STATE OF MICHIGAN

COURT OF APPEALS

In re PETER MARTIN WEGE TRUST,
f/b/o SUSAN WEGE CARTER.

SUSAN WEGE CARTER,

Petitioner-Appellant,

v

FIFTH THIRD BANK,

Respondent-Appellee.

UNPUBLISHED
June 17, 2008

No. 271244
Kent Probate Court
LC No. 02-173246-TT

SUSAN WEGE CARTER,

Petitioner-Appellant/Cross-Appellee,

v

FIFTH THIRD BANK,

Respondent-Appellee/Cross-Appellant.

No. 274217
Kent Probate Court
LC No. 02-173246-TT

SUSAN WEGE CARTER,

Petitioner-Appellee,

v

FIFTH THIRD BANK,

Respondent-Appellant.

No. 274256
Kent Probate Court
LC No. 02-173246-TT

SUSAN WEGE CARTER,

Petitioner-Appellee,

v

FIFTH THIRD BANK,

Respondent-Appellant.

No. 274850
Kent Probate Court
LC No. 02-173246-TT

SUSAN WEGE CARTER,

Petitioner-Appellant,

v

FIFTH THIRD BANK,

Respondent-Appellee.

No. 281244
Kent Probate Court
LC No. 02-173246-TT

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

These consolidated appeals arise from a petition filed in Kent County Probate Court by petitioner Susan Wege Carter ("Carter") challenging the management by respondent Fifth Third Bank ("the Bank") of the assets of the Peter Martin Wege Trust, and later of the separate Peter Martin Wege Trust for the benefit of Carter (hereafter referred to jointly as "the Trust"), for surcharge against the Bank and seeking to remove the Bank as corporate trustee of the Trust and to transfer administration of the Trust to a successor corporate trustee of her choice. In Docket No. 271244, Carter appeals the probate court's order granting summary disposition to the Bank on that portion of count II of Carter's petition seeking surcharge for losses resulting from a lack of diversification of Trust assets between January 1, 1997 and December 31, 2001. In Docket No. 274217, Carter appeals the probate court's order granting summary disposition to the Bank on that portion of count II of Carter's petition seeking surcharge for losses resulting from a lack of diversification of Trust assets after December 31, 2001. In Docket No. 274256, the Bank appeals the probate court's order removing it as corporate trustee. In Docket No. 274850, the Bank appeals the probate court's order appointing SunTrust Bank as successor corporate trustee. In Docket No. 281244, Carter appeals the probate court's order dismissing the remainder of her claims relating to the Bank's management of Trust assets. We affirm.

The Trust was established by the will of Peter Martin Wege ("Wege"), one of the founders of the Metal Office Furniture Company, which later became Steelcase, Inc. ("Steelcase" or "the company").[1] At the time of his death, on June 22, 1947, the majority asset held by the Trust consisted of shares in the company. In his will, Wege expressed his wish that the Trust retain the company stock, if in the trustees' discretion they deemed it prudent and for the best interest of the estate to do so, and notwithstanding that such retention might otherwise be in violation of laws governing trust investments. Wege's will also provided that any sale of company stock by the Trust was subject to the written consent of both his son, Peter Melvin Wege and his initial individual trustee, Walter D. Idema, or the survivor of them. Steelcase became publicly owned in February 1998. The Trust was the single largest participant in the initial public offering ("IPO"), selling ten percent of its holdings in the company for approximately $52 million. Two additional sales of Steelcase stock occurred in 2000 and 2001, each involving 200,000 shares. Then, in April 2002, the Trust was divided into seven individual trusts for the benefit of Wege's grandchildren, including Carter. Thereafter, Carter and her financial advisor agreed to an investment strategy proposed by the Bank, which resulted in a reduction of the Trust's Steelcase holdings to approximately 40 percent of Trust assets by February 2006.

In May 2006, Carter filed the instant petition seeking to remove the Bank as corporate trustee, allowing her to transfer administration of the Trust to a successor corporate trustee of her choice, and for surcharge. Ultimately, the probate court granted Carter's request for removal, and appointed SunTrust Bank as successor trustee; the probate court denied Carter's request for surcharge.

Docket No. 271244

Carter argues that the trial court erred in granting the Bank summary disposition of that portion of count II of her petition alleging breach of fiduciary duty from January 1, 1997 to December 1, 2001, under MCR 2.116(C)(7),[2] on the basis that Carter's claims were barred by the probate court's prior approval of the 47th through 51st annual accounts of the Trust. We disagree.

This Court reviews the probate court's grant of summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Sobiecki v Dept of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006). Whether principles of res judicata and/or collateral estoppel apply to bar an action or a

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[1] The Trust was modified in 1952, and again in 1962, by agreement of the trustees and the beneficiaries, to alter the amount of income to be paid to Wege's wife, and then, after her death, to alter the manner and timing of distribution of income and principal to Wege's son and grandchildren. Neither modification otherwise altered the powers or authority of the trustees at issue here.

[2] MCR 2.116(C)(7) applies when "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

claim presents a question of law also subject to de novo review on appeal. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). When deciding a motion for summary disposition under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Res judicata bars a subsequent action between the same parties, or their privies, when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001); *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata applies where: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Washington, supra* at 418; *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County, supra*.

An order of a probate court is final, and is res judicata with respect to its subject matter, *Banks v Billups*, 351 Mich 628, 634; 88 NW2d 255 (1958), and an "allowance of an account is an adjudication of each item of it," *McDannel v Black*, 270 Mich 305, 310, 312; 259 NW2d 40 (1935). Thus, in the absence of fraud or concealment, an order by the probate court approving the account of a fiduciary is final and conclusive as between the parties as to all matters that were resolved, or which could have been resolved, by that order. *Washington, supra*; *Adair, supra* at 121; *Banks, supra* at 635, citing *McDannel, supra* at 311; *In re Swart's Estate*, 332 Mich 404, 409; 51 NW2d 903 (1952); *In re Gray Estate*, 9 Mich App 262, 271; 156 NW2d 594 (1967).

Here, Carter asserts that the probate court's prior orders approving the 47th through 51st accounts do not operate to bar her current claims arising from the Bank's failure to diversify the Trust during the periods covered by those accounts, because the Bank fraudulently concealed from her that it had a business relationship with Steelcase and that it failed to diversify the Trust's holdings in Steelcase in accordance with its own internal policy and because the Bank failed to timely provide the beneficiaries with "critical information" regarding the Steelcase IPO. Carter does not deny that the Bank disclosed, in the accountings and otherwise, that it sold ten percent of the Trust's holdings in Steelcase at the IPO, that it made two additional sales of Steelcase stock in 2000 and 2001, and that there were no other transactions undertaken to diversify Trust assets.

"Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of affirmative character and fraudulent." *McNaughton v Rockford State Bank*, 261 Mich 293, 296; 246 NW2d 84 (1932). Further, to constitute fraudulent concealment of a cause of action – or in this context, of a basis to timely object to approval of the annual accountings – sufficient to avoid preclusion of a subsequent action on the basis of res judicata, Carter must show that the information the Bank allegedly fraudulently concealed was

material to the basis of the objection, such that the need for any objection was itself concealed from her. See, *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 652; 692 NW2d 398 (2004); *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994).

At the time that the accountings were approved by the probate court, Carter was aware of the concentration of the Trust's assets in Steelcase stock, of the amount of Steelcase stock sold by the Trust, and of the ongoing concern on the part of the trustees about the degree of concentration of the Trust's assets in Steelcase stock. Thus, there is no basis for Carter's assertion that a need to object to the accountings based on the Bank's failure to appropriately diversify the Trust was concealed from her, merely because she was unaware that Steelcase had a banking relationship with the Bank, that the Bank had additional shares of Steelcase stock under its management as the trustee for other trusts, or that the trustees initially thought that they "might" like to sell as much as twenty-five percent of the Trust's holdings in Steelcase at the IPO.[3] While those facts might be relevant to the reasons underlying the Bank's management decisions, concealment of them, if any, did not impede Carter's knowledge of the transactions undertaken by the Bank or of the degree of concentration of the Trust assets in Steelcase stock. Simply, the facts that Carter alleges the Bank to have fraudulently concealed from her are not material to the basis for her claims that the Bank inadequately managed the Trust assets by failing to properly diversify the Trust's holdings.

Additionally, even if material, Carter's bare assertions that the Bank had a substantial business relationship with Steelcase, had "interlocking directorship" with the company, and had substantial holdings, as custodian or agent, of Steelcase stocks, do not evidence – without more – a basis to object to the accounts. Therefore, such assertions are insufficient to establish a genuine issue of material fact precluding summary disposition on this issue. See, *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006) (citing *Quinto v Cross Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996) ("Mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is a genuine issue of material fact for trial.")

Further, it is well settled that Carter cannot base her assertions that the Bank fraudulently concealed information from her on her own lack of diligence in availing herself of information available to her had she exercised reasonable diligence. *Adair, supra* at 121, citing *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Simply put, while Carter does not have any duty to search public records for information pertaining to the Trust, *Heap v Heap*, 258 Mich 250, 256; 242 NW 252 (1932), she is not permitted to remain ignorant of important, publicly available information about the Trust, or about Steelcase, and then assert that the Bank fraudulently concealed that information from her. *Id.*; see also, *In re John F Ervin Testamentary Trust,*

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[3] Carter asserts that the trustees made an initial decision to sell twenty-five percent of the Trust's Steelcase holdings at the IPO, and then inexplicably reduced the Trust's participation to ten percent of its holdings. However, the record is clear that, when asked for an initial expression of interest, the trustees indicated that they "might like" to sell up to twenty-five percent of the Trust's Steelcase holdings, however, they never made any decision, nor sought approval from Wege's son, as required by Wege's will, to do so.

unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket Nos. 249974, 253745, 253824) ("Because [petitioner] did not exercise reasonable diligence, she failed to raise claims she could have raised, and the court properly dismissed her claims on res judicata grounds."). Thus, the probate court did not err in dismissing that portion of Carter's petition pertaining to the Bank's actions during the time periods covered by the 47th through 51st annual accounts; those claims were barred by the prior probate court orders approving the annual accounts. *Washington, supra* at 419; *Sewell, supra* at 575; *Chestonia supra* at 429.[4]

Docket No. 274217

Carter argues that the probate court erred in determining that the language in Wege's will excused the Bank from compliance with the diversification requirement that is ordinarily deemed prudent under Michigan's prudent investor rule. We disagree.

Courts refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of a trust. *In re Butterfield Estate,* 418 Mich 241, 259; 341 NW2d 453 (1983). Relevant statutes and case law further define a trustee's duties. *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). Generally, trustees must meet the standard of care of a prudent person when dealing with trust property. *Id.* This rule is codified at MCL 700.7302, which provides:

> *Except as otherwise provided by the terms of the trust*, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills. [Emphasis added.]

Likewise, MCL 700.1502 provides that:

> (1) A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill and caution.
>
> (2) The Michigan prudent investor rule is a default rule that *may be expanded, restricted, eliminated, or otherwise altered by the provisions of the governing instrument*. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument. [Emphasis added.]

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[4] Because we conclude that summary disposition was proper under MCR 2.116(C)(7), we need not address the Bank's assertion that, rather than file a petition raising her claims for lack of diversification prior to December 31, 2001, Carter was required to move for relief from the probate court's prior orders approving the annual accounts, pursuant to MCR 2.612.

The prudent investor rule, when applicable, may require a trustee to diversify a trust's investments, where doing so is objectively prudent. In this regard, MCL 700.1504 provides:

> A fiduciary shall diversify the investments of a fiduciary estate unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the fiduciary estate are better served without diversifying.

As this Court explained in *In Matter of Jervis C Webb Trust*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket Nos. 263759, 263900), liability for lack of diversification of trust assets is premised on a breach of a fiduciary's duty to prudently manage the estate and, while there may generally be a duty to diversify investments, as recognized in the pertinent statutes, a settlor may always authorize a trustee not to diversify trust assets.

In his will, Wege expressed a desire that the Trust retain Steelcase stock, and he provided the trustees with the authority to

> hold and retain any bonds or shares of stock or other securities or other properties held or owned by me at my death, if *in their discretion they shall deem it prudent and for the best interest of my estate so to do, notwithstanding the fact that the retention of such investments might, except for this express direction, be in violation of the laws of this State governing trust investments.* [Emphasis added.]

The probate court properly determined that this language creates a "safe harbor" protecting the Bank "from the diversification requirement that ordinarily would be deemed prudent." That is, Wege's will expressly exempts the trustees from compliance with the prudent investor rule, allowing them to retain Steelcase stock if they, in their *subjective* discretion, deem it prudent and in the best interest of the estate to do so, notwithstanding the *objective* standards of prudence that might otherwise be imposed under the above-referenced statutes. Carter has presented no evidence that the Bank acted other than as it deemed prudent and in the best interest of the estate. Deposition testimony expressed the difficulties inherent in diversifying this particular Trust, and Carter herself disavowed an interest in selling Steelcase stock merely to diversify, where she found the price of the stock to be unacceptable.

Carter also argues that any exemption from the prudent investor rule afforded to the trustees by Wege's will was negated because the Bank acted in bad faith and had a conflict of interest due to its business and banking relationship with Steelcase. Carter cites *In re Green, supra*, and *In re Harold S Ansell Family Trust*, 224 Mich App 745, 749; 569 NW2d 914 (1997), for the general proposition that the liability of the trustee is not limited, despite terms of the trust instrument otherwise, where the trustee has acted in bad faith or their exists a conflict of interest. However, neither case supports Carter's assertion that a trustee's bad faith or a conflict of interest will invoke the prudent investor rule, where trust documents expressly disavow it.

At issue in both *In re Green* and *In re Ansell* was whether the trustee obtained an adequate price for property sold. In *In re Green, supra* at 312, the Court concluded that the trustees did not meet the requirement, set forth in the trust documents, that they exercise their discretion to determine the timing of the sale of the property "so as to realize its 'full value.'" The Court noted that the property was not independently appraised or marketed to the general

public before an offer to purchase from the client of the lawyer-trustee was accepted, and therefore, the lawyer-trustee did not meet his duty to obtain the best price for it. The Court established a three-prong test for evaluating the price obtained for trust property, determining that the trustee's actions were insufficient under that test. Further, in *In re Green*, there was record evidence establishing an actual conflict of interest on the part of the lawyer-trustee, who represented the purchaser of the property as his attorney and had previously represented him in other matters, and that client received preferential treatment regarding the sale of the property. Here, Carter asserts that the Bank has a conflict of interest merely because it has a banking relationship with Steelcase, because there have been as many as two common directors between Steelcase and Fifth Third Bancorp, and because the Bank "beneficially owns" as agent, trustee or custodian, a substantial amount of Steelcase stock. However, Carter has presented no evidence indicating any impact of those circumstances on the Bank's – or the individual co-trustee's – decisions regarding diversification of Trust assets. Thus, *In re Green* is not instructive on the instant issue.

Similarly, at issue in *In re Ansell* was whether the trustee abused its discretion in selling a piece of commercial property and whether the trustee obtained an adequate price for that property. The Court explained that the three-pronged test adopted by the Court in *In re Green* for evaluating whether an adequate price was obtained "applies only in a situation in which there are allegations of bad faith, unfair dealings, or conflicts of interest" which were not alleged in *In re Ansell*. The Court explained further that "in the absence of bad faith, unfair dealings, or a conflict of interest, the adequacy of a price obtained by a trustee for a piece of the trust property should be reviewed for an abuse of discretion." *Id.* at 749. That principle is inapplicable here.

Further, to the extent that a showing of bad faith or an actual conflict of interest might be held to negate a limitation on application of the prudent investor rule expressed in trust documents, Carter's bare assertions here that the Bank acted in bad faith, without more, are insufficient to establish a genuine issue of material fact precluding summary disposition on this issue. *Bennett*, *supra* at 317.[5]

[5] The parties disagree over whether the probate court also granted the Bank summary disposition on Carter's post-2001 claims relating to the failure to diversify Steelcase stock on the basis of equitable estoppel arising from Carter's agreement to an investment plan for diversification of the Trust's position in Steelcase and the Bank's compliance with that plan from 2002 to 2005. The probate court's ruling, delivered on the record, is unclear in this regard. Because we conclude that Wege's will exempts the Bank from the prudent investor rule, we need not determine whether Carter is estopped from challenging transactions undertaken pursuant to her consent to the investment plan.

The Bank argues that the probate court erred in concluding that MCL 700.7305 permitted the Bank to be removed as trustee because Grand Rapids had become an inappropriate place of administration for the Trust, considering Carter's residence outside the state and her lack of contact with or presence in Grand Rapids. We disagree.

This Court reviews de novo questions of statutory interpretation. *Tousey v Brennan,* 275 Mich App 535, 538; 739 NW2d 128 (2007). This Court reviews the probate court's findings of fact for clear error. MCR 2.613(C); *Gumma v D&T Construction Co,* 235 Mich App 210, 221; 597 NW2d 207 (1999). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm,* 255 Mich App 637, 652; 662 NW2d 424 (2003). This Court reviews the probate court's decision to remove a trustee for an abuse of discretion. *In re Duane V Baldwin Trust,* 274 Mich App 387, 396-397; 733 NW2d 419 (2007); *Comerica Bank v Adrian,* 179 Mich App 712, 729; 446 NW2d 553 (1989). An abuse of discretion occurs only when the trial court's decision falls outside the range of principled outcomes considering the facts and circumstances of the case. *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007); *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006).

MCL 700.7305 provides:

> A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. *If the principal place of administration becomes inappropriate for any reason, the court may enter an order furthering efficient administration and the interests of beneficiaries, including, if appropriate,* release of registration, *removal of the trustee,* and appointment of a trustee in another state. A trust provision relating to the place of administration, to changes in the place of administration, or to change of trustee controls unless compliance would be contrary to efficient administration or the purposes of the trust. *The view of an adult beneficiary shall be given weight in determining the suitability of the trustee and the place of administration.* [Emphasis added.]

"The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. Our Legislature is presumed to have intended the meaning it plainly expressed." *Manning v Amerman,* 229 Mich App 608, 612; 582 NW2d 539 (1998) (citations omitted). MCL 700.7305 plainly allows for removal of a trustee, to further the efficient administration and the interests of the beneficiaries, whenever "the principal place of administration becomes inappropriate for any reason." Carter advanced two primary reasons that Grand Rapids had become an inappropriate place of administration: (1) the distance between Grand Rapids and her home and its impact on her relationship with the trustee and on the administration of the Trust to her satisfaction, and (2) her lack of confidence and trust in the Bank, because of its ties to the company, the amount of Steelcase stock it holds as beneficial owner, and the perceived lack of loyalty, responsiveness and information afforded to Carter by the Bank. Carter presented the probate court with admissible evidence supporting these reasons.

Additionally, MCL 700.7305 mandates that the probate court give weight to the view of adult beneficiaries as to both "the suitability of the trustee" and "the place of administration." Here, each of the adult beneficiaries of the Trust consented to the Bank's removal. The probate court was required to, and did, give weight to the expressed views of these adult beneficiaries of the Trust when determining the suitability of the trustee and the place of administration. Therefore, on the record presented, the probate court's decision to remove the Bank as trustee of the Trust was within the range of principled outcomes considering the facts and circumstances of the case, and therefore, was not an abuse of discretion. *Saffian, supra* at 12; *Maldonado, supra* at 388.

The Bank argues that MCL 700.7305 does not permit a trustee to be removed merely because the trustee's principal place of administration is inconvenient to the beneficiary. Rather, the Bank asserts, removal is permitted if, and only if, the trustee's principal place of business interferes with the proper administration of the Trust. The Bank notes further that given technology, including email, the location where a trust is administered is generally immaterial to its sound and efficient management. However, we find that such a reading is contrary to the plain language of the statute, and that it presents an overly restrictive view, which would eviscerate the statute. The statute plainly permits removal when the place of administration becomes inappropriate for any reason even in this age of improved technology and communication.[6] Carter presented ample record evidence to permit the probate court to conclude

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[6] In support of its argument, the Bank relies on *In re Zoellner Trust*, 212 Neb 674, 679; 325 NW2d 138 (1982) (citations omitted), in which the Supreme Court of Nebraska reversed a lower court order removing the trustee, concluding that removal was improper because "[t]he place of administration of the trust did not interfere with the proper administration of the same, and therefore, was not inappropriate." The *Zoellner* Court opined that

> It is true that under the provisions of § 30-2816 [Nebraska's codification of UCP § 7-305, equivalent to MCL 700.7305] the court may enter any order "furthering efficient administration" of the trust, but first it must find that the "principal place of administration [has become] inappropriate for any reason." . . .
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> In construing this section the key word is "inappropriate." Webster's Third New International Dictionary, Unabridged (1968) defines *inappropriate* as "Not appropriate: unbecoming, unsuitable," and the Oxford Dictionary, Vol. V, Part II (1901), offers the definition of "Not appropriate; unsuitable to the particular case; unfitting, improper." A place of administration which may be less efficient, less convenient or less pleasant is not necessarily improper or unsuitable unless, in combination with other circumstances, it interferes with the proper administration of the trust. If the law were otherwise, it would subject a trustee to removal proceedings whenever a new trust institution was created which was more conveniently located to the residence of the beneficiaries. This was not the legislative intent. [*Id.* at 678.]

(continued…)

that the place of administration was inappropriate for reasons including its geographic distance from the adult beneficiaries, the nature of the relationship between the Bank and Carter and the impact of the place of administration on that relationship, and the proximity of the Bank to Steelcase and the importance of Steelcase to the Grand Rapids area – to permit it to remove the trustee in order to further "efficient administration and the interest of the beneficiaries" of the Trust.[7]

Docket No. 274850

The Bank challenges the probate court's order appointing SunTrust Bank as successor trustee. The Bank argues that SunTrust's principal place of administration of the Trust, in Georgia, is no less inappropriate than was Grand Rapids, and therefore, that SunTrust is not an

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(…continued)

In *Zoellner*, the beneficiaries complained about difficulty in obtaining information from the trustee, which was located approximately 400 miles away from the beneficiaries and the real estate owned by the trust, about a lack of contact with the trustee, that the trustee did not inspect the property, about the rate of return of the trusts fixed income and equity assets, and that the trustee was rude and inattentive. *Id.* at 676-677. The *Zoellner* Court noted that its review was de novo, and concluded that it did not "believe that the place of administration had become 'inappropriate.'" *Id.* at 678. The Court explained:

> The rate of return on investments had nothing to do with the location of the trustee, nor did the claimed rudeness of one of its employees. Inferentially, at least, the real property was acquired by the trust at the request of the beneficiaries, i.e., it was conveniently and strategically located with reference to the family business in which they were directly connected. The beneficiaries were using this building as if they presently owned it. Their present and future interests and their control and obligations under the leases were such as to render any additional supervision and inspection by the trustee an exercise in redundancy. [*Id.* at 679.]

Of course, this Court is not bound by *Zoellner*, and we find that case to present an overly restrictive interpretation of the language contained in MCL 700.7305. Specifically, *Zoellner* fails to account for the inclusion of the broad language "for any reason" in the statute, unnecessarily limiting the manner in which the place of administration might be considered to be "inappropriate," as well as the degree of inappropriateness required to justify removal. It would also eviscerate the statute's directive that the court consider the views of adult beneficiaries when determining both "the suitability of the trustee and the place of administration." If this Court were to adopt the approach in *Zoellner*, as noted by the Bank, considering the reach of technology, it would be extremely rare, if ever, that the place of administration could be so inappropriate as to interfere with the administration of the trust. Further, the location of the Bank in Grand Rapids negatively impacted the relationship between the Bank and Carter, so as to impede the efficient administration of the Trust.

[7] Because we conclude that the probate court did not abuse its discretion by removing the Bank as trustee under MCL 700.7305, we need not determine the merits of Carter's arguments concerning MCL 700.7207.

appropriate successor trustee.[8] However, we conclude that the Bank lacks standing to challenge the order appointing SunTrust.

As our Supreme Court explained in *In re Trankla's Estate*, 321 Mich 478, 482; 32 NW2d 715 (1948):

> An appeal can only be taken by parties who are affected by the decree appealed from; there must be some substantial rights of the parties to which the appeal would be prejudicial. . . .
>
> In legal acceptation a party is aggrieved by a judgment or a decree when it operates on his rights in property or bears directly upon his interest.
>
> 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. This is the general rule. [Internal quotations and citations omitted.]

Thus, a party is not "an aggrieved person entitled to appeal" when it lacks a "direct pecuniary interest" in the outcome of an appeal. *Id.*

Regardless whom the probate court appointed to succeed it, the Bank had been removed as trustee and thus, no longer had any right of action or any interest in the Trust. The entity selected to serve as successor trustee is immaterial to the Bank's pecuniary interest; the Bank's prior removal was wholly unaffected by who was named successor trustee. Thus, the Bank has no standing to challenge SunTrust's appointment.

Additionally, even were this Court to determine that the Bank had standing to contest SunTrust's appointment as successor trustee, there is nothing that requires that the probate court determine that SunTrust offers a more appropriate place of administration than did the Bank. Rather, having removed the Bank as trustee, the probate court must merely determine whether SunTrust Bank is a suitable successor trustee. The Bank does not contest that – absent geography – SunTrust is a suitable trustee. Therefore, there is no basis for the Bank to assert that the probate court's appointment of SunTrust as successor trustee constituted an abuse of discretion.

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[8] The Bank's argument here is more properly addressed to the issues raised in Docket No. 274256, regarding removal of the Bank as trustee under MCL 700.7305, in that the Bank is essentially arguing that Carter's assertion that Grand Rapids was an inappropriate place of administration for the Trust was merely a pretext to remove the Bank as trustee, without a showing of cause. Even considered in that context, this argument would not lead us to conclude that there was an abuse of discretion. Certainly, this argument presents no proper basis for challenging SunTrust's appointment as successor trustee.

Carter argues that the probate court erred in applying an abuse of discretion standard of care to the evaluation of the Bank's investment decisions, as well as by determining that Carter failed to establish a genuine issue of material fact that the Bank abused its discretion in its management of Trust assets. We disagree.

More specifically, Carter argues that the Trust is a "support trust" and not a discretionary trust, such that the Bank has no discretion whether to provide for her support and maintenance; it is required to do so. Therefore, Carter asserts that the applicable standard of review of the trustee's performance is one of negligence, and not an abuse of discretion. To this end, Carter's expert opined that the Bank was negligent in its management of the Trust by, among other things, failing to unitize the Trust and by allocating a portion of the Trust's assets to bond investments.

As our Supreme Court explained in *Miller v Dep't of Mental Health,* 432 Mich 426, 429; 442 NW2d 617 (1989):

> There are, for the purposes of this discussion, three kinds of trusts. Firstly, a trust vesting in the beneficiary the right to receive some ascertainable portion of the income or principal. Secondly, a trust providing that the trustee *shall pay* so much of the income or principal as is necessary for the education or support of the beneficiary, called a support trust. Thirdly, a trust providing that the trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines, called a discretionary trust.

Wege's will did not require that the trustee "pay so much of the income or principal as is necessary for the education or support" of Carter. Instead, it afforded the Bank sole and conclusive discretion whether to make additional payments from principal to meet the needs of the beneficiaries. It also authorized the Bank to pay out less than all of the net income, if the Bank, in its sole discretion, deemed such lesser payment to be in the beneficiary's best interest. Additionally, the Trust contemplates that the beneficiaries will have "other income and means of support" and notes "the desirability of augmenting their separate incomes and estates." The language of Wege's will thus belies Carter's argument that the Trust creates a "support trust" that unequivocally requires the Bank to provide for her support and maintenance, affording it no discretion whether and to what degree to do so.[9]

As to the Bank's investment decisions, Wege's will provides the trustees with the authority to make investment decisions, as "in their discretion may seem best," including purchasing stocks and bonds as "to them may seem proper." It is well-settled that, "[a]s to those matters which the settlor has left to the discretion of the trustee, the courts will not interfere with

[9] Carter also argues, consistent with her position in Docket No. 274217, that the prudent investor rule applies to the Trust, and imposes a negligence standard on the Bank's actions. However, as discussed above, Wege's will exempts the Trust from application of the prudent investor rule.

the trustee's exercise of his discretion unless the trustee has abused his discretion." *In re Sykes*, 131 Mich App 49, 53-54; 345 NW2d 642 (1983); see also *Moss v Axford*, 246 Mich 288, 294; 224 NW 425 (1929); *In re Ansell, supra* at 749. Thus, the probate court properly concluded that the appropriate standard of care for review of the Bank's performance relating to investment decisions is an abuse of discretion.

Carter's expert opined that the Bank's conduct in failing to unitize the Trust, and in utilizing bonds in lieu of stocks, was inattentive and negligent; he did not opine that these actions constituted an abuse of discretion. Considering the limitation of her expert's opinions, and, perhaps more tellingly, Carter's own admission that she does not challenge the manner in which the Bank exercised its investment discretion, Carter has failed to establish a genuine issue of material fact as to whether the Bank abused its discretion in its investment decisions for the Trust.

Finally, we reject Carter's claim that the Bank's motion for summary disposition did not properly address her claims that the Bank made imprudent investments in stocks and bonds, and therefore, that the probate court erred in granting the Bank's motion as to these claims. MCR 2.116(C)(4) requires a party moving for summary disposition under MCR 2.116(C)(10) to specifically identify those issues on which it asserts there is no question of material fact. The Bank specifically indicated that there was no question of material fact that the Bank did not abuse its discretion by not unitizing the Trust and by investing in bonds. And the Bank clearly indicated that it was requesting that the trial court dismiss all of Carter's reaming claims, including Carter's claim of negligent failure to unitize the Trust and Carter's claim of negligent investment in bonds.

Because the Trust afforded the trustees broad discretion in making investment decisions, Carter was required to show that those investment decisions constituted an abuse of that discretion. However, she offered only testimony and evidence establishing, at best, a question whether the Bank may have been negligent in its investment decisions. That is insufficient to establish a question of fact whether the Bank abused its discretion by virtue of those decisions. Therefore, summary disposition was properly granted as to all of Carter's remaining claims on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey