



Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May



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DT: November 1, 2010

RE: Estate of Jewell Anderson, a Protected Person
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

The surprises of the 2010 Season:

True baseball cognigenti or fans of the players noted in this article might not have been surprised at their 2010 season. I was.

First, Josh Hamilton many know of his addiction problems and he is blessed to have overcome them. Kudos to the Texas Rangers who celebrated their ALCS victory with ginger ale rather than champagne. It is no surprise to me that he was a great ball player, but this year shows how great, a .359 batting average, 32 homers and 100 RBI. Let's put this into context. Josh is 29 years old and his .359 places him third – tied with Nap Lajoie for batting average by a 29 year

old. He jumped from .268 to .359 for 91 points. I know of no list for “jumps” but I do recall one, Carl Furillo, Jr., .247 to .344 for .97. Furillo dropped to .294 the next year which will be a good touchstone to measure Hamilton’s 2011 season.

Then there is Jose Bautista who went from 13 homeruns to 54. True he had nearly twice as many at bats, but that’s quite a leap. Next year we’ll see if he was a one year wonder.

Finally, Dave Price of Tampa Bay 10 to 19 wins, 102 to 188 strike outs, and a drop in ERA from 4.42 to 2.72.

Who surprised you?

REVIEW OF CASE:

Reference Files: Jurisdiction of Probate Court for Eviction
Standard on Appeal – Sanctions

This reviewer will only be dealing with two legal doctrines of import in this review. The facts represent a litany of charges which were either rejected by a Probate Court or not pleaded or preserved on appeal.

Two legal points are of interest. A District Court action was begun for eviction by the fiduciary. The action was transferred to the Probate Court, and an eviction was ruled proper. The Court of Appeals does not say that the Probate Court had jurisdiction to entertain an action for eviction, only that they did *not* have jurisdiction, and:

“The purpose of the concurrent jurisdiction is to simplify the disposition of an action or proceeding involving a decedent, protected individual(s), a ward’s or trust’s estate by consolidating the probate and other related actions or proceedings in the Probate Court.”

“...Thus we conclude that it was not error to consolidate these proceedings in the Probate Court.”

I would have preferred a statement that it was proper and phrased it in the affirmative.

We often discuss this among practitioners as to the ability of a fiduciary to evict a tenant in an action before the Probate Court. I do not know that the Court of Appeals would have ruled the same way if the matter had not begun in District Court and was consolidated into the Probate Court. It is hopeful that the decision would have been the same had the eviction begun by way of motion out of the Probate Court.

As to issues of standard on appeal, the Court of Appeals appropriately cites *In re Temple Trust*, 278 Mich App 122 to the effect that findings of fact are reviewed for clear error; while court’s dispositional rulings are reviewed for an abuse of discretion. Abuse of discretion is appropriately defined as “a finding outside the range of principled outcomes.”

Sanctions are reviewed de novo, but the standard of de novo is “clear error” and the Court of Appeals cites *Schadewald v Brule*, 225 Mich App 26 (1997).

An interesting argument that was not preserved on appeal is whether an estate, leasing property, requires a landlord license.

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JEWELL ANDERSON, a Protected Person.

TIMOTHY FLYNN, Conservator of JEWELL ANDERSON, a Protected Person,

UNPUBLISHED
September 23, 2010

Petitioner-Appellee,

v

DIANE ANDERSON,

No. 292036
Oakland Probate Court
LC No. 2004-295192-GA

Intervening Plaintiff-Appellant,

and

DAVID C. ANDERSON,

Intervening Plaintiff.

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Intervening plaintiff, Diane Anderson, appeals as of right a probate court order, which she argues inadequately reimbursed her in the amount of \$2,179.61 for expenses made on behalf of the estate of Jewell Anderson, a protected person. She further challenges the portion of that order for her eviction from Jewell's home if she failed to pay past due rent. We affirm.

I.

This case arises out of a 2004 petition by Jewell's son, David C. Anderson, acting as power of attorney for Jewell, for a conservator of Jewell's estate. In his petition, David alleged that Jewell suffered from mental deficiency (early onset of Alzheimer's Disease) and since Jewell's daughter, Diane, had moved from Australia to Michigan in 2003, Jewell's accounts had been dissipated and credit card debt had accrued. The probate court appointed David, first as special conservator and then conservator, but some time after Diane petitioned to remove David and appoint herself as conservator, the probate court appointed a public administrator, Timothy Flynn, as guardian and conservator.

The record contains evidence of many conflicts between David, Diane, and Bruce Anderson (Jewell's other son) regarding visitation time and Jewell's residential placement. When the proceedings were initiated, Jewell lived in her own home with Diane. In October 2005, Jewell was moved to Bruce's home in Vestaburg, Michigan. Meanwhile, Flynn filed an action in the Oakland County District Court to have Diane evicted from Jewell's home so it could be sold to fund a long-term assisted living placement for Jewell. The action was removed to the probate court because of the pending probate proceedings involving the parties. After Bruce died in 2007, Jewell was moved to American House in Rochester Hills.

In March 2008, Diane filed a motion for a change of venue from Oakland County to Washtenaw County, alleging various claims of bias including that 1) judges in Oakland County could not hear the case without prejudice because David is married to Oakland County Judge Martha Anderson and 2) Judge Grant allowed David to defame her with his allegations regarding the dissipation of Jewell's assets. Judge Barry M. Grant disqualified himself from the probate proceedings. In June 2008, Judge David Szymanski of the Wayne County Probate Court was assigned by the State Court Administrator to serve as a judge of the Oakland County Probate Court. In light of this assignment, the probate court ordered that the motion for a change of venue was moot.

When Diane received an eviction notice to quit by March 2008, she filed an motion to change Jewell's placement to her home. The probate court denied this motion, but in lieu of eviction, in August 2008, it ordered Diane to pay \$900 per month to live in Jewell's home. Soon afterward, however, Diane filed an additional motion to change Jewell's placement from the assisted living facility in Rochester Hills to a different facility in Southfield, where Diane had already reserved a room. The probate court denied this motion and awarded sanctions to David, Flynn, and the guardian ad litem.

In response to assertion by Diane that she was entitled to reimbursement for expenses incurred on behalf of Jewell, the court ordered Diane to submit proof of "indebtedness of Jewell Anderson's estate" to her within 14 days, and all claims not presented by Diane would be waived. Diane subsequently submitted claims totaling more than \$16,000, but only timely supported a portion of these claims with proof. By February 2009, Diane had failed to pay court-ordered rent and Flynn filed a new motion to evict Diane. Again, Diane claimed that she was entitled to reimbursement for expenses incurred on behalf of Jewell and that the reimbursement should offset the unpaid rent.

Diane subsequently filed a motion for an immediate investigation of Flynn and for a change of venue to Washtenaw County. The probate court denied these motions and awarded sanctions to David, Flynn, and the guardian ad litem.

Following an evidentiary hearing regarding Diane's claims to offset her unpaid rent with expenses owed to her by Jewell's estate, the probate court concluded that only \$2,179.61 of the claims were properly substantiated. The probate court further concluded that Diane's unpaid rent totaled \$5,920 and, offsetting this amount with the \$2,179.61 in substantiated claims, the probate court ordered Diane to pay the remaining \$3,740.39 in unpaid rent by May 19, 2009. This appeal followed.

II.

On appeal, Diane argues that the probate court lacked jurisdiction to order her to pay rent for living in Jewell's home and to evict her based on the non-payment of that rent. We disagree. A probate court has exclusive subject matter jurisdiction over guardianship and conservatorship proceedings, MCL 700.1302(c), and the probate court has concurrent subject matter jurisdiction to "hear and decide a claim by . . . a fiduciary . . . for the return of property," MCL 700.1303(1)(h). Quoting MCL 700.1303(3), this Court explained in *In re Estate of Graves*, ___ Mich App ___; ___ NW2d ___ (Docket No 286674, issued December 3, 2009) that "[t]he purpose of the concurrent jurisdiction is 'to simplify the disposition of an action or proceeding involving a decedent's, a protected individual's, a ward's, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.'" The probate court's orders, for Diane to pay rent to live in Jewell's home and to evict Diane when she failed to pay that rent, concerned Jewell's guardianship and conservatorship because the rent and the proceeds of the sale were intended to fund Jewell's long-term assisted living placement. Thus, we conclude it was not error to consolidate these proceedings in the probate court.

Diane further argues that, because the probate court exercised jurisdiction over Flynn's claims for rent and to evict Diane, she was denied her right to a trial by jury on her claim for reimbursement for repairs and maintenance in the district court pursuant to MCR 4.201. Diane waived any right she may have had to a trial by jury on this issue by failing to demand one. MCR 5.158; see MCR 2.508(C)(1).

Next, Diane argues that Flynn was not licensed by the city of Lathrup Village, where Jewell's home is located, to be a landlord. Consequently, she argues that the trial court erred by ordering her to pay rent to Flynn and evicting her for failing to pay rent. Diane's claim is abandoned because she fails to cite authority in support of her argument that Flynn was required to hold a landlord license.¹ See *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002) ("this Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal."). In any event, when a license "has not been issued . . . actions for rent and for possession of the premises for nonpayment of rent may be maintained . . ." City of Lathrup Village, § 18-185.

In a related argument, Diane argues that the trial court violated MCL 554.139, which provides in relevant part:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

¹ Diane alludes to a City of Lathrup Village ordinance, but failed to cite the ordinance or attach it as an exhibit to her brief.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

In response to Flynn's motion for eviction for nonpayment of rent, Diane failed to argue that she had withheld rent because the home was not in reasonable repair. See *Rome v Walker*, 38 Mich App 458; 196 NW2d 850 (1972). Rather, Diane argued that she had been obligated to pay for repairs and maintenance and she submitted a list of expenses she had incurred for reimbursement. Diane's defense to eviction on appeal, that the home was not in reasonable repair because of a leaking roof, a cracked second floor shower, a broken toilet, water in the basement, and diseased trees, is not preserved. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008) (review unpreserved claims for plain error existing on the record, affecting substantial rights). Diane attaches a 2007 inspection of the home, which reflects some of the alleged damage, as an exhibit to her brief on appeal. However, our review is limited to the record presented to the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990); see also MCR 7.210(A), and because Diane failed to present this inspection as evidence that the home was not in reasonable repair when the probate court considered the motion for eviction, we decline to consider it. Absent any evidence on the record that the home was not in reasonable repair, causing Diane to withhold rent, Diane has failed to establish plain error.

Diane further alleges numerous violations of the Estates and Protected Individuals Code (EPIC), MCL 700.2101 *et seq.*,² First, she claims that the trial court erred by failing to ensure that Flynn accounted for his expenses on Jewell's behalf. Contrary to Diane's claim, however, the record reflects that Flynn filed annual accountings in the probate court, MCL 700.5418(1). Diane also claims that the trial court erred by failing to ensure Flynn provided for Jewell's care, comfort, and maintenance, MCL 700.5314(b). However, in 2004, the trial court ordered then special conservator David to pay all of Jewell's bills, including expenses for the internet and telephone. Diane correctly maintains that Flynn was delinquent in paying some of Jewell's bills. However, the probate court ordered Flynn to be personally responsible for the additional costs incurred by Jewell's estate as a result of the delinquencies. It also reimbursed Diane for expenses she incurred on Jewell's behalf and only denied Diane's requests for reimbursement where she waived her right to make requests by failing to substantiate her expenses within the time limitation ordered by the probate court. Consequently, Diane has failed to establish any abuse of discretion.

² A court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion. *In re Temple Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

Second, Diane claims that the probate court failed to minimize the intrusion into Jewell's life and maximize independence pursuant to MCL 700.5134. According to her statement of questions presented, Diane challenges the probate court's orders regarding Jewell's residential placements. However, it was not an abuse of discretion to order that Jewell should remain in Vestaburg with Bruce because, despite evidence that Jewell preferred to live at home where she could be closer to friends, the record demonstrated that Jewell's health had improved there. Furthermore, it was not an abuse of discretion to order that, after Bruce's death, Jewell should live in an assisted living facility in Rochester Hills rather than return home. Although Diane presented evidence that moving Jewell home would have promoted cost savings and proximity to friends, the record demonstrated that Jewell could not live independently, but rather required assistance with medication administration, grooming, and housekeeping. A psychologist also opined that the physical layout of Jewell's home could be unsafe for her. Next, it was not an abuse of discretion to order that Jewell should remain at the assisted living facility in Rochester Hills. Although Diane averred that the Southfield facility was less expensive and closer to Jewell's friends, at the time of Jewell's motion for a change of placement, Jewell had lived at the Rochester Hills facility for nearly one year and a psychological assessment demonstrated that she was thriving because of its structured environment with support services.

According to Diane's statement of questions presented, she also challenges the probate court's order regarding the sale of Jewell's property. MCL 700.5423(3) provides:

The court shall only approve the sale or other disposal of the real property or interest in real property if, after a hearing with notice to interested persons as specified in the Michigan court rules, the court considers evidence of the value of the real property or interest in real property and otherwise determines that the sale or other disposal is in the protected individual's best interest.

Even if Jewell opposed the sale, it was not clear error to find that the sale was in Jewell's best interest. The record demonstrates that the sale was necessary to fund Jewell's long-term assisted living placement where, again, she was thriving. Earlier efforts to fund the placement by renting Jewell's home to Diane were unsuccessful because Diane repeatedly failed to pay rent ordered by the probate court. Again, Diane has failed to establish any abuse of discretion.³

Third, Diane claims that the trial court failed to "admonish[]" Flynn for alleged violations of EPIC. Diane filed repeated motions in the probate court to have Flynn removed as Jewell's conservator. Pursuant to MCL 700.5414, a probate court "may remove a conservator for good cause." The court's decision regarding a petition to remove a fiduciary is reviewed for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1, 13; 349 NW2d 247 (1984). Diane generally asserts that Flynn failed to provide for Jewell's healthcare and personal needs, but the record demonstrates that Flynn arranged her placement in the assisted living facility in Rochester Hills and made arrangements for staff to administer her medication appropriately. Diane also

³ In her brief, Diane asserts additional complaints regarding Flynn that are not included in the statement of questions presented and are abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

challenges Flynn's decision to move Jewell to Bruce's home, but as we noted earlier in this opinion, the record demonstrated that Jewell's health had improved there. Because Diane has failed to establish good cause for Flynn's removal, we conclude that it was not an abuse of discretion for the probate court to deny Diane's motions to remove him. Regarding Diane's claims that Flynn failed to visit Jewell according to MCL 700.5314(a) and made "unsubstantiated allegations" that "misled the court," Diane fails to cite to any record evidence and we deem these claims abandoned. *Flint City Council*, 253 Mich App at 393 n 2.

Diane argues that the probate court erred by refusing to uphold orders by Judge Grant to repay Diane and Barry Pond for expenses advanced on behalf of Jewell. We disagree. Judge Szymanski's May 4, 2009 order reimbursed Diane for \$2,179.61 in expenses advanced on behalf of Jewell. However, Diane fails to demonstrate other written orders by Judge Grant that Judge Szymanski failed to uphold. See *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009) ("[i]t is well settled that a court only speaks through written judgments and orders."). To the extent that Pond has a claim, we agree with Judge Szymanski that Pond could assert this claim on his own behalf. Therefore, Diane's claim of error fails.

Diane challenges the trial court's order denying her motion for \$300 per week for an allowance. The probate court did not clearly err in finding that Jewell was living in an all-inclusive facility and Diane had failed to document expenses justifying that allowance. In denying the motion, however, the probate court urged Jewell to submit claims for services that might not be provided by the facility, including telephone and hairdressing.⁴ Diane has failed to establish that this order was outside the range of principled outcomes.

Diane next challenges reports submitted to the probate court by the guardian ad litem, arguing that the reports were "often misleading." Diane's unpreserved argument is reviewed for plain error affecting her substantial rights. *Wolford*, 279 Mich App at 637. Diane claims that the guardian ad litem's reports "creat[ed] a sense of crisis and never ending police interventions." However, the record contains evidence of a number of police interventions surrounding the siblings' visitation with Jewell. Any report of these interventions by the guardian ad litem would have been cumulative and did not affect Diane's substantial rights. For this same reason, Diane's claim that the guardian ad litem failed to file the reports in a timely fashion also did not affect her substantial rights.

Diane also argues that the probate court erred in ordering visitation schedules based on Flynn's recommendations. Diane attempts to generally discredit Flynn by: 1) arguing he changed Jewell's residence to "blackmail" her into dismissing her petition to remove him as guardian and conservator, 2) noting the discrepancies between Flynn's and Diane's recollections of Jewell's illness around Christmas 2008, which Diane maintained resulted from a flu epidemic at the assisted living facility in Rochester Hills, and 3) arguing Flynn weighed a psychologist's evaluation more heavily than that of a psychiatrist even though the psychiatrist is a medical doctor.

⁴ Diane's remaining challenges under MCL 700.5314 are not included in Diane's statement of questions presented and are therefore abandoned. *Mettler Walloon, LLC*, 281 Mich App at 221.

Even if this Court were to assume that Flynn was not worthy of belief, Diane has failed to establish that the probate court's visitation schedules fell outside the range of principled outcomes. The schedules not only provided each sibling individual time with Jewell, but they also delineated holidays and vacations for them. As the proceedings progressed, amendments to the schedules increasingly accommodated conflict among the siblings. Initially, in 2005, the siblings could visit Jewell daily from 9:00 a.m. to 8:00 p.m. In September 2008, the probate court ordered that David could visit on even-numbered days and Diane could visit anytime on odd-numbered days and during the workday on even-numbered weekdays when David would not be visiting. However, by April 2009, the probate court limited Diane's visits to odd-numbered days only, because David alleged that Jewell was agitated during his visits when Diane's visits preceded his. No abuse of discretion occurred.

In a related claim, Diane argues that the probate court should have required David to alert her when he was not visiting Jewell, thereby allowing her to visit Jewell during that time. Jewell's unreserved claim⁵ is reviewed for plain error affecting her substantial rights. *Wolford*, 279 Mich App at 637. In light of the ongoing hostility and conflict between David and Diane, Diane cannot establish plain error from the probate court's failure to require additional interaction and cooperation regarding visitation between these siblings. Furthermore, contrary to Diane's claims that David's unused visitation time resulted in the abandonment and elder abuse of Jewell, Diane was permitted to visit Jewell on every odd-numbered day and, even when visitors were not present, the staff and resources at Jewell's assisted living facility remained.

Diane argues that the probate court erred by denying her motion to immediately investigate Flynn. The basis of Diane's unreserved claim⁶ is that Flynn's mismanagement of Jewell's affairs resulted in the following hospital stays: 1) Jewell was hospitalized in September 2005 for congestive heart failure, 2) Jewell was hospitalized later in 2005 for acute syncope, and 3) Jewell was hospitalized for renal failure and an untreated urinary tract infection in 2007. Diane asserts that these hospitalizations were caused in turn by: 1) Flynn's alleged authorization of a 264-mile trip to Bruce's home, 2) Flynn's failure to seek follow-up treatment for Jewell, and 3) Flynn's failure to immediately respond when the assisted living facility requested permission to take Jewell to the hospital. Aside from Diane's assertions on appeal, she fails to cite, and there is no record of, any evidence that Flynn's alleged management of Jewell's estate caused her hospitalizations. Therefore, Diane has failed to establish plain error.

In a related argument, Diane challenges the probate court's decision to award sanctions, pursuant to MCR 2.114(E) and (D)(3), to David, Flynn, and the guardian ad litem following: 1) her motion for a change of placement from the assisted living facility in Rochester Hills to the Southfield facility, and 2) her motion to immediately investigate Flynn and change venue to

⁵ Diane made this claim below, but the probate court did not address it on the record.

⁶ The probate court decided the motion to investigate Flynn on different grounds asserted by Diane at the hearing—namely that Flynn's instructions to the assisted living facility regarding the administration of pills resulted in Jewell missing a dose, that Flynn failed to properly respond to Jewell's flu at Christmas 2008, and that Flynn generally mismanaged Jewell's estate during his years as a fiduciary.

Washtenaw County. We review de novo the probate court's interpretation and application of the court rules, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), and we review for clear error the probate court's findings of fact regarding the imposition of a sanction under MCR 2.114(E), *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

"To impose a sanction under MCR 2.114(E), the trial court must first find that an attorney or party has signed a pleading in violation of MCR 2.114(A)-(D)." *In re Stafford*, 200 Mich App 41-42; 503 NW2d 678 (1993). MCR 2.114(D)(3) provides in relevant part:

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

* * *

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

We are not left with a definite and firm conviction that the probate court made a mistake with regard to the sanctions imposed for the motion for a change of placement, finding that it was intended to increase the cost of litigation and harass, where Diane had previously opposed Jewell's placement on numerous occasions and the probate court had maintained the status quo based on evidence that she was thriving in that environment. Likewise, we are not left with a definite and firm conviction that the probate court made a mistake with regard to the sanctions imposed for the motion for immediate investigation of Flynn because the investigation would only have imposed further costs on Jewell's estate where the proceedings were already protracted and Diane failed to establish a link between Flynn's alleged mismanagement and harm to Jewell. Finally, we are not left with a definite and firm conviction that the probate court made a mistake with regard to the sanctions imposed for the motion for a change of venue, which amounted to harassment where the court had already denied a similar motion less than one year earlier and Diane repeatedly failed to establish that the proceedings could not be heard impartially in Oakland County.

Diane's last claim on appeal is that the probate court generally relied on unsubstantiated allegations by David and Flynn in making rulings against Diane and Jewell. Diane's unpreserved claim is reviewed for plain error affecting her substantial rights. *Wolford*, 279 Mich App at 637. Diane cites only one allegedly unsubstantiated allegation by David that Jewell's 2007 hospitalization for renal failure and an untreated urinary tract infection resulted from food poisoning during Diane's visit with Jewell. In her brief, Diane argues that the probate court failed to challenge the veracity of David's statement on the record. However, because there is no record evidence, and Diane has not demonstrated, that the probate court actually relied on this particular statement in making a decision, Diane has failed to prove that this claim of error affected her substantial rights.⁷

⁷ In her brief, Diane argues that the probate court was discourteous to her and not impartial, but this argument is not presented in the statement of questions presented and is abandoned. *Mettler*
(continued...)

Affirmed. As the prevailing party, Flynn may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

(...continued)

Walloon, LLC v Melrose Twp, 281 Mich App 184, 221; 761 NW2d 293 (2008).