STATE OF MICHIGAN

COURT OF APPEALS

In re MARY E. GRIFFIN Revocable Grantor Trust.

OTTO NACOVSKY,

Petitioner-Appellee,

v

PRISCILLA HALL, Trustee,

Respondent-Appellant.

FOR PUBLICATION
December 2, 2008
9:00 a.m.

No. 277268
Shiawassee Probate Court
LC No. 05-032492-TV

Advance Sheets Version

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

HOEKSTRA, P.J.

This case involves the enforceability of the *in terrorem* (no-contest) clause in the Mary E. Griffin Revocable Grantor Trust agreement. Respondent appeals as of right the probate court's order declaring the clause unenforceable and denying her motion for summary disposition under MCR 2.116(C)(9) and (10). Although MCL 700.2518 does not apply to trusts, we conclude that it reflects this state's public policy that a no-contest clause in a trust agreement is unenforceable if there is probable cause for challenging the trust. We further conclude that petitioner, Otto Nacovsky, had probable cause to challenge the trust because the trust, on its face, violated the rule against perpetuities. Therefore, the *in terrorem* clause was unenforceable, and we affirm the probate court's order denying respondent's motion for summary disposition.

I

Respondent, Priscilla Hall, is the daughter of petitioner. They are both beneficiaries under a trust created by Mary E. Griffin, who is petitioner's mother and respondent's grandmother. The trust was established in 2001, and the trust agreement was amended several times thereafter, including in January 2003 and May 2003. The January 2003 amendment added the following clause to the trust agreement:

> Terror [sic] Clause. If any beneficiary under this Agreement or any heir of Settlor, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest the admission of Settlor's will to probate, or challenge or contest any provision of Settlor's will or of this

> Agreement, the beneficiary or heir shall receive no portion of Settlor's estate, nor any benefits under this Agreement. However, it will not be a "challenge or contest" if Trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this Agreement.

After Griffin died in January 2005, petitioner filed a petition contesting the trust. Petitioner alleged that the trust violated the rule against perpetuities because the trust agreement, as last amended on May 1, 2003, provided that the principal was to be held in trust for the benefit of petitioner and Griffin's dogs, but failed to include a provision for the distribution of the trust corpus after the death of petitioner and the dogs. Petitioner also alleged that Griffin's last two amendments in January 2003 and May 2003 resulted from respondent's undue influence over Griffin. Respondent filed a petition to enforce the *in terrorem* clause. She claimed that, because petitioner had challenged the validity of the trust, if petitioner failed to substantiate his claim of undue influence, petitioner was not entitled to receive anything under the trust.

Following an evidentiary hearing, the probate court determined that the perpetuities problem was the result of a drafting error, and it reformed the trust agreement to remedy the omission of the residuary clause. The court also determined that there was no undue influence. Petitioner thereafter filed a motion alleging defenses to the *in terrorem* clause. Respondent in turn moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), arguing that the *in terrorem* clause was both enforceable and applicable because petitioner had challenged the trust. The probate court determined that because MCL 700.2518 applied to wills but not trusts, the Legislature intended that no-contest clauses in trust agreements be unenforceable. Accordingly, the probate court held that the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement was unenforceable as a matter of law, and it denied respondent's motion for summary disposition.

II

On appeal, respondent does not contest the probate court's conclusion that MCL 700.2518 only applies to wills. Rather, she contests the probate court's conclusion that because the Legislature did not include a provision regarding no-contest clauses in trust agreements in the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, a no-contest clause in a trust agreement is unenforceable. Respondent argues that the enforceability of a no-contest clause in a trust agreement must be gleaned from the common law relating to no-contest clauses in wills. We disagree.

A

This Court reviews de novo a lower court's decision on a motion for summary disposition. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Below, respondent argued that summary disposition was proper under MCR 2.116(C)(9) because the defense petitioner asserted to her petition to enforce the *in terrorem* clause—that he had probable cause for challenging the trust—was not a defense to the enforcement of a no-contest clause in a trust agreement. A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings and is properly granted when the party has failed to state a valid defense to a claim. A defense is invalid for purposes of MCR 2.116(C)(9) when the party's pleadings are

so clearly untenable as a matter of law that no factual development could possibly deny the opposing party's right to recovery. *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004).

B

Whether the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement is enforceable requires us to ascertain our state's public policy regarding the enforceability of no-contest clauses in trust agreements. If no-contest clauses in trust agreements are against public policy, then the *in terrorem* clause at issue here is unenforceable. 2 Restatement Trusts, 3d, § 29(c), pp 53-54 (stating that a trust provision is invalid if it is contrary to public policy).

This state's public policy is reflected in its statutes, "and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997) (quotation marks and citation omitted). There is no statute regarding the enforceability of no-contest clauses in trust agreements, nor is there any caselaw on the issue. There are, however, caselaw and a statute, MCL 700.2518, addressing the enforceability of no-contest clauses in wills.

In *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929), the Supreme Court held that no-contest clauses in wills were valid and enforceable, irrespective of whether the will contest was in good or bad faith. The Court reasoned:

> Such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation. [*Id.* at 519.]

In *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962), and *Farr v Whitefield*, 322 Mich 275, 280-281; 33 NW2d 791 (1948), the Court reiterated the rule that no-contest clauses in wills are generally enforceable.

However, in 1998, the Legislature enacted MCL 700.2518, which provides:

> A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

This statute reflects the Legislature's decision to partially abrogate the rule announced in *Schiffer*. Accordingly, MCL 700.2518 indicates this state's current public policy regarding the enforceability of no-contest clauses in wills. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("'In general, where comprehensive litigation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.'") (citation omitted).

Thus, pursuant to MCL 700.2518, a no-contest clause in a will is unenforceable if probable cause exists for instituting proceedings.

The question becomes whether the public policy regarding the validity of no-contest clauses in wills, as established by MCL 700.2518, controls the enforceability of no-contest clauses in trust agreements. Legal authorities agree that the same test should apply to no-contest clauses in wills and trust agreements. As observed in Bogert, Trusts & Trustees (rev 2d ed, 2008 Cum Supp), § 181, p 103 "Although [*in terrorem*] clauses appear most frequently in wills, there appears to be no reason to apply a different test in determining the validity of such a clause in a living trust instrument . . . ." Similarly, 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment i p 200, provides:

> With the increase in the use of revocable inter vivos trusts as will substitutes, no-contest clauses and clauses restraining challenges of particular provisions in those trusts serve the same purpose as do such clauses in wills, and the same test applies to determine the validity of those clauses in the two comparable situations.

Cf. *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005) (law governing wills typically applies to trusts).

On the basis of these authorities, we conclude that while MCL 700.2518 does not apply to trusts, it reflects this state's public policy that no-contest clauses in trust agreements are unenforceable if there is probable cause for challenging the trust.[1] Conversely, if there is no probable cause to challenge the trust, it is not contrary to public policy to enforce the no-contest clause. Thus, the probate court properly denied respondent's motion for summary disposition under MCR 2.116(C)(9). As a defense to respondent's petition to enforce the *in terrorem* clause, petitioner alleged that he had probable cause to challenge the trust. Because a no-contest clause in a trust agreement is unenforceable if there is probable cause for challenging the trust, petitioner stated a valid defense.

C

Respondent further argues, however, that she was entitled to summary disposition under MCR 2.116(C)(10) because there was no genuine issue of material fact that petitioner lacked probable cause for challenging the trust. We disagree.

[1] Our conclusion that MCL 700.2518 reflects the public policy of this state with regard to no-contest clauses in trust agreements is consistent, in part, with respondent's argument. Respondent urged us to apply the common law relating to no-contest clauses in wills to the *in terrorem* clause in the present case. Thus, respondent appears to concede that there is no policy reason to treat no-contest clauses in trust agreements differently from no-contest clauses in wills. We just disagree with respondent's contention that the common law, rather than MCL 700.2518, reflects the state's public policy regarding no-contest clauses in trust agreements.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Ins Comm'r*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The Restatement provides the following definition of probable cause: "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment c p 195. In this case, petitioner sought to terminate the trust on two grounds: (1) it was invalid pursuant to MCL 554.72 because of the perpetuities problem and (2) it was invalid because of undue influence by respondent.[2]

A trust is invalid if it violates the rule against perpetuities. 2 Restatement Trusts, 3d, § 29(b), pp 53-54. The rule against perpetuities is codified in MCL 554.72, which, at the time relevant to this case,[3] provided:

> (1) A nonvested property interest is invalid unless 1 or more of the following are applicable to the interest:
>
> (a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.
>
> (b) The interest either vests or terminates within 90 years after its creation.

The last trust amendment failed to include a provision for the distribution of the trust corpus after the death of petitioner and Griffin's dogs. Accordingly, the trust, on its face, violated the rule against perpetuities because it was not certain to vest or terminate within 21 years after Griffin's death or within 90 years after the creation of the trust. Because the trust, on its face, violated the rule against perpetuities, there was evidence from which a reasonable person could conclude that there was a substantial likelihood that a challenge to the trust as violating the rule against perpetuities would be successful. Accordingly, petitioner had probable cause to challenge the trust.[4] Respondent was not entitled to summary disposition under MCR 2.116(C)(10).

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[2] Although the probate court ultimately determined that the perpetuities problem was the result of a drafting error and there was no evidence of undue influence, the enforceability of the *in terrorem* clause depends on whether petitioner had probable cause to challenge the trust on these bases. Thus, the probate court's ultimate decision on petitioner's claims is not dispositive of whether petitioner had probable cause to bring a challenge in the first instance.

[3] The statute was amended by 2008 PA 149, effective May 28, 2008.

[4] Because we conclude that petitioner had probable cause to challenge the trust on the basis that it violated the rule against perpetuities, we need not decide whether petitioner had probable cause

(continued…)

D

In conclusion, the probate court properly denied respondent's motion for summary disposition under MCR 2.116(C)(9) and (10). A no-contest clause in a trust agreement is unenforceable if probable cause exists to challenge the trust, and petitioner had probable cause for challenging the trust as violating the rule against perpetuities. Therefore, the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement is unenforceable. Because the probate court reached the right result, albeit for the wrong reason, we affirm the probate court's order denying respondent's motion for summary disposition. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh

(…continued)

to challenge the trust on the basis of undue influence by respondent.