

PROBATE LAW CASE SUMMARY

BY ALAN A. MAY



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.

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 2007-2021 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© 2022 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2021 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. Additionally, he has been designated a “Leading Lawyer” in Trust, Will & Estate Planning Law for the years 2013 to the present (a distinction granted to the top 1% of attorneys in Michigan). 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).

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

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DT: June 21, 2022

RE: *In re Leithauser Trust*

STATE OF MICHIGAN COURT OF APPEALS

Kemp Klein Law Firm represents Elder Law of Michigan, a charitable organization and Trustee of the Elder Law of Michigan Pooled Account Trust. Through this relationship, our attorneys administer the Pooled Account Trust for Elder Law of Michigan on a long-term contract. If interested, please contact Cindy Fedewa at 248-528-1111 or cindy.fedewa@kkue.com.

KEMPKLEIN
LAW FIRM

Alan, you cannot write about baseball all your life.

Mrs. Pollinger
12th Grade English Comp
Mumford High —1959

BASEBALL LORE:

IMMACULATE INNING

A first happened recently. Two immaculate innings in one game. An immaculate inning is an inning where the pitcher strikes out three batters with nine pitches.

Houston played Texas. Luis Garcia started and in the second inning struck out three Rangers. Phil Maton took over in relief and in the 7th inning repeated the feat.

Amazingly, it was the same three batters.

There have been 108 total immaculate innings. Three pitchers have done it three times; Sandy Koufax, Max Scherzer and Chris Sale.

In the last few years, it has happened more often, probably because the hitters are worse.

Immaculate innings are distinguished from “3-Pitch” innings which occur when a pitcher throws three pitches which result in the three batters striking the ball and making an out.

Walter Johnson did it four times. My mother was present in 1917 for the last one. This feat has been accomplished 187 times.

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 Leithauser Trust*

- Trust Distribution – Vesting – Anti Lapse

Decedent's trust says:

“(b) DEATH OF A CHILD: If any of the Settlor's children shall die before termination of the trust and its distribution thereof, than [sic] the share herein provided for the deceased child shall be held in a “Grandchildren's Trust” as provided hereafter in subparagraph (c).”

There was no definition of the word distribution; the time the child must be alive to receive inheritance. The lower Court said even though a child received a partial distribution when that child died the child's estate did not inherit, the Grandchild's Trust was entitled to the subsequent distribution.

The Court of Appeals affirmed and inter alia said:

1. The definitions of distribution used were in dictionaries and common law. It means disburse.
2. The intent of the trust was meant to apply to living relatives.

Query: Why not look at MCL 700.2718(4)(b) which says:

“Distribution date” means, with respect to an interest, the time when the interest is to take effect in possession or enjoyment. The distribution date does not need to occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

Why not cite MCL 700.2714:

- (1) Subject to subsection (2), a future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:
 - (a) Except as provided in subdivision (d), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a

REVIEW OF CASE:

substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

In re GENE L. LEITHAUSER TRUST.

JANIS M. BRENNEN, Trustee of
GENE L. LEITHAUSER TRUST,

UNPUBLISHED
May 26, 2022

Petitioner,

v

No. 357738
Oakland Probate Court
LC No. 2021-399313-TV

JOYCE LEITHAUSER,

Appellant,

and

ALEXANDER LEITHAUSER,

Appellee,

and

GAIL LEITHAUSER,

Other Party.

Before: SWARTZLE, P.J., and CAMERON and PATEL, JJ.

PER CURIAM.

In this probate action, appellant Joyce Leithauser appeals the probate court’s June 2021 order, which awarded Kurt Leithauser’s remaining share from Gene L. Leithauser’s Trust to appellee Alexander Leithauser. We affirm.

I. BACKGROUND

In 1997, Gene L. Leithauser (the settlor) executed the trust at issue in this case. The trust was created for the benefit of the settlor's wife, Emilie Leithauser (Emilie), during her lifetime. The settlor died in 2018. The settlor was survived by Emilie and their three children: Janis M. Brennen (the trustee), Gail Leithauser, and Kurt Leithauser (Kurt). When Emilie died in February 2020, she was survived by the same three children. In May 2020, the trustee made a partial distribution of the trust assets to the three children. Kurt died before he received his entire share of the trust assets. Kurt was survived by appellant, who is Kurt's wife and the personal representative of Kurt's estate, and appellee, who is Kurt's son. Appellant and appellee disputed who was entitled to Kurt's remaining share.

In March 2021, the trustee filed a petition, requesting that the probate court determine the proper beneficiary of Kurt's remaining share of the trust assets. To determine the proper distribution of the assets in question, the trustee requested that the probate court interpret Article VII(E)(4)(b) of the trust, which provides: "If any of the Settlor's children shall die before termination of the trust and its distribution thereof, the share herein provided for the deceased child shall be held in a 'Grandchildren's Trust.'" The probate court interpreted this Article to mean that, because Kurt did not survive the termination *and* distribution of the trust assets, the remainder of Kurt's share must be distributed to appellee through a grandchildren's trust. This appeal followed.

II. STANDARD OF REVIEW

"We review de novo a probate court's construction and interpretation of the language used in a will or a trust. When construing a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012). (quotation marks and citations omitted). "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 court may not construe a clear and unambiguous [document] in such a way as to rewrite it, and, where possible, each word should be given meaning. . . ." *In re Estate of Reisman*, 266 Mich App 522, 527; 702 NW2d 658 (2005) (quotation marks, citations, and alteration omitted).¹ "The word 'shall' is generally used to designate a mandatory provision. . . ." *American Federation of State, Co & Muni Employees v Highland Park Bd of Edu*, 214 Mich App 182, 186; 542 NW2d 333 (1995). The word "and" is a conjunction that means "with," "as well as," and "in addition to. . . ." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009). "When given its plain and ordinary meaning, the word 'and' between two phrases requires that both conditions be met." *Id.*

¹ "The rules in interpreting contracts are equally applicable to interpreting wills," *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989), and "[t]he rules of construction applicable to wills also apply to the interpretation of trust documents," *In re Estate of Reisman*, 266 Mich App at 527. Thus, when interpreting the trust instrument, we will at times refer to authority that interprets contracts and wills.

III. ANALYSIS

Appellant argues that the probate court erred because the unambiguous trust language requires Kurt's remaining share to be distributed to his estate. We disagree.

Article VII(E) of the trust provides:

4. TERMINATION OF TRUST: After the death of the Settlor's spouse, the trust shall terminate and shall be distributed as follows:

(a) DIVISION OF TRUST ESTATE: The trust estate shall be divided into three shares; 50% of the trust estate shall be paid to the Settlor's daughter, JANIS M. BRENNEN[;] 25% [] to the Settlor's daughter GAIL ANN LEITHAUSER; and 25% to the Settlor's son, KURT J. LEITHAUSER.

(b) DEATH OF A CHILD: If any of the Settlor's children shall die before termination of the trust and its distribution thereof, than [sic] the share herein provided for the deceased child shall be held in a "Grandchildren's Trust" as provided hereafter in subparagraph (c).

Thus, the settlor intended for the trust to terminate after Emilie's death² and for the trustee to distribute the remainder of the trust estate to the settlor's children, as outlined in the trust instrument. However, in order to be entitled to their shares, the settlor's children had to survive the termination of the trust *and* the distribution of the trust estate.

The trust instrument does not define "distribution." Therefore, it is proper to consult dictionary definitions. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). "Distribute" is defined as "to divide and give out in shares; allot," *Random House Webster's College Dictionary* (2005), "to give out or deliver esp. to members of a group," *Merriam-Webster's Collegiate Dictionary* (11th ed), and "[t]o . . . disperse," *Black's Law Dictionary* (7th ed).

In this case, it is undisputed that Kurt died before his remaining share was given to him. Because Kurt died before the distribution of the trust estate was complete, the trust instrument requires Kurt's remaining share to "be held in a 'Grandchildren's Trust' . . ." Although appellant argues that Kurt had a vested interest in his entire share at the time of Emilie's death, appellant disregards the fact that the trust instrument required Kurt to survive both the termination of the trust and "its distribution. . ." To conclude that Kurt only had to survive Emilie's death would require us to disregard the plain language of the trust instrument, which we are not permitted to do. *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 627-628; 839 NW2d 693 (2013) ("We must give effect to every word, phrase, and clause in [an instrument] and avoid an

² Under MCL 700.7410(1), "a trust terminates to the extent the trust . . . expires pursuant to its terms. . ."

interpretation that would render any part of the [instrument] surplusage or nugatory.”) (Quotation marks and citation omitted).

Additionally, as noted by the probate court, the trust instrument clearly reflects that the settlor’s intent was to provide for *living* relatives. For example, Article VII(E)(4)(c)(4) provides:

PRIOR DEATH: In the event that a grandchild being the child of the Settlor’s deceased child shall die before attaining age twenty-five (25) years then such grandchild’s separate share shall be distributed and allocated equally to the separate share Trusts so set up for the Settlor’s *living grandchildren* being the children of the Settlor’s deceased child, if such separate share Trusts are still in existence, otherwise outright to those *living grandchildren* whose Trusts have terminated. [Emphasis added.]

There is no indication anywhere in the trust instrument that the settlor intended to provide for the spouse of a deceased child through a devise to the deceased child’s estate. In fact, the settlor only intended to provide for someone other than a child or a grandchild if “no beneficiary . . . [was] living” “at the time of the termination of [the] trust . . .” Article VII(E)(4)(c)(5). In such a case, the settlor directed that “all of the remaining principal and accrued and undistributed income of [the] trust . . . be distributed to those persons who would be entitled to the distribution of the property of the Settlor, and in such shares, had the Settlor died at that time intestate and a resident of the State of Michigan.” Article VII(E)(4)(c)(5). Thus, the probate court did not err by concluding that the trust instrument was unambiguous and that Kurt’s remaining share must be held in a “Grandchildren’s Trust.” Given this holding, we need not address the parties’ remaining arguments.

Affirmed.

/s/ Brock A. Swartzle
/s/ Thomas C. Cameron
/s/ Sima G. Patel