



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

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DT: February 27, 2013

RE: **In re Miller Osborne Perry Trust**
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL LORE:

ALL FOUR EYES TEAM Major League Players Who Wore Glasses

Outfield – Dom DiMaggio
Outfield – Reggie Jackson
Outfield – Chick Hafey
First Base – Earl Torseson
Center – Clint Courtney
Shortstop – Eddie Joost
Third Base – Bob Dillinger

Major League Players Who Wore Glasses –*continued*–

Second Base – Eric Sogard

R. H. Pitcher – Jim Konstanty

L. H. Pitcher – Bob Veale

R. H. Designated Hitter – Dick Allen

L. H. Designated Hitter – Bill Virdon

Umpire – “You’re blind ump” – Frank Umont

Manager – Bobby Valentine

REVIEW OF CASE:

Reference Files: Terror Clause
 Probable Cause Hearing

Whether or not the Appellee read my article (Alan May – Litigation Under New Trust Code, Vol. 4, No. 3, Mich Prob, NTR, LJ p. 27), he availed himself of my theory; that probable cause can be tested by either a Proponent or a Respondent in a probable cause hearing without triggering the terror clause.

The Lower Court found that a prospective contestant who filed a Petition for Declaratory Relief, did not have probable cause to sustain a contest to a Trust. The Probate Court further found that the declaratory relief sought by the proposed contestant did not constitute a challenge within the meaning of the Settlor’s terror clause within his Trust.

The Court of Appeals affirmed because the type of action taken by Appellee did not fall within the “strict” definitions of the terror clause set forth by the Settlor of the Trust. In addition to noting the absence of language of “any legal action” in the terror clause, the Court of Appeals went on to say that there was an additional ground for ruling that the terror clause was not triggered and that was that the Appellee’s prayer for relief did not request the overturning of the Trust, therefore, the court could not have granted it.

All well and good, but then the Court of Appeals went on to say that the Lower Court cannot answer hypothetical questions even though declaratory judgment, authorized by the court rules, presents a hypothetical question. Nevertheless, the Court of Appeals affirmed because they said the issue of hypothetical question was not before it. What the Court of Appeals is saying is ‘even though they ruled on and affirmed this Lower Court decision in this case, the whole procedure utilized by the Probate Court might be void.’ The Court of Appeals then goes on to say that a Probate Court should not rule on whether there is probable cause until there is an actual controversy, and that would be by filing the contest. If this becomes the law (and this case is published), that means that a Defendant can have a preliminary hearing, but a Plaintiff cannot without triggering the terror clause.

Lesson for the Scrivener, be as broad or narrow as the Settlor wishes and the court should sustain you.

STATE OF MICHIGAN
COURT OF APPEALS

In re MILLER OSBORNE PERRY Trust.

SUSAN PERRY, Trustee for the MILLER
OSBORNE PERRY Trust,

Appellant,

v

MARK D. PERRY,

Appellee.

FOR PUBLICATION
February 19, 2013
9:10 a.m.

No. 309725
Ingham Probate Court
LC No. 12-000191-TV

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

Susan Perry, acting as the trustee for the Miller Osborne Perry Trust, appeals by right the probate court's finding that Mark D. Perry's suit for declaratory relief did not constitute a challenge to the Trust within the meaning of the Trust's forfeiture clause—otherwise known as a terror clause. On appeal, Susan Perry argues that the trial court clearly erred because, after it found that Mark Perry would not have had probable cause to challenge the Trust within the meaning of MCL 700.7113, it had to find that his suit triggered the terror clause. As such, she further maintains, the probate court should have determined that Mark Perry forfeited his distributions under the Trust. Because we conclude that Mark Perry's suit for declaratory relief did not constitute a challenge to the Trust as stated in the Trust's Terror clause, we affirm.

I. BASIC FACTS

Miller Osborne Perry established the Trust in January 1993. Susan Perry is Miller Perry's daughter and Mark Perry's aunt.

In November 2006, Miller Perry amended the trust to give the majority of his estate to Susan Perry; he established that 75% would go to Susan Perry, 12.5% to Mark Perry and the remaining 12.5% would go Mark Perry's half-sister, Debra C. Pinedo. He also added Section 4.4, which provided that any beneficiary who challenges the admission of the Trust to probate or any of the Trust's provisions would forfeit his or her benefits under the Trust:

If any beneficiary under this trust or any heir of mine, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest the admission of this trust to probate, or challenge or contest any provision of this trust, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this trust. However, it will not be a challenge or contest if my personal representative, trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this trust.

Miller Perry died in March 2010, at 102 years of age.

After discovering evidence that his aunt may have had a questionable influence over Miller Perry during his final years, Mark Perry petitioned the probate court for declaratory relief. Specifically, he asked the trial court to determine whether he had “probable cause” to challenge the Trust’s 2006 amendments under MCL 700.7113. In his petition, Mark Perry stated that his petition should “not . . . be construed as contesting the validity of the trust, but rather only seeks a declaratory judgment pursuant to MCR 2.605 on the existence of probable cause if [he] were to bring such an action.” (emphasis added).

In response to Mark Perry’s petition, Susan Perry denied that she had had an undue influence on her father. She also asked the probate court to find that Mark Perry’s request for declaratory relief constituted a “contest” of the Trust under Section 4.4, thus triggering the terror clause. After a hearing on the issue, the probate court denied Mark Perry’s request for a declaratory judgment, but also found that his petition was not a contest or challenge under Section 4.4.

II. JURISDICTION

As a preliminary matter, we note that Mark Perry argues on appeal that Susan Perry is not an aggrieved party under MCR 7.203(A) because she appealed as the Trust’s trustee and, in that capacity, she did not suffer a concrete or particularized injury. See *Federated Ins Co v Oakland Co Rd Comm’n*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). For that reason, he maintains that this Court lacks jurisdiction to hear her appeal. It is not clear that Susan Perry appealed solely as the Trust’s trustee and not also in her personal capacity. In any event, because Susan Perry has a duty to ensure that the Trust is properly administered according to its terms and for the benefit of all beneficiaries and may be liable for failing to protect the Trust’s assets, including as provided under the terror clause, MCL 700.7801, MCL 700.7812, MCL 700.7901, MCL 700.7902, we conclude that she has a sufficient pecuniary interest to meet the requirements stated under MCR 7.203(A).

III. THE TERROR CLAUSE

A. STANDARD OF REVIEW

This Court reviews de novo the proper interpretation of both statutes and trusts. *In re Reisman Trust*, 266 Mich App 522, 526; 702 NW2d 658 (2005). However, this Court reviews a trial court’s factual findings underlying its conclusions of law for clear error. MCR 2.613(C).

B. ANALYSIS

Terror clauses, such as that found under the Trust's Section 4.4, are generally valid and enforceable. See *Farr v Whitefield*, 322 Mich 275, 280; 33 NW2d 791 (1948). However, the Legislature amended the Michigan Trust Act to limit the scope of terror clauses: "A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust." MCL 700.7113. The probate court found that Mark Perry would not have probable cause under that statute to challenge the validity of the Trust's amendments. Accordingly, if Mark Perry's request for declaratory relief constituted a challenge to the Trust, as defined under Section 4.4, then Mark Perry forfeited his interest under the Trust by challenging it without probable cause to do so. However, we do not agree that his petition for declaratory relief constituted a challenge to the Trust under Section 4.4.

When interpreting the meaning of a trust, this Court must ascertain and abide by the intent of the settlor. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). We must look to the words of the trust itself. *Id.* Courts must, however, construe no contest clauses strictly. See *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962). Thus, this Court may only forfeit Mark Perry's distributions if his actions "come strictly within the express terms" of the terror clause at issue. *Id.* (quotation marks, citation, and emphasis omitted).

Under Section 4.4, Miller Perry did not provide that a beneficiary would forfeit his or her right under the Trust if the beneficiary filed *any* legal action—however tangentially related to the Trust. Instead, he provided that only a beneficiary who contests or challenges the Trust's *admission* to probate or who challenges a *provision* will forfeit his or her rights under the Trust.

With his suit, Mark Perry stated that he was not challenging the Trust itself. Moreover, in his allegations, he did not ask the probate court to pass judgment on any term within the Trust, did not allege that the terror clause was actually invalid, and did not seek monetary relief. He did, however, ask the probate court to order that "the existence of probable cause renders unenforceable the terror clause" in his prayer for relief. Because he stated in the body of his petition that he was not actually challenging the trust—and the terror clause is a provision in the trust—the probate court would have no authority to grant the requested relief. Thus, this request did not transform his petition into a legal challenge to the Trust.

When the petition is examined as a whole, it is clear that Mark Perry asked the probate court to examine his evidence and determine whether that evidence *would* give him probable cause—as that phrase is understood under MCL 700.7113—if he *were* to challenge the Trust. That is, he essentially posed a hypothetical scenario to the probate court and asked it to advise him about the probable application of a statute—MCL 700.7113—to his proposed scenario. For that reason, Mark Perry likely failed to allege a justiciable controversy. See *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978) (stating that courts should not decide hypothetical issues; rather, declaratory relief is only appropriate where the plaintiff has

sufficiently alleged an actual justiciable controversy).¹ Nevertheless, whether the probate court had the authority to make the probable cause determination is not now before us. The only question is whether the trial court properly found that Mark Perry's petition did not amount to a challenge that would trigger the terror clause. When his petition is read as a whole, it is clear that Mark Perry did not actually challenge the Trust in any of the ways specified under the terror clause. Therefore, the trial court did not err when it denied Susan Perry's request to have Mark Perry's interest forfeited.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Michael J. Kelly

¹ MCL 700.7113 nullifies the operation of a terror clause ("shall not be given effect") as to challenges for which there was "probable cause" for "instituting" the challenge. Hence, MCL 700.7113 does not operate to nullify a terror clause's operation until there is an actual challenge and then only if there was probable cause to bring the challenge. Because probable cause necessarily turns on the evidence that the challenging party had at the time he or she instituted the challenge, a trial court cannot properly make a probable cause determination until after the challenge has been made.