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: January 23, 2013

RE: In re Guardianship of THOMAS NORBURY
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL:

STAN THE MAN

Stan Musial has passed away and baseball has lost another icon. As clean as the PED players were dirty, he without controversy of any kind dominated baseball from 1941 to 1963. In 1962, at age 41, he had 433 at bats and hit .330, playing in 135 games. He did not play in 1945. If we use his 1944 and 1946 stats as a benchmark he would have amassed, in a career, over 3800 hits and 2000 RBIs; not that his current stats are shabby. At first base he had a .992 fielding average and in the outfield .984. He had as many hits on the road as at home.

He will be remembered for his batting stance, his achievements, his community activism, his 71 years of marriage and his class; world class. Stan, you gave us excitement and a load of memories.

REVIEW OF CASE:

Reference Files: Effect of an Appearance
Jurisdiction Over a Non Party
Discretion
Abuse of Discretion
Review of Terms of Trust De Novo Standings

This case is a well-reasoned Opinion on a variety of subjects until the last paragraph where in pure dicta it gives the defeated party legal assistance by way of a road map.

Beneficiary was legally incapacitated. Appellee is her Guardian. Appellee asked the Probate Court for fees. The trustee was not a party to that matter. The trustee was also beneficiary's sister and appeared in the fee matter in pro per. She said to the court that the Trust, for benefit of the Ward, was discretionary and would not pay the guardian's bill. The court ordered her to do so. Appellant sought rehearing claiming the Trust was not a party, hence, there was no jurisdiction. Further, that she had discretion to deny payment pursuant to the terms of the Trust. The Lower Court denied rehearing saying her appearance in court vested jurisdiction and the Trust by using the words "obligation" in a paragraph that mentioned "mental incapacity" was not discretionary in this instance.

Jurisdiction: The Court of Appeals invokes the "two hat" theory. Just because you are a fiduciary and a relative, your appearance in the latter capacity does not constitute an appearance in the former.

Effect of Appearance: Also jurisdiction must be invoked it doesn't just "occur". The court correctly cites MCR 2.117(B) to the effect that filing an Appearance does not confer or enlarge jurisdiction.

Discretion: The court correctly states that the reviewing of the interpretation of the terms of a Trust Agreement is de novo. The Court of Appeals distinguishes the totality of discretion from a phrase allowing payment of obligation during incompetency. It opines that the latter determined a methodology of payment (to the third party not the beneficiary) and not a dilution of the discretionary paragraph.

Dicta: After the ruling was concluded the court closes by saying the trustee "may" have abused her discretion by not paying an obligation that was in beneficiary's best interest and that as the trustee's children were successors in interest "which certainly encourages speculation regarding her ability to exercise her discretion", but the court does not go into this of course because the Probate Court had no jurisdiction.

This is a bad dicta and bad law. Most Trusts and trustees are "intra familial". A trustee often has discretion which, if invoked in a certain manner, may benefit a familial remainder person. The Court of Appeals allowed some party to stick its nose in a matter the Settlor knew of ab initio.

AAM:jv:doc 730615
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Guardianship of THOMAS NORBURY.

THOMAS NORBURY, a legally incapacitated person, and MICHAEL J FRALEIGH, Guardian.

Respondents-Appellees,

v

FRANCES NORBURY TRUST and BEVERLY SEIDEL, Trustee,

Appellants

and

KARLA OKAIYE,

Petitioner.

UNPUBLISHED
November 29, 2012

No. 306099
Oakland Probate Court
LC No. 2010-328458-GA

Before: JANSEN, P.J., AND STEPHENS AND RIORDAN, JJ.

PER CURIAM.

Appellant Beverly Seidel, in her capacity as trustee of the Frances Norbury Trust, appeals as of right from the trial court's denial of her motion for reconsideration of its previous order, which provided that the Frances Norbury Trust was required to pay certain fees and expenses claimed by Appellee Michael Fraleigh. We reverse the denial of the motion for reconsideration and vacate the original order.

The underlying facts of this matter are essentially undisputed. On August 17, 1993, Frances A. Norbury, as settlor, executed a trust agreement with her daughter, Beverly Norbury Seidel, serving as trustee. Several portions of that agreement are relevant to the present appeal. The agreement provided that Seidel was to pay the net income and/or principle of the trust to the settlor so long as the settlor lived. Paragraph Third of the agreement provided that Seidel, in her discretion, could distribute the net income and/or principal "for the proper support and maintenance of the Settlor." Upon the settlor's death, Paragraph Fourth provided that the contents of the trust were to be divided into two equal shares. One share was to be immediately distributed to Seidel if she was living, and to her living issue if she was deceased. The other

share was reserved for Thomas A. Norbury. Paragraph Fourth stated that "Trustee shall distribute to or apply so much of the net income and/or principal of the trust for [Norbury] in such proportions as the Trustee in her sole and uncontrolled discretion may deem to be in his best interests."[1] Any portion of the trust that had not been distributed to Norbury by the time of his death was to be distributed to Seidel, if living, or her living issue if she was deceased. If a portion of the trust became payable to an individual under 21 years of age, the trustee was instructed to exercise her "absolute discretion" and distribute funds necessary for the "support, maintenance and education" of that beneficiary. Paragraph Seventh of the agreement provided that the rights of the beneficiaries were not "subject to any right of encumbrance or subject to attachment, garnishment, or other legal process of whatsoever description." Finally, Paragraph Eleventh provided that in the case of a payment to a minor or a person under a legal disability, "the Trustee is authorized in her absolute discretion, and in complete discharge of any obligation therefore," to make the payment to a legal representative or a near relative of that individual, or "to the use and benefit of such person."

The parties agree that Norbury was declared legally incapacitated in 2010, upon the petition of Karla Okaiye, an adult protective services worker.[2] The probate court issued letter of guardianship on March 31, 2010, which appointed Michael Fraleigh, an attorney and a public administrator, as Norbury's guardian. Fraleigh commenced serving as Norbury's guardian. In April 2011, Fraleigh submitted an accounting of his fees and incurred expenses to the probate court from the first year of his guardianship. According to the submitted documents, Fraleigh's total fees and expenses for the year was $7,177.21.

The probate court held a hearing regarding the petition for the annual accounting on May 4, 2011. At the hearing, Fraleigh affirmed that the accounting that he filed with the court accurately reflected all expenditures that had been made on behalf of Norbury. Seidel, who was given notice of the hearing as a result of being listed as Norbury's heir during the initial petition for legal incapacitation, attended the hearing and was asked by the court whether she objected to the accounting. She stated that she did not, but wished to emphasize that the "family discretionary trust" would not pay Fraleigh.[3] After it expressed confusion, the parties explained to the probate court that Fraleigh had submitted his bills to the trust, which then rejected payment. The court then stated "Mr. Norbury has assets and I'm going to order that the trust pay Mr. Fraleigh and not the county because he is doing services on behalf of Mr. Norbury."

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[1] In a subsequent amendment to the Trust Agreement in 1995, this portion of Paragraph Fourth was modified. While the original agreement provided that payment would be made "for" Norbury, in the Trustee's discretion, the amended agreement provided that payment would be made "to" Norbury. The language relating to the Trustee's discretion was not modified in any way.

[2] While Okaiye was the initial petitioner, she is not involved in the current litigation.

[3] In a brief later filed with the probate court, Seidel asserted that Fraleigh informed her that Norbury was able to pay $1,048.00 of the fees and expenses, which left an outstanding balance of $6,129.21

Following the hearing, Seidel filed a motion for reconsideration in which she contested the accounting and argued that the trust was not a party to the litigation, which prevented the court from entering the order in question. Seidel also argued that the trust was discretionary and, therefore, inaccessible to Fraleigh as a creditor.

The court issued an opinion on June 14, 2011, in which it denied the motion for reconsideration in part and granted the motion in part. The court held that the motion was denied to the extent that it challenged the contents of the accounting. The court reasoned that Seidel waived any such objection when she stated at the hearing that she did not object to the contents of the accounting, but only objected to the attempt to recover funds from the trust. Regarding Seidel's arguments regarding the nature of the trust and whether it was accessible to creditors, the court held that the issues could not be addressed because it had not been provided with the relevant trust documents. Consequently, the court ordered the parties to provide supplemental briefs addressing the nature of the trust, ordered that the trust be joined as a party and ordered that a copy of the trust agreement be filed with the court.

Seidel, in both her individual capacity and her capacity as trustee, filed her supplemental brief on July 5, 2011. Seidel asserted that the language of the trust agreement demonstrated that it was a discretionary trust which was not accessible to a beneficiary's creditors. She further argued that even if the court determined that it was not a discretionary trust, the contents of the trust could still not be reached by creditors in light of the spendthrift clause. Finally, Seidel asserted that Fraleigh had previously applied for food stamps on Norbury's behalf. Seidel asserted that because an individual is ineligible for food stamps if he has access to trust property, Fraleigh's application for the food stamps demonstrated his acknowledgment that the trust was discretionary in nature.

Fraleigh filed his supplemental brief on July 6, 2011. Fraleigh argued that the trust agreement demonstrated that the trust was properly classified as a general support trust. According to Fraleigh's interpretation of the document, Seidel did not have the authority to deny an expenditure that was in Norbury's best interests. Consequently, because it was not a discretionary trust, it was accessible to Fraleigh for his expenses. The brief further argued that Seidel's failure to distribute trust funds to pay for Fraleigh's service constituted a breach of her fiduciary duty which resulted from her desire to preserve trust property for her children. Finally, Fraleigh argued that the spendthrift clause in the trust agreement did not preclude the trial court's order because a statutory exception permitted the payment to the guardian of a beneficiary.

The court issued a detailed opinion on August 5, 2011, which analyzed the language of the Agreement. The court stated that the agreement did give the appearance of a discretionary trust. However, the court explained that when analyzing a trust agreement, the court must give effect to each word of the agreement when ascertaining the settlor's intent. Ina analyzing the language of Paragraph Eleventh, the court concluded that the settlor did not intend the trust to be discretionary in an instance in which the beneficiary was under a legal disability. In support of that conclusion, the court cited the portion of that paragraph that provided "the Trustee is authorized in her absolute discretion, and in complete discharge of any obligation therefore," to make certain distributions. According to the court, the agreement's use of the word "obligation" indicated an intent to restrain the trustee's discretion during the time in which the beneficiary

was legally disabled. Therefore, because Norbury was legally incapacitated, the trustee had an obligation to provide for his support, which included making payments for Fraleigh's services.

On appeal, Seidel first argues that the trial court erred in denying her motion for reconsideration to the extent that it argued that the trial court erred in exercising jurisdiction over the trust. We agree. "This Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration." *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006). "The legal question of whether a court possesses personal jurisdiction over a party is [] reviewed de novo." *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012).

The record demonstrates that the Frances Norbury Trust was not a party to any litigation at the time the probate court held its hearing on Fraleigh's petition for an annual accounting. Seidel was present at the hearing and was not assisted by an attorney. She never indicated that she was present at the hearing in her capacity as trustee, as opposed to her capacity as Norbury's sibling. After being asked whether she objected to Fraleigh's accounting[4], she stated to the trial court that the family discretionary trust would not make any payments for the claimed fees and expenses. The court, upon becoming aware of the existence of the trust, but not yet having seen the actual trust documents, ordered the trust to pay the unobjected to fees and expenses. After the completion of the hearing and the filing of Seidel's motion for reconsideration, the court ordered that the trust be added as a party.

As Seidel argues on appeal, MCL 700.7201(1) provides that "[a] court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." Here, Fraleigh does not argue that the trust was an interested person that invoked the court's jurisdiction. Rather, Fraleigh asserts that Seidel appeared at the May 4, 2011 hearing in her capacity as trustee and that, pursuant to the terms of MCR 2.117, she therefore "submitted" to the probate court's jurisdiction. As Fraleigh accurately asserts, MCR 2.117(A) does provide that "a party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose." However, Fraleigh neglects to acknowledge the applicability of MCR 2.117(B), which provides that "filing an appearance without taking any other action toward prosecution or defense of the action neither confers not enlarges the jurisdiction of the court over the party." As a result, whether Seidel initially appeared before the court in her individual capacity or in her capacity as trustee is without consequence when determining whether the probate court had jurisdiction over the trust, because Seidel never invoked that jurisdiction.

Because an interested party did not invoke the probate court's jurisdiction, MCL 700.7201(1) demonstrates that jurisdiction only existed if it was specifically provided for by law. MCL 700.1302(b) provides that the probate court has "exclusive legal and equitable jurisdiction" of "[a] proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the

[4] It is not clear from the record why the probate court asked Seidel whether she had any objection. Prior to the court's question, there was no indication that Seidel had any authority on which to base an objection to Fraleigh's accounting.

declaration of rights that involve a trust, trustee, or trust beneficiary." The proceeding at issue in this matter did not fall within that statutory umbrella. Rather, the proceeding was merely to consider the accounting that had been submitted by Fraleigh to the probate court. The proceeding concerned Fraleigh's fees and expenses, and not the distribution of the trust nor a declaration of rights. This is particularly true where Fraleigh had not sought any court-ordered distribution of trust assets. Because no other legal provision in support of jurisdiction has been identified, we conclude that the probate court did not have jurisdiction over the Francis Norbury Trust. Consequently, the court's order must be vacated.

Even if this Court were to determine that the probate court properly exercised its jurisdiction over the trust, the order in question would still be vacated. As Seidel asserts, the probate court additionally erred in concluding that the trust at issue was properly characterized as a support trust and that it could be ordered to pay Fraleigh's expenses. We review the probate court's interpretation of the trust agreement de novo, as a question of law. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

"A discretionary trust provides that a 'trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines....'" *In re Hertsberg Inter Vivos Trust*, 457 Mich 430, 433; 578 NW2d 289 (1998) (quoting *Miller v Dept of Mental Health*, 432 Mich 426; 442 NW2d 617 (1989)). Our Supreme Court has previously held that a beneficiary of a discretionary trust does "not have an ascertainable interest in the assets of the trust" and, consequently, the assets of a discretionary trust cannot be claimed by the beneficiary's creditors. *Miller*, 432 Mich at 427. Whether a trust may properly be characterized as discretionary is dependent upon the intent of the settlor. *Id.* at 428.

As described above, Paragraph Fourth of the trust agreement provided that the "[t]rustee shall distribute to or apply so much of the net income and/or principal of the trust for [Norbury] in such proportions as the Trustee in her sole and uncontrolled discretion may deem to be in his best interests." In the trial court's opinion, it acknowledged that the trust appeared to be discretionary in nature. However, the court concluded that Paragraph Eleventh demonstrated that the trust was not discretionary in an instance in which a beneficiary was legally incapacitated. By its terms, Paragraph Eleventh applies when a beneficiary of the trust is a minor or is legally incapacitated. The portion of Paragraph Eleventh at issue provides that "the Trustee is authorized in her absolute discretion, and in complete discharge of any obligation therefore," to make the payment to a legal representative or a near relative of applicable beneficiaries, or "to the use and benefit of such person." The court concluded that Paragraph Eleventh's use of the term "obligation" constituted an acknowledgement that the trustee was required to make distributions to legally incapacitated individuals. However, a review of the entire trust document demonstrates that the settlor's intent varied depending on the identity of the beneficiary. In each instance in which the trust agreement contemplated Norbury as the beneficiary, it consistently indicated that the trustee was to exercise uncontrolled discretion in making distributions. In contrast, the trust agreement anticipated the possibility that Seidel's minor children could become beneficiaries. In such an instance, Paragraph Fourth provided that the trustee shall distribute trust assets for the support, maintenance and education of the beneficiary. Read in the context of the entire agreement, Paragraph Eleventh does not indicate that the settlor intended to limit the discretion of the trustee in the instance that a beneficiary was legally incapacitated. Rather, the paragraph indicates that where there *is* an obligation to make a payment, such as in

the instance in which a minor beneficiary requires funds for his or her support, the payment need not be made directly to the actual beneficiary to satisfy that obligation. Paragraph Eleventh has no impact on the discretion that could be exercised regarding Norbury during his legal incapacitation.

The language of the trust agreement clearly demonstrates that Frances Norbury intended this trust to be discretionary in regard to Thomas Norbury. The agreement's instruction to utilize the trust property for the support, maintenance and education of certain beneficiaries demonstrates that the drafter's use of the term discretion in regard to Thomas Norbury was intentional. Therefore, because the trust is discretionary in nature, the trial court erred in concluding that it could be ordered to pay for Fraleigh's services.[5]

We acknowledge the probate court's concern that the county should not have to pay for Fraleigh's services in light of Norbury's access to trust assets. We note that it remains possible that Seidel is abusing her discretion in failing to distribute funds to Norbury when such a distribution appears to be in his best interest. We further note that the fact that any trust property not distributed to Norbury will potentially pass to Seidel's children certainly encourages speculation regarding her ability to exercise her discretion. However, because the probate court did not properly obtain jurisdiction over the trust and because the court improperly concluded that the trust was not discretionary in nature, the court's order amounts to error.

The order denying the motion for reconsideration is reversed and the order pertaining to the trust's obligation to pay Fraleigh's fees and expenses is vacated.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

[5] It could also be concluded that the trial court erred in concluding that the trust was accessible to Fraleigh despite the trust containing a spendthrift clause. However, because the trial court did not fully analyze that issue and because its resolution would not impact this Court's opinion, we choose to not analyze the validity or impact of that provision.