STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF OAKLAND

IN THE MATTER OF:

FRANKLIN Z. ADELL TRUST,
DATED JULY 17, 2002.

Case No: 2008-319178-TV
HON. LINDA S. HALLMARK

Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by mailing it to their addresses as disclosed by the pleadings of record with prepaid postage on the 14th **day of JUNE 2011.**

Signed: Ryan J. Dakl

OPINION AND ORDER REGARDING
CROSS-PETITIONS TO REVOKE SHARES IN TRUST

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan, on

JUN 14 2011

IT IS ORDERED that Kevin Adell's Petition to Revoke Shares or Interest in the Trust and his counterclaim seeking to enforce the no-contest provision of the Trust are **DENIED**.

IT IS ORDERED that Laurie Fischgrund and Julie Verona's Petition to Revoke Kevin Adell's shares in the Trust is **DENIED**.

IT IS ORDERED that Kevin Adell shall pay Julie Verona and Laurie Fischgrund each the sum of $20,000.00 per month after taxes, retroactively to October 1, 2008, until further order of the Court as their share of the proceeds of the Franklin Z. Adell Trust dated July 17, 2002 as amended and restated.

WITNESSES FOR KEVIN ADELL: Kevin Adell, Julie Verona, Bradley Verona, Laurie Fischgrund, Ralph Lameti, Thomas McFarland, Richard Mazzari.

WITNESSES FOR JULIE VERONA AND LAURIE FISCHGRUND: Laurie Fischgrund, Dr. Jeffrey Fischgrund, Julie Verona.

EVIDENTIARY HEARING DATES: 10/25/2010, 11/1/2010, 11/8/2010, 1/10/2011, 1/13/2011, 1/18/2011, 2/7/2011, 2/8/2011, 2/10/2011, 2/14/2011.

Following the conclusion of testimony, the parties entered into settlement negotiations. This opinion was delayed while the settlement discussions were ongoing.

This matter is before the Court on three petitions seeking to revoke the beneficiaries' shares in the Trust:

1) Kevin Adell's counterclaim, filed October 27, 2008, to the initial petition seeks to revoke Julie Verona and Laurie Fischgrund's shares in the Trust.
2) Kevin Adell's Petition to revoke Shares or Interest in the Trust was filed June 15, 2009; and
3) Laurie Fischgrund's and Julie Verona's Petition to Revoke Kevin Adell's Share or Interest in the Trust, filed November 11, 2009.

This matter was initially assigned to Judge Eugene Arthur Moore on September 19, 2008. Judge Moore disqualified himself on May 3, 2010 and the matter was assigned to Judge Hallmark on May 4, 2010.

PROCEDURAL HISTORY

On July 17, 2002, Franklin Z. Adell executed the Franklin Z. Adell Revocable Trust (Trust). During his lifetime, Franklin Adell served as trustee. On October 31, 2003, Franklin Adell amended and restated the Trust. The Trust is funded with 100% of the shares of STN.com, Birmingham Properties and 86% of Adell Broadcasting Company. Franklin Adell died on August 13, 2006. Upon his death, the Trust became

irrevocable by its terms. The Trust nominates Ralph Lameti to serve as successor trustee and provided that "[a]ny successor Trustee may thereafter nominate in writing his or her own successor." The day after Franklin Adell's death, on August 14, 2006, Mr. Lameti appointed Kevin Adell successor trustee and Kevin Adell accepted the appointment the same day.

On September 19, 2008, Laurie and Julie filed a petition to remove Kevin as successor trustee, alleging that he repeatedly breached his fiduciary duties and engaged in self-dealing. In response, Kevin filed a counterclaim against Laurie and Julie seeking to enforce the no-contest provision of the Trust and revoke their interest in the Trust.

On November 24, 2008, Laurie Fischgrund and Julie Verona filed a motion for summary disposition seeking to dismiss his counterclaim to invoke the no contest clause. That motion was denied by Judge Eugene Arthur Moore on January 6, 2009.

On June 15, 2009, Kevin Adell filed a Petition to Revoke Shares or Interest in the Trust. On April 6, 2010, Laurie and Julie filed a Motion for Summary Disposition

At a hearing on April 20, 2010, Judge Moore granted the summary disposition motion, finding that the actions taken by the sisters did not violate the no contest provision of the Trust. Prior to entry of an order, on May 3, 2010, Judge Moore recused himself due to personal bias. The matter was reassigned to Judge Hallmark on May 4, 2010.

On July 7, 2010, the Court heard a Motion for Entry of Order from the April 20, 2010 hearing filed by Laurie Fischgrund and Julie Verona and a Motion for

Reconsideration filed by Kevin Adell. This Court granted reconsideration and set the matter for evidentiary hearing.

On November 4, 2009, Laurie and Julie filed a Petition to Revoke Kevin's shares in the trust based on the *in terrorem* clause contained in the Trust.

Kevin Adell filed a Motion for Summary Disposition on November 9, 2009. The petition was set for hearing before Judge Moore on May 11, 2010. Judge Moore recused himself on May 3, 2010. This Court Denied the Motion for Summary Disposition and set the Petition to Revoke Shares for trial.

THE NO CONTEST PROVISION OF THE TRUST

The petitions presently before the Court seek the enforcement of the no contest or *in terrorem* clause (Article Five) of the Trust agreement dated July 17, 2002, as amended and restated October 31, 2003. The text of Article Five is attached as Appendix A.

KEVIN ADELL'S CLAIM TO REVOKE
THE SHARES OF JULIE VERONA AND LAURIE FISCHGRUND

Kevin Adell alleges that Julie Verona and Laurie Fischgrund violated the no contest provision in the Trust in the following respects:

1) By challenging the designation of Ralph Lameti as successor trustee upon Kevin Adell's resignation and challenging Kevin Adell's appointment as temporary personal representative of Franklin Adell's estate;

2) By attacking and seeking to impair the no contest provision by arguing that the probable cause safe harbor provision in the Michigan Trust Code is applicable;

3) By attacking an *inter vivos* gift made by Franklin Adell in the form of the payment of a $6,667,018 sanctions judgment on behalf of Kevin Adell;

4) By challenging the Services and Facilities Agreement (SFA) Contract between STN.com and the Word Network.

JULIE VERONA AND LAURIE FISCHGRUND'S
PETITION TO REVOKE THE SHARES OF KEVIN ADELL

Julie Verona and Laurie Fischgrund allege that Kevin Adell's actions have directly attacked the Trust and "seek to invalidate or impair Franklin Adell's estate plan and therefore constitute a violation of the No Contest provision of the Trust Agreement." Specifically, Julie Verona and Laurie Fischgrund allege the following acts by Kevin Adell constitute violations of the no contest clause:

1) There was an extraordinary increase in Kevin Adell's compensation from the time he became trustee. Julie Verona and Laurie Fischgrund allege Kevin Adell increased his own compensation to prevent the Trust companies from having any income, which deprives the Trust of income.

2) The companies' acquisition of numerous luxury vehicles and a garage, for the benefit of Kevin Adell the expense of the Trust.

3) STN.com's payment of a mortgage on a condominium owned solely by Kevin Adell at the expense of the Trust.

4) STN.com's securing of loans to pay for a yacht and private plane for Kevin Adell's personal use at the expense of the Trust.

5) Kevin Adell's re-classification of the payment of the $6,667,018 sanctions judgment against him from a loan to a gift. This Court determined this to be a gift in an Opinion and Order dated September 3, 2010 (attached to this opinion as Appendix B).

6) Kevin Adell's unilateral disposal of Franklin Adell's personal property. The Trust provided that Franklin Adell's household furnishings and other tangible property were to be distributed to "Settlor's then living children, to be divided as they agree."

7) Kevin's filing of a petition for instruction regarding Julie's house. The Petition alleges that Kevin, as trustee of the Julie Lynn Adell Irrevocable Trust, filed a petition to evict Julie from the home owned by the Trust. She alleges the home was a gift from her father in 2002.

8) Kevin Adell's failure to collect Federal Estate Taxes from himself and Patricia Rodzik.

9) Kevin Adell's filing of a petition to revoke their shares.

THE FRANKLIN Z. ADELL TRUST

The Court heard ten days of testimony regarding the issue of revocation. In addition, the Court has heard seven days of testimony relative to whether the $6,667,018 payment by Franklin Adell to the U.S. Bankruptcy Court should be treated as a gift or a loan to Kevin Adell and five days of testimony and argument on the issue of whether to surcharge Kevin Adell. In total, this Court has heard twenty-two days of testimony regarding the Trust, since May 2010. There have also been other disputes regarding administration of the Trust heard on motion. At this time, the Court's file contains 1,233 documents and has thirty-four volumes related to the Trust case. There are two other civil matters assigned to the Probate Court arising out of the administration of this Trust.[1] There are additional cases in the Circuit Court. The Court takes judicial notice over the Probate files and evidence in these matters.

FACTUAL BACKGROUND

Franklin Z. Adell was a businessman residing in Bloomfield Hills, Michigan. He was married to Sharon Adell and had three children: Laurie Fischgrund, Julie Verona and Kevin Adell. Sharon Adell died on May 13, 2002. Franklin Adell died on August 13, 2006.

Franklin Adell and Sharon Adell had a traditional marriage. Sharon Adell did not work. Franklin and Sharon Adell expected their daughters to have traditional roles as wives and mothers. Laurie Fischgrund testified that Sharon Adell never worked or

[1] Case Nos.: 2010-330,572-CZ and 2010-331,808-CZ

wrote a check. Kevin Adell testified that Sharon Adell was the "glue" and driving force of the family. He also testified that Franklin and Sharon Adell were "a good team."

Laurie Fischgrund testified that Franklin and Sharon Adell valued education and set up a trust fund to pay for their children's college education. All three children attended college in Arizona.

In 1978, Franklin Adell decided to go into television broadcasting and he applied to the FCC for a television broadcast license. The process for obtaining a license is a lengthy one and Sharon assisted him in obtaining some of the required documentation. Franklin Adell received the license for WADL, channel 38, in 1988. At the same time, Kevin Adell graduated from Arizona State University and returned to Michigan to work with his father to build WADL. Franklin Adell and Sharon Adell used their home and life savings as collateral for the loan, and borrowed $3.3 million to build the television station. On May 29, 1989, the station went on the air. There was extensive testimony in prior hearings regarding Kevin Adell's efforts at building the television station and obtaining content and uplink services.

Kevin Adell worked under his father's direction. Franklin Adell determined Kevin Adell's pay and oversaw the business.

As the business expanded, Birmingham Properties was formed in 1994 with the purchase of a building located at 20733 West Ten Mile Road, in Southfield, Michigan. In 1999, the family business expanded again with the formation of STN.com, which provided satellite uplink and marketing services.

On February 14, 2000, Franklin Adell formed The Word Network. The Word is a non-profit corporation with 501(c)(3) status. STN.com and The Word operate out of the

property owned by Birmingham Properties. STN.com paid expenses and salaries for The Word under a Services and Facilities Agreement (SFA). Under the terms of the SFA, 95% of the revenues of The Word were paid to STN.com for salaries and expenses.

On May 1, 2002, just thirteen days before Sharon Adell died, Franklin and Sharon Adell executed the Julie Lynn Verona Irrevocable Trust. The trust was created by Franklin and Sharon Adell to convey the family home to Julie Verona. Kevin Adell was named the trustee. The Trust requires Julie Verona to pay the taxes, insurance and maintenance on the home. The Trust grants Julie Verona the right to ask the trustee to sell the home and use the proceeds for the purchase of another home.

On July 17, 2002, Franklin Adell executed the Franklin Z. Adell Trust. During his lifetime, Franklin Adell served as trustee. This trust agreement appointed Kevin Adell Trustee upon the death of Franklin Adell. After distributing the personal property of Frank Adell to his children, the Trust provided that the trust property would be divided into as many shares as children then living and pay to them the income from the trust at quarterly or more frequent intervals until the child's death or termination of the Trust. The Trustee was granted the discretion to distribute principal from the child's share. The beneficiaries were not permitted to withdraw their shares in the trust companies until the trustee disposes of the entire interest or until Kevin Adell discontinues as trustee.

Franklin Adell executed an amendment to the Trust on July 17, 2003.[2] In this amendment, Ralph Lameti was appointed successor trustee upon Franklin Adell's death or incapacity. If Ralph Lameti failed to qualify or discontinues as trustee, Ralph Lameti

was to nominate his successor. If he failed to nominate a successor, a successor was to be appointed by Franklin Adell's then living children, other than Kevin Adell.

The amendment also altered the distributions upon Franklin Adell's death such that equal shares were created for Kevin Adell and Julie Verona and Laurie Goldman (now Fischgrund). The trustee was granted discretion to distribute principal and interest to the beneficiaries until their death. The Trust was to continue until the death of Kevin Adell *and granted to him a power of appointment to distribute the remaining trust assets* at his death as he provides in his will.

On October 31, 2003, Franklin Adell amended and restated the Trust.[3] This version of the Trust appointed Ralph Lameti successor trustee upon the death of Franklin Adell, with the power to nominate his own successor. After the distribution of personal property, the remaining trust property was to be divided into equal shares as the Trustee had then living children or deceased children with descendants then living. The Trustee was granted discretion to pay each beneficiary as much Trust income and/or principal from the child's trust as the trustee deems appropriate. The Trust grants each child a power of appointment regarding their share of the trust assets.

The testimony and evidence presented clearly established Franklin Adell's intent regarding his estate plan. Franklin Adell was a self-made man who built a broadcasting enterprise with his son Kevin Adell. He was a family man with traditional values. He was generous with his children; giving them homes and providing for their education.

Like many parents, Franklin Adell had his disappointments with each of his children. Kevin Adell testified that Franklin was disappointed with his daughters' marital

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[2] Exhibit P2
[3] Exhibit P1

choices and he believed they spent too much money. Franklin Adell also had disappointments with Kevin Adell, related to the litigation against John Richards Homes, which culminated in his paying the sanctions judgment to bring Kevin back to Michigan and end the litigation that was beginning to threaten the family businesses. (See Appendix B).

Following his death, Franklin Adell intended for all of his three children to be provided for by the Trust companies throughout their lives. Thomas McFarland, the attorney who drafted the Trust for Franklin Adell, testified Franklin Adell also intended that Kevin Adell would run the trust companies as long as he was able to do so.

It is clear that the no contest language of the Trust was intended by Franklin Adell to discourage his children from litigating over his estate. The language of Article Five prohibits a broad range of actions, including contesting "any contracts or investment arrangements involving trust assets, executed before or after the Settlor's death." Sadly, Franklin Adell's intent to discourage litigation over his estate by and among his children has been frustrated. This Court has three cases pending related to the Trust. This matter has been pending since September 2008. Without judicial intervention, it is unlikely this litigation will end in the near future. To that extent, the no contest provision of the Trust has failed to achieve the purpose for which it was designed. This protracted litigation has been destructive to the relationships between Franklin Adell's children, contrary to Franklin Adell's intent.

INTERPRETATION OF THE NO CONTEST PROVISION

"In resolving a dispute concerning the meaning of a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor." *In re Kostin Estate*, 278 Mich

App 47, 53; 748 NW2d 583 (2008). "The intent of the settlor is to be carried out as nearly as possible." *Id.* The settlor's intent is determined based on the trust document itself, unless the language of the trust is ambiguous. *Id.* "If ambiguity exists, the court must look outside the document in order to carry out the settlor's intent, and may consider the circumstances surrounding the creation of the document and the general rules of construction." *Id.*

"The rules of construction applicable to wills also apply to the interpretation of trust documents." *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005). With regard to wills, a court may not construe a clearly written will in such a way as to rewrite it, and if possible, the court must give each word meaning. *Id.* An ambiguity in a will may be patent or latent; a latent ambiguity may be proven by facts extrinsic to the instrument. *In re McPeak*, 210 Mich App 410, 412; 534 NW2d 140 (1995). "A latent ambiguity exists where the language and its meaning are clear, but some extrinsic fact creates the possibility of more than one meaning." *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). "A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." *Id.* at 327-328.

The first issue the Court must address in enforcing the no contest provision is to determine whether there is any ambiguity in the Trust language. The language of the no contest provision of Article Five of the Trust is clear and unambiguous on its face. The language is broad enough to prohibit any challenge to any action of the trustee. In evaluating Article Five, it is necessary to place in context all of the Trust provisions. The Trust does not permit the trustee unlimited authority. Article Four, Section B,

requires the trustee to invest the trust property in accordance with the prudent investor rule. A plain reading of Article Five's prohibition of a challenge to "any contracts or investment arrangements involving trust assets, whether executed before or after Settlor's death or incapacity" prohibits any challenge to an investment by the trustee. These two provisions of the Trust conflict and without extrinsic evidence, it is not possible to determine which controls.

On its face the Article Five would abrogate the trustee's duties under the Michigan Trust Code. Under a plain reading of Article Five, a challenge to a contract or contract modification that violates the trustee's duty of loyalty to the interests of the trust beneficiaries would invalidate the challenging beneficiary's interest in the Trust. The Trust does not provide that the trustee's duties under Michigan Law are abrogated. To the contrary, the Trust explicitly states at Article Three, Section K that Michigan law governs the validity, interpretation and administration of this Agreement . . ." The provisions in Article Five conflict with other provisions of the Trust and this conflict constitutes a latent ambiguity in the Trust language.

In this case, all of the challenges asserted by Laurie Fischgrund and Julie Verona are challenges to Kevin Adell's actions as trustee. Specifically, they challenge alleged conduct which, if true, would constitute self-dealing and constitute a violation of his duty of loyalty. Having found that a latent ambiguity exists, the Court must resolve it by looking to extrinsic evidence of Franklin Adell's intent.

Kevin Adell asserts that the no contest provision of the Trust was intended to give him unfettered access to the Trust companies. At the time Franklin Adell executed the Trust, Kevin Adell was embroiled in the litigation with JRH. The litigation came to an

end when Franklin Adell paid the sanctions judgment of $6,667,018 to the U.S. Bankruptcy Court. Kevin Adell and Ralph Lameti testified that Franklin Adell modified his estate plan and named Ralph Lameti as trustee, because the litigation could have threatened the Trust if Kevin Adell was trustee.

When Franklin Adell died on August 13, 2006, Mr. Lameti declined to act as trustee and appointed Kevin Adell successor trustee. Kevin Adell accepted the appointment on August 14, 2006.

Kevin Adell testified that after the Bankruptcy Court litigation had concluded, his father intended to amend the Trust to appoint him successor trustee. He went on to testify that Franklin Adell's failure to amend the Trust was a mistake. However, the Trust was modified three times between July 17, 2002 and October 31, 2003. Franklin Adell modified his estate plan when he believed it was necessary. The fact that Franklin Adell did not modify the Trust after he paid the sanctions judgment to the U.S. Bankruptcy Court suggests that he left his estate plan in place because he trusted Ralph Lameti to carry out his wishes.

Kevin Adell asserts four grounds upon which his sisters have violated the no contest provision of the Trust.

(1) Kevin Adell claims Julie Verona and Laurie Fischgrund violated the no contest provision of the Trust by attacking and continuing to attack Kevin Adell's appointment as successor trustee; Kevin Adell's designation of Ralph Lameti as successor Trustee upon Kevin Adell's resignation and challenging Kevin Adell's appointment as personal representative of the estate of Franklin Z. Adell.

In his initial petition to revoke the shares of Laurie Fischgrund and Julie Verona to the Trust, Kevin Adell argued that they attacked his appointment as trustee. Laurie and Julie argue they are not attacking Kevin's appointment. Instead, they are attacking

his actions in his role as successor trustee. They argue that Kevin Adell breached his fiduciary duty by taking excessive officer compensation (over $10 million); they object to the companies' acquisition of luxury vehicles (boats, planes, cars), which Kevin Adell has converted to his own use; and conversion of the payment of the sanctions judgment from a loan to a gift. They argue they were enforcing, rather than contesting, the terms of the Trust. In response, Kevin Adell argues that as trustee, the no contest provision of the Trust agreement gives him an absolute right to manage the trust companies.

Laurie Fischgrund and Julie Verona allege that Kevin Adell mismanaged the Estate and depleted Trust assets. Their petition does not contest the appointment of Kevin Adell, but rather his actions as trustee. Kevin Adell was initially appointed for two years without objections. As trustee, Kevin Adell made distributions to Julie Verona and Laurie Fischgrund from September 2006 to October 2007 in the amount of $20,000.00 per month after taxes.

On June 27, 2008, Kevin Adell wrote a letter to Laurie Fischgrund responding to a request by Ms. Fischgrund for financial disclosures regarding the Trust.[4] In the letter, Kevin Adell stated that the Trust required a confidentiality agreement from Ms. Fischgrund before he would release any financial information to her. He also requested a $1,000,000.00 bond covering any unauthorized disclosure of the information.

When Kevin Adell stopped all distributions and failed to provide accountings and disclosures Julie Verona and Laurie Fischgrund filed the Petition for Supervision and to Remove or Suspend Trustee, Compel Disclosure of Financial and Administrative Information, Compel Full and Complete Accounting, Determine Title to Assets and for

[4] Exhibit P39.

an Ex Parte Temporary Restraining Order and Preliminary Injunction on September 26, 2008.

The Court must construe the trust instrument so that each word has meaning to the extent possible. *Detroit Bank & Trust Co. v. Grout*, 95 Mich App 253, 289 NW2d 898 (1980). The no contest provision must be read in conjunction with all other provisions of the Trust. All of the provisions have meaning and they are the substance of Franklin Adell's estate plan. It is not a violation of the no contest provision to challenge an action by the trustee that violates some other duty imposed on the trustee by the Trust or Michigan law. There is a duty to provide annual accounts and other disclosures and a duty to follow the prudent investor rule. Julie Verona and Laurie Fischgrund sought supervision of the Trust to enforce all of its provisions. This is not a violation of the no contest clause.

Kevin Adell also argues that Julie Verona and Laurie Fischgrund challenged his appointment of Ralph Lameti as successor trustee. On March 26, 2009, Judge Moore entered an order directing that the Trust be supervised. On August 31, 2009, Kevin Adell executed an appointment of successor trustee nominating Ralph Lameti successor trustee in the event he was unable to serve for any reason.[5] On September 1, 2009, Judge Moore entered an order suspending Kevin Adell as trustee. On September 10, 2009, Kevin Adell, through counsel, filed a Notice of Appointment of Successor Trustee, notifying the Court of his nomination of Ralph Lameti the day before his suspension. On September 22, 2009, Julie Verona and Laurie Fischgrund, through their respective counsel objected to the appointment. On October 15, 2009, Judge Moore set a hearing on the matter of the validity of the nomination of Ralph Lameti and

ordered that Ralph Lameti not act as successor trustee and giving the special fiduciary the powers of trustee.

The objections by Julie Verona and Laurie Fischgrund to Kevin Adell's nomination of Ralph Lameti do not constitute a violation of the no contest provision because the Trust was under court supervision at the time. The Court had the authority to appoint a successor Trustee. Julie Verona and Laurie Fischgrund's objections to Kevin Adell's nomination of the successor Trustee was a request to the Court to appoint someone other than Ralph Lameti. A court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. MCL 700.7201(1). The probate court also has authority to remove an unsuitable trustee. MCL 555.26. Any interested person may petition the Court to appoint a successor. MCL 555.27. Once the Court's jurisdiction was invoked, Julie Verona and Laurie Fischgrund were not challenging the appointment; they were requesting the Court to appoint a successor trustee. Accordingly, this is not a basis to revoke their shares in the Trust.

Kevin Adell also alleges that Julie Verona and Laurie Fischgrund challenged the his appointment as personal representative of Franklin Adell's estate. In his will dated July 17, 2002, Franklin Adell nominated Kevin Adell to serve as personal representative.[6] On October 20, 2009, Laurie Fischgrund filed a Petition for Probate, which nominated Lauren Underwood as personal representative.[7] Paragraph 12 of the petition indicates that Kevin Adell has a prior or equal right to appointment but that he "is unsuitable to be appointed Personal Representative and it is not in the Estate's best

[5] Exhibit P47.
[6] Exhibit PR3.

interest." This does not constitute a challenge to the appointment of Kevin Adell because Kevin Adell did not previously open an estate and had not previously sought appointment as personal representative. Thus, this is not a basis to revoke Laurie Fischgrund's share in the Trust.

(2) Kevin Adell asserts that Julie Verona and Laurie Fischgrund violated the no contest provision of the Trust by filing a petition to surcharge Kevin Adell for the $6,667,018 Franklin Adell paid toward the Bankruptcy Court sanction against Kevin Adell, arguing that it was a loan to be repaid to the Trust.

The surcharge petition was filed on September 30, 2009. After an evidentiary hearing, this Court found the payment of the sanctions judgment by Franklin Adell was a gift to Kevin Adell and not a loan. See Appendix B.

Kevin Adell argues that the surcharge petition constitutes an attempt to rescind, impair or challenge the gift by Franklin Adell in violation of the no contest clause. The no contest provision provides the shares of any beneficiary who "contests or attacks this instrument or any of its provisions or seeks to impair or invalidate any part or provision of Settlor's 'Estate Plan,'" which includes "any lifetime gifts or transmutations of property." The words "contest or attack" are defined in subparagraph k as "Any attempt to rescind, impair or challenge the validity of any lifetime gift made by Settlor."

The term "rescind" means "[t]o abrogate or cancel (a contract) unilaterally or by agreement."[8] The term "impair" means "to diminish the value of (property or a property right)."[9] The term "challenge" means "[t]o dispute or call into question."[10] The petition to surcharge Kevin Adell seeks repayment of the $6,667,018 paid by Franklin Adell toward

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[7] Exhibit PR4.
[8] Black's Law Dictionary (9th ed).
[9] Id.
[10] Id.

the sanctions judgment. This was not an attempt to rescind, impair or challenge the payment. The sole issue was whether Kevin Adell should reimburse the Trust for the payment. It did not seek to undo the transaction, diminish its value or call it into question.

Further, the characterization of the payment was never made clear by Franklin Adell. Kevin Adell classified the payment of the sanctions judgment as an asset of the estate on the initial Estate Tax Return.[11] In addition, Kevin Adell referred to the payment as "a loan from his father" in a filing in response to a motion to impose sanctions in the U.S. Bankruptcy Court for the Middle District of Florida on February 20, 2007.[12] After an extensive evidentiary hearing, the Court found the payment was a "gift" because there was insufficient evidence that there was an agreement to repay the funds.[13] The issue was highly contested and remains on appeal. The challenge to the sanction payment filed by Julie Verona and Laurie Fischgrund is not a violation of the no contest provision of the Trust.

(3) Kevin Adell asserts that Julie Verona and Laurie Fischgrund have violated the no contest provision by arguing that the "probable cause" standard contained in MCL 700.7113 applies in this case.

Throughout this proceeding Julie Verona and Laurie Fischgrund have argued that the Michigan Trust Code permits contests where probable cause exists. Under the new Michigan Trust Code, effective April 1, 2010, "[a] provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a

[11] Exhibit P9
[12] Exhibit P63
[13] The Court's Opinion and Order regarding the surcharge of Kevin Adell in the amount of $6,667,018 is attached as Appendix B and is incorporated herein by reference.

proceeding contesting the trust or another proceeding relating to the trust." MCL 700.7113.

This provision is not applicable to the petitions presently before the Court. MCL 700.8206(1)(a),(b) and (c) state that the Michigan Trust Code applies "to all trusts created before, on, or after [April 1, 2010]," "to all judicial proceedings concerning trusts commenced on or after [April 1, 2010]" and "to judicial proceedings concerning trusts commenced before that effective date unless the court finds that the application of a particular provision of the amendments and additions would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." MCL 700.8206 (2) states as follows:

> (2) The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded.

All of the petitions before the Court were filed before the effective date of the Michigan Trust Code and all of the actions occurred before the law became effective. The petitions were filed by the parties based on the existing state of the law at the time the petitions were filed. As a result, the so called "safe harbor" provision of the Michigan Trust Code contained in MCL 700.7113 is not applicable to these petitions.

The assertion of a defense to a petition to revoke shares is not a violation of the no contest provision. The no contest provision does not prohibit asserting defenses to a petition to revoke shares. Accordingly, Julie Verona and Laurie Fischgrund have not

violated the no contest provision by asserting a defense to the petition to revoke shares in the Trust under MCL 700.7113.

(4) Kevin Adell argues Julie Verona and Laurie Fischgrund have sought to impair or invalidate the Services and Facilities Agreement (SFA).

Kevin Adell testified Julie Verona and Laurie Fischgrund challenged the SFA by demanding dividends and asserting that STN.com could make a profit. Kevin Adell asserts that STN.com was not permitted to make any profit under the terms of the SFA. It was merely a pass-through entity to pay the expenses of The Word. Kevin Adell argues that the assertion that STN.com could make a profit violates the no contest clause because the SFA is a "contract . . . involving trust assets."

Julie Verona testified that Kevin Adell revised his interpretation of the Services and Facilities Contract when Franklin Adell died. She testified that STN.com had made a profit and paid dividends before Franklin Adell's death. Laurie Fischgrund testified that after Franklin Adell's death, Kevin Adell "came up with a scheme so STN wouldn't profit."

The Court ruled that STN.com was permitted to make a profit under the SFA in its Opinion and Order Regarding the Show Cause of Kevin Adell. The Court wrote:

> Mr. Adell argues that under the Services and Facilities agreement, STN.com could not make a profit. He argues that STN.com is a pass through entity and that had he not taken benefits or salary from STN.com, it would have stayed with The Word and not to the Trust. He concludes that the Trust could not have suffered a loss as a result of the payment of his expenses and salary by STN.com.
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> It was clearly established that STN.com was not treated this way prior to the litigation. The financial statements of STN.com for 2005, 2006, 2007 and 2008, reflect that STN.com paid dividends and had retained earnings in those years. In addition, the business valuation

> prepared by Stout Risus Ross, to assist in the preparation of the estate tax return for the Trust was based on the discounted cash flow method, which evaluates the company's earning and dividend paying capacity available to investors after considering reinvestment required for a company's future growth. That evaluation was done at the request of Kevin Adell. Thus, STN.com can issue dividends and produce profit.

Since the Court found that STN.com is permitted to make a profit, Julie Verona and Laurie Fischgrund did not violate the no contest provision of the Trust. Further, Julie Verona and Laurie Fischgrund did not attempt to impair or invalidate the SFA. To the contrary, they were seeking to enforce the contract.

Julie Verona and Laurie Fischgrund assert nine grounds upon which Kevin Adell has violated the no contest provision of the Trust.

(1) Julie Verona and Laurie Fischgrund allege Kevin Adell increased his own compensation to prevent the Trust companies from having any income, which deprives the Trust of income.

Kevin Adell's income from STN.com increased dramatically after Frank's death. In 2005, Kevin Adell's W-2 from STN reflected a salary of $980,846.75.[14] His W-2 reflected a salary of $4,461,193.02 in 2006.[15] In 2007, $8,327,718.25 was reported on Kevin Adell's W-2 from STN.com.[16] In 2008, $5,838,351.68 was reported on his W-2 from STN.com.[17] In 2008, per the October 1, 2008 order from Judge Moore, only a base salary was taken. He was not permitted to take a bonus. After 2006, STN paid everything it brought in as compensation and expenses. Between 2002 and 2006, STN had retained earnings and did not return profits to The Word.

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[14] Exhibit P30.
[15] Id.
[16] Id.
[17] Id.

Julie Verona and Laurie Fischgrund do not identify which portion of the no contest provision has been violated. They argue that the taking of excessive compensation by Kevin Adell violated the no contest provision by depriving the Trust of assets and income and that this constitutes an attempt to impair a gift. However, the no contest provision only identifies an "attempt to rescind, impair or challenge the validity of any *lifetime* gift made by settlor" (emphasis added) as a triggering event to revoke a beneficiary's shares. Kevin Adell's compensation increased after Franklin Adell's death. While the language of the no contest provision prohibits a broad range of actions, it does not specifically identify a diversion of trust income in salary and wages for employees, directors or officers of the Trust companies as a triggering event to revoke a beneficiary's share. Courts are required to read forfeiture provisions narrowly and the provisions are to be strictly construed and forfeiture avoided if possible. *Saier*, 366 Mich at 520. Unless the action is specifically identified as a triggering event, the Court will not invoke the no contest provision. Since the language of Article Five does not specifically identify the taking of excessive compensation as a condition that will result in the revocation of a beneficiary's share, the Court cannot revoke Kevin Adell's share in the Trust on this basis.

(2) Julie Verona and Laurie Fischgrund allege Kevin Adell violated the no contest provision of the Trust by acquiring numerous luxury vehicles and a garage.

Julie Verona and Laurie Fischgrund argue that Kevin Adell solely benefited from the acquisitions of numerous luxury vehicles and a garage at the expense of the Trust. A review of the financial statement of STN.com dated June 30, 2008 reflects that the company owned $3,503,601.00 in vehicles and a "Garage/Bus Depot" valued at

$610,890.00.[18] The financial statement of STN.com dated June 30, 2006 reflects that STN.com owned $57,008.00 in vehicles at that time.[19] It does not reflect a garage. Accordingly, the garage and $3,446,593.00 in vehicles were purchased between those dates. Julie Verona and Laurie Fischgrund argue that the purchase of these vehicles constitutes a deprivation of trust income and constitutes an attempt to impair a gift. Once again, the complained of action is not identified as a triggering event to revoke a beneficiary's share under the no contest provision and the Court cannot revoke shares on this basis.

(3) Julie Verona and Laurie Fischgrund allege Kevin Adell violated the no contest provision by causing STN.com to pay the mortgage on a condominium owned by him individually.

Kevin Adell and Franklin Adell owned a condominium in California as joint tenants with rights of survivorship. When Franklin Adell died, the condominium passed to Kevin Adell by operation of law. Julie Verona and Laurie Fischgrund allege that STN.com paid the mortgage and maintenance fees on the condominium. They allege this was a personal benefit to him, which deprived the Trust of income that would have been paid to the beneficiaries. Once again, Petitioners do not identify the portion of the no contest provision that addresses this as a triggering event to revoke shares and the Court cannot revoke Kevin Adell's share in the Trust on this basis.

(4) Julie Verona and Laurie Fischgrund allege Kevin Adell violated the no contest provision by causing STN.com to secure loans to pay for a yacht and a private plane for Kevin Adell's personal use and that he benefited at the expense of the Trust.

Julie Verona and Laurie Fischgrund argue that the payment of these expenses violated the no contest provision of the Trust because they benefited Kevin Adell at the

[18] Exhibit P25

expense of the remaining Trust beneficiaries. This does not fall within one of the prohibited actions to trigger a revocation of shares under the no contest provision.

(5) Julie Verona and Laurie Fischgrund allege that Kevin Adell violated the no contest provision of the Trust by re-classifying Franklin Adell's payment of the $6,667,018 sanctions judgment against Kevin Adell from a loan to a gift.

Julie Verona and Laurie Fischgrund alleged that the sanctions judgment was a loan based on the initial Form 706 Estate Tax Return and the bankruptcy court filing by Kevin Adell and the Bankruptcy Court Opinion regarding John Richards Homes motion for sanctions. They claim that shortly after the initial petition commencing this action in September 2008, Kevin filed amended returns characterizing the loan as a gift. They argue this deprived the Trust of the repayment of the loan.

As discussed earlier, this Court has ruled that the payment of the sanctions judgment by Franklin Adell was a gift and not a loan. Thus, Kevin Adell did not violate the no contest provision of the Trust by characterizing the transaction as a gift.

(6) Julie Verona and Laurie Fischgrund allege that Kevin Adell violated the no contest provision of the trust by unilaterally disposing of Franklin Adell's personal property.

The Trust provides at Article One, Section B(1), that Franklin Adell's household furnishings and other tangible property were to be distributed to "Settlor's then living children, to be divided as they agree." Kevin Adell testified he sold Franklin Adell's gun collection to raise funds to pay the Estate Tax. He stated he sold the guns at auction for $250,000. Kevin Adell and Laurie Fischgrund testified that he provided them a copy of the book prepared for the auction. Julie Verona and Laurie Fischgrund testified they were not consulted about the sale.

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[19] Exhibit P23.

Kevin Adell also testified he sold two Rolls Royce and two Bentley automobiles for $500,000.00. Kevin Adell testified he removed a Lalique table and sconces because they were purchased by the The Word and were not owned by Franklin Adell. Kevin Adell did not seek consent of Julie Verona and Laurie Fischgrund when he removed or sold these items. The Trust also states, "The trustee will sell any property Settlor's children do not desire, or which is not distributed for any reason, and will distribute the proceeds from the sale with the remaining trust property." The Court finds Kevin Adell had discretion to sell Trust property that was not distributed and to use the proceeds to pay Trust expenses and this action did not violate the no contest clause.

(7) Julie Verona and Laurie Fischgrund allege that Kevin Adell violated the no contest provision of the Trust by filing a petition for instruction relative to the Julie Lynn Adell Verona Irrevocable Trust.

The Julie Lynn Adell Verona Irrevocable Trust was executed May 1, 2002 by Franklin and Sharon Adell.[20] The Trust was created by Franklin and Sharon Adell to give the family home to Julie Verona. Kevin Adell was named the trustee. The Trust required Julie Verona to pay the taxes, insurance and maintenance on the home. Julie had the right to ask the trustee to sell the home and use the proceeds for the purchase of another home.

On October 31, 2008, Kevin Adell filed a petition for instruction regarding the Trust seeking Court supervision. Kevin Adell filed a petition for instructions because he was unsure if Julie had paid the expenses. In the petition, Kevin Adell suggested that Julie Verona pay rent, purchase the home at Fair Market Value or evict her.

The terms of the Trust are clear and Julie Verona is required to pay all of the expenses for the property. It is not a violation of the no contest provision of the Franklin

Z. Adell Trust to seek supervision of the Julie Lynn Adell Verona Irrevocable Trust if the trustee believes the beneficiary fails to fulfill an obligation under the Trust. Thus, the Court does not find that Kevin Adell violated the no contest provision in this regard.

(8) Julie Verona and Laurie Fischgrund allege Kevin Adell violated the no contest provision of the Trust by failing to collect Federal Estate Taxes from himself and Patricia Rodzik.

Kevin Adell testified that Patricia Rodzik was Franklin Adell's fiancée. She received the home she jointly owned with Franklin Adell in West Palm Beach, Florida, by operation of law. Franklin Adell's will states "any estate taxes attributable to property not transferred under this Will will be apportioned to and paid by the recipient of that property." (Will at Art I(B)).[21] Likewise, the Trust states, "any estate taxes attributable to property not transferred under this Agreement will be apportioned to and paid by the recipient of that property." Kevin Adell testified that as trustee he negotiated to have Patricia Rodzik pay the mortgage for which the Trust would have been responsible and in exchange the Trust would pay the Estate Tax.

Kevin Adell received a condominium in California by virtue of the fact that he held the property jointly with Franklin Adell as a joint tenant with rights of survivorship, along with the contents of the property. At the time of death, the condominium was valued at $837,790.00 and the personal property $100,000.00. Kevin Adell also received property on Martell Drive in Bloomfield Hills, Michigan. He received this property by virtue of the Orchard Lake Property Trust dated June 6, 2005. There was no evidence that he paid the portion of the estate tax attributable to this property.

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[20] Exhibit P40.
[21] Exhibit PR 3.

The failure to collect the Estate Tax does not constitute a "contest" or "attack" on the Estate Plan as defined in the no contest provision. The language of the no contest provision is very specific as to what actions constitute a "contest" or "attack." Article Five does not define these terms as a failure to pay or collect estate taxes.

(9) Julie Verona and Laurie Fischgrund allege that Kevin Adell violated the no contest provision by filing a petition to revoke their shares.

Under the interpretation set forth by Julie Verona and Laurie Fischgrund, any petition to enforce the terms of the Trust by invoking the no contest clause would effectively destroy the Trust. The Court finds that Kevin Adell did not violate the no contest provision of the Trust by filing a petition to revoke the shares of Julie Verona and Laurie Fischgrund.

RESOLUTION

This Trust has been in litigation since September 2008. As discussed earlier, Franklin Adell's intent in inserting the no contest clause was to avoid this type of protracted litigation.

Judge Moore ordered the Trust supervised in an order dated March 26, 2009. The Probate Court has exclusive jurisdiction to "[d]etermine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust." MCL 700.1302(b)(v). The Court is authorized to intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. MCL 700.7201(1). Michigan's probate courts have equitable jurisdiction over proceedings involving the administration, distribution, modification, reformation, or termination of a trust. MCL 700.1302(b). Exigent circumstances, unforeseen by the settlor, can provide a basis for a court to exercise its equitable powers to modify a trust.

Young v Young, 255 Mich 173, 179-180; 237 NW 535 (1931). A probate court exercising its equitable powers "may act in opposition to the provisions of a trust, and it may do whatever is necessary, not only for the preservation of the trust property, but also, whatever is necessary for the protection of the rights of the beneficiaries and the promotion of their interests." *Evans v Grossi*, 324 Mich 297, 305; 37 NW2d 111 (1949).

Franklin Adell intended that Kevin Adell would run the Trust companies after his death. The Trust provides that each child take one-third share of the estate. The beneficiaries do not take based upon their contribution to the Trust companies. Rather, they take based upon their status as the children of Sharon and Franklin Adell. Franklin and Sharon Adell wanted their children to equally share in the fruits of their labors. Franklin Adell was a sophisticated businessman. He had access to and consulted with excellent legal and financial counsel. Franklin Adell could have provided that his son, who helped to build and run the corporations, would be the sole beneficiary. Instead, he provided that all of his children take equally. He was not incompetent or unduly influenced. His intent is very clear. The Court will order that Kevin Adell pay Julie Verona and Laurie Fischgrund each the sum of $20,000.00 per month after taxes, retroactively to October 1, 2008, until further order of the Court as their share of the proceeds of the Franklin Z. Adell Trust dated July 17, 2002 as amended and restated.

IT IS SO ORDERED.

DATED: 10-14-11

HONORABLE LINDA S. HALLMARK

APPENDIX A

ARTICLE FIVE

Contesting Settlor's Estate Plan

If any beneficiary under this agreement in any manner, directly or indirectly (singly or in conjunction with other persons), contests or attacks this instrument or any of its provisions or seeks to impair or invalidate any part or provision of Settlor's "Estate Plan," any share or interest given to that contesting beneficiary under this agreement as if that contesting beneficiary had predeceased the Settlor without leaving descendants surviving.

For these purposes, Settlor's Estate Plan includes: (i) Settlor's Last Will and Testament, *including all Codicils*; *(ii) this Trust Agreement, as amended and/or* restated; (iii) any lifetime gifts or transmutations of property; (iv) any contracts or investment arrangements involving trust assets, whether executed before or after Settlor's death or incapacity; and (v) any designation of beneficiary executed by Settlor with respect to any and all testamentary payments or distributions of property under any life insurance policies, tax-deferred annuities, employee benefit plans, IRAs or any other contractual arrangements.

For these purposes, the words "contest" and "attack" include, but are not limited to any claim asserted against any document within Settlor's Estate Plan, or any assets or entity encompassed within Settlor's Estate Plan, based on any of the following:

a. Lack of capacity;
b. Undue influence;
c. Any "quantum meruit" theory;
d. Mistake;
e. Duress, menace or fraud;
f. A constructive trust theory;
g. An alleged oral agreement (or an alleged written agreement which is to be proved by parol evidence) claiming that Settlor agreed to give or devise anything to such person, whether or not such alleged agreement is also alleged to be made in consideration for the provision of personal or other services to Settlor;
h. The claimed ownership of an interest in any property alleged by the personal representatives or the Trustees to belong to Settlor's estate or this trust which claim is ultimately unsuccessful;
i. The prosecution of any creditor's claim which has been disallowed by the personal representatives of Settlor's estate;
j. Any challenge to the appointment of a person named or designated as a personal representative or a Trustee;

k. Any attempt to rescind, impair or challenge the validity of any lifetime gift made by Settlor; or

l. Any challenge to the validity of any irrevocable trust established by Settlor during his lifetime.

The Trustee is expressly authorized to vigorously defend, at the expense of the trust, any contest or attack against Settlor's Estate Plan. Settlor cautions the Trustee against settling any such action and directs that, prior to settlement of any such action short of a trial court judgment or jury verdict, the Trustee seek approval of any such settlement from the appropriate Court. In ruling on any such petition, Settlor requests the Court to take into account Settlor's firm belief that no person contesting or attacking his Estate Plan should take or receive any benefit from Settlor's estate and/or trust under any theory and, therefore, no settlement should be approved by the Court unless it is proved by clear and convincing evidence that such settlement is in the best interest of Settlor's trust, estate and Estate Plan.

If any provision of this Article FIVE is void or ineffective, all other provisions shall nevertheless remain in full force and effect.

APPENDIX B

STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF OAKLAND

IN THE MATTER OF:

FRANKLIN Z. ADELL TRUST,
DATED JULY 17, 2002.

Case No: 2008-319178-TV
HON. LINDA S. HALLMARK

Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by mailing it to their addresses as disclosed by the pleadings of record with prepaid postage on the 3rd day of SEPTEMBER 2010.

Signed: Ryan J. Deel

OPINION AND ORDER

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan, on

SEP 0 3 2010

IT IS ORDERED that the portion of Petitioner's Petition to Surcharge Trustee Kevin Adell in the amount of $6,667,018 is DENIED.

FINDINGS

1) The payment of the sanctions judgment by Franklin Adell on April 3, 2006, was a gift to Kevin Adell and not a loan.

2) The payment of the sanctions judgment was an intra-family transfer and the presumption of a gift is applicable.

FILED Sept 3 2010
Film
Deputy Register of Probate

3) There was not a fiduciary relationship between Franklin Adell and Kevin Adell on April 3, 2006.

4) Even if a fiduciary relationship had existed, Kevin Adell did not exercise undue influence in order to obtain payment of the sanctions judgment.

5) There was never an express or implied promise to repay the sanctions judgment.

PROCEDURAL HISTORY

On September 30, 2009, Petitioners Laurie Fischgrund and Julie Verona, filed a Petition to Surcharge Trustee. The petition sought to surcharge Kevin Adell $25,000,000.00 for his actions as trustee. In part, the Petition alleges:

> "In 2006, Frank Adell made a payment of approximately $6,400,000.00 constituting a sanctions judgment against Kevin Adell related to Kevin's efforts to force John Richards *Home Building Co., LLC, into involuntary bankruptcy*. . . . Originally, in 2007, when there was no litigation pending, the payment of $6,400,000.00 for Kevin's Bankruptcy judgment was listed as an *asset* of Frank Adell's estate. Only in 2008, after this litigation commenced, did Kevin seek to have this asset re-characterized as a "gift" to his own benefit."

The issue before the Court is whether the $6,667,018 payment by Franklin Adell to the U.S. Bankruptcy Court should be treated as a gift or a loan to Kevin Adell. On July 7, 2010, the Court denied the cross-motions for summary disposition by Kevin Adell and Petitioners, ruling there were issues of fact for trial. The Court held an evidentiary hearing on July 27, 2010; July 29, 2010; July 30, 2010; August 2, 2010; August 3, 2010; August 5, 2010 and August 11, 2010.

PETITIONERS' WITNESSES: Lorraine New, Kevin Adell and Ralph Lameti.

RESPONDENT'S WITNESSES: Laurie Fischgrund, Julie Verona, Ralph Lameti, Roberta Colton, Margurite Lentz and Richard Mazzari.

ISSUE

Whether Kevin Adell should be surcharged $6,667,018.00, the amount paid by Franklin Z. Adell toward his sanctions judgment in the U.S. Bankruptcy Court, or whether the payment was a gift?

BURDEN OF PROOF

The burden of establishing a right to surcharge a fiduciary is upon those who seek to have him so charged. *In re Baldwin's Estate*, 311 Mich. 288, 311; 18 N.W.2d 827 (1945). The standard of proof to establish ownership of property by *inter vivos* gift is by preponderance of the evidence. *McKinney v. Kalamazoo-City Sav. Bank*, 244 Mich. 246; 221 N.W. 156 (1928).

BACKGROUND

A. THE ADELL FAMILY

Franklin Z. Adell was a businessman residing in Bloomfield Hills, Michigan. He was married to Sharon Adell and had three children: Laurie Fischgrund, Julie Verona and Kevin Adell.

Laurie Fischgrund and Julie Verona testified the family was very close. Sharon Adell was a stay-at-home mother. Franklin Adell and Sharon Adell had a traditional marriage and wanted their daughters to have traditional roles as wives and mothers. Franklin Adell and Kevin Adell had a close relationship and bonded over a mutual appreciation for exotic automobiles. It was undisputed that Franklin Adell and Kevin

Adell not only shared a close father-son relationship, they were also business partners and best friends.

Early in his career, Franklin Adell worked with his two brothers. The Adell Brothers invented a door guard, which they manufactured and sold to the automotive industry.

Kevin Adell testified that in 1978, Franklin Adell applied to the FCC for a television broadcast license. He received the license for WADL, channel 38, in 1988. Kevin Adell graduated from Arizona State University in 1988. He wanted to stay in Arizona, but his father enticed him to return to Michigan to work with him to build WADL. Franklin Adell and Sharon Adell used their home and life savings as collateral for the loan, and borrowed $3.3 million to build the station. On May 29, 1989, the station went on the air.

Kevin Adell testified that he built the station, originally working out of a trailer. His father was employed for Adell Brothers during the day until 4:30 p.m. Franklin Adell came after work to oversee Kevin Adell's efforts in building WADL.

Kevin Adell testified the station became profitable in 1991, when home shopping was put on the air. In 1992, Franklin Adell stopped working with his brothers and he and Kevin Adell worked as partners. In approximately 1991 or 1992, Kevin Adell began taking a salary and Franklin Adell determined the amount of his pay. Kevin Adell testified business picked up in 1992 when air time was sold to religious pastors.

In 1994, Kevin Adell and Franklin Adell formed Birmingham Properties, which owns a building located at 20733 West Ten Mile Road, in Southfield. The building was purchased for $750,000.00 using a line of credit for $1,000,000.00. Kevin Adell and

Franklin Adell formed STN.com in 1999. STN.com provides uplink and marketing services.

Kevin Adell testified he formed The Word Network on February 14, 2000. The Word is a non-profit corporation with 501(c)(3) status. STN.com and The Word operate out of the property owned by Birmingham Properties. Kevin Adell testified that STN.com, a for-profit company, paid expenses and salaries for The Word under a Services and Facilities Agreement.

On May 13, 2002, Sharon Adell died of breast cancer. On July 17, 2002, Franklin Z. Adell executed the Franklin Z. Adell Trust (Trust). During his lifetime, Franklin Adell served as trustee. On October 31, 2003, Franklin Adell amended and restated the Trust.

The Trust, as amended and restated, nominated Ralph Lameti as successor Trustee upon Franklin Adell's death. The Trust further provides:

> "If RALPH LAMETI predeceases Settlor, fails to qualify or for any reason discontinues to serve as Trustee, the successor nominated in writing by RALPH LAMETI will serve as successor trustee. Any successor Trustee may thereafter nominate in writing his or her own successor."[1]

The Trust also provided that Franklin Adell's children were to divide his personal property amongst them. The residue was to be divided into three equal shares between Laurie Fischgrund, Julie Verona and Kevin Adell. The shares were to be held in trust and distributed at the sole discretion of the Trustee.[2]

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[1] Petitioner's Exhibit 1, The Franklin Z. Adell Trust Under Agreement Dated July 17, 2002 as Amended and Restated, Article II., B.
[2] Petitioner's Exhibit 1, Article I., B.

B. THE JOHN RICHARDS HOME BUILDING CO., LLC, LITIGATION

On December 28, 2001, Kevin Adell contracted with John Richards Home Building Co., LLC, (JRH) to build a home. On June 6, 2002, Kevin Adell initiated a lawsuit against JRH after a dispute arose. Kevin Adell testified that on advice of counsel, he filed an involuntary bankruptcy petition against JRH in the U.S. Bankruptcy Court for the Eastern District of Michigan on June 24, 2002. The Bankruptcy Court dismissed the petition on July 15, 2002. In dismissing the petition, the Bankruptcy Court reserved the issue of sanctions against Kevin Adell.

On April 25, 2003, the Bankruptcy Court entered a sanctions judgment against Kevin Adell, awarding JRH $ 6,413,230 in punitive damages and attorney fees, pursuant to 11 U.S.C.S. § 303(i), as sanctions for commencing involuntary bankruptcy proceedings in bad faith.[3] He unsuccessfully appealed this order to the U.S. District Court for the Eastern District of Michigan, the Sixth Circuit U.S. Court of Appeals and the U.S. Supreme Court, which denied certiorari on October 2, 2006.[4]

In 2003, Kevin Adell moved to Florida to take advantage of Florida's generous homestead exemption and avoid the Bankruptcy Court Judgment. On September 17, 2003, the Michigan Bankruptcy Court issued an order that Kevin Adell sell his home in Naples, Florida, to satisfy the judgment within 60 days.

To protect his Florida home, Kevin Adell filed a petition for relief in the U.S. Bankruptcy Court for the Middle District of Florida on November 14, 2003. The Florida Bankruptcy was ultimately dismissed on February 14, 2006.

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[3] Petitioner's Exhibit 7.

[4] *Adell v. John Richards Homes Bldg. Co., L.L.C.*, 127 S.Ct. 85 (Mem), No. 01-1532 (2006).

On April 3, 2006, Franklin Z. Adell paid $6,667,018 to the U.S. Bankruptcy Court in Michigan to satisfy the sanctions judgment. JRH had been targeting the family businesses to collect on the judgment by filing garnishments to reach any funds owed to or held for Kevin Adell. Franklin Adell wanted Kevin Adell back in Michigan to run the family businesses. He also wanted to end the protracted litigation, which was beginning to threaten the family businesses.

C. THE TRUST CASE

Franklin Adell died on August 13, 2006. Pursuant to Article II. B. of the Franklin Z. Adell Trust, Ralph Lameti was nominated as successor Trustee upon Franklin Adell's death. Under Article II (B) of the Trust:

> "If RALPH LAMETI predeceases Settlor, fails to qualify or for any reason discontinues to serve as Trustee, the successor nominated in writing by RALPH LAMETI will serve as successor trustee. Any successor Trustee may thereafter nominate in writing his or her own successor."

The day after Franklin Adell's death, on August 14, 2006, Mr. Lameti appointed Kevin Adell successor trustee and Kevin Adell accepted the appointment the same day.

On April 24, 2007, Kevin Adell, as successor trustee, filed an Estate Tax Return on behalf of the Trust. Schedule F on that return (other miscellaneous property of the decedent's estate) lists the $6,667,018 as an "asset of the estate."

On September 26, 2008, Laurie Fischgrund and Julie Verona filed a Petition for Supervision and to Remove or Suspend Trustee, Compel Disclosure of Financial and Administrative Information, Compel Full and Complete Accounting, Determine Title to

Assets and for an Ex Parte Temporary Restraining Order and Preliminary Injunction. Laurie Fischgrund and Julie Verona allege that Kevin Adell has mismanaged the Estate and depleted Trust assets.

On September 30, 2009, Laurie Fischgrund and Julie Verona filed a petition to surcharge Kevin Adell for the $6,667,018, arguing that it was a loan to be repaid to the Trust. First, they argue Kevin Adell is precluded from calling the payment a gift under the doctrine of judicial estoppel because he filed a pleading in response to a motion to impose sanctions in the U.S. Bankruptcy Court for the Middle District of Florida on February 20, 2007, in which he characterizes the $6,667,018 as "a loan from his father." In an opinion dated March 28, 2007, the U.S. Bankruptcy Court wrote:

> "Adell has now paid the Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court. The funds were borrowed from his father, through his father's companies, and paid into the registry of the Court on April 3, 2006."

Petitioners allege that under the doctrine of judicial estoppel, the fact that Kevin Adell successfully asserted that the funds were a loan from his father to the U.S. Bankruptcy Court, precludes him from asserting that it is a gift in the Trust case.

Kevin Adell argues the doctrine of judicial estoppel does not apply. He contends the Florida Bankruptcy Court relied on representations of counsel that were without basis and no finding was made that the funds were a loan. Further, the statement in the Bankruptcy Court opinion is simply dicta, and not material to the determination that the funds had been paid and no further sanction should be imposed.

Secondly, Laurie Fischgrund and Julie Verona argue that Kevin Adell is bound to his statements on the Estate Tax return listing $6,667,018 as an Estate asset. Kevin

Adell responds that the Estate Tax Returns do not support the assertion that the payment was a loan. He argues the payment is listed in Schedule F (miscellaneous property) because the payment was made during the year of Franklin Adell's death. He goes on to argue that a loan would be listed under Schedule C as a note.

Kevin Adell argues that intra-family transfers are presumed gifts. Petitioners respond that Kevin Adell was in a fiduciary relationship with Franklin Adell and there is a presumption of undue influence, which places the burden of proof on the donee. *Grondziak v. Grondziak*, 12 Mich App 61, 162 NW2d 354 (1968). They argue that Kevin Adell was in a fiduciary relationship with Franklin Adell because Kevin Adell was Franklin Adell's "best friend" and trusted advisor, particularly regarding business matters.

I. JUDICIAL ESTOPPEL

On February 14, 2006, Kevin Adell's bankruptcy petition was dismissed in the Florida Bankruptcy Court. Franklin Adell paid the bankruptcy sanctions judgment in the Michigan Bankruptcy Court on April 3, 2006. Following this, JRH filed an Amended Motion to Impose Sanctions in the Florida Bankruptcy Court.

Kevin Adell, through his attorneys, filed a response to JRH's motion. Regarding the payment to the Michigan Bankruptcy Court, the response states:

> Adell has now paid the Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court. The funds were borrowed from his father, through his father's companies, and paid into the registry of the Court on April 3, 2006.[5]

[5] Petitioners' Exhibit 8 at paragraph 21 on page 8.

Roberta Colton, Kevin Adell's Florida Bankruptcy attorney authored the response. She testified that the response was not signed by Kevin Adell. Ms. Colton testified the information that the funds were "borrowed" came from pleadings in the Michigan Bankruptcy Court. She also testified that she had no discussion with Franklin Adell regarding the nature of the payment of the sanctions judgment. She testified there was a hearing on the motion in the Florida Bankruptcy Court, but no testimony or evidence was presented. Ms. Colton testified the opinion was based on the written record, including Kevin Adell's response to sanctions motions.

The Florida Bankruptcy Court denied JRH's Motion on March 28, 2007. JRH filed a Motion for Reconsideration or Rehearing on Order Denying Amended Motion to Impose Sanctions. On March 28, 2007, the Florida Bankruptcy Court issued an opinion denying JRH's motion for reconsideration. The Court wrote:

> ... Adell borrowed the funds from his father, through his father's company and on April 3, 2006, Adell paid the Sanctions Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court.[6]

Petitioners argue that because of Kevin Adell's response to the Amended Motion for Sanctions and the Florida Bankruptcy Court's opinion, the doctrine of judicial estoppel applies. In *Paschke v. Retool Industries*, 445 Mich. 502, 519 NW2d 441 (1994), the Michigan Supreme Court held:

> In the context of the administrative proceedings at issue, we adopt the "prior success" model of judicial estoppel:
>
> Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. [Lichon v. American Univ Ins Co, 435 Mich. 408, 416; 459 NW2d 288 (1990), citing Edwards

[6] Petitioner's Exhibit 7.

v. Aetna Life Ins Co, 690 F.2d 595, 598 (CA 6, 1982). (Emphasis omitted).]

> Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. *Further, in order for the doctrine of judicial estoppel to apply,* the claims must be wholly inconsistent.
>
> *Id* at 509-510.

The rationale for the judicial estoppel doctrine was explained in *Edwards v. Aetna Life Ins Co*, 690 F2d 595, 599 (6th Cir. 1982):

> The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. See *Allen v. Zurich Ins. Co.*, [667 F.2d 1162, 1167 (4th Cir. 1982)]; *Konstantinidis v. Chen*, [200 U.S. App. D.C. 69, 626 F.2d 933, 939 (1980)] . . . Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled. See *Konstantinidis v. Chen*, 626 F.2d at 938.
>
> In light of the policies underpinning judicial estoppel, the rule can not be applied in a subsequent proceeding unless a party has successfully asserted an inconsistent position in a prior proceeding. *City of Kingsport v. Steel & Roof Structures, Inc.*, [500 F.2d 617, 620 (6th Cir. 1974)]. . . . Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or the second court was misled is not present. *Kingsport*, 500 F.2d at 620; *Konstantinidis v. Chen*, 626 F.2d at 939.

Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-599 (6th Cir. Mich. 1982).

In his dissent in *Paschke,* Justice Griffin noted that the use of the doctrine of judicial estoppel is disfavored. He wrote, "The doctrine of judicial estoppel is to be used with caution." *Paschke v. Retool Industries*, 445 Mich. 502 at 523. It is noteworthy that the doctrine of judicial estoppel has never been applied in a Michigan case.

In analyzing whether the doctrine of judicial estoppel applies in this case, the Court must evaluate whether Kevin Adell successfully asserted that Franklin Adell's payment of the Michigan Bankruptcy Court sanctions judgment was a loan in the Florida Bankruptcy Court and whether that position is inconsistent with his position in this case that the payment was a gift. The Florida Bankruptcy Court's holding regarding sanctions states:

> It should be noted that the imposition of sanctions is a matter of discretion, and this Court had the power and authority to deny the Motion in order to permit Adell's attempt to resolve this problem within the confines of Chapter 11. The fact that Adell failed to obtain confirmation and his case was ultimately dismissed is of no consequence in considering the JRH's Motion to Impose Sanctions. Adell rightfully relied on this Court's approval to pursue all available means to save his homestead. The post-filing litigation for which JRH now seeks sanctions was primarily initiated by JRH, who relentlessly pursued its claim and objected to the Debtor's every attempt to achieve rehabilitation through confirmation of his Chapter 11 Plans.
>
> This Court is satisfied that Adell attempted to pursue a legitimate goal within the utmost of his ability and, therefore, to impose a sanction would be a double punishment in addition to the $ 2 million judgment imposed by the Michigan Bankruptcy Court. In addition, considering the totality of the circumstances, this Court is satisfied that the Order entered by this

> Court was on the merits and, therefore, any further sanctions would be improper.
>
> *In re Adell*, 371 B.R. 541, 545-546 (Bankr. M.D. Fla. 2007).

To the extent that the payment of the sanctions judgment in the Michigan Bankruptcy Court had any bearing on the Florida Bankruptcy Court's ruling on JRH's motion for sanctions, it is clear from the opinion that the court focused on the fact that the judgment was paid and not whether the payment constituted a loan or a gift. There was no evidentiary hearing or finding of fact on the issue of the gift versus loan. There was no evidence presented that there was even a question of fact as to whether the payment of the sanctions judgment constituted a gift or a loan in the Florida Bankruptcy Court. Based on the opinion, the Florida Bankruptcy Court simply accepted the statement contained in Mr. Adell's response to JRH's Amended Motion for Sanctions. The case did not turn on whether the payment was a gift or a loan, but rather that the sanctions judgment was paid and the Florida Bankruptcy Court's desire to bring the "turbulent history of litigation between these parties" to a close. Because the gift versus loan issue was not ruled on by the Court, it cannot be said that Kevin Adell was successful in his assertion that the payment of the sanctions judgment was a loan. The Bankruptcy Court's statements regarding the "loan" from Mr. Adell's father was dicta.

It is true that Kevin Adell has taken inconsistent positions. In the bankruptcy case, his attorneys asserted that the sanctions payment was a loan from his father. Likely, they wanted to portray Kevin Adell as not having assets or easy access to assets. Nonetheless, that assertion was not made directly by Kevin Adell. It was made

in the course of lengthy, contentious litigation and was not essential to the Court's findings.

II. THE ESTATE TAX RETURNS

On April 24, 2007, Kevin Adell, as successor trustee, and Ralph Lametti, as the preparer, executed an IRS Form 706, United States Estate (and Generation-Skipping Transfer Tax Return) on behalf of the Trust. On Schedule F (Other Miscellaneous Property Not Reportable Under Any Other Schedule) of that return, the following was listed:

> ADELL JUDGEMENT IN THE AMOUNT OF 6,667,018 WAS A LIABLITY AGAINST THE DECEDENT'S SON KEVIN ADELL THAT WAS PAID BY THE DECEDENT AND RECORDED AS AN ASSET SEE JUDGEMENT [sic] SUMMARY AND COPY OF OFFICIAL CHECK[7]

On November 14, 2008, Kevin Adell and Ralph Lameti filed an Amended Form 706 and a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return.[8] The Amended Form 706 removed the $6,667,018 as a miscellaneous asset of the Estate. The Form 709, listed the $6,667,018 as a gift to Kevin Adell on Schedule A. Both the Amended Form 706 and the Form 709 contain the following statement:

> The estate tax return (form 706) included the legal judgment in the gross estate under the assumption the gift could be reported in the estate tax return given that the decedent's death and the gift both happened in 2006. It was latter [sic] learned upon legal advice that the gift should have been reported on a separate gift tax return and added back to the estate tax return as prior taxable gifts and not part of the gross estate.

Petitioners argue that the initial Form 706, executed April 24, 2007, listing the $6,667,018 payment of the sanctions judgment as an asset of the Estate evidenced

[7] Petitioners' Exhibit 2.

Kevin Adell's belief that it was a loan. They further argue the Amended Form 706 and the Form 709 dated November 14, 2008, was an attempt to re-characterize the loan as a gift.

Ralph Lameti testified the $6,667,018 which was used to pay the sanctions judgment against Kevin Adell was listed under Schedule F as an asset of the Estate because it was part of the taxable estate. This is distinguished from a financial asset, which would be owned by the decedent at the time of death. According to Lameti, the gift tax had not been paid on the $6,667,018 at the time of Franklin Adell's death on August 13, 2006, because it was not due until April 15, 2007. In order to pay the tax, Lameti believed he had to include it as an asset of the Estate on the Form 706. Because it did not fit into any other category, he listed it on Schedule F, which is "Other Miscellaneous Property Not Reportable Under Any Other Schedule." Lameti testified the Estate Tax and the Gift Tax are the same amount, so listing the payment as an asset of the Estate would pay the gift tax obligation that had not been paid.

Lameti testified that he believed the judgment payment must be included in the Form 706 due to the 6166 consideration. A 6166 election allows an estate to pay the Estate Tax over fifteen years rather than in a lump sum. This election must be approved by the IRS. Per Lameti, all gifts of closely held stock must be added back to the Estate, for the purpose of the 6166 election. He testified that gifts within three years of death are added back to the gross estate.

Mr. Lameti testified the Amended Form 706 and Form 709 were filed November 14, 2008. He stated that he filed the returns even though he did not feel it was necessary. He testified that tax counsel for the Trust recommended the amendment "to

[8] Petitioners' Exhibits 4 and 6.

make a better presentation." The Amended Form 706 removed the payment of the judgment from Schedule F. A Form 709 gift tax return was filed identifying the payment as a taxable gift. According to Lameti, the amended returns did not change the amount of the tax obligation. He testified that he does not know whether the IRS accepted the return.

Two experts testified regarding the returns. Lorraine New testified for the Petitioners. Marguerite Lentz testified for Respondent.

Lorraine New is an estate and gift tax attorney, licensed in Michigan. She was previously employed at the IRS in the Estate and Gift Tax Division for 19 years since 1988. At the IRS, she examined returns for legal and valuation issues. She testified she has written many articles on gifts and estate tax and has given presentations on the subject.

Ms. New testified that the IRS Form 706, Estate Tax Return, lists assets at the time of death and their values. Gifts must be added in to assets owned at death. Assets, such as life insurance, are also included, if they come into being at the time of death. The funeral expenses and debts are deducted from the gross estate to get to the taxable estate. There is a $1 million lifetime exemption, under which no gift tax would be due.

Ms. New testified that Schedule F of the Form 706 is for listing items owned by or due to the decedent. She stated that the instructions for Schedule F states that all items not reported elsewhere including debts and mortgages not evidenced by writing are to be included on Schedule F.[9] She states that the payment of the sanctions judgment identified on the Schedule F is a liability against the son paid by the decedent

and is owed to the Estate. She testified that because the payment of the judgment was listed on the Form 706, it must be repaid at the time of the Estate distribution. In other words, it would become part of his share as a beneficiary and is treated like an advance on his inheritance.

Ms. New testified that the only change between the initial Form 706 and the Amended Form 706 is the deduction of the payment of the sanctions judgment. She testified this is unusual because a Form 706 is usually amended to add assets.

Ms. New testified that a gift tax return (Form 709) is due on April 15th of the year following the gift or nine months following the death of the donor. The tax is due at the time of the return. This tax would be due before the Federal estate tax return. A taxpayer can file an extension to file a gift tax return, but there is interest and penalties for late payment of the tax.

Ms. New testified that she did not believe the Form 709 filed by the Trust was credible. She believes that it was filed too late and was inconsistent with the initial estate tax return (Form 706) filed by the Estate. She also based her opinion on the fact that it was filed without payment of the tax and approximately two years too late, with no extensions requested. This would subject the Estate to a penalty and interest. The return asks that the estate tax funds be applied to this gift tax, but she testified this is improper and harmful to the Estate. She testified the IRS commissioner refused to accept the gift tax return.

Ms. New testified that the gift of the payment of the sanctions judgment within four months of death was not consistent with the overall estate plan of Franklin Adell. The Trust provides an equal residue to each child. Mr. Adell had made gifts of homes

[9] The instructions to Schedule F of Form 706 were admitted as Petitioners' Exhibit 14.

and real estate previously. Ms. New testified that a $6,667,018 gift would make payment of the estate tax difficult. She also testified there is nothing to indicate that a gift was intended. She concluded that the initial Form 706 was the best indicator of Franklin Adell's intent. Based upon the return, she testified there was a "promise to repay" the funds out of salary and benefits. She testified that Franklin Adell controlled Kevin Adell's solvency and ability to repay the funds. She testified that a "promise to repay" is distinguished from a loan in that it is not in writing.

Marguerite Lentz testified as an expert in estate tax returns on behalf of Kevin Adell. Ms. Lentz testified she had been an attorney at Honigman, Miller, Schwartz and Cohn, LLP, for 27 years until May 2009. She has prepared estate tax returns for estates up to $100 million, as well as gift tax returns.

Ms. Lentz testified this was an unusual case because there was a large taxable gift that created a large tax liability within a year of Franklin Adell's death. She testified that whether the transfer was a gift or a loan would not change the amount of tax owed.

Ms. Lentz testified that the gross estate is defined under the Internal Revenue Code as "all property the decedent had an interest in at the time of death." This does not include a completed *inter vivos* gift. She went on to state that an inter vivos gift may be included in the estate for the purposes of the 6166 election.

Ms. Lentz testified regarding the criteria for making the 6166 election. To qualify, the decedent must be a U.S. Citizen and have an interest in a closely held business, which is defined as a sole proprietor, partnership, or ownership of at least 20% of the voting stock in a corporation with 45 fewer shareholders. The decedent must be active in the trade or business.

Ms. Lentz testified that the 6166 election requires that the value of the closely held businesses must be at least 35% of the adjusted gross estate to qualify for deferring the payment of the tax. Computation of the estate for the purposes of the 6166 election includes gifts and transfers within three years of the date of death to meet the 35% threshold. Gifts are then excluded and the 35% threshold must still be met. Ms. Lentz testified this was the reason the payment of the sanctions judgment was listed on Schedule F of the initial Form 706. Ms. Lentz stated that if it were a loan, such a large receivable would be listed on Schedule C. However, a large receivable without a note would be on Schedule F, if it were owed to the decedent. Debts to the trust would be listed on Schedule G.

Ms. Lentz testified the Form 709, gift tax return, lists the value of the gift. The donor is liable for the tax. The gift tax and the return for gifts in 2006 was April 15, 2007, and the fiduciary had to file the 709 on or before that date. Ms. Lentz testified that the 35% 6166 threshold could have been met even if the payment of the sanctions judgment was reported as a gift and the 709 was timely filed.

Ms. Lentz testified that the Trust's failure to timely file the 709 could have an impact on the Trust. Interest was due and the Trust could be subjected to a penalty. The gift tax is separate from the estate tax due on a Form 706, despite the fact that the tax rate is the same. She stated that the Amended 706 filed by the Trust is more accurate.

Ms. Lentz testified that the reason Mr. Lameti chose to include the payment of the sanctions judgment in the gross estate was to qualify for the 6166 election. She opined that it was an error for Mr. Lameti to not file a gift tax return along with the 706.

The fact that the payment of the sanctions judgment is listed on Schedule F could serve as evidence that there was an expectation of repayment. However, Mr. Lameti provided a plausible explanation that he was attempting to meet the 35% threshold for the 6166 election. The Estate was primarily comprised of non-liquid assets. The Trust would benefit from the installment payment option afforded by the 6166 election. The 6166 election requires that gifts and transfers within three years of the date of death be included in the estate. The estate tax rate and the gift tax rate are the same, so the amount of the tax liability would be the same. Mr. Lameti believed it was appropriate to include the payment of the judgment on the Form 706. Both experts agree this was not correct under the Internal Revenue Code, however, there was a disagreement between the experts regarding the proper listing of the sanctions payment. Mr. Lameti stated a plausible, if incorrect, reason for his actions. At the time of the original 706 filing, this litigation had not been filed. In November 2008, the amended 706 and 709 were filed, but at that time, Mr. Lameti was unaware of the gift versus loan issue. The Court cannot conclude that the filing of the original or amended returns were evidence of the donative intent of Franklin Adell. More likely, Mr. Lameti was attempting to save the Trust from an immediate estate tax liability.

III. THE PRESUMPTION OF INTRA-FAMILY TRANSFERS AS GIFTS

Under Michigan Law, intra-family transfers are presumed to be gifts. *Smith v Smith*, 215 Mich 556, 184 NW 501 (1921). Under this presumption, Franklin Adell's payment of his son's, Kevin Adell, sanctions judgment would be presumed to be a gift. Petitioners argue that Kevin Adell is not entitled to the presumption because the donee had a fiduciary relationship with the donor, giving rise to a presumption of undue

influence. *Grondziak v. Grondziak*, 12 Mich App 61, 162 NW2d 354 (1968). Petitioners allege that Kevin Adell had a fiduciary relationship with Franklin Adell due to their close relationship. They also contend when the payment was made, Franklin Adell was in failing health and vulnerable. He died within months after the payment was made.

In *Karmey-Kupka v. Karmey* (In re Estate of Karmey), 468 Mich. 68, 75; 658 NW.2d 796 (2003), the Michigan Supreme Court adopted the following definition of a fiduciary relationship:

> Black's Law Dictionary (7th ed) defines the term as:
>
> > *[a] relationship in which one person is under a duty to* act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships--such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client--require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.
>
> > *Karmey-Kupka v. Karmey* (In re Estate of Karmey), 468 Mich. 68, 75; 658 N.W.2d 796 (2003).

The Court went on to note:

> Although a broad term, "confidential or fiduciary relationship" has a focused view toward relationships of inequality. This Court recognized in In re Wood Estate, 374 Mich. 278, 287; 132 N.W.2d 35 (1965), that the concept had its English origins in situations in which dominion may be exercised by one person over another. Quoting 3 Pomeroy, Equity Jurisprudence (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when "'there is

> confidence reposed on one side, and the resulting superiority and influence on the other.'" 374 Mich. 283.
>
> *Id.*

The testimony established that Kevin Adell was very close to his father. He began working with his father shortly after he graduated from college. While Kevin Adell testified that he built WADL from the ground up, he acknowledged that it was Franklin Adell and Sharon Adell who obtained the FCC license and borrowed $3 million from the Detroit Pension Board to build the station. Kevin Adell testified his compensation was always determined by Franklin Adell. Kevin Adell testified that between 2005 and 2006, Franklin Adell fell and his health suffered. He was in and out of the hospital during this time period and Kevin Adell was given a greater role in running the day-to-day operations of the businesses. While Franklin Adell allowed Kevin Adell a great deal of authority to run his companies, the testimony was clear that the companies always belonged to Franklin Adell. Ultimately, Kevin Adell was running the companies with Franklin Adell's permission. Testimony clearly established that Franklin Adell was in control of his businesses even though he may have delegated authority to Kevin Adell. Kevin Adell never assumed a position of superiority to Franklin Adell. Franklin Adell and Kevin Adell shared a close father-son relationship and a close business relationship, but that relationship did not rise to the level of a fiduciary relationship between Kevin Adell and Franklin Adell.

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of

affirmative evidence that it was exercised, are not sufficient. *Kar v. Hogan*, 399 Mich. 529, 537; 251 NW.2d 77 (1976), citing *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912). In this case, there is no evidence that Kevin Adell ever requested that Franklin Adell pay the sanctions judgment. In fact, Kevin Adell felt the sanctions judgment was unjust and would likely never have paid it.

Ralph Lameti testified that Franklin Adell said he wanted Kevin Adell to stop fighting and return to Michigan. He wanted to end the bankruptcy. He testified Franklin Adell sold T-Bills to generate the funds to pay the sanctions judgment. Mr. Lameti also stated that Adell Broadcasting Company and STN.com could have been liable for the entire sanctions judgment because the companies had filed false garnishee disclosure statements. The testimony established that the companies were at risk of becoming entangled in Kevin Adell's bankruptcy.

There was no evidence presented that Kevin Adell ever requested that his father pay the sanctions judgment. To the contrary, it is clear from the testimony that Franklin Adell did not approve of the protracted litigation with JRH. He wanted Kevin Adell in Michigan to focus on running the Adell companies. It was also becoming clear that the companies were at risk due to the bankruptcy litigation. There is no evidence that Kevin Adell exercised any influence on Franklin Adell's decision to pay the sanctions judgment. Accordingly, the Court does not find any evidence of undue influence.

IV. DONOR'S INTENT

The payment of the sanctions judgment by Franklin Adell was a gift to Kevin Adell. It was uncontroverted that a written loan agreement was never executed. Although written loan agreements had been executed between Franklin Adell and Kevin

Adell in the past, there was no loan agreement or other writing regarding this transfer. Furthermore, Kevin Adell never agreed to repay his father. On the contrary, he opposed payment of the sanctions judgment and would have remained in Florida. Kevin Adell felt he could run the businesses from Florida and did not need to return to Michigan.

Franklin Adell wanted his son home. He was nearing the end of his life and had begun to have health problems. Franklin Adell was a traditional man, born in the first half of the Twentieth Century. He was close to his family, particularly Kevin Adell. Franklin Adell had become a wealthy man due to his own efforts and those of his son. He was less concerned over repayment than he was about having his son close at hand. Franklin Adell trusted Kevin Adell to earn significant amounts of money once the bankruptcy litigation ended and he concentrated full-time on the family businesses. In that way, he would be repaid. Franklin Adell trusted Kevin Adell to take care of the family. Franklin Adell was clear headed when he paid the sanctions judgment. He did not consult with anyone before making the decision. In fact, both daughters testified they were uncomfortable discussing with Franklin Adell any aspect of "Kevin's exile to Florida" or the judgment against him. Neither Ralph Lameti nor Richard Mazzari ever directly discussed whether Franklin Adell's payment constituted a gift or loan.

Franklin Adell did not discuss the payment with Kevin Adell or Mr. Lameti. He told Mr. Lameti he was paying the money to stop the fighting. He realized Kevin Adell would not stop fighting unless his father ended it. Franklin Adell did not need the permission or advice of anyone before making the payment. He acted unilaterally and there was no express expectation of repayment.

The Court finds the payment of the sanctions judgment is a gift. Insufficient evidence was presented to determine that Franklin Adell intended the payment of the sanctions judgment to be a loan. It was uncontroverted that note was never executed. Franklin Adell did not ever tell anyone he was making a loan. Furthermore, Kevin Adell never agreed to repay the funds to Franklin Adell. Franklin Adell did expect the funds to return to the Estate. Franklin Adell trusted that Kevin Adell would earn significant money back for the companies after the bankruptcy litigation terminated. This expectation is not evidence that the funds were a loan. Rather, it is evidence of Franklin Adell's motivation for paying the sanctions judgment.

DATED: 9-3-10

HONORABLE LINDA S. HALLMARK