



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



Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2012 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an “AV” peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell’s Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2013 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2012 by

Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, go online to: <http://www.kempklein.com/probate-summaries.php>

DT: August 7, 2013

RE: **In re Conservatorship of Clara Austin**
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL:

Questions from Sarah

Sarah asks when did leitmotif become de rigueur?

Actually there are 10 Google pages on this subject. Apparently, theme music has been played before batters approach the batter’s box or pitchers the pitching mound, since the inaugural game at Jacobs Field in 1994. Some players request that no music be played. Many Latin players request Latin themes. Here are some player’s choices:

- Alex Rodriguez, of blessed memory, liked JayZ’s “Already Home”. (I would suggest an olde, Connie Francis’ “Who’s Sorry Now”.

- Mark Teixeira, bats to the tune of the Twisted Sisters “I Wanna Rock”.
- Lance Berkman likes Johnny Cash’s “God’s Gonna Cut You Down”.
- You’d think that Brian Wilson would like something from the Beach Boys but he likes House of Pain’s “Jump Around”.
- Yankee reliever, Mariano Rivera has been playing Metallica’s “Enter Sandman” since 1999.
- Our own Torii Hunter likes Lil Wayne’s “Dinner Time”. Hunter has also used “Welcome 2 Detroit City” by Eminem, “The Street Beater” by Quincy Jones and Sanford & Son theme music. He has also used “Movin on Up” theme son of The Jeffersons.
- Miguel Cabrera uses “Mercy” and sometimes he uses “Perros Salajes” (Wild Dogs).
- Victor Martinez uses “All Begin Dancing”.
- Alex Avila “I Got Mine”.
- Brayan Pena “All I Do Is Win”.
- Austin Jackson “Ambition”.
- Matt Tuiasosopo “Circle of Life” and “Tell The World”.
- Jhonny Peralta “Energaa” (we know from what he derived his energy).
- Justin Verlander “Til I Collapse”.
- Max Scherzer “That’s All She Wrote”.
- Prince Fielder “Moments In Love”.

REVIEW OF CASE:

Reference Files: Grounds for Removal of Conservator
 Procedures in Removal of Conservator

Petitioner had numerous negative Guardian Ad Litem Reports.

Petitioner was challenged by Guardian Ad Litem relative to lack of proofs regarding the disbursements.

Petitioner scheduled her own hearing.

Petitioner was removed.

MCR 5.203(a) sets forth a procedure to remove a conservator. The Court of Appeals remarked on the Lower Court’s failure to follow those procedures. However, nevertheless, in light of the substantive objections to the accounting, and the knowledge of the petitioner of those substantive objections, the Court of Appeals sustained the removal of the conservator by the Lower Court.

Substantial compliance with a court rule? Interesting.

STATE OF MICHIGAN
COURT OF APPEALS

In re Conservatorship of CLARA AUSTIN.

LAURA BROWN,

Petitioner-Appellant,

v

LAURA M. KYSTAD,

Respondent-Appellee.

UNPUBLISHED

July 18, 2013

No. 308676

Wayne Probate Court

LC No. 03-668256-CA

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUS, JJ.

PER CURIAM.

Petitioner Laura Brown appeals as of right from a probate court order disallowing an account and removing her as successor conservator and appointing respondent Laura M. Kystad as successor conservator. We affirm.

Petitioner is the guardian and successor conservator of her great aunt, Clara Austin, and is responsible for managing the benefits she received from the Social Security Administration and private pension funds. Petitioner filed a second amended annual account for the period between February 28, 2010, February 28, 2011. The guardian ad litem objected to the account for numerous reasons, including the lack of receipts for \$26,000 in expenditures, petitioner's failure to produce tax returns filed on behalf of Clara, failure to provide utility records to determine Clara's 1/6 share of those expenses, and petitioner's failure to purchase a pre-paid funeral for Clara as previously ordered by the court. The probate court referred to the negative guardian ad litem report, as well as the history of negative guardian ad litem reports and petitioner's history of conflict with every guardian ad litem that had been appointed, in denying the account, removing petitioner as successor conservator, and appointing a new successor conservator.

The removal of a conservator is governed by the Estates and Protected Individual's Code (EPIC), MCL 700.1101 *et seq.* The court is authorized to remove a conservator for good cause upon notice and hearing. MCL 700.5414. According to court rule, the court must notify the fiduciary, his attorney, and each surety of the nature of the deficiency and a notice to correct or appear for a conference. MCR 5.203(A). If the fiduciary fails to perform the duties within the

time specified, the court may suspend his powers. MCR 5.203(D). Upon the removal of the conservator, the court may appoint another conservator. MCL 700.5414.

It appears from the file that the court did not precisely follow these procedures. However, petitioner acted as her attorney, scheduled the hearing on the petition to allow the account, and was admittedly aware of the negative guardian ad litem report and the deficiencies in the account.

Petitioner, as a conservator, could only expend or distribute estate income or principal without court approval "for the support, education, care, or benefit of the protected individual." MCL 700.5425. She owed a fiduciary duty to Clara to manage her estate in a prudent manner and without self-interest. MCL 700.5416; *In re Green Charitable Trust*, 172 Mich App 298, 312-313; 431 NW2d 492 (1988). Here, the court referred to the negative guardian ad litem report, as well as the history of negative ad litem reports and petitioner's history of conflict with every guardian ad litem that had been appointed. Petitioner had no receipts for \$26,000 in expenditures. She also failed to provide copies of tax returns filed on behalf of Clara, and failed to provide copies of all utility records to determine Clara's 1/6 share of those expenses. Petitioner also failed to provide documentation that she had complied with the court's prior order to purchase a prepaid funeral plan for Clara. Because petitioner could not account for the expenses allegedly incurred on Clara's behalf, she breached her fiduciary duty as a conservator by removing the funds from Clara's estate. Therefore, the court did not abuse its discretion in disallowing the account and had good cause to remove petitioner as successor conservator and appoint a new successor conservator.¹

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

¹ Petitioner's contention that she did not have notice of the hearing is misplaced as she scheduled the hearing, was present at the hearing, and had notice that the guardian ad litem's report was negative.