requiring the prior approval of the commission.

that a request to transfer the stock to the trust could not be completed without additional documentation. After Norman's death, Anagnost wrote to Bonita Hill informing her that Pullen was supposed to complete the liquor license transfer. Pullen recalled that prior to Norman's death, Norman had agreed to transfer nine percent of the outstanding stock to his wife in an effort to add her to the liquor license, evidencing that Norman continued to control the stock as an individual. Because no one ever completed a proper transfer of the stock into the trust, Bonita Hill had no fiduciary or other obligations under the trust. MCL 700.7401(2). See also Martin & Harder, *Estates and Protected Individuals Code with Reporters' Commentary* (2010), p 380 ("[U]ntil property is transferred to the trustee or made subject to the trust, no fiduciary duties arise and a trust does not exist.")

III. REAL PROPERTY

Petitioners next argue that the trial court erred in finding that the 2004 deed transferring Norman's interest in a partnership involving the tavern to his son, petitioner Randall Hill, was not valid because it was not delivered. A deed takes effect from the time of its delivery and not from the time of its date, execution, or recording. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). The purpose of the delivery requirement is to indicate the grantor's intent to give effect to the instrument. *Hooker v Tucker*, 335 Mich 429, 435-436; 56 NW2d 246 (1953). Delivery is not made where the grantor reserved the right to recall the deeds and the parties recognized his right to do so, or where the grantor continues to exercise supervision and control over the property until the time of death. *Id.* at 435; *Phelps v Pipher*, 320 Mich 663, 673; 31 NW2d 836 (1948). The burden of proving delivery remains with the party relying on the deed. *Ligon*, 276 Mich App at 130.

The July 2004 deed purportedly conveyed Norman's interest in the tavern property to Randall. However, the deed was not delivered to Randall during Norman's lifetime. Rather, Anagnost retained the deed in his office until Norman's death. Petitioners argue that delivery of the deed to Anagnost was a valid delivery. As a general rule, delivery of a deed to one acting exclusively as the grantor's agent is ineffectual to transfer title to the grantee. *Hooker*, 335 Mich at 436. Nonetheless, valid delivery of the deed to Randall could have occurred after Norman's death, provided that it was Norman's intent to convey title when he signed the deed. *Id.* "But it must be the design of the grantor to immediately pass title by such delivery, and, if it is, on the contrary, his intention that the title should remain in him until his death, the deed would be but testamentary in its character because subject to revocation." *Weber v Schafer*, 236 Mich 345, 348; 210 NW 248 (1926); accord *Osten-Sacken v Steiner*, 356 Mich 468, 475; 97 NW2d 37 (1959).

Here, Anagnost indicated that he believed that it was Norman's intent for him to hold the deed and deliver it to Randall after his death. However, Pullen averred that Norman continued to receive monthly rental payments of \$550 from the corporation for the tavern real estate. Pullen also stated that he never received information that money was paid to a partnership. Norman's subsequent act of receiving rental payments for the real property covered by the deed demonstrates that Norman continued to exercise dominion over the real property. The trial court could properly take into account Norman's subsequent conduct when determining whether Norman intended to pass title to Randall. See *Tighe v Davis*, 283 Mich 244, 249-250; 278 NW 60 (1938). Thus, regardless of Anagnost's subjective belief regarding Norman's intent, the

objective evidence supported the trial court's determination that Norman never transferred his interest in the real property to Randall.

IV. PREMATURE SUMMARY DISPOSITION

Petitioners next argue that the trial court erred in granting summary disposition in favor of respondent prior to the conclusion of discovery. Petitioners assert that they were unable to schedule a deposition with Pullen after his affidavit was submitted. Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed. *Colista v Thomas*, 241 Mich App 529, 537; 616 NW 2d 249 (2000). However, summary disposition prior to the close of discovery is appropriate if there is no reasonable chance that further discovery will produce factual support for the nonmoving party. *Id.* at 538.

As respondent points out, petitioners had from late July to early September to schedule the deposition with Pullen. Further, petitioners could have requested additional time for discovery before the court ruled on the motion for summary disposition by submitting an affidavit according to MCR 2.116(H), but did not do so. Petitioners also did not request any depositions according to MCR 2.303(B).

Most importantly, petitioners did not identify how they stood a fair chance of uncovering support for their position if the discovery time had been allowed to run. See *Huff v Ford Motor Co*, 127 Mich App 287, 296; 338 NW2d 387 (1983). Pullen was not involved in the estate or business planning that produced the trust and the partnership agreement. According to his affidavit, he was involved in conversations with Anagnost and Norman regarding the tavern stock and the liquor license. It was not apparent from petitioners' arguments how testimony from Pullen would have further illuminated a disputed issue or produce factual support for the nonmoving party. *Colista*, 241 Mich App at 537-538.

V. TIMELINESS

Lastly, petitioners argue that the trial court erred in finding that their claim for an accounting of partnership assets was time-barred by the statute of limitations and by the doctrine of laches. In January 1976, Norman and his son Richard Hill signed a partnership agreement to operate the tavern. A partnership is defined as "an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit." MCL 449.6; *Byker v Mannes*, 465 Mich 637, 644; 641 NW2d 210 (2002).

The Uniform Partnership Act, MCL 449.1 *et seq.*, defines the dissolution of a partnership as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." MCL 449.29. Section 449.43 of the Act provides that the right to an account of an interest in the partnership accrues at the date of dissolution, in the absence of any agreement to the contrary.

Here, there is disagreement regarding when the partnership was dissolved. Petitioners argue that it was dissolved in July 2004 when Norman executed an assignment of his interest in the partnership to Randall. However, there was no evidence that prior to the 2004 transfer, Richard and Norman ever acted to "carry on as co-owners a business for profit." Richard did not

assist in operating the tavern and did not share in the profits or losses of the tavern business—the accountants utilized by the tavern business had no knowledge of any profit sharing with Richard.

Significantly, ownership of the tavern business had been transferred to the corporation in 1985 when the business was incorporated. Respondent also asserts that in violation of the partnership agreement, no certificates of co-partnership were filed after 1981. Thus, dissolution occurred when the tavern's assets were transferred to Hill's Tavern, Inc., and the partnership no longer functioned to operate the business as specified in the partnership agreement. See MCL 449.31(1)(a). Because petitioners' right, if any, to an accounting accrued when dissolution of the partnership occurred, and the period of limitations for such a claim was six years according to MCL 600.5807(8), the trial court did not err in finding that petitioners' claim was time-barred.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter