MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

TABLE OF CONTENTS

Vol. 38 • Spring 2019 • No. 2

Featured Articles:

Subchapter J After Tax Reform: Ten Planning Considerations
Raj A. Malviya 2

Lerbakken v Sieloff and Associates, P.A.—A Rose by Any Other Name May Not Smell As Sweet, Retirement Benefits Received Pursuant to a QDRO Are Not Entitled to Federal Bankrupty Exemption Treatment
Sandra D. Glazier 27

Petitions for Instructions and *Res Judicata*
Neal Nusholtz 30

Federal Regulations Designed to Avoid Financial Exploitation Make Estate Planning and Elder Law Attorneys' Lives More Complicated: Some Coping Suggestions
George W. Gregory 34

STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

Petitions for Instructions and *Res Judicata*

By Neal Nusholtz

This article addresses the question of whether a court order construing the terms of a trust would serve as a *res judicata* bar against future constructions of the same terms of the same trust. Seems obvious that it would. Yet, a couple cases contradict that conclusion.

Trust litigation is governed by MCL 700.7201(3), which lists the types of matters that can co-exist in any proceeding involving administration of a trust.[1] A number of those matters relate to the construction of the terms of the trust (e.g. validity, internal affairs, settlement, distributions, modifications, reformations, terminations, and a declaration of rights that involve a trust, the trustee, or a trust beneficiary). Question: To what extent would a court order on construction of trust terms under one provision of §7201(3) serve as a *res judicata* bar against the constructions of a trust under other provisions of §7201(3)?

Res Judicata bars the relitigation of issues when there are two actions between the same parties and the issues *might* have been the subject matter of the first action.[2] More specifically, *res judicata* bars claims arising out of the same transaction that a plaintiff could have brought in a prior proceeding, but did not. The test for determining whether two claims arise out of the same transaction is whether the same facts or evidence are essential to the maintenance of the two actions.[3] In situations where a transaction or an occurrence is not the same, collateral estoppel will bar any issue that was actually litigated in the first action.[4] Two cases make the question about *res judicata* and the construction of trusts difficult to answer.

Case No. 1. *In Re Rood's Estate,* 41 Mich App 405, 200 NW2d 728 (1972)

John Rood died on December 23, 1961.[5] Eleven pages of his fifteen-page will explained his political philosophy.[6] He warned we are in danger of becoming socialists or communists,[7] we have too much "pork barrel legislation,"[8] we should not pay elected officials,[9] the administrators of a central government have a lust for power, and so on.[10] Under his will, the residue of his estate was to be used to teach Rood's philosophies of political science at Michigan State, Olivet College, and Alma College in perpetuity.[11] The presidents of those colleges and their successors were named as trustees.[12] Each school or college receiving benefits under the will and codicil were to supply each and every student with Rood's books, "History of Building the Constitution of the United States," "A Political Science Primer," and "A First Book on Government."[13] Those same schools were required to offer courses covering the substance of the matter contained in those books.[14]

The trustees sued for construction of the will claiming that the charitable bequests were impossible, impractical, and illegal.[15] The estate was worth $452,000.[16] Michigan State estimated the cost of supplying books at $135,000 a year.[17] Alma College estimated the cost at $2,700 per year.[18] Expert opinion was provided that the books were poorly written, viewed with disfavor, and could not be used as textbooks.[19]

Under the *cy pres* doctrine, the trustees filed suit seeking to include Rood's books in their libraries and do something else with the money.[20] Intestate heirs counter-sued for the assets claiming that the actions of the trustees constituted a renunciation of the trust.[21] The trustees filed a motion for summary judgment, which was granted by the court on the basis that Rood's will and codicil constituted a charitable trust.[22] The counter complaint was dismissed.[23] An interlocutory appeal resulted in the lower court being affirmed.[24] The case was remanded to determine alternative methods of satisfying Rood's chari-

table bequests.[25]

On remand, the heirs argued that Rood's trust did not qualify for *cy pres* because *cy pres* requires a general charitable intent as opposed to a specific charitable intent.[26] The lower court ruled the issue of application of the *cy pres* doctrine had been resolved by the prior appeal.[27] The court had the colleges submit proposals, which Michigan State refused to do.[28] The funds were split between Olivet and Alma College.[29] The heirs appealed again.[30]

On appeal, the issue was whether the *cy pres* argument on remand was barred by *res judicata.*[31] The court of appeals held that the issue of whether there was a general charitable intent was not previously addressed and, therefore, was not barred by *res judicata.*[32] It then affirmed the lower court's ruling after it found that there was a general charitable intent.

The *Rood* case is peculiar because it relied on *res judicata.* It would seem that the proper area of law in *Rood* was not *res judicata* but the doctrine of law-of-the-case. Under the law-of-the-case doctrine, "[i]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same."[33] The doctrine is applicable only to issues actually decided, either implicitly or explicitly, in the prior appeal.[34]

Under the law of the case doctrine, the decision in *Rood* would have depended on whether the issue of general charitable intent had been addressed in the prior appeal. Under the *res judicata* doctrine, the decision in *Rood* would have depended upon whether the issue of general charitable intent should have been raised in the earlier proceeding. (Assuming that the initial case and the remand can be treated as two different transactions). If the two appeals in *Rood* addressed different transactions, then under collateral estoppel, the issue would again have been whether the general charitable intent had been resolved in the first proceeding. Reliance on *res judicata* in *Rood* could conceivably be cited for the proposition that under some circumstances *res judicata* does not bar construction of the terms of a trust in a subsequent proceeding even if the issue might have been raised in a prior proceeding. That proposition would severely weaken the application of *res judicata*.

Case No. 2. *In re Solomon Gaston Miller Trust*, No. 341502 (Mich Ct App, Nov 29, 2018) (Unpublished)

Sol G. Miller, O.D., died on January 8, 2016.[35] His third wife, Ilene, predeceased him on December 11, 2015.[36] They each had children from prior marriages.[37] Dr. Miller's trust provided for his two daughters to receive 5/12ths of the trust income for their lifetime if Ilene died after Dr. Miller.[38] But, if Ilene predeceased Dr. Miller, each daughter was to receive nothing.[39] For various reasons, the two daughters suspected that they were disinherited as the result of a drafting error.[40]

The attorney who had drafted Dr. Miller's trust was also its current trustee. He filed a petition for instructions to construe the provisions at issue.[41] The daughters responded with a request for an evidentiary hearing to examine the trustee to determine if the trust was drafted according to the intentions of Dr. Miller.[42] The request for an evidentiary hearing was denied because, under the four corners rule, extrinsic evidence is not examined unless there is an ambiguity -- and there was no ambiguity on the face of the trust.[43] An order of distribution was entered disinheriting the two daughters.[44]

A motion for reconsideration was filed by one of the daughters arguing that one of the remedies included in MCL 700.7201(3) is a reformation to correct errors.[45] Reformations are allowed even in the absence of an ambiguity under MCL 700.7415.[46] The motion for reconsideration was denied, but the court allowed aggrieved parties 60 days to file a petition for reformation, which created the sort of *res judicata* issue discussed here.[47]

The daughter who had filed the motion for reconsideration appealed.[48] The court of appeals affirmed because there was no ambiguity in the trust and also because the initial interpretation of the trust by the probate court judge did not bar a subsequent petition for reformation:

> Additionally, with respect to her claim for reformation under MCL 700.7415, appellant was not aggrieved by the probate court's decision where the court stayed its October 2, 2017 order until February 1, 2018, permitting appellant time to file a petition for reformation under her new legal theory. See MCR 7.203(A). To have standing to bring an appeal, a party must be aggrieved by the lower court's decision. *Kieta v Thomas M Cooley Law School*, 290 Mich App 144, 147; 799 NW2d 579 (2010). In this case, the decision of the probate court gave appellant the opportunity to pursue her new theory of reformation by filing a new petition. "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) (citation omitted). Appellant contends the probate court's ruling was illusory because a new petition for reformation would be barred by res judicata. But this argument does not show that the court's ruling is directly adverse to her claim for reformation because it depends on future contingencies and future rulings of the court. Id.; see also *Rymal v Baergen*, 262 Mich App 274, 318-319; 686 NW2d 241 (2004).[49]

The above language in *Miller* implies that constructions of a trust under MCL 700.7201(3) do not necessarily bar a subsequent MCL 700.7201(3) proceeding that also involves construction of the same trust terms addressed in a prior action. While *Miller* is an unpublished decision, someone could one day cite *Miller* and the *Rood* case to argue that seeking repeated judicial constructions of identical sections of a trust are not barred by *res judicata*. You might be able to get at least two bites at the apple.

Notes

1. MCL 700.7201. Role of court in administration of trust.

***

(3) A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do any of the following:

(a) Appoint or remove a trustee.

(b) Review the fees of a trustee.

(c) Require, hear, and settle interim or final accounts.

(d) Ascertain beneficiaries.

(e) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a trust.

(f) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.

(g) Release registration of a trust.

(h) Determine an action or proceeding that involves settlement of an irrevocable trust.

2. *In Re Estate of Thwaites,* 173 Mich App 697, 704-05, 434 NW2d 214 (1988).
3. *Schwartz v City of Flint,* 187 Mich App 191, 194-195, 466 NW2d 357 (1991).
4. *In Re Estate of Thwaites*, 173 Mich App 697, 704-705, 434 NW2d 214 (1988).
5. *In Re Rood's Estate,* 41 Mich App 405, 407, 200 NW2d 728 (1972).
6. *Id*. at 429-439.
7. *Id.* at 430.
8. *Id*.
9. *Id*. at 432.
10. *Id*. at 431.
11. *Id*. at 408.
12. *Id*.
13. *Id*. at 439.
14. *Id.*at 408.
15. *Id*.
16. *Id.* at 410.
17. *Id*.
18. *Id*.
19. *Id.*
20. *Id.* at 408.
21. *Id*.
22. *Id*.
23. *Id*. at 409.
24. *Id*