

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the ALICE SHOTWELL
GUSTAFSON REVOCABLE LIVING TRUST.

PATRICIA WELCH,

Petitioner-Appellant,

v

J. LAEVIN WEINER, Successor Trustee,

Respondent-Appellee.

UNPUBLISHED
December 4, 2007

No. 268552
Oakland Probate Court
LC No. 2003-290443-TV

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Petitioner appeals as of right the probate court's order denying her requests for an accounting of the Alice Shotwell Gustafson Revocable Living Trust (trust), for a copy of the trust instrument, for removal of the trustee, and to surcharge the trustee. We reverse and remand for proceedings consistent with this opinion before a different judge.

I

Alice Shotwell Gustafson (Alice) was married to Robert Gustafson (Robert) and was petitioner's aunt. In 1976, Alice established the trust with her own assets. In 1998, Robert sued Alice for divorce. However, Robert and Alice subsequently reconciled, and the divorce proceedings were dismissed. The trust was amended in 2000 to make Robert a trustee. The amendment also purportedly made Robert a partial co-settlor of the trust.¹ Alice died in 2003, leaving Robert as trustee.

¹ Although the 2000 amendment purported to make Robert a co-settlor with respect to all of the trust except Article 5, we question whether Robert in fact provided any consideration for the trust. "[A] settlor is one who provides consideration for a trust." *In re Hertsberg Inter Vivos Trust*, 457 Mich 430, 435; 578 NW2d 289 (1998). Therefore, Robert could not have become a co-settlor of any portion of the trust unless he actually provided consideration. *Id.* It is simply
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Prior to Robert's death, respondent served as his attorney. In June 2003, respondent sent petitioner a check for \$50,000, drawn on the trust's account. The check was accompanied by a letter, in which respondent explained that petitioner was "one of the contingent beneficiaries of the Trust." Respondent's letter to petitioner further provided:

Robert Gustafson, Trustee of the Gustafson Living Trust, has authorized and directed that an Advance payment be made to you in the amount of Fifty Thousand Dollars (\$50,000.00). It is his present intention that a like amount will be advanced to you annually until such a time as your legacy has been fully paid, or, until all contingencies have been satisfied and the balance of your legacy then outstanding is paid.

When petitioner attempted to learn more about the terms of the trust, she was informed that she could not have a copy of the trust instrument. She therefore commenced this action in September 2003, petitioning the probate court for an accounting of the trust, for a copy of the trust instrument, for removal of the trustee, and for sanctions from the trustee. After reviewing the trust *in camera*, the probate court denied petitioner's requests.

II

We review for clear error the findings of a probate court sitting without a jury. *In re White Estate*, 260 Mich App 416, 419; 677 NW2d 914 (2004). A finding is clearly erroneous when the reviewing court is left with a firm and definite conviction that a mistake has been made. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). We review de novo issues of statutory construction and other questions of law. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566; 702 NW2d 539 (2005). A probate court's decision whether to remove a trustee is reviewed for an abuse of discretion. *Comerica Bank v City of Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III

Petitioner argues that she is entitled to an accounting of the trust and to a copy of the trust instrument. We agree.

The administration of trusts in Michigan is governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.* The Legislature has directed the courts to liberally construe the provisions of EPIC in order to facilitate the use and enforcement of trusts in this state. MCL 700.1201(d). In general, the trustee of a revocable trust "does not have a duty to inform a trust beneficiary of the trust and its administration" MCL 700.7303(1). However, there are clear exceptions to this general rule. Relevant to the present case, MCL 700.7303(3) provides that after the acceptance of trust or the death of the settlor, the trustee of a revocable trust

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not clear from the record whether Robert provided any consideration for the trust.

shall inform in writing each interested trust beneficiary of the trust's existence, of the court in which the trust is registered, if it is registered, of the trustee's name and address, and of the interested trust beneficiary's right to request and receive both a copy of the trust's terms that describe or affect the interested trust beneficiary's interest and relevant information about the trust property. In addition, all of the following apply:

(a) Upon reasonable request, the trustee shall provide a beneficiary with a copy of the trust's terms that describe or affect the beneficiary's interest and with relevant information about the trust property.

(b) Unless the settlor directs or requests in the trust instrument that the trustee provide accounts to less than all interested trust beneficiaries,^[2] all of the following apply:

(i) At least annually and on termination of the trust or a change of the trustee, the trustee shall provide a statement of account to each current trust beneficiary and shall keep each current trust beneficiary informed of the trust and its administration.

(ii) Upon reasonable request, the trustee shall provide a statement of account to each interested trust beneficiary who is not also a current trust beneficiary and shall keep each of those persons reasonably informed of the trust and its administration.

(iii) The trustee shall provide a statement of account and other information to a beneficiary as the court directs.

(iv) In the trustee's discretion, the trustee may provide a statement of account and other information to any beneficiary.

Even if the trust instrument provides that certain individuals are not entitled to statements of account and other trust information, the court in its discretion may direct the trustee to provide statements of account and other trust information to those excluded individuals. MCL 700.7303(3)(c). Similarly, "a trust provision relieving the trustee of the duty to keep formal

² The disclosure provisions of MCL 700.7303(3)(b) apply only if the settlor has not "direct[ed] or request[ed] in the trust instrument that the trustee provide accounts to less than all interested trust beneficiaries" Respondent has presented no evidence that Alice Shotwell Gustafson ever directed that petitioner not receive an accounting or any other information concerning the trust. Nor has respondent presented evidence that the terms of the trust instrument would preclude petitioner from receiving an accounting or other information concerning the trust. We note, however, that even if the trust instrument did direct the withholding of an accounting and other information from petitioner, such a provision would not abrogate the trustee's duty to provide information and account to petitioner in the probate court. *In re Childress Trust*, 194 Mich App 319, 327-328; 486 NW2d 141 (1992).

accounts does not abrogate the statutory duty to account to the beneficiaries in the probate court.” *In re Childress Trust*, 194 Mich App 319, 327-328; 486 NW2d 141 (1992);³ see also *Raak v Raak*, 170 Mich App 786, 790; 428 NW2d 778 (1988). “Although the terms of the trust may regulate the amount of information that the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.” *In re Childress Trust*, *supra* at 328.

Turning back to the facts of the present case, given that Robert was not a co-settlor with respect to Article 5 of the trust, Article 5 became irrevocable upon the death of Alice Gustafson. See note 3. As noted above, after the death of the settlor of a revocable trust, the trustee upon reasonable request “shall provide a beneficiary with a copy of the trust’s terms that describe or affect the beneficiary’s interest and with relevant information about the trust property.” MCL 700.7303(3)(a). Further, the trustee “shall provide a statement of account to each current trust beneficiary and shall keep each current trust beneficiary informed of the trust and its administration.” MCL 700.7303(3)(b)(i). Finally, “[u]pon reasonable request, the trustee shall provide a statement of account to each interested trust beneficiary who is not also a current trust beneficiary and shall keep each of those persons reasonably informed of the trust and its administration.” MCL 700.7303(3)(b)(ii). Thus, if petitioner is either a “current trust beneficiary” or an “interested trust beneficiary,” she was entitled to relevant information about the trust and to an accounting of the trust. MCL 700.7303(3)(a) and (b).

Pursuant to MCL 700.1105(d), an “interested trust beneficiary” is a person who has one or more of the following interests in the trust:

(i) Life estate.

(ii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal.

³ Respondent suggests that this Court’s decision in *In re Childress Trust* is not applicable here because the trust at issue in that case had become irrevocable when the settlor died. Respondent attempts to distinguish *In re Childress Trust* from the present case by asserting that the instant trust remained fully revocable until Robert Gustafson’s death. While an amendment to the trust purported to make Robert a co-settlor with respect to the majority of the trust, the amendment clearly specified that Robert *was not* a co-settlor with respect to Article 5 of the trust. Indeed, although we have not received a copy of the trust instrument on appeal, respondent admits in his brief that under the relevant amendment, Alice Gustafson alone remained settlor with respect to Article 5. Moreover, respondent also admits in his brief that “those portions of the Trust instrument which specifically describe the sum and conditions of [petitioner’s] specific bequest” are contained in Article 5. Therefore, while Robert might have become a co-settlor with respect to most of the trust, Article 5 of the trust—the portion of the trust that affects petitioner’s interest—became irrevocable upon Alice’s death.

(iii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal upon termination of an interest of a person described in subparagraph (i) or (ii).

(iv) Presently exercisable or testamentary general or special power of appointment.

Petitioner argues that she is an interested trust beneficiary because she was an eligible recipient of a distribution by the trustee of income or principal. Petitioner notes that she has already received a distribution from the trust, which was drawn on the trust account and accompanied by a receipt. Petitioner points to the accompanying letter, which indicated that the funds were being paid from the trust as an advance against any future trust distributions.

Respondent suggests that Robert gave the \$50,000 to petitioner in his capacity as settlor rather than as trustee, and that the money was a gift rather than a discretionary trust distribution. However, we have already determined that Robert was not a settlor with respect to the portion of the trust that affected petitioner's interests. Moreover, as petitioner points out, if the \$50,000 had constituted a mere gift, Robert would have been liable for federal gift taxation.

Because Robert was not a settlor with respect to Article 5, the only capacity in which he could have distributed funds to petitioner under Article 5 was as trustee. Indeed, the letter accompanying the \$50,000 check specifically stated that Robert had directed and authorized the distribution as "Trustee of the Gustafson Living Trust." In light of the representations made in respondent's 2003 letter to petitioner, it cannot be seriously disputed that petitioner was an "[e]ligible recipient of a mandatory or discretionary distribution by the trustee of income or principal." MCL 700.1105(d)(ii).⁴ Therefore, as an interested trust beneficiary she was entitled to an accounting and to relevant information about the trust pursuant to MCL 700.7303(3)(a) and (b)(ii).⁵

⁴ Respondent argues that petitioner's interest in the trust was such that it could not ripen into a present interest until Robert's death. Because Robert was not a settlor with respect to Article 5 of the trust, we conclude that he was at most a life tenant with respect to that portion of the trust. Therefore, even assuming that respondent is correct in arguing that petitioner's interest did not ripen until Robert's death, petitioner was nevertheless an "interested trust beneficiary" as the holder of a remainder interest that ripened at the termination of a life estate. MCL 700.1105(d)(iii). Contrary to respondent's suggestion, "[a] remainder interest vests upon the death of the [settlor], not upon the death of the life tenant." *In re Childress Trust*, *supra* at 323. Accordingly, even if petitioner held merely a remainder interest, it vested when Alice died. The death of a remainderman before the life tenant and the discretion of the life tenant to exhaust the trust assets during his or her lifetime are not conditions that transform an otherwise-vested remainder interest into a contingent remainder interest. Instead, such a remainder is properly characterized as a "vested remainder interest subject to defeasance." *Id.* at 322.

⁵ Respondent argues that petitioner's interest in the trust was contingent on two additional "events and circumstances," both apparently relating to the sale of certain property and to the total value of the trust at the time of Robert's death. Because respondent has not afforded us the opportunity to examine the terms of the trust instrument, we have no way of assessing the

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The probate court clearly erred in concluding that Robert was a co-settlor with respect to the entire trust and in failing to conclude that petitioner was an interested trust beneficiary under MCL 700.1105(d). *In re White Estate*, *supra* at 419. As an interested trust beneficiary, petitioner was entitled to relevant information about the trust and to an accounting of the trust pursuant to MCL 700.7303(3)(a) and (b). On remand, the probate court shall order the new successor trustee to provide a complete and unredacted copy of the trust instrument to petitioner and petitioner's counsel. MCR 7.216(A)(7). The probate court shall also direct the new successor trustee to provide petitioner with information concerning the trust's administration and a full accounting of the trust's property. MCL 700.7303(3)(a) and (b)(ii). If necessary, and in its discretion, the probate court may enter a protective order to prevent petitioner and petitioner's counsel from divulging any of the trust's confidential terms to any other parties.

IV

Petitioner next argues on appeal that the trustee should be removed.⁶ Again, we agree.

A trustee must act "as would a prudent person in dealing with the property of another" MCL 700.7302. For the purposes of this case, both Robert and respondent violated their specific duties to petitioner under MCL 700.7303(2). The probate court has jurisdiction to appoint or remove a trustee, MCL 700.1302(b)(i), upon a showing of negligence or a violation of duty, see, e.g., *Waddell v Waddell*, 335 Mich 498, 509-511; 56 NW2d 257 (1953). Our Supreme Court has opined that "a trustee must show the utmost good faith. He must exercise in the execution of the trust the degree of care and diligence which a man of ordinary prudence would exercise in the management of his own affairs." *Michigan Home Missionary Soc v Corning*, 164 Mich 395, 402; 129 NW 686 (1911). Prudence is defined as "acting with care, diligence, 'integrity, fidelity and sound business judgment.'" *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998), quoting *In re Buhl's Estate*, 211 Mich 124, 132; 178 NW 651 (1920). Both Robert and respondent breached their duties to petitioner by failing to provide her with an accounting and with relevant information about the trust. The probate court abused its discretion by failing to remove the trustee and successor trustee. *Comerica Bank*, *supra* at 729.

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validity of this assertion, and do not consider these alleged additional contingencies for the purposes of this appeal. However, we note that because petitioner will be receiving a complete, unredacted copy of the trust instrument, she will be able to ascertain for herself whether her interest was in fact conditioned on such contingencies. On remand, the probate court should consider whether petitioner's interest was conditioned on these alleged additional contingencies, and should determine whether the occurrence or nonoccurrence of these alleged contingencies has affected petitioner's interest in the trust.

⁶ Petitioner originally sought removal of Robert Gustafson as trustee. Although Robert has died, respondent and successor trustee J. Laevin Weiner has now been substituted in Robert's place. See *In re Alice Shotwell Gustafson Revocable Living Trust*, unpublished order of the Court of Appeals, entered April 12, 2007 (Docket No. 268552). Therefore, we treat petitioner's original request to remove the trustee as a request to remove respondent as successor trustee.

On remand, the probate court shall remove respondent as successor trustee and replace him with a new successor trustee. MCR 7.216(A)(7); see also MCL 700.1302(b)(i). When appointing a new successor trustee, the probate court shall choose someone whom it reasonably believes will discharge his or her statutory and fiduciary obligations to all trust beneficiaries.

V

Petitioner further requests that we remand this matter for proceedings before a different probate judge.

Petitioner's request in this regard has not been properly presented for our review because it is not contained in her statement of the questions presented or in the argument section of her brief on appeal. MCR 7.212(C)(5); MCR 7.212(C)(7). Nonetheless, we may sua sponte remand to a different judge when "it is reasonable to expect that the original judge on remand would have substantial difficulty putting out of his mind his previously expressed views" *People v Rosen*, 201 Mich App 621, 623-624; 506 NW2d 609 (1993).

Our general objective when deciding whether to remand a case to a different judge is to preserve the appearance of justice. See *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992). "We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). In light of Judge Grant's statements concerning petitioner, we conclude that he would likely "have difficulty in putting aside his previously expressed views[.]" *Id.* Therefore, we remand this matter to a different probate judge.

VI

Because we have not received a copy of the trust instrument on appeal, we have been unable to address several issues, including (1) the nature and effect of Robert's purported 2006 revocation of the trust; (2) whether Robert ever provided sufficient consideration to become a co-settlor with respect to any portion of the trust, see note 1, *supra*; (3) whether petitioner's interest in the trust was in fact conditioned on the occurrence or nonoccurrence of any additional contingencies; and (4) whether petitioner's request to surcharge the trustee should have been granted below. On remand, the probate court shall consider these issues to the extent necessary.

We reverse the probate court's determination that Robert Gustafson was a co-settlor with respect to the portion of the trust affecting petitioner's interest. Even according to respondent, the plain language of the trust amendment indicates otherwise. We also reverse the probate court's denial of petitioner's request for an accounting, of petitioner's request for a copy of the trust instrument, and of petitioner's request to remove the trustee.

We remand to the probate court for further proceedings before a different judge. On remand, the court shall appoint a new successor trustee. The probate court shall direct the new successor trustee to provide petitioner with an accounting, a complete and unredacted copy of the trust instrument, and other appropriate information concerning the trust's administration and assets. As noted above, the probate court at its discretion may enter a protective order to prevent

petitioner and petitioner's counsel from divulging any of the trust's confidential terms to any other parties.

Reversed and remanded for proceedings consistent with this opinion before a different judge. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane M. Beckering