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).

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DT: May 24, 2013

RE: In re AWAD Estate
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

Did Major League Baseball players do their part in World War II ("WWII")? Much has been written to say they did. There is a great book which came out in 2008 called "When Baseball Went to War", which tells many stories of the bravery shown by some of the many who served.

But, did they really do their part, or were they mostly playing baseball for military teams or serving in combat positions?

Let me share some statistics:

- 16 million Americans were under arms in WWII; 400,000 died (.025%).

- 114 Minor League players lost their lives in WWII (.00285%). Stopping there, even if you played Minor League baseball, your chances of dying were 100 times less than the average soldier.
- Two major leaguers did die, Harry O'Neill and Elmer Gedeon. In my opinion, calling them major leaguers is a stretch. Both O'Neill and Gedeon only played in the bigs in 1939. O'Neil got into one game for the athletics and had no at bats. The A's lost 97 games that year and finished seventh. Gedeon played for the Senators and went three for 15 getting into five games. Washington lost 87 games that year and finished sixth.

I do not denigrate their service to the war, and I honor their loss of life, but they were not really major leaguers.

"A" conclusion – if you were a Major League ballplayer in WWII you weren't likely to die.

REVIEW OF CASE:

Reference Files: Fees on Fees
Liability of Non-Probate Assets
Apportionment of Fees as to Non-Probate Assets

This case is an excellent summary of the law involved and is spot on correct.

In pertinent part Appellee was awarded fees as well as fees in defending the attack on fees. The probate assets were insufficient to pay the fees. The judge declared liability on the non-probate assets in a non-pro rata fashion; specifically against the person who caused the fees to be incurred.

I. Fees on Fees

In re Sloan, 212 Mich App 357 (1995) does say what this Court of Appeals says it says. In pertinent part, "the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney and the estate may not be diminished to pay those fees and costs". Fees for fees claims are claims brought in behalf of an attorney "seeking fees'. **Nevertheless** the Court of Appeals panel did not look to see whether these fees were ordinary and ignored the second footnote of Sloan which says:

> "Nonetheless where extraordinary fees and costs are incurred because of an opposing party's fraud, unjustifiable objections raised in bad faith or other extraordinary circumstances the Probate Court is authorized to impose appropriate sanctions via various fee shifting mechanisms".

Since the Lower Court awarded sanctions, and since the Lower Court did employ fee shifting mechanisms, the Court of Appeals, in this reviewer's opinion, should have upheld the fees on fees portion of the Probate Court award as part of the fee shifting done against the non-probate assets. In other words, rather than remanding back, if hypothetically $8/10^{ths}$ of a fee did not deal with fees on fees and $2/10^{ths}$ did because of the action of the respondent, $10/10^{ths}$ should be allowed and $2/10^{ths}$ of the total not paid by the Trust, under *Sloan*, apportioned against the non-objecting parties.

The court uniquely cited *In re Hammond* as will be seen later. But, if *In re Hammond* was to be invoked, and if there were sanctions why not sustain all the fees – merely not against the estate and avoid a remand?

II. Claims Against Non-Probate Assets

The Court of Appeals correctly cited MCL 700.3805(3) that non-probate assets should pay the proportionate share of unpaid claims. Under Section 1201 an administrative expense is a claim, as is a funeral bill. The court defines proportionate not necessarily being equal and that a 100% could be proportionate. They then go on to apply *In re Hammond* to non-probate assets which have never been done before, but which does appear to be appropriate, and it is the first time I have seen it done. The interested party causing the appeal bears the full cost of the proportionate allegation against non-probate assets.

I would like to see a court, someday, define "extraordinary circumstances" to find out just how far *Sloan* (actually footnote 2) goes. If there is a full blown contest involving expert witnesses, in defense of a fiduciary on a fee issue – based on allegations of wrongdoing, wouldn't this be extraordinary?

AAM:jv:741254
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re AWAD Estate.

CATHOLIC FAMILY SERVICES, Personal Representative for the Estate of EMIL ELIAS AWAD,

Appellee,

V

MARIE AWAD,

Appellant.

UNPUBLISHED
April 25, 2013

No. 310660
Bay Probate Court
LC No. 09-047102-DE

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Interested person and appellant, Marie Awad ("Awad"), appeals as of right the probate court's order granting appellate attorney fees and costs to Catholic Family Services (CFS), the personal representative of her father's estate, and authorizing CFS to satisfy this outstanding claim against the estate solely by collection from the non-probate assets that Awad received. We remand to the probate court to exclude the portion of the appellate expenses that were incurred defending the costs and attorney fees earned in the original case. We affirm in all other respects.

I. FACTS AND PROCEDURAL HISTORY

Awad's father, Emil Elias Awad ("the decedent"), died intestate on May 4, 2009. The decedent's heirs were his three daughters: Awad, Camille Hanley ("Hanley"), and Nadia Awad ("Nadia"). CFS became the estate's personal representative. As of October 2009, the estate consisted of $50,000 in cash and an undermined sum with respect to household furniture, furnishings, and personal effects. A sizable sum passed to the heirs outside of probate. By October 2010, CFS's amended final account of fiduciary and amended petition for complete estate settlement reflected an estate balance of $50,576 and fees, expenses, and claims against the estate totaling $72,585, $24,512 of which was for attorney fees sought by CFS's attorney, George Phillips. CFS requested $3,982 in fees for its services, proposed allotments of over $5,000 to both Nadia and Hanley for funeral expenses, and requested that the probate court sanction Awad under MCR 2.114 for filing frivolous, legally unsound, and factually inaccurate

pleadings. After a hearing on October 14, 2010, the probate court approved the fees requested by CFS, awarded Phillips $19,512 in attorney fees, sanctioned Awad under MCR 2.114 by eliminating a proposed distribution of $2,345 to her for attorney fees that she incurred in the guardianship and conservatorship proceedings, allowed distributions of $5,672 apiece regarding Nadia and Hanley's claims for funeral expenses, and awarded Nadia and Hanley each an additional $1,022.

Awad appealed. On January 12, 2012, this Court issued an unpublished opinion resolving all claims in favor of CFS. *In re Awad Estate*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2012 (Docket No. 300891), slip op at 14. We awarded CFS taxable costs under MCR 7.219 for having fully prevailed on appeal. *Id.* CFS did not request attorney fees for the appeal, and we did not award appellate attorney fees. See *id.*

After the appeal, CFS filed in the probate court a post-appeal petition to restructure final distributions. CFS argued that Awad's appeal resulted in "significant additional administrative expense" to the estate, i.e., $15, 246.94 in attorney fees and costs. Thus, CFS requested that the court award it these additional expenses; CFS suggested that the court should allow the claims to be collected from the nonprobate transfers received by the heirs. On April 12, 2012, the probate court issued an opinion and order on the post-appeal petition. The court concluded that "MCL 700.3720 provides for payment of attorney fees for defending the estate" and, therefore, granted CFS's request for $15, 246.94 in attorney fees and costs The probate court also concluded that MCL 700.3805(3) allows an insolvent estate to request that nonprobate transfers be returned to the estate to satisfy claims against it. The court determined that it was equitable for Awad to bear the cost of the appeal without any contribution by the other heirs because Awad was the only one who participated in the appeal. Thus, the court authorized CFS to collect the $15,246.94 in attorney fees and costs from Awad's nonprobate transfers. Awad moved the court for reconsideration, and the court denied the motion.

II. ANALYSIS

A. FEES FOR FEES

Awad's first argument on appeal is that the probate court erred by permitting CFS to charge the estate for the time it spent defending the attorney fees it earned in the original proceedings. We agree.

We review for an abuse of discretion a trial court's ruling on a request for attorney fees. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.*

"The general rule in Michigan is that absent authorization by statute, court rule, or contract, attorney fees are not recoverable." *In re Temple Marital Trust*, 278 Mich App 122, 129; 748 NW2d 265 (2008). Under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, there is statutory authority for awarding attorney fees in this case. See MCL 700.3715(w)-(x) (stating that a personal representative may prosecute and defendant a claim or proceeding and employ an attorney who shall receive reasonable compensation for his or her

employment); MCL 700.3720 (stating that a personal representative that defends or prosecutes a proceeding in good faith, whether successful or not, is entitled to receive from the estate necessary expenses and disbursements, including reasonable attorney fees incurred). Nevertheless, this Court has held that "legal services rendered in behalf of an estate are compensable where the services confer a benefit on the estate by either increasing or preserving the estate's assets." *In re Sloan Estate*, 212 Mich App 357, 362; 538 NW2d 47 (1995). Fees-for-fees claims, i.e., claims seeking payment from an estate of attorney fees and costs incurred in establishing or defending a petition for attorney fees, "clearly do not benefit the estate because they do not increase or preserve the estate's assets." *Id.* at 363. Instead, "the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney, and the estate may not be diminished to pay those fees and costs." *Id.* Fees-for-fees claims are claims "brought in behalf of the attorney seeking the fees." *Id.*

In this case, Awad argued the following in the initial appeal: the attorney fees and costs awarded by the probate court were excessive, the probate court erred by granting CFS's petition to approve a plan of administration, CFS should have commenced an action against her sisters to recover $50,000 allegedly stolen from the estate, CFS mismanaged the estate, her due-process rights were violated because she was not given evidentiary hearings on her claims and objections, and the probate court erred by rejecting her claim for certain expenses that she incurred on behalf of her father. *In re Awad Estate*, unpub op at 6-13. Although not all of the issues on appeal involved the defense of the costs and attorney fees awarded by the probate court, at least some of the time CFS spent defending the appeal was time spent defending the costs and fees awarded to it. The time spent on such defense did not benefit the estate because it did not increase or preserve the estate's assets. See *In re Sloan Estate*, 212 Mich App at 363.

Therefore, the probate court abused its discretion by awarding costs and attorney fees for these specific expenses. See *id.* at 362-363. Thus, we must remand this case to the probate court to exclude the portion of the appellate expenses that were incurred defending the costs and attorney fees earned in the original case.

B. INVASION OF AWAD'S NONPROBATE ASSETS

Awad next argues that the probate court erred by authorizing CFS to collect the attorney fees and costs solely from Awad's nonprobate transfers. We disagree.

We review de novo as questions of law issues of statutory interpretation. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). We review for an abuse of discretion the probate court's dispositional rulings. *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011).

MCL 700.3805(3) states the following:

> If there are insufficient assets to pay all claims in full . . . [and if] the personal representative is aware of other nonprobate transfers that may be liable for claims . . . the personal representative shall proceed to collect the deficiency in a manner reasonable under the circumstances so that each nonprobate transfer . . . bears a proportionate share or equitable share of the total burden.

Awad asserts that MCL 700.3805(3) requires a personal representative to collect equally from each nonprobate asset if nonprobate assets are used to satisfy a deficiency and, thus, that the probate court erred by authorizing collection solely from Awad's nonprobate assets and ignoring the word "each" in MCL 700.3805(3). Awad misconstrues the statute.

When interpreting EPIC, we adhere to well-established principles of statutory interpretation:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. [*Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 259; 827 NW2d 379 (2012), quoting *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010).]

EPIC does not define "equitable" or "proportionate." See MCL 700.1101 *et seq*. The common meaning of "equitable" is "fair and impartial or reasonable; just and right." *Random House Webster's College Dictionary* (2005). The common meaning of "proportionate" is "proportional," which means "having the same or a constant ratio or relation." *Id.* In contrast, the common meaning of "equal" is "as great as; the same as . . . like or alike in quantity, degree, value, etc." *Id.* Thus, "equitable" does not mean the same thing as "equal." Instead, it refers to what is fair and just. Furthermore, "proportionate" does not require that something be "equal." Therefore, MCL 700.3805(3) does not require that an equal share be taken from each nonprobate asset.

We conclude that the probate court's decision to authorize CFS to collect the attorney fees and costs solely from Awad's nonprobate transfers did not fall outside the range of reasonable and principled outcomes. See *Smith*, 278 Mich App at 207. It is inequitable to charge all nonprobate assets equally when only a single beneficiary's actions—Awad's actions—incurred additional administrative costs for the estate. Cf. *In re Hammond Estate*, 215 Mich App 379, 388; 547 NW2d 36 (1996) ("[I]t would be grossly unjust and inequitable to assess a portion of the attorney fees against those beneficiaries who declined to participate in appellants' efforts to "reprobate" [the] estate."). Furthermore, by collecting from only Awad's assets, the share assessed to each asset was proportional with the amount of additional costs to the estate that each beneficiary incurred. Specifically, Awad's actions incurred 100% of the costs, so her proportionate share was 100%. The other beneficiaries did nothing to incur additional costs, so their proportionate share was nothing. Therefore, regardless of whether we view the nonprobate assets as being equitably or proportionally used to pay the expenses, MCL 700.3805(3) authorized the probate court's invasion of only Awad's nonprobate assets.

Accordingly, the probate court did not abuse its discretion.

C. FACTUAL ERRORS

Awad also argues that the probate court made "serious and fundamental errors regarding the facts underpinning many of its earlier decisions." In particular, Awad contends that the court made factual errors regarding an alleged conversion of $50,000 from the decedent, the reimbursements for funeral expenses, and the reason the initial attorney fees were so high. For these reasons, Awad insists that the probate court's award of appellate attorney fees and costs should be reversed. We reject this argument.

Generally, we review for clear error a probate court's findings of fact. *In re Temple Marital Trust*, 278 Mich App at 128. To the extent Awad's allegations of factual error involve the application of the law-of-the-case doctrine, we review the issue de novo. *KBD & Assoc, Inc v Great Lakes Foam Tech, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012).

"Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals." *Augustine v Allstate Ins Co*, 292 Mich App 408, 425; 807 NW2d 77 (2011). The doctrine applies to questions specifically determined in a prior decision and to questions necessarily determined to arrive at the prior decision. *Schumacher v DNR*, 275 Mich App 121, 128; 737 NW2d 782 (2007); *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

With respect to Awad's argument that the court made factual errors regarding an alleged conversion of $50,000, Awad is essentially asking this Court to "correct" the factual errors that the probate court made regarding the $50,000. She argues that if the probate court had corrected the factual errors and misunderstandings with respect to this money, it would not have assessed all of the appeal expenses against her. We addressed Awad's conversion allegation extensively during her first appeal in which she argued that the estate should have filed a conversion claim against her sisters. See *In re Awad Estate*, unpub op at 6-9. We explained that under the plan of administration that Awad agreed to, she was required to petition the probate court under MCL 700.3415 concerning her sisters' potential civil liability, but she never did. *Id.* at 7. We also explained that it was clear that the probate court had rejected Awad's conversion argument and that the alleged conversion had been addressed and resolved during the guardianship and conservatorship proceedings such that her argument was "problematic on res judicata principles." *Id.* at 8-9. Thus, we denied her any relief on the issue. *Id.* at 9. Even if the conversion issue was unresolved in some way before the first appeal, our decision in the first appeal has ended the issue. See *Augustine*, 292 Mich App at 425; *Schumacher*, 275 Mich App at 128; *Kalamazoo*, 229 Mich App at135. The matter contested, i.e., the factual circumstances regarding the $50,000, was resolved when we concluded that the issue was procedurally barred. Additionally, even if the probate court "corrected" the factual errors and misunderstandings, it is not clear how that would have altered the court's decision to award appellate attorney fees and costs; Awad simply states in conclusory fashion that it would have made a difference. An argument is abandoned when an appellant provides this Court with a mere conclusory assertion and, thus, leaves it to this Court to discover and rationalize the basis for the claim. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 131-132; 715 NW2d 398 (2006). Accordingly, Awad has not demonstrated entitlement to relief on this basis.

With regard to Awad's argument concerning the reimbursements for funeral expenses, Awad states in her appellate brief that "*[o]nce again* Marie Awad asserts that the claim filed by [her sisters] for reimbursement of funeral expenses is nothing more than a fraud upon this Court." (Emphasis added). She insists that she and her sisters paid equally for the decedent's funeral expenses. In her prior appeal, Awad objected on this basis to the funeral expenses claimed by her sisters, and this Court concluded that the probate court did not err by authorizing the sisters' funeral-expense claims. *In re Awad Estate*, unpub op at 12-13. We are bound by this earlier determination. See *Augustine*, 292 Mich App at 425. Thus, the probate court did not err on this basis.

Finally, Awad argues that the probate court erroneously relied on a representation made by Phillips that, because Awad engaged numerous attorneys during the original case, the amount of attorney fees incurred by CFS increased because Phillips spent a large number of hours bringing the attorneys hired by Awad up to speed. This argument lacks merit. The probate court's view of what caused the initial attorney fees to be so high is simply not relevant in this appeal. It does not matter what caused the attorney fees in the original proceedings to be so high because those proceedings are over. This Court already upheld the award of fees connected with the original administration of the estate. *In re Awad Estate*, unpub op at 10-14. The award of attorney fees and costs for defending the first appeal, i.e., the $15, 246.94, is what is now before this Court. And as previously discussed, Awad's actions incurred 100% of these costs for the estate. Awad has not established that she is entitled to relief on this basis.

D. ADDITIONAL ISSUES

As a final matter, we note two additional issues arising in this appeal: (1) Awad's suggestion that the probate court's award of attorney fees is unreasonable under Michigan Rule of Professional Conduct (MRPC) 1.5 and (2) Awad's contention that CFS, Phillips, and the probate court were biased against her. These issues are not properly before this Court because Awad has not raised either issue in her statement of questions presented. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) ("This issue is not contained in the statement of questions presented; it is therefore deemed abandoned."). Moreover, we conclude that Awad's one-sentence argument regarding the reasonableness of the attorney fees is abandoned for the additional reason that it is presented in a conclusory and cursory fashion. See *PT Today, Inc*, 270 Mich App at 131-132; *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

We remand to the probate court to exclude the portion of the appellate expenses that were incurred defending the costs and attorney fees earned in the original case. We affirm in all other respects. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan