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 2007-2017, 2019 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*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: January 23, 2020
RE: ***In re Bjorkquist Living 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 – DETROIT TIGERS 2020 FORESIGHT

Normally, I'm a critic of the locals, but I must say in my opinion, I'm hopeful for their 2020 season.

I'm happy that they made some positive movements and acquisitions.

The Tigers obtained three players that may pan out. At least they're not standing still.

The first player was Ivan Manuel, a pitcher with an 89 and 76 record. On the negative side, in the last three years, he was 31 and 35 with an average ERA of 4.35. He had better years while he was with the Yankees, but we're no Yankees. Also, there was a never a year in which he played without a wild pitch. In one year, he had eleven wild pitches.

Next the Tigers bagged Jonathon Schoop, a first baseman, for 6.1 million dollars a year. Schoop had a great season in 2017 batting .293 with 182 hits and 32 homers. For whatever reason in 18' he dropped to .256 with 23 dingers.

Finally, the Tigers landed CJ Cron, a second baseman, who last year batted .253. His best season was .278. On the down side, in 18' he struck out 145 times. In 19', the strike outs were down to 107 albeit, he played in 15 fewer games.

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re Bjorkquist Living Trust*

- Ademption
- General Bequests not Subject to Ademption
- Ambiguity

Decedent owned Blackacre "A" when she drafted her Trust. Appellee and his wife owned Blackacre "B" which was next door and adjacent to Blackacre "A". Decedent built a house on lot "B". At the time of her death, she owned neither "A" nor "B". Her Trust left "Blackacre" per se to Appellee and set forth a formula to appraise Blackacre and give Appellant one-half the appraised value of Blackacre per se. The lower Court said both distributions had been adeemed, therefore, the clause was nugatory.

The Court of Appeals said:

1. They agreed that parcel "A" was adeemed. The Court gave a proper definition of ademption with proper citations and affirmed the lower Court.

2. The Court of Appeals reversed the lower Court's decision that the distribution to Appellant was adeemed. It said that the bequest was general in nature and it dealt with distribution of money from the assets of the Trust.

3. The Court of Appeals then ruled that there was latent ambiguity in the pertinent Trust clause and used extrinsic evidence to resolve the ambiguity. They looked at a utility bill and said the Trust must have been referring to parcel "B" which should be appraised, and they thus remanded.

I have my own misgivings about this decision.

How could the clause refer only to "Parcel B," as decedent never owned "Parcel B"? If they really meant this, they should have said that an appraisal of assets can be utilized on property never owned such as a Dow Jones average, etc.

But, how could you apply the appraisal formula which required the appraisal to be made "prior to distribution" of Blackacre since there would be no distribution of either "A" or "B" since the decedent owned neither.

In this regard, one might give more weight to the lower Court opinion.

Evidently, someone agrees with me because a Motion for Reconsideration of Opinion was filed on January 9th.

STATE OF MICHIGAN

COURT OF APPEALS

In re JUNA H. BJORKQUIST LIVING TRUST.

DENNIS F. PAWLIK,

Petitioner-Appellee,

v

ELVI J. BJORKQUIST,

Respondent-Appellant.

UNPUBLISHED
December 26, 2019

No. 345970
Oakland Probate Court
LC No. 2018-384546-TV

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Respondent Elvi Bjorkquist, the daughter of trust settlor Juna H. Bjorkquist (Helen),[1] appeals the trial court's opinion and order interpreting a provision of the Trust at issue in favor of petitioner Dennis Pawlik, Helen's son-in-law. Respondent contends on appeal that the trial court erred by applying the doctrine of ademption in interpreting the relevant provision of the Trust. We affirm in part, reverse in part and remand.

In late August 1998, Helen established the Juna H. Bjorkquist Living Trust. Several years later, in August 2004, Helen paid for the construction of a second residence on the property located at 9966 Greentree in Clarkston, Michigan, owned by petitioner and his deceased wife, Elaine Pawlik (Helen's other daughter). According to the record, the second residence's address was 9966 Greentree #B, was to serve as an in-law quarters for Helen to reside, and was next to petitioner's own residence on the property.

In October 2013, the Trust was amended and restated in its entirety. The amendments included Article Seven, Section Three, which addressed the distribution of Trust assets. It

[1] Juna Bjorkquist also went by Helen.

provided, "In consideration for all the assistance my son-in-law DENNIS F. PAWLIK has provided me with during my life time, upon my death, Trustee shall convey any and all interest that this trust or I have in 9966 Greentree, Clarkston, MI 48348 to DENNIS F. PAWLIK." Less than a year later, on August 28, 2014, a second amendment to the Trust was executed. In relevant part, the second amendment added the language emphasized below to Article Seven, Section Three of the Trust:

> **ARTICLE SEVEN**
>
> **SECTION 3. SPECIFIC DISTRIBUTIONS OF TRUST PROPERTY**
>
> In consideration for all of the assistance my son-in-law, DENNIS F. PAWLIK has provided me during my life time, upon my death, Trustee shall convey any and all interests that this trust or I have in 9966 Greentree, Clarkston, MI 48348 to DENNIS F. PAWLIK, or his separate trust share shall he fail to survive Settlor. *Prior to distribution, the Trustees shall have the property appraised by a certified appraiser and ELVI J. BJORKQUIST shall receive ½ of the appraised value outright and free and clear of any trust restrictions.* In the event that ELVI J. BJORKQUIST shall predecease Settlor, her separate trust shares shall receive the bequest. [Emphasis added.]

After Helen passed away in mid-June 2018, petitioner and respondent became cosuccessor trustees. Petitioner filed a petition seeking instruction from the trial court as to the administration of the Trust in light of Article Seven, Section Three. Petitioner took issue with the fact that neither the Trust nor Helen ever had an interest in the Greentree property and, therefore, could not distribute it, appraise its value, or take any action whatsoever with regard to the property. Respondent, on the other hand, argued that Helen, through her Trust, did not intend to deprive petitioner of his right to the property. Instead, according to respondent, Helen provided a formula by which the Trust's assets would be divided and distributed. Subsequently, the trial court, relying on the doctrine of ademption, entered an opinion and order instructing the cotrustees to forgo making distributions under Article Seven, Section Three. The trial court concluded that the devise under Article Seven, Section Three was a specific devise that was adeemed and therefore inoperative. This appeal followed.

Respondent argues that the trial court erred when it applied the doctrine of ademption to preclude distribution under Article Seven, Section Three of the Trust. We agree in part.[2]

"A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust." *In re Herbert Trust*, 303 Mich App 456, 458; 844 NW2d

[2] We review a probate court's dispositional rulings for an abuse of discretion and its factual findings for clear error. *In re Bibi Guardianship*, 315 Mich App 323, 328-329; 890 NW2d 387 (2016). However, a probate court's interpretation of a trust is a question of law reviewed by this Court de novo. *In re Herbert Trust*, 303 Mich App 456, 458; 844 NW2d 163 (2013).

163 (2013). "This intent is gauged from the trust document itself, unless there is ambiguity." *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

"A testamentary gift of testator's specific real or personal property is adeemed, or fails completely, when the thing given does not exist as part of his estate at the time of his death." *In re Thornton*, 192 Mich App 709, 712; 481 NW2d 828 (1992). Under the doctrine of ademption, the "question is, whether the specific property is in existence at the death of the testator, and whether testator then owns the interest which may pass under his will. If the property which is described in the will is not in existence, or does not belong to testator, at his death, the legacy fails." *Hankey v French*, 281 Mich 454, 462-463; 275 NW 206 (1937) (quotation marks and citations omitted).

Article Seven, Section Three of the Trust contained a specific and a general bequest. The bequest to petitioner of any interest that Helen had in the Greentree property was a specific bequest, i.e., "[a] bequest of a specific or unique item of property, such as any real estate or a particular piece of furniture." *Black's Law Dictionary* (11th ed). However, the bequest to respondent of half of the property's appraised value was a general bequest, i.e, "[a] bequest payable out of the general assets of the estate." *Black's Law Dictionary* (11th ed). Significantly, "[a]demption does not apply to general bequests . . ." 80 Am Jur 2d, Wills § 1444.

The trial court correctly concluded that the portion of Article Seven, Section Three attempting to convey any and all interest in the Greentree property to petitioner was adeemed. It is undisputed that the Greentree property was not titled to the Trust. And the trial court rightly found that there was "no evidence or allegation that Helen intended the specific devise to be effective in the event the Trust did not have an interest in the property." Because the Trust had no right, title, or interest in the Greentree property, the specific bequest in Article Seven, Section Three of the Trust was inoperative and, therefore, the cotrustees could not make any distributions under that provision.

However, the trial court erred in applying the doctrine of ademption to the second part of Article Seven, Section Three, which provided a general bequest to respondent. Helen did not devise any interest in the Greentree property to respondent. Nor did Helen condition respondent's share of the Trust's assets on Helen having an interest in the Greentree property at the time of her death. Rather, the general devise in Article Seven, Section Three bequests half of the appraised value of the property outright to respondent out of the Trust's general assets: "Prior to distribution, the Trustees shall have the property appraised by a certified appraiser and ELVI J. BJORKQUIST shall receive ½ of the appraised value outright and free and clear of any trust restrictions." Accordingly, it is not whatever *interest* that the Trust or Helen had in the Greentree property that is to be appraised under Article Seven, Section Three, but the property itself. Once the property is appraised, Article Seven, Section Three then instructs that respondent shall receive half of that appraised value from the Trust's general assets. In other words, although the Greentree property is not part of the Trust inventory for purposes of distribution, Helen intended that its value be considered at distribution.

That said, we acknowledge that there is a latent ambiguity regarding the meaning of "9966 Greentree, Clarkston, MI 48348" and "the property" in Article Seven, Section Three. See *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992) ("A latent ambiguity

exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning."). If the terms of a trust are ambiguous, a court may look outside the document to determine the settlor's intent, and consider the circumstances surrounding the trust's creation as well as general rules of construction. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

The fact that Helen built a second residence on the Greentree property, and respondent's acknowledgment that neither Helen nor the Trust owned the Greentree property, suggests that there is another meaning for "9966 Greentree, Clarkston, MI 48348" and "the property" in the Trust. Specifically, it appears that Helen intended this language to refer to the second residence that she built on the Greentree property rather than the entirety of the property. This is supported by a utilities bill for the second residence, which lists Helen as the account holder and an address of "9966 Greentree #B." In sum, considering the circumstances of the formation of the Trust and the fact that Helen constructed and lived in the second residence, we conclude that the language of Article Seven, Section Three refers to the second residence and not the entire Greentree property.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro