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 2007-2014 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*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 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: May 2, 2016

RE: **In Re Otto William and Margaret Anne Meyer Revocable Trust**
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

BASEBALL STATS:

MAY 8, 2016 WILL BE THE 75TH BIRTHDAY OF FOUNDING PARTNER SANDY KLEIN

Sandy, like three others, including myself, was a graduate of Mumford's Class of 59'. He became a preeminent tax lawyer lauded by his clients and his brothers and sisters in the firm. These are not the reasons why the article is dedicated to him. The reason is that Sandy reads this blog and often has comments.

Sandy was born in 1941. 1941 is considered the greatest year in the history of baseball. Ted Williams became the last person to bat over .400 and he did it in 1941, finishing the year with .406. Joe DiMaggio set a record probably never to be broken with 56 consecutive games with a hit. He topped Ted Williams for the MVP award. Williams hit a walk off homerun in Detroit at Briggs Stadium in the bottom of the ninth of the 1941 All-Star Game.

Through the years many things happened on May 8th:

- In 1900, John McGraw and Wilbert Robinson became the first free agents. They ended their contract disputes and as part of the settlement their reserve clauses were waived.
- In 1906, Connie Mack put a pitcher, Chief Bender, into left field. Bender proceeded to hit 2 homeruns, both inside the park.
- In 1926, the bleachers burned in Fenway Park.
- In 1929, Carl Hubbard no-hit the Pittsburgh Pirates; Mel Ott hit 2 homeruns.
- In 1930, third baseman, Fred Lindstrom, went 5 for 5, including hitting for the cycle.
- In 1935, Ernie Lombardi of the Cincinnati Reds hit 4 doubles off 4 different pitchers against the Phillies.
- In 1946, Johnny Pesky while playing for the Red Sox (he later played for the Tigers) had 6 runs in 1 game. During this period of time, he had 11 straight hits, which was a record in the American League until broken by Walter Dropo, who also went from the Red Sox to the Tigers in the same trade.
- In 1957, Ted Williams hit 3 homeruns.
- In 1963, Willie Stargell hit his first homerun on May 8th.
- In 1966, the St. Louis Cardinals played their last game at Busch Stadium.
- In 1973, Whitey Lockman was the manager of the Cubs and on May 8th was thrown out of a baseball game and replaced on the field by Ernie Banks, who technically became the first African American manager.

Happy Birthday Sandy Klein!

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

Referenced Files: Mistake of Law
Mistake of Fact
Ambiguity
Right of Invasion – Right to Amend

Settlors, husband and wife, signed a trust which according to its terms specifically became irrevocable upon the death of the first party. The second party had a limited power of invasion. The second party amended the trust to include additional beneficiaries. The second spouse died.

The original beneficiaries challenged the amendment to the trust saying that the trust became irrevocable and hence the amendment was invalid. The Lower Court and the Court of Appeals agreed.

Inter alia the Court of Appeals said:

1. The limited right of invasion, even potentially to the right of exhaustion, does not constitute the right of amendment.
2. That limited right of withdrawal does not create an ambiguity, vis-a-vis irrevocability.
3. Ambiguity means that one its face, the language is capable of more than one meaning or some extrinsic fact creates the possibility of more than one meaning.

The court defines modification based on mistake of fact and mistake of law and finds none present.

AAM:kjd
Attachment
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STATE OF MICHIGAN

COURT OF APPEALS

In re OTTO WILLIAM AND MARGARET ANNE MEYER REVOCABLE TRUST.

JANET ANNE LAUX, JOSEPH PETER MEYER, and JEAN LINDA ADAMS,

Appellees,

v

JAMES JUDE MEYER, Individually and as Successor Trustee of the OTTO WILLIAM AND MARGARET ANNE MEYER REVOCABLE TRUST OF 1993, and CHERYL A. MEYER,

Appellants.

UNPUBLISHED
March 17, 2016

No. 326894
Van Buren Probate Court
LC No. 2014-000002-CZ

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Appellants, James Jude Meyer, individually and as successor trustee of the Otto William and Margaret Anne Meyer Revocable Family Trust, and Cheryl A. Meyer (collectively, the Trust), appeal as of right the March 26, 2013 order of the trial court granting summary disposition under MCR 2.116(C)(10) in favor of appellees, Janet Anne Laux, Joseph Peter Meyer, and Jean Linda Adams (collectively, the siblings), on the siblings' claims that Margaret could not modify the trust after Otto's death. We affirm.

I. BACKGROUND FACTS

Otto and Margaret signed trust documents on October 7, 1993. These documents provided in pertinent part that the trustees had sole discretion to distribute principle or income until the death of one of the settlors:

> During the lifetime of SETTLORS, and until the death of one of them, the Trustee at any time, in the Trustee's sole discretion, is authorized to distribute to or for the benefit of SETTLORS, . . . such portions of the income and principal of this

> Trust, in equal shares, as the Trustee deems advisable in the exercise of his discretion.

On the death of one of the settlors, the trustee was instructed to divide the trust into a Spouse's Trust and a Family Trust. The Spouse's Trust was to consist of the federal marital estate tax deduction, and the Family Trust was to consist of any residuary estate. When one of the settlors died, the trust became irrevocable:

> Upon the death of one of the SETTLORS, this Trust shall be irrevocable. All property then a part of the Trust and all property thereafter added to the Trust shall be held, administered and distributed to the beneficiaries previously named.

The trust document additionally provided that the trust could be amended only if both settlors agreed about the amendment:

> The SETTLOR may amend or revoke this Agreement, or any part of it, provided both SETTLORS' are in Agreement with the amendment, or revocation at any time by writing. . . . The interest of any beneficiary is subject to the SETTLOR'S power to withdraw trust principal and to amend or revoke this agreement.

In 1994, Otto and Margaret amended the trust to provide for one-fourth shares to four of their specifically named children (the siblings) on the death of the surviving spouse. Under the amended articles, the surviving spouse was allowed to distribute "all of the net income" and "such sums from the principal of the Trust as [the trustee] deems necessary for the spouse's health, welfare and support." This amount was to take into consideration the spouse's standard of living, and could include an additional $5,000 or 5% of the trust principal.

Regarding the Family Trust, the trustee was permitted to pay any income from the Family Trust to the surviving spouse and descendants. The surviving spouse could also use principal from the Family Trust for his or her health and support:

> . . . Whenever the TRUSTEE determines that the income of the spouse, from all sources known to the TRUSTEE, is not sufficient for the spouse's health, support and welfare, the TRUSTEE shall pay to the spouse, or apply to the spouse's benefit, so much of the principal of the Trust as the TRUSTEE finds necessary for these purposes. . . .

Again, on the death of the surviving spouse, the trustee was to distribute any trust income and principle with one-fourth to each named child.

Otto died on October 6, 2005. On October 30, 2011, Margaret attempted to amend the trust to provide that, on the death of the surviving spouse, property in Lawrence Township would go to James Jude Meyer, and the other siblings would each receive one-third of the remaining trust principal. Margaret died on September 14, 2013. On September 30, 2013, James, acting as successor trustee, transferred the Lawrence Township property to himself by quit claim deed.

On September 30, 2014, the siblings sued The Trust, seeking to nullify the second trust amendment and distribute the trust principal in accordance with the first amended trust. In

February 2015, the siblings moved for summary disposition under MCR 2.116(C)(8), (9), and (10). At the hearing on the motion, the trial court noted that it had to interpret the trust documents by giving intent to the settlors, and the language of the trust was the best indicator of the settlors' intent. Because there was no ambiguity in the trust document, the trial court determined the settlors' intent solely from the trust document. It determined that the trust clearly stated that after the death of one spouse, the trust became irrevocable. While Margaret could use the trust principal for her support, that was not the same as being able to revoke or modify the trust. There was no evidence that the settlors were operating under a mistake of fact or law and that modifying the trust would not further the settlors' stated purposes. The trial court summarized:

> While the court would agree that there is no binding contract between Otto and Margaret regarding the disposition of the trust assets after one of the spouses passes, this is not the issue here. The issue is whether or not the trust should be modified, and it should not.

The trial court thus determined that the second trust amendment was invalid because the trust was irrevocable when Margaret purported to execute it. The trial court granted the siblings' motion for summary disposition under MCR 2.116(C)(10).

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120. A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

III. AMBIGUITY

First, the Trust contends that the trial court could not rely solely on the language of the trust because the trust language was ambiguous. We disagree.

This Court reviews de novo the proper interpretation of trusts. *In re Stan Estate*, 301 Mich App 435, 442; 839 NW2d 498 (2013). The trial court's goal is to "ascertain and give effect to the intent of the settlor." *Id*. The trial court must gauge the settlor's intent from the trust document itself unless there is an ambiguity. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

The trial court may only look outside the trust document to carry out the settlor's intent if the trust is ambiguous. *Id*. A trust is ambiguous if "an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language," or if "the language and its meaning is clear, but some extrinsic fact creates the

possibility of more than one meaning." *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992).

In this case, we conclude that the trust is unambiguous. The language of the trust is not obscure or insensible. It states in plain English that, on the death of one of the settlors, the trust becomes irrevocable. It also plainly states that the trust may be amended only if both settlors agree with the amendment. The trust clauses also do not create the possibility of more than one meaning—no clause in the trust states or even implies that a single settlor, acting alone, may change the trust. Because the clauses of the trust document do not conflict, the trial court properly considered only the four corners of the trust document when it ruled on the motion, and the siblings did not need to provide additional evidence of the settlors' intent.

Second, the Trust also contends that the trust was ambiguous because Margaret was free to dispose of the trust principal during her lifetime. This is an inaccurate characterization of this trust provision. No provision in the trust allowed Margaret to dispose of the trust principal as she wished. Margaret was free to use the trust principal, or an additional 5% or up to $5,000, for her welfare and support. There was no indication that her attempt to amend the trust to give the Lawrence Township property to James was for her welfare or support. Accordingly, we conclude that these provisions do not conflict with the provision rendering the trust irrevocable after Otto's death.

Finally, the Trust contends that the trust's joint nature does not indicate a presumption that the trust was irrevocable. This case is not based on a presumption. It is based on an explicit provision that provided that, "[u]pon the death of one of the SETTLORS, this Trust shall be irrevocable." We reject the Trust's contention that the joint trust provision operates but does not apply in this case because the trial court's decision was not based on that presumption.

IV. MODIFICATION

The Trust contends that the trial court should modify the trust because there was evidence of a mistake of law. We disagree.

The trial court may reform the terms of an unambiguous trust if the terms of the trust were affected by a mistake of fact or law:

> The 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. [MCL 700.7415.]

A mistake of fact is "a misunderstanding, misapprehension, error, fault, or ignorance of a material fact." *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951). "[M]istakes of law are divided into two classes: mistakes regarding the legal effect of the contract actually made and mistakes in reducing the instrument to writing." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 379-380; 761 NW2d 353 (2008). The first type of mistake of law exists when there was a mistake by one side or the other regarding the legal effect of an agreement. See *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). The second type of mistake of law exists when both parties

specifically wanted the contract to contain terms that the written instrument ultimately did not. See *Johnson Family Ltd Partnership*, 281 Mich App at 382-383.

First, the Trust presented no evidence that Otto and Margaret misunderstood the legal effect of their agreement that the trust would be irrevocable on one of their deaths. The affidavit of Dennis Tushla, the trust's drafting attorney, provides no such evidence. Tushla stated, "I do not recall if I discussed with the Meyers the implications of any clause regarding whether or not the Trust Agreement could be changed after one of them died." Tushla also stated, "[o]ther than to satisfy the Internal Revenue Service, neither Otto nor Margaret Meyer had any intent to limit the ability of the other to change the Trust Agreement after the death of the first to die."

These statements are directly contradictory because Tushla could not have known of Otto's and Margaret's thoughts about the irrevocability provision if he did not talk to them about it. The trial court may disregard contradictory statements in affidavits. See *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). Because this was the only evidence the Trust provided regarding whether the settlors' mistook the law, we conclude that the Trust failed to provide evidence showing a genuine issue of material fact regarding mistake of law.

The trial court may also modify the dispositive terms of a trust if there has been an unanticipated change in circumstances and modification would further the settlor's intent:

> The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose or, if there is no stated purpose, the settlor's probable intention. [MCL 700.7412(2).]

In this case, the Trust did not demonstrate that there was a change of circumstances that would justify modifying the trust in the way the Trust seeks. The Trust wants to remove the irrevocability provision of the trust and modify the provision allowing trust amendments only with the agreement of both settlors. While the federal state tax exemption increased, there is no evidence that this change affected whether trust documents were required to be irrevocable,[1] nor is there evidence regarding whether federal law changed regarding settlors acting in concert. We conclude that the Trust failed to demonstrate that there was a question of fact regarding whether a change in federal estate tax law affected the provision at issue.

We affirm. As the prevailing parties, the siblings may tax costs. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray

[1] The letter that James contends supports this position actually states, "Federal tax law has changed to the extent that this particular trust would no longer be helpful in saving taxes in an estate of this size." The letter makes no reference to any change in irrevocability requirements.