

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re FRANCES WILLIAMS MESSER TRUST,  
DATED JANUARY 10, 1939.

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OLD KENT BANK, Trustee,

Petitioner-Appellee,  
Cross-Appellant,

v

REMAINDER BENEFICIARIES,

Respondents-Appellants,  
Cross-Appellees.

UNPUBLISHED

June 25, 1996

No. 174624

LC No. 92-153441-WT

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Before: Sawyer, P.J., and Griffin and M. G. Harrison,\* JJ.

PER CURIAM.

Respondents appeal as of right an order denying their objections to Old Kent Bank & Trust Company's petition for approval of its final accounting and release as trustee of the Frances Williams Messer Trust. Petitioner cross appeals the probate court's order awarding costs and attorneys' fees. We remand for a jury trial on the issue whether petitioner acted with reasonable prudence in administering trust assets. We do so only because we are required to follow Supreme Court precedent. We urge the Supreme Court to reconsider its prior holdings on this issue which we consider to be wrongly decided.

I

In 1939, Frances Messer chartered a trust for the benefit of his son, John. After John died in 1991, petitioner, the acting trustee<sup>1</sup>, wrapped up the trust by disbursing equal shares of the remaining corpus to respondents, John's children.<sup>2</sup> Petitioner thereafter petitioned the probate court for approval

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\* Circuit judge, sitting on the Court of Appeals by assignment.

of its final accounting and discharge as trustee. Respondents objected, claiming, inter alia, that petitioner should be surcharged for losses sustained by the trust due to petitioner's imprudent management of trust assets.<sup>3</sup> Specifically, respondents claim that petitioner imprudently sold valuable stock held by the trust in a closely held corporation back to the corporation at an unreasonably low price that was established by the corporation itself.

The probate court denied respondents' demand for a jury trial, ruling that the factual issues in this equitable proceeding should be resolved by the court as the trier of fact. Following a bench trial, the probate court entered an order approving petitioner's final accounting and discharging it as trustee. The probate court found that petitioner acted with reasonable prudence in its handling of the stock and adopted all of petitioner's proposed findings and conclusions.

## II

On appeal, respondents contend that the probate court erroneously denied their request for a jury trial. We reluctantly agree. MCR 5.508(A)(1) entitles a party to a probate proceeding to demand a jury trial "of an issue for which there is a right to trial by jury." MCL 600.857(1); MSA 27A.857(1), provides in pertinent part:

(1) If a party to a proceeding in the probate court would have had a right before January 1, 1971 to demand a jury to determine a particular issue of fact in the circuit court upon a de novo appeal from that proceeding to the circuit court, that party shall on and after January 1, 1971 have the right to demand a jury to determine that issue of fact in the probate court proceeding.

In determining whether a party had a right to a jury trial on a "particular issue of fact" prior to 1971, we look to the "nature of the action" to determine if a party would have been traditionally afforded a right to a trial by jury. *Anzaldúa v Band*, \_\_\_ Mich App \_\_\_ ; \_\_\_ NW2d \_\_\_ (Docket Nos. 168358; 170339, issued 5/14/96, slip op at 7, 10-11); see also *State Conservation Dep't v Brown*, 335 Mich 343; 55 NW2d 859 (1952); *Brown v Kalamazoo Circuit Judge*, 75 Mich 274; 42 NW 827 (1889); *Hackett v Connor*, 58 Mich App 202, 207; 227 NW2d 292 (1975); see generally, 3 Martin, Dean & Webster, Michigan Court Rules Practice, p 138. Because jury trials were not afforded in equitable proceedings, this Court has held that a party may demand a jury trial only if the matter is "legal" in nature. *Anzaldúa, supra*; *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 154-155; 486 NW2d 326 (1992); *Thomas v Steuernol*, 185 Mich App 148, 155-156; 460 NW2d 577 (1990); *Kahoun v Metropolitan Life Ins Co*, 12 Mich App 441, 445; 162 NW2d 922 (1968); see generally, 3 Martin, Dean & Webster, Michigan Court Rules Practice, pp 138-139. Therefore, because respondents do not seriously dispute petitioner's claim that this is an equitable matter, see *Second Michigan Cooperative Housing Ass'n v First Michigan Cooperative Housing Ass'n*, 358 Mich 252, 256; 99 NW2d 665 (1959); *Rudell v Union Guardian Trust Co*, 295 Mich 157; 294 NW 132 (1940); *Gott v Culp*, 45 Mich 265, 275-276; 7 NW 767 (1881); George T. Bogert, *Trusts* (6th ed), § 157, p 558, respondents should have no right to a trial by jury.

However, in a series of cases decided in the early part of this century, the Supreme Court held that parties in equitable proceedings possess a right to have certain factual disputes resolved by a jury. See, e.g., *In re Weiss' Estate*, 315 Mich 276, 278-279; 24 NW2d 123 (1946) (reasonable value of services rendered by an attorney who provided services to a trust); *Morton v Johnston*, 124 Mich 561; 83 NW 369 (1900) (whether the administrator of an estate agreed to serve for free and whether a tax title bought by the administrator was taken in the name of the estate); *Rivard v Rivard*, 109 Mich 98; 66 NW 681 (1896) (whether the testator of a will was subjected to undue influence); *In re Estate of Stebbins*, 94 Mich 304; 54 NW 159 (1892) (whether a testator intentionally omitted his children from his will); *Grovier v Hall*, 23 Mich 7 (1871) (whether a personal representative of an estate fraudulently and collusively pursued claims against the estate with estate assets); see also *Detroit Trust Co v Struggles*, 283 Mich 471, 477; 278 NW 385 (1938); compare *Homrich v Allegan Circuit Judge*, 238 Mich 308, 310-311; 213 NW 167 (1927) (review of a trustee's accounting is an issue for the court); *Gott, supra* (same). Consistent with this line of authority, the Supreme Court in *Stebbins, supra*, stated that it was "fully settled" that a party appealing a probate proceeding to a circuit court had the "absolute right" to have factual questions resolved by a jury. *Id.* at 308, citing *Grovier, supra* at 11. Moreover, in *In re Allwardt's Estate*, 278 Mich 80, 86-87; 270 NW 223 (1936), the Supreme Court found error requiring reversal when a trial court denied trust beneficiaries the right to a jury trial on the issue whether a fiduciary acted imprudently or in bad faith in failing to sell stock that was rapidly losing value.

We view the pertinent facts of *Allwardt's Estate* to be indistinguishable from the present case. In each case, beneficiaries of a trust fund claimed that the fiduciary should be surcharged for damages caused by an imprudent administration of stock held by the trust. Despite the general rule of no right of trial by jury in equitable matters, we are required to follow the Supreme Court's 1936 holding in *Allwardt's Estate* which we deem to be controlling. Accordingly, we rule that the probate court erred in denying respondents' jury demand regarding the factual issue whether petitioner acted with reasonable prudence. Further, we are not persuaded by petitioner's claim that this error is harmless. After a thorough review, we conclude that a directed verdict would have been improper. Here, respondents produced sufficient evidence to allow a reasonable trier of fact to conclude that petitioner failed to exercise reasonable prudence in retaining the stock or exploring other markets before selling the stock back to the corporation at an allegedly undervalued price.

It should be noted that requiring the jury to decide an underlying factual issue does not mean that the jury is to provide a general verdict. *Homrich, supra* at 310. Instead, the purpose of the jury is to "find 'such specific facts as will, when found, aid the court in determining questions which belong to its equitable discretion.'" *Id.*, quoting *In re Bristol*, 199 Mich 453; 165 NW 819 (1917); see also *Gott, supra*.

### III

We urge the Supreme Court to revisit its 1936 holding in *Allwardt's Estate*, along with the line of authority that affords a right to jury trials of factual issues in equitable proceedings. As this Court

observed in *Anzaldua, supra*, juries should not be the trier of fact in equitable matters. See also *Gellman Sciences, Inc v Fireman's Fund Ins Co*, 183 Mich App 445, 450; 455 NW2d 328 (1990); *Ecco Ltd v Balimoy Mfg Co*, 179 Mich App 748, 751; 446 NW2d 546 (1989); *Dutka, supra* at 173. This long-standing, pragmatic policy of having judges decide factual issues in equitable proceedings is undermined, confused, and overly burdened by the ancient and wrongly decided line of authority that this Court is compelled to follow. Cf. *Ecco Ltd., supra* at 749 (“Despite the merger of law and equity in Michigan, there remains a constitutional right to have equitable claims decided by a court of equity rather than a jury”); *Dutka v Sinai Hosp of Detroit*, 143 Mich App 170, 173; 371 NW2d 901 (1985), citing *Abner A Wolf, Inc v Walch*, 385 Mich 253; 188 NW2d 544 (1971).

#### IV

The remaining issues on appeal pertain to whether petitioner will prevail in defending its administration of the trust. In accordance with our holding, resolution of these issues is not presently appropriate. *In re Gerber Trust*, 117 Mich App 1, 15-16; 323 NW2d 567 (1982). Petitioner's cross appeal is dismissed as moot.

Reversed and remanded for a jury trial. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Richard Allen Griffin  
/s/ Michael G. Harrison

<sup>1</sup> Originally, the trust named two trustees: Maurice Lambie and the Michigan Trust Company. Lambie has since died, and petitioner assumed the role as sole trustee as the successor to the Michigan Trust Company.

<sup>2</sup> Petitioner withheld \$41,162 from the disbursement, however. It withheld the money to cover its expenses in defending against anticipated criticism of its administration of the trust. The probate court eventually awarded this money to petitioner as costs and attorneys' fees. Although respondents contest petitioner's ability to withhold these funds, our resolution of this case makes the resolution of this issue premature.

<sup>3</sup> Respondents also claimed that petitioner had charged excessive fees and paid excessive income tax as a result of a 1989 stock sale. These issues were summarily dismissed by the probate court, however, on the ground that such claims were available only to the life beneficiary because they related solely to trust income. Respondents do not contest this ruling on appeal. Nor do respondents contest the trial court's determination that petitioner had no conflict of interest.