

## Wills & Trusts Litigation: 3 New Cases in a Nutshell

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In 2010, the Michigan Court of Appeals handed down a number of decisions that may affect your estate plan. Three cases are highlighted below.

### **Feuding Co-Trustees:**

#### **Does Trust Pay for Separate Counsel?**

##### **In Re *Frances A. Fox Revocable Living Trust*, Michigan Court of Appeals (Nov. 16, 2010)**

A co-trustee that reasonably retains separate counsel when a dispute arises with his co-trustee is entitled to have his fees paid for by the trust, unless the trust agreement states otherwise.

In this case, the grantor's daughters (Mary and Cynthia) were named as co-trustees and retained the same counsel. After disagreements arose as to trust management and distribution, Mary retained separate counsel without Cynthia's consent. The probate court approved the trust's final accounting in which Mary's attorneys' fees were paid by the trust. Cynthia appealed, arguing that the trust agreement required all decisions to be unanimous, and she had not consented to Mary retaining separate counsel.

The Court of Appeals affirmed the probate court's ruling because the trust agreement was silent on a trustee's retention of counsel. The Michigan Trust Code allows a trustee to retain counsel, and Mary acted "reasonably and prudently" in retaining separate counsel.

### **Joint Trust After Death of Co-Settlor:**

#### **Can Surviving Co-Settlor Amend?**

##### **In Re *Hayes Revocable Trust*, Michigan Court of Appeals (Nov. 2, 2010)**

Whether a surviving co-settlor can amend a joint trust after the death of the co-settlor depends on the language in the trust agreement.

In this case, Wellington and Elizabeth created a joint trust, naming themselves as co-trustees and a bank as successor trustee. After Elizabeth died, Wellington amended the joint trust agreement and appointed himself sole trustee, named his daughter from his first marriage (Patricia) as successor trustee, and changed the beneficiary distributions. Wellington amended the trust again to grant Patricia his house and car at his death.

After Wellington died, Elizabeth's beneficiaries petitioned to invalidate Wellington's two amendments to the trust agreement. The probate court granted the petition and invalidated the two amendments. Patricia appealed.

The Court of Appeals affirmed the probate court's ruling because the trust agreement stated that the co-settlors reserved the right to "revoke, alter or amend" to "themselves" (meaning the two of them together) and contained no provision that either co-settlor or survivor could act alone.

## **Agreement to Make Mutual Wills:**

### **Can Surviving Spouse Transfer Assets?**

#### **In Re *Estate of Carlton J. Leix*, Michigan Court of Appeals (Aug. 26, 2010)**

An agreement to make mutual wills does not restrict a surviving spouse from transferring assets, unless the agreement expressly limits transferring assets.

In this case, Carlton and Viola Leix (husband and wife) created identical wills, a trust agreement and agreed to execute mutual wills. These documents collectively reflected their intent to create a trust for their granddaughter's benefit for life, with the trust remainder passing to their other descendants. After Viola's death, Carlton transferred nearly all of their assets into joint ownership with their granddaughter (which would have the effect of removing them from the trust, and at Carlton's death, would pass directly to their granddaughter). The probate court dismissed Carlton and Viola's other descendants' petition to impose a constructive trust over some of these assets.

The Court of Appeals affirmed because the agreement to make mutual wills did not expressly prohibit the surviving spouse from transferring assets, and the court refused to recognize an implied limitation on the transfer of assets (even if the purpose of the transfers was to avoid the testamentary disposition).

These types of cases highlight the importance of having your estate plan prepared by a qualified estate-planning professional. If you would like to discuss your estate plan or have it reviewed by Warner Norcross & Judd, please contact David Skidmore (616.752.2491 or [dskidmore@wnj.com](mailto:dskidmore@wnj.com)) or Laura Morris (616.752.2407 or [lmorris@wnj.com](mailto:lmorris@wnj.com)) or another member of the Trusts & Estates Practice Group.