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 through 2009 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. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, click on the link below. http://www.kempklein.com/probate-summaries.php

DT: March 19, 2010

RE: Estate of Upjohn
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE BASEBALL:

Baseball fans often play games with each other as to the best players they have ever seen. Being a strict constructionist I want to define "seen" as "personally seen." Although I was born and raised in Detroit, I had the privilege of seeing National League players in spring training and in the 1971 and 2005 all star games. So here is my best team.

Starting nowhere in particular, the best catchers I have ever seen were Roy Campanella and Yogi Berra; if I had to pick a third and fourth it would be Carlton Fisk and Johnny Bench.

The best first basemen that I have ever seen were Mickey Vernon and Norm Cash.

My nomination for second basemen would be Bobby Doerr and Jackie Robinson. At shortstop I choose Phil Rizzuto and Pee Wee Reese.

Third base I would have to choose George Kell and Eddie Matthews, but Al Rosen and Harmon Killebrew would be close behind.

My outfielders are Al Kaline, Ted Williams, Willie Mays, Hank Aaron, Reggie Jackson and Ken Griffey, Jr.

Although one never played at this position, I would choose Joe Dimaggio as my right handed designated hitter and Carl Yatrzemski as my left handed designated hitter. (Yaz did play over 411 games as designated hitter).

My right handed pitchers are Bob Gibson, Bob Feller and Bob Lemon.

My left handed pitchers are Sandy Koufax, Whitey Ford and Billy Pierce.

Happy memories.

REVIEW OF CASE:

Reference files: Res Ajudicata
Effective Accounting
Rule Against Perpetuities
Corporate Existence
Estoppel/Acquiescence

Decedent Upjohn established a Trust in his Will which created scholarships for Upjohn Company employees. The Trust was composed of Upjohn stock and was to continue until the company's Board voted otherwise or the Upjohn Company should "cease to exist." Under either of those two circumstances, the principal would then go to another foundation.

The Trust was established in 1938.

The trial court ruled with the successor foundation and the Office of the Attorney General for two reasons. First the trial court found that the Upjohn Company did not exist because it was not listed in the phone book and no one could buy stock in that company. Second, it ruled that the "prize" Trust violated the rule against perpetuities since it was not limited to 21 years. The corpus must, therefore, be paid to the successor foundation.

The Court of Appeals reversed.

The Court of Appeals reviewed at length all of the corporate iterations of the Upjohn Company. I will not review those, except to say that they were many commencing in 1958. Two moments of legal significance occurred throughout the corporate journey.

1. In 1962 the trustee filed annual accountings with the Probate Court and the Office of the Attorney General and, in the words of the Court of Appeals, "the Attorney General requested copies of all petitions and Notice of Hearings filed in the estate thereafter." The accountings were allowed. Keep in mind that 21 years, plus 1938 would be 1959. Therefore, the violation of rule against perpetuities could have been raised at the hearing on the accounting.

2. In 1996 the trustee asked the Probate Court for an interpretation of the Will to determine whether prize recipients could get their traveling expenses to personally receive their award(s).

No objections to the prizes, qua prizes, were raised by either the successor foundation or the Office of the Attorney General.

The ruling:

A. The Corporate Non-Existence Claim

The Court of Appeals ruled that the allegations of non-existence were barred because they could have been raised in the 1962 and/or 1996 court hearings and the court found that the corporation still existed as it was, in a Dictionary sense, "functional" and that it "operated."

(1) I prefer the second rationale. The stock that Mr. Upjohn set aside produced income and grew through many forms and produced more income. The essence of a Will case is the testator's intent; that doctrine would apply here when the iterations of the company are "functional" and "operational." That should have been the sine qua non of the decision.

(2) The reason for my limitation is that res ajudicata, applied in the instant case, is potentially dangerous. In theory anything could have been raised at either hearing. As lawyers, however, life isn't like that. Clients have limited resources and want to address the issues before the court. Cadillac cars are not always driven when Chevys will do. The concurring opinion relied on estoppel which might alleviate many of our fears. Even better would have been the doctrine of acquiescence, see *Aiken v Gonser, 342 Mich 29* (1959). The parties in Aiken lived under acquiescence, under the terms of a Will for 30 years including a wrongful division of property.

B. Rule Against Perpetuities

(1) Same result res ajudicata; this could have been argued in 1962.

(2) Query: Was the Attorney General served with notice prior to 1962? If not, isn't notice jurisdictional? Can't the Attorney General now challenge the years 1959 through 1962 and avoid res ajudicata in that way?

This is another reason why I would limit my opinion to a finding that the corporation is still in existence and that the Attorney General acquiescenced.

Conclusion:

I would have limited the ruling to say that Upjohn Company existed within the meaning of the Will and Trust and that the Foundation and Attorney General acquiescenced in a pattern and practice that barred their right to raise the rule against perpetuities.

AAM:jv:Doc#656919v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of UPJOHN.

NATIONAL CITY BANK OF THE MIDWEST, TRUSTEE,

Petitioner-Appellee,

v

PHARMACIA & UPJOHN COMPANY, L.L.C.,

Respondent-Appellant,

and

KALAMAZOO COMMUNITY FOUNDATION,

Respondent-Appellee,

and

ATTORNEY GENERAL/CONSUMER PROTECTION AND CHARITABLE TRUSTS DIVISION,

Intervening-Appellee.

UNPUBLISHED
February 23, 2010

No. 278668
Kalamazoo Probate Court
LC No. 1956-020742-TT

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Respondent, Pharmacia & Upjohn Company, L.L.C., appeals as of right the Kalamazoo probate court's order in favor of the Kalamazoo Community Foundation (Foundation) and Attorney General/Consumer Protection and Charitable Trusts Division (Attorney General) on the parties' cross-motions for summary disposition. The motions related to the trustee, National City Bank of the Midwest's petition for a declaration of rights of the William E. Upjohn Prizes Trust, which the late Dr. William E. Upjohn established to reward employees of The Upjohn Company for special accomplishments. We reverse.

I.

Dr. Upjohn founded The Upjohn Company in Kalamazoo in 1886 and it was incorporated under Michigan law in 1909. For nearly 50 years afterward, The Upjohn Company was a privately or closely held company without publicly-traded stock.

On December 3, 1931, Dr. Upjohn executed a will and established the William E. Upjohn Prizes Trust. Dr. Upjohn directed:

> Section Number VII. At the end of five (5) years after my death, my Trustees shall set aside and keep in separate trusts the following shares of Common Stock of the Upjohn Company (as such shares are constituted at the time of my death) or, in case said shares shall have been converted into other property, then the proportionate and equitable amounts of such other property, for the following purposes:
>
> * * *
>
> (j) In a separate trust, two thousand (2,000) shares, the entire net income of which shall be available annually to The Upjohn Company for use as prizes for special accomplishment of any employee of The Upjohn Company, preferably two or more in each year, to be known as "the William E. Upjohn prizes". Any income in any year which is not awarded as prizes by The Upjohn Company shall be paid to the BANK OF KALAMAZOO, AS TRUSTEE, for the benefit of the KALAMAZOO FOUNDATION, and at such time as the Board of Directors of The Upjohn Company signify by a majority vote that the income is no longer desired, or in case The Upjohn Company should cease to exist, or cease to function, the principal and any undistributed income shall be paid to the BANK OF KALAMAZOO,[1] AS TRUSTEE, for the benefit of the KALAMAZOO FOUNDATION. [Footnote added.]

Dr. Upjohn subsequently died in 1932. Following a petition by the executors of Dr. Upjohn's estate in 1937, the probate court entered an order appointing the trustees and transferring assets for the administration of the prizes trust. The probate court's order was not appealed and, from 1938 to 2003, the corpus of the prizes trust was distributed to employees of The Upjohn Company, with any remainder distributed to the Foundation.

In the fall of 1958, the board of directors of The Upjohn Company (a Michigan corporation) decided to offer the company's stock to the public. Consequently, a new corporation, The Upjohn Company of Delaware, Inc., was formed. Thereafter, The Upjohn Company merged into The Upjohn Company of Delaware, Inc. The Agreement and Plan of Merger provided that The Upjohn Company of Delaware, Inc., would be the surviving corporation. It also provided that "the separate existence of Upjohn Michigan shall cease."

---

[1] The eventual successor to the Bank of Kalamazoo, as trustee of the prizes trust, was National City Bank.

Shortly after the merger, The Upjohn Company of Delaware, Inc., changed its name to The Upjohn Company.

On January 8, 1962, the trustee filed the annual accounting in the probate court and a hearing was scheduled. On January 25, 1962, the Attorney General intervened in the Upjohn Estate on behalf of the people in the state of Michigan and all interested beneficiaries. The Attorney General requested copies of all petitions and notice of hearings filed in the estate thereafter. On February 8, 1962, the probate court entered an order allowing the trustee's annual accounting.

The corpus of the prizes trust continued to grow and, in the 1990s and early 2000s, The Upjohn Company (now a Delaware corporation) underwent further changes to its corporate structure. In August 1995, Bushwood Subsidiary, Inc., changed its name to Pharmacia & Upjohn Subsidiary, Inc., and merged into The Upjohn Company. At the same time, Bushwood, Inc., changed its name to Pharmacia & Upjohn, Inc., and became a parent company of The Upjohn Company. The Upjohn Company's shares were converted to the right to receive shares of Pharmacia & Upjohn, Inc.

On May 10, 1996, Pharmacia, Inc., a Minnesota corporation, merged into The Upjohn Company. The Upjohn Company was the surviving corporation. On June 3, 1996, The Upjohn Company changed its name to "Pharmacia & Upjohn Company."

On June 14, 1996, the trustee filed a petition with the probate court, requesting an interpretation of the will's trust provisions. Specifically, the trustee noted that, as a result of the recent merger, the employees eligible for the prizes had increased from 20,000 to over 30,000, and those employees work in various places, not just Kalamazoo. The trustee questioned whether the recipients could be reimbursed for expenses incurred for traveling to the award presentation.

At a subsequent hearing, counsel for the Foundation raised the issue whether The Upjohn Company had ceased to exist, which would terminate the prizes trust. However, counsel ultimately stated, "It is my understanding that what happened is that a holding company was formed when The Upjohn Company stock was purchased by that holding company and the Pharmacia stock was purchased by that holding company. So that, in fact, The Upjohn Company does still exist." Thereafter, on August 14, 1996, the probate court entered an order authorizing the use of a portion of the income of the prizes trust to reimburse travel expenses.

In the years following the probate court's order, The Upjohn Company, which was then known as the Pharmacia & Upjohn Company, underwent further changes to its corporate structure. On March 31, 2000, Pharmacia & Upjohn Company's parent corporation, Pharmacia & Upjohn, Inc., engaged a merger. MP Sub, Inc., a Delaware corporation wholly owned by Monsanto Company, merged into Pharmacia & Upjohn, Inc., a Delaware corporation. Pharmacia & Upjohn, Inc., was the surviving corporation. As a result of the merger, Pharmacia & Upjohn, Inc., became a wholly-owned subsidiary of Monsanto Company. Meanwhile, Pharmacia & Upjohn Company remained a wholly-owned subsidiary of Pharmacia & Upjohn, Inc. Next, Monsanto Company changed its name to Pharmacia Corporation.

Effective April 16, 2003, Pfizer Acquisition Sub Corp., a wholly-owned subsidiary of Pfizer, merged into Pharmacia Corporation. Pharmacia Corporation was the surviving corporation. As a result of the merger, Pharmacia became a wholly owned subsidiary of Pfizer.

On December 22, 2003, the trustee filed a petition in the probate court, requesting an interpretation regarding whether The Upjohn Company continued to exist or function. According to Dr. Upjohn's will, if The Upjohn Company ceased to exist or ceased to function, the Foundation would be entitled to the principal and undistributed income. While the petition was pending, on August 13, 2004, Pharmacia & Upjohn Company, L.L.C. (a Delaware limited liability company) was created. Thereafter, Pharmacia & Upjohn Company converted to Pharmacia & Upjohn Company, L.L.C.

After the parties engaged in substantial discovery pursuant to the trustee's petition, Pharmacia & Upjohn Company, L.L.C., the Foundation, and the Attorney General filed cross-motions for summary disposition. The Foundation and the Attorney General argued that The Upjohn Company, identified by Dr. Upjohn in the will, no longer existed or functioned. The Foundation and Attorney General further argued that the prizes trust created by Dr. Upjohn's will was an honorary trust, because it was created for a specific noncharitable purpose (to provide an annual bonus to a select number of Upjohn employees), and because there were no definite or definitely ascertainable beneficiaries. Thus, the Foundation and Attorney General argued that, as an honorary trust, the prizes trust had exceeded its statutory period of validity, 21 years, and was no longer valid. Pharmacia & Upjohn Company, L.L.C., contended that The Upjohn Company continued to exist and to function as part of the Pfizer family of companies.

On May 23, 2007, the probate court issued its ruling from the bench. The probate court noted that The Upjohn Company was not in the phone book and it appeared that one could not purchase shares of the company. Thus, the probate court concluded that The Upjohn Company had ceased to exist and to function. The probate court then concluded that the prizes trust was an honorary trust and no longer valid. Accordingly, the probate court granted the Foundation's motion for summary disposition, but denied Pharmacia & Upjohn Company, L.L.C.'s motion. The instant appeal followed.

II.

In Pharmacia & Upjohn Company, L.L.C.'s first claims on appeal, it argues that: 1) the Foundation and Attorney General's arguments that The Upjohn Company ceased to exist and function are barred by res judicata, and alternately, 2) The Upjohn Company continues to exist and function even if the Foundation and Attorney General's arguments are not barred by res judicata. We agree with Pharmacia & Upjohn Company, L.L.C.'s arguments in both respects. This Court reviews a court's application of a legal doctrine, such as res judicata, *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007), and the court's decision to grant summary disposition de novo, *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007).

A. 1958 Merger

The Foundation and Attorney General argue that The Upjohn Company ceased to exist in 1958 when it merged into The Upjohn Company of Delaware, Inc. In opposition, Pharmacia and Upjohn Company, L.L.C., claims that the argument is barred by res judicata. Because we agree with Pharmacia and Upjohn Company, L.L.C., we decline to address whether the 1958 merger affected The Upjohn Company's corporate existence or functionality.

Res judicata bars a subsequent action if (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

As we noted, *supra*, the Attorney General intervened in the Estate of Upjohn in 1962 during probate proceedings to allow the trustee's annual accounting. Ultimately, the probate court held a hearing and entered an order, which was decided on the merits and was final. Thus, the first and second elements of res judicata are satisfied. *Richards, supra*, 272 Mich App at 531. The trustee's annual accounting arguably included information regarding the funds in the prizes trust and amounts paid pursuant to the trust. As an intervening party, the Attorney General could have objected to those payments and argued that The Upjohn Company had ceased to exist or function, but it failed to do so. Likewise, as an interested party, the Foundation could have also objected, but there is no evidence of such an objection in the record. Therefore, the third element of res judicata is satisfied. *Id.* The Foundation and Attorney General were involved in both the 1962 action and the instant petition to interpret the will. Consequently, the fourth element of res judicata requiring both actions to involve the same parties is satisfied and res judicata bars the Foundation and Attorney General's argument that The Upjohn Company ceased to exist following the 1958 merger. *Id.*

B. 1990s Transactions

The Foundation and Attorney General also argue that The Upjohn Company ceased to exist following: 1) the 1995 merger of Pharmacia & Upjohn Subsidiary, Inc., into The Upjohn Company, 2) the 1995 conversion of outstanding shares of The Upjohn Company to the right to receive shares of Pharmacia & Upjohn, Inc, and 3) the May 1996 name change of The Upjohn Company to Pharmacia & Upjohn Company. Again, consistent with Pharmacia and Upjohn Company, L.L.C.'s argument, this Court need not address whether The Upjohn Company ceased to exist as a result of the 1995 and 1996 corporate transactions because those arguments are barred by res judicata.

The parties apparently do not contest that the June 1996 petition was decided on the merits and the probate court's order constituted a final decision. Thus, the first and second elements of res judicata are satisfied. *Richards, supra*, 272 Mich App at 531. As interested parties who received notice and an opportunity to be heard at the 1996 hearing, the Foundation and Attorney General could have argued that The Upjohn Company ceased to exist or function as a result of either the 1995 merger, 1995 stock conversion, or 1996 name change, but the parties failed to do so. The Foundation even conceded, "The Upjohn Company does still exist." Therefore, the third element of res judicata is satisfied. *Id.* Finally, the same parties were involved in both the 1996 petition and the instant petition to interpret the will. The fourth

element of res judicata is satisfied and, again, res judicata bars the Foundation and Attorney General's arguments that The Upjohn Company ceased to exist following the 1995 merger, 1995 stock conversion, or 1996 name change. *Id.*

C. 2000s Transactions

As we noted earlier, Pharmacia & Upjohn Company, L.L.C., maintains that The Upjohn Company continued to exist and function throughout both the corporate transactions preceding the 1996 order and those following that order. The Foundation counters that, even if res judicata bars its arguments that The Upjohn Company ceased to exist and function as a result of corporate transactions prior to the 1996 order, The Upjohn Company ceased to exist and function as a result of subsequent corporate transactions. Incorporating our res judicata analysis, *supra*, The Upjohn Company contemplated in Dr. Upjohn's must be treated as having continued existence and functionality in the form of Pharmacia & Upjohn Company following the 1996 order and the question remains whether it ceased to exist or function following the subsequent corporate transactions. We conclude that it did not.

1. 2000 Merger

"A corporation is a creature of statute, unable to exist except by the force of express law." *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 425; 325 NW2d 447 (1982). "Consequently, the effect of a merger or consolidation on the existing constituent corporations depends upon the terms of the statute under which the merger or consolidation is accomplished." *Id.*

> MCL 450.1724 provides, in relevant part:
>
> (1) When a merger takes effect, all of the following apply:
>
> (a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation party to the merger except the surviving corporation ceases.

Very similarly, under Delaware Law, 8 Del C § 259(a) provides, in relevant part:

> When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated . . . .

Under these statutes, the separate existence of MP Sub, Inc., ceased when it merged into Pharmacia & Upjohn, Inc., in 2000. MCL 450.1724; 8 Del C § 259(a). Also under the statutes

and the certificate of merger, Pharmacia & Upjohn, Inc., was the surviving corporation and it continued to exist.

Pharmacia & Upjohn Company was unaffected by the merger between MP Sub, Inc., and Pharmacia & Upjohn, Inc. Generally, parent and subsidiary corporations are separate and distinct entities. *Seasword v Hilti, Inc* (*After Remand*), 449 Mich 542, 547, 537 NW2d 221 (1995). Pharmacia & Upjohn Company must have been a "'a mere instrumentality'" of Pharmacia & Upjohn, Inc., for "its separate corporate existence [to] be disregarded." *Id.*, quoting *Maki v Copper Range Co*, 121 Mich App 518, 524; 328 NW2d 430 (1982). Pharmacia & Upjohn Company, L.L.C., cites MCL 600.2140 for the proposition that Pharmacia & Upjohn Company was not a mere instrumentality. MCL 600.2140 provides:

> In any suit or proceeding, civil or criminal hereafter instituted in any of the courts of this state, wherein it shall become material or necessary to prove the incorporation of any company or corporation, or the existence of any joint stock company or association, whether the same be a foreign or domestic corporation, company, or association, evidence that such corporation, company, or association is doing business under a certain name shall be prima facie proof of its due incorporation or existence pursuant to law, and of its name.

Even if the fact that Pharmacia and Upjohn Company was doing business under that name following the 2000 merger constitutes prima facie proof of its existence, other facts in the record suggest that it was not a mere instrumentality. Pharmacia & Upjohn Company was an independent operating company that manufactured products, owned assets and research facilities, and held patents. The company was headquartered in New Jersey and had home offices in Kalamazoo. Susan Grant, a paralegal, stated at her deposition that she maintained minute books for Pharmacia & Upjohn Company. She also recalled that the company had a board of directors and officers, and there was evidence that it employed thousands of employees who enjoyed their own benefits plan. Grant admitted that many Pharmacia & Upjohn Company directors and officers served in other capacities for Pfizer, but the United States Supreme Court has stated that "'directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership.'" *United States v Bestfoods,* 524 US 51, 69; 118 S Ct 1876; 141 L Ed 2d 43 (1998). In light of these facts, the separate existence of Pharmacia & Upjohn Company following the 2000 merger should not be disregarded.

2. 2000 Name Change

"An amendment of the articles of incorporation changing the corporation's name does not divest a stockholder of an equity interest in the successor corporation nor change the identity of the corporation; the amendment does not have any effect on the corporation's property, rights, or liabilities." 18 Am Jur 2d, Corporations, § 97; see also *Union Guardian Trust Co v Kowalsky*, 267 Mich 110, 113; 255 NW 171 (1934) (the amendment in the articles of incorporation, which changed the name of the company, did not transfer any rights from one company to another). Guided by this authority, the identity of Pharmacia and Upjohn Company's grandparent company, Monsanto Company, did not change when it changed its name to Pharmacia Corporation. It follows, therefore, that the name change also did not change the identity of the

grandparent company's subsidiary, Pharmacia & Upjohn, Inc., or that subsidiary's subsidiary, Pharmacia and Upjohn Company.

3. 2003 Merger

The separate existence of Pfizer Acquisition Sub Corp., ceased when it merged into Pharmacia Corporation. MCL 450.1724; see also 8 Del C § 259(a). Just like Pharmacia & Upjohn, Inc., in the 2000 merger, Pharmacia Corporation was the surviving corporation and it continued to exist after the 2003 merger. *Id.* For this merger to affect the corporate existence of Pharmacia Corporation's subsidiary's subsidiary, Pharmacia & Upjohn Company, it must have become a mere instrumentality of its parent. We concluded above that Pharmacia and Upjohn Company was a separate and distinct entity from its parent corporation in 2000. No evidence in the record suggests any changes in the functioning of the company between the 2000 merger and the 2003 merger. It follows that Pharmacia and Upjohn Company was not a mere instrumentality after the 2003 merger and its separate existence at that time should not be disregarded.

4. 2004 Conversion

The Delaware Statute that was in effect at the time of Pharmacia and Upjohn Company's conversion to Pharmacia & Upjohn Company, L.L.C., provided:[2]

> (a) A corporation of this State may, upon the authorization of such conversion in accordance with this section, convert to a limited liability company, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or statutory trust of this State.
>
> * * *
>
> (c) Upon the filing of a certificate of conversion in accordance with subsection (b) of this section, the filing of any document required to be filed by the statute governing the formation of the entity into which the corporation is converting and payment to the Secretary of State of all fees prescribed under this title, the Secretary of State shall certify that the corporation has filed all documents and paid all fees required by this title, *and thereupon the corporation shall cease to exist as a corporation of this State* at the time the certificate of conversion becomes effective in accordance with § 103 of this title. Such certificate of the Secretary of State shall be prima facie evidence of the conversion by such corporation.

[2] This statute has since been amended, but the amended version has a similar effect. See 8 Del C § 266(h) ("When a corporation has been converted to another entity or business form pursuant to this section, the other entity or business form shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the corporation.").

(d) The conversion of a corporation pursuant to a certificate of conversion under this section shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such conversion or the personal liability of any person incurred prior to such conversion.

(e) After the time the certificate of conversion becomes effective *the corporation shall continue to exist as a limited liability company*, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or statutory trust of this State, and the laws of this State shall apply to the entity to the same extent as prior to such time.

(f) Unless otherwise provided in a resolution of conversion adopted in accordance with this section, the converting corporation shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and *the conversion shall not constitute a dissolution of such corporation and shall constitute a continuation of the existence of the converting corporation in the form of the applicable other entity of this State*. [8 Del C § 266 (emphasis added).]

Although 8 Del C § 266 provides that the corporation, here the Pharmacia and Upjohn Company, shall cease to exist as a corporation, it also provides that the conversion shall constitute a continuation of the existence of the converting corporation in the form of the new entity, here Pharmacia and Upjohn Company, L.L.C. In light of this statute, we conclude that Pharmacia and Upjohn Company did not cease to exist when it converted to a limited liability company. Cf. *Lucent Technologies, Inc v Tatung Co*, unpublished memorandum opinion of the Southern District of New York, February 20, 2003 (Docket No. 02 Civ. 8107); *JP Morgan Trust Co v Mid-America Pipeline Co*, 413 F Supp 2d 1244, 1258-1259 (D Kan, 2006).

Furthermore, the facts in the lower court record suggest that the Pharmacia and Upjohn Company did not cease to function when it converted to a limited liability company. *Random House Webster's College Dictionary* (2001) defines "function" as "to work; operate." The record shows that Pharmacia and Upjohn Company was an independent operating and manufacturing company, owning assets, researching and holidng products until the 2004 conversion to a limited liability company. Grant stated that no substantial changes followed the 2004 conversion to a limited liability company and explained that the conversion was for tax purposes only. Accordingly, we conclude that the probate court erred in its determination regarding whether The Upjohn Company ceased to exist or function under Dr. Upjohn's will.

III.

In Pharmacia & Upjohn Company, L.L.C.'s last claim on appeal, it argues that the probate court erred when it concluded that the prizes trust is no longer valid and ruled in favor of the Foundation and Attorney General. Pharmacia & Upjohn Company, L.L.C. maintains that any argument that the trust is invalid under 21-year rule against perpetuities is barred by res judicata. We agree. Once again, this Court reviews de novo a court's application of a legal doctrine and the decision to grant summary disposition. *Washington, supra*, 478 Mich at 417; *Schaendorf, supra*, 275 Mich App 509.

The Michigan Supreme Court has barred subsequent collateral action seeking to declare a trust void where: 1) the probate court previously issued an order approving an executor's final accounting and ordering that the residue of the estate be assigned to a testamentary trustee, and 2) no appeal is taken from that order. See *Cleveland v Second Nat'l Bank & Trust Co*, 354 Mich 202, 218, 221; NW2d (1958); *Chapin v Chapin*, 229 Mich 515, 533; NW2d (1924). Similarly, here, in 1937, the probate court entered an order appointing the trustees and transferring assets for the administration of the prizes trust. The Foundation was a party to the 1937 proceedings and did not appeal the probate court's order. Following *Cleveland* and *Chapin*, the Foundation's argument, that the trust is invalid under the rule against perpetuities, is barred by res judicata.

The Attorney General argues that, unlike the Foundation, it was not a party to the 1937 proceedings and should not be precluded from raising the argument at this time. For res judicata to apply, a party to a subsequent action need not have been a party to the prior action if that party was in privity with a party to the prior action. *Richards, supra*, 272 Mich App at 531.

> The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. [*Durant v Michigan*, 456 Mich 175, 122; 566 NW2d 272 (1997).]

The Foundation and the Attorney General arguably had different interests throughout the administration of this trust. The Foundation was interested in protecting its individual rights to the remainder of the prizes trust whereas the Attorney General was more generally interested in protecting any right or interest of the state of Michigan or its people. Even if the parties were not in privity in 1937, the Attorney General intervened in the Estate of Upjohn in 1962. We concluded above that the 1962 order was on the merits and final. Given that the annual accounting would have included information regarding the prizes trust, the Attorney General could have objected to the trust and argued that it was invalid under the rule against perpetuities. However, the Attorney General failed to do so. As a party with notice and opportunity to be heard in the 1962 action, the Attorney General is now barred from arguing that the prizes trust is invalid in the instant action. *Richards, supra*, 272 Mich App at 531. The probate court erred when it granted the Foundation's motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Pharmacia & Upjohn Company, L.L.C., being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of UPJOHN.

NATIONAL CITY BANK OF THE MIDWEST, TRUSTEE,

Petitioner-Appellee,

v

PHARMACIA & UPJOHN COMPANY, L.L.C.,

Respondent-Appellant,

and

KALAMAZOO COMMUNITY FOUNDATION,

Respondent-Appellee,

and

ATTORNEY GENERAL/CONSUMER PROTECTION AND CHARITABLE TRUSTS DIVISION,

Intervening-Appellee.

UNPUBLISHED
February 23, 2010

No. 278668
Kalamazoo Probate Court
LC No. 1956-020742-TT

Before: Murray, P.J., and Markey and Wilder, JJ.

MURRAY, P.J. (*concurring*).

I concur in the lead opinion reversing the trial court's order and holding that The Upjohn Company continues to exist and function as contemplated by Dr. Upjohn's will. However, rather than concluding that the Kalamazoo Community Foundation and Attorney General are barred by res judicata from raising whether changes to the corporate structure prior to 1962 and 1996 caused the company to no longer exist or function, I would simply hold that the Foundation waived any such argument at the 1996 hearing, see *People v Dobek*, 274 Mich App 58, 65; 732 NW 2d 546 (2007), citing *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), and

that both the Foundation and the Attorney General are "estopped by laches from now questioning the righteousness of" the prior orders enforcing and upholding the trust. *Sprague v Trustees of Protestant Episcopal Church*, 186 Mich 554, 564; 152 NW 996 (1915). With respect to the assertions that The Upjohn Company ceased to exists or function based on events occurring since 1997, I fully concur in the lead opinion's rationale and conclusions.

/s/ Christopher M. Murray