



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

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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.

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DT: October 30, 2012

RE: In re Eleanor V. Mirek Trust
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

What college provided the Major Leagues with the most players? USC did with 102. Texas is second with 101. The U of M isn’t far behind with 77.

Let's make up an all star team of Wolverines:

First Base	-	George Sisler/Hall of Fame
Second Base	-	Charlie Gehringer/Hall of Fame
Shortstop	-	Barry Larkin/Hall of Fame
Third Base	-	Steve Boros/Tigers
Center field	-	Elliott Maddox/Tigers
Left field	-	Dick Wakfield/Tigers
Right field	-	Don Lund/Tigers
Catcher	-	Bill Freehan/Tigers
Pitcher	-	Jim Abbott – left handed
Pitcher	-	J. J. Putz – right handed

Michigan also boasted the first pre Jackie Robinson, African American, in Fleet Walker and his brother, Welday Walker, and for laughs I name MSU's Kirk Gibson as my Manager.

REVIEW OF CASE:

Reference Files: Will Construction
Governance of Later Paragraph over Earlier Paragraph
Effect of Non Provision – Recital
Extrinsic Evidence
Ambiguity
Reformation

Appellee and Appellant both wish to become trustee. Appellee relied upon a provision of the Will appointing her successor trustee. Appellant relied upon the cover page naming him as trustee.

The Court of Appeals covered all bases. First they decided that the specific paragraph prevailed over the cover page because it came later in space, and cited *Foster v Stevens*, 146 Mich 139 (1906).

The Court then went on to say if there was an ambiguity, because the Probate Court used extrinsic evidence to determine the intent of the testator, and that intent was to appoint the Appellee, there was a second reason for sustaining the opinion of the Probate Court.

Third, the Court of Appeals said that the use of a term of 'art' is more indicative of intent than interpretation based on speculation, and cited *In re Raymond*, 276 Mich App 22 (2007).

The Trust could not be reformed, as it was already determined that the Testator did not intend the interpretation of Appellant.

The Court set down rules for reconsideration by a Lower Court and cited *In re Moukalled Estate*, 269 Mich App 708 (2006), to the effect that it is reviewed for abuse of discretion. The Court also cited MCR 2.601 (B) to the effect that a Court can award relief, even if it is not requested, if the party deserves it.

STATE OF MICHIGAN
COURT OF APPEALS

In re ELEANOR V MIREK TRUST.

JOANNE KLOSS,

Petitioner-Appellant,

v

WARREN L. KRISKYWICZ,

Respondent-Appellee.

UNPUBLISHED
September 18, 2012

No. 303695
Macomb Probate Court
LC No. 2011-202137-TV

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Petitioner Joanne Kloss appeals the probate court's order denying her petition for construction of various documents associated with the Eleanor V. Mirek's revocable trust. The probate court found that Mirek, the settlor, intended for respondent, Mirek's nephew, to serve as the successor trustee. For the reasons set forth below, we affirm.

Petitioner contends that the probate court erred by failing to find that Article III of Mirek's will ("Will") and the cover page of the eighth amendment to Mirek's trust ("Eighth Amendment"), were writings under MCL 700.7602(3)(b)(i) that provided clear and convincing evidence of Mirek's intent to name petitioner the successor trustee. MCL 700.7602(3) provides several ways for a settlor to revoke or amend a revocable trust. Pertinent to the issue raised by petitioner, if a trust does not specify the exclusive method in which it can be amended, MCL 700.7602(3)(b)(i) provides that "[i]f the trust is created pursuant to a writing, [it may be amended or revoked] by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust."

MCL 700.7602(3)(b)(i) does not apply to this case because Mirek created her trust on November 28, 1994, and the statute does not apply to revocable trusts that were created before April 1, 2010. MCL 700.8204; MCL 700.7602(1). Because MCL 700.7602(3)(b)(i) has no effect on the outcome of this case, petitioner's issue is moot and does not warrant consideration. *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) ("[g]enerally, this Court need not reach moot issues or declare legal principles that have no practical effect on the case . . .").

Petitioner argues that the probate court erred by ruling that the cover page of the Eighth Amendment was not incorporated into the text of the Eighth Amendment. We review the probate court's factual findings for clear error. *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The cover page of the Eighth Amendment provided that it was a "TRUST INDENTURE naming ELEANOR V. MIREK as GRANTOR and INITIAL TRUSTEE and JOANNE KLOSS as SUCCESSOR TRUSTEE of ELEANOR V. MIREK TRUST AGREEMENT . . ." The text of the Eighth Amendment did not, however, name petitioner the successor trustee; instead, the text of the Eighth Amendment provided that all terms in the trust "which have not been altered or modified shall remain in full force and effect and are hereby confirmed by Grantor and Trustee." One of the provisions confirmed by the text of the Eighth Amendment was Article 4.1 of the seventh amendment to Mirek's trust ("Seventh Amendment"). Article 4.1 of the Seventh Amendment clearly and unambiguously named respondent the successor trustee because it contained Mirek's declaration that "[a]t my death, or when I am no longer able to serve as Trustee, my nephew, WARREN KRISKYWICZ shall be successor Trustee. If he is unable to [sic] unwilling to serve then my friend JOANNE KLOSS shall be successor Trustee."

Petitioner is not entitled to relief on her claim that the probate court erred by finding that the cover page of the Eighth Amendment was not incorporated into the text of the Eighth Amendment because there is no evidence in the record that the probate court actually made this finding. Accordingly, there is no support in the record for petitioner's claim and she is not entitled to relief. See *State Bar Grievance Admin v Beck*, 400 Mich 40, 48; 252 NW2d 795 (1977) (where the record does not contain support for the appellant's claim of error, the appellant is not entitled to relief). Moreover, even if the probate court ruled that the cover page of the amendment was not incorporated into the Eighth Amendment, petitioner is not entitled to relief because the record reveals that the probate court nonetheless considered the cover page in rendering its decision.

Petitioner avers that the probate court erred by failing to find a patent ambiguity in the Eighth Amendment and by failing to consider extrinsic evidence. Whether an ambiguity exists is a question of fact. We review the probate court's findings of fact for clear error. *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App at 531. "In resolving a dispute concerning the meaning of a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor." *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The intent of the settlor "is gauged from the trust document itself, unless there is ambiguity." *Id.* Here, petitioner contends that the Eighth Amendment contained a patent ambiguity. "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." *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992). If an ambiguity exists, the reviewing court's primary goal is to determine the settlor's intent, based on extrinsic evidence and the rules of construction. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

The probate court never expressly stated that the Eighth Amendment contained a patent ambiguity. However, the record reveals that the probate court considered extrinsic evidence when it reached its decision. Because the probate court could only have considered extrinsic evidence if it found an ambiguity, *In re Kostin Estate*, 278 Mich App at 53, we hold that the probate court found a patent ambiguity in the Eighth Amendment. Moreover, because the probate court considered extrinsic evidence, there is no relief that we can grant petitioner on this issue and the issue is rendered moot. *Ryan*, 260 Mich App at 330.

Petitioner also raises several reasons why the probate court erred in finding that Mirek intended to name respondent, not petitioner, the successor trustee. As discussed, we review petitioner's claim regarding the probate court's findings of fact for clear error. *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App at 531. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters*, 239 Mich App at 456.

We are not left with a definite and firm conviction that a mistake was committed by the probate court. Initially, petitioner claims that the probate court erred by finding that the Eighth Amendment did not evince Mirek's intent to name petitioner the successor trustee. As noted above, the cover page of the Eighth Amendment purported to name petitioner the successor trustee; however, the text of the amendment confirmed that respondent was the successor trustee. We hold that these conflicting provisions create a patent ambiguity. When resolving a patent ambiguity, we look to extrinsic evidence and the rules of construction. *In re Kremlick Estate*, 417 Mich at 240. The rules of construction applicable to wills also apply to the construction of trusts. *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005). Moreover, "[i]t is a well-established rule of construction that, if two clauses in a will are absolutely irreconcilable, the last prevails, as being the latest expression of the testator's wishes." *Foster v Stevens*, 146 Mich 131, 139; 109 NW 265 (1906). Here, the text of the Eighth Amendment, which confirmed that respondent was to serve as the successor trustee, followed a provision that purported to name petitioner the successor trustee. Applying the rule from *Foster*, we hold that the later provision prevails and provides the best evidence of Mirek's intent. *Id.* Accordingly, we further hold that the probate court's finding was not clearly erroneous.

Moreover, our conclusion is buttressed by the rule of construction whereby "the specific terms of art used by the will drafter are more indicative of the testator's intent than an interpretation based on speculation." *In re Raymond Estate*, 276 Mich App 22, 39; 739 NW2d 889 (2007). Here, Article 4.1 of the Seventh Amendment, as confirmed by the Eighth Amendment, provided clear and specific language that respondent was to serve as the successor trustee. This language prevails over the speculative language contained in the cover page of the Eighth Amendment that allegedly named petitioner the successor trustee. *Id.*

In addition to the rules of construction, our finding is also consistent with the extrinsic evidence produced in the record. Petitioner argues that the Will provides support for her position, and notes Article III of the Will, which provides that

~~I [Mirek] give the residue of my estate, whether real, personal, or mixed, to the then acting Trustees or Trustee under the certain Trust Agreement executed by myself on or about November 24, 1994, as amended on December 19, 1994,~~

August 21, 1997, December 1, 1998, June 26, 2000, August 16, 2002, October 23, 2003, August 28, 2009, and October 22, 2010, with JOANN [sic] KLOSS, as Successor Trustee, to be added to the Trust estate to be held, administered and disposed of in accordance with all the provisions of that Agreement as now written and as hereafter amended and in effect at my death.

Rather than supporting petitioner's position, we find that Article III of the Will is consistent with the probate court's ruling that Mirek intended respondent to serve as the successor trustee. Although Article III uses the term "successor trustee" with regard to petitioner, Article III also directs that before the residue is given to petitioner as the successor trustee, it is first to be given "to the then acting Trustees or Trustee under the certain Trust Agreement" Thus, Article III implies that an individual will act as the successor trustee before petitioner, and that petitioner will succeed the person who was acting as the successor trustee at the time of Mirek's death. This reading of Article III is consistent with the Seventh Amendment, which names respondent the successor trustee, and notes that petitioner is to serve as the successor trustee to respondent.

In light of the foregoing evidence, we hold that Mirek intended to name respondent the successor trustee. Thus, we uphold the probate court's finding of fact with regard to Mirek's intent because we are not left with a "definite and firm conviction that a mistake has been committed." *Walters*, 239 Mich App at 456.

Having concluded that the probate court did not clearly err in finding that Mirek intended for respondent to serve as the successor trustee, we reject petitioner's argument that the probate court erred by failing to find that the Eighth Amendment was affected by a scrivener's error. Petitioner contends that the evidence she offered demonstrated that the scrivener who drafted the estate planning documents erred because the evidence clearly demonstrated that Mirek intended to name petitioner the successor trustee. However, because we hold that the evidence demonstrates the contrary, we reject petitioner's claim.

Likewise, we reject petitioner's claim that the probate court erred in failing to amend the Eighth Amendment pursuant to MCL 700.7415. MCL 700.7415 provides that

[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved 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, whether in expression or inducement.

Petitioner first contends that the Eighth Amendment and Article III of the Will demonstrate a mistake that warrants reformation under MCL 700.7415. Because we conclude that these documents do not demonstrate that Mirek intended to name petitioner the successor trustee, we find no mistake in the documents that warrants reformation.

Petitioner also references extrinsic evidence that she believes supports her position that reformation was warranted under MCL 700.7415, including a list of personal property that Mirek allegedly dictated to petitioner with instructions for petitioner to distribute the property at Mirek's death, a statement made by Mirek, and Mirek's friendship with petitioner. We hold that

neither the list of personal property nor Mirek's friendship with petitioner amounts to clear and convincing evidence of a mistake in the terms of the Eighth Amendment. Indeed, neither piece of evidence is relevant for purposes of determining Mirek's intent about who should serve as the successor trustee. We also reject petitioner's argument that a statement by Mirek indicated that Mirek intended for petitioner to serve as the successor trustee. The statement was unsworn; thus, it has no evidentiary value and we need not consider it. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005); *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 711-712; 620 NW2d 319 (2000).

Further, we reject petitioner's argument that the probate court abused its discretion in failing to appoint a suitable trustee. The appointment of a suitable trustee ordinarily arises where a trustee has been removed for improper conduct, *Comerica Bank v City of Adrian*, 179 Mich App 712, 728-729; 446 NW2d 553 (1989), and not in cases that involve the construction of a trust document. Thus, the principle sought to be applied by petitioner has no application in this case.

Petitioner also contends that the probate court erred by denying her the relief to which she was entitled under MCR 2.601(A). MCR 2.601(A) does not provide independent grounds for relief, but merely provides that "[e]xcept as provided in subrule (B) [pertaining to default judgments], every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." As discussed, petitioner is not entitled to relief. Accordingly, her argument that she was denied relief under MCR 2.601(A) is meritless.

Finally, petitioner contends that the probate court erred by denying her petition for reconsideration. "This Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration." *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006). In her petition for reconsideration, petitioner repeated the arguments she made in her original petition for construction of the trust. Having rejected those arguments, we hold that the probate court did not abuse its discretion in denying petitioner's petition for reconsideration. *Id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio