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.

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

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DT: April 22, 2010

RE: Estate of James Bryant Boyer, Deceased
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE BASEBALL:

What is your favorite game? – I'll tell you mine.

Again, I am restricting myself to games that I have actually seen in person.

My father was a great father, a great business man, a great lawyer, and a fair gin player. After he left the FBI, his first clients were members of the Purple Gang, (Fleisher v United States, 302 US 218 (1937)). Although he became a very fine commercial lawyer and litigator, he maintained some of those old "friendships." One gentleman happened to live in Cuba and always remembered my father by sending him six boxes of Belinda cigars each month, until the unfortunate Castro revolution.

My father had worked out an arrangement with a gentleman who operated the advanced ticket window at Briggs Stadium, and the Cuban cigars became the lingua franca for the best box seats available for that day's game, rather than some game in the future.

On April 17, 1955 my best friend, Dale Rands, and I took a bus down to Briggs Stadium and, in exchange for half dozen of my father's cigars, obtained two box seats behind the Tiger dugout and witnessed the best game I have ever seen from a young fan's perspective. The Tigers beat the lowly Kansas City Athletics 16 to nothing. But the highlight was Al Kaline hitting three homeruns – two in one inning. It never got any better than that; friendship, hero worship and the smell of fresh grass at Briggs Stadium. Memories are the only refuge from which man cannot be driven.

REVIEW OF CASE:

Reference Files: Default Judgment – Set Aside
Sanctions
Fees and Costs
Efficacy of DNA

This case has little to do with probate law, but emanates from a decision by a Probate Court.

The decedent's daughter was appointed personal representative of her dad's estate. Petitioner sought to determine Respondent not to be a daughter in a hearing for determination of heirs. Daughter, a student at Michigan State University; on her mother's advice, did not appear for discovery or trial and a "default judgment" was entered against her. Respondent was determined not to be a daughter, by the Probate Court, because of the default and removed as personal representative. She and her mother were ordered to pay petitioner's attorney fees, based on estimates as to what the fees of Petitioner were. (Jurisdiction over mom?)

Daughter asked the Probate Court to have the judgment set aside. She produced a DNA test result showing that there was 99.9997 percent certainty that she was the daughter of decedent. She also supplied other supporting evidence. She affied that she was at school and ill and produced a doctor's note, together with a statement on her reliance upon her mother, all as evidence of good cause.

The Probate Court refused to entertain her request and did not set the judgment or the sanctions aside. The Court of Appeals vacated the Order and remanded the matter.

Good Cause

The Court of Appeals set up a sliding scale. The better the meritorious defense, the less the showing of "good cause" has to be. (This is good sliding scale, similar to the amount of influence necessary to constitute undue influence, based on the physical and mental condition of a person.)

Since, in this case, the meritorious defense was "absolute" (Court's words not mine) the Court of Appeals ruled that the Probate Court did not give strong enough weight and consideration to the absolute meritorious defense on the sliding scale. The Probate Court was told on remand to decide whether, under the totality of the circumstances, the Respondent had made the requisite lesser showing of "good cause" to prevent manifest injustice.

Fees and Costs

Estimate on fees are insufficient for sanctions. The matter was remanded to give the parties an opportunity to contest the estimates provided.

AAM:jv:660071v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JAMES BRYANT BOYER,
Deceased.

CHARLES FILMORE and SUSAN FILMORE,

Petitioners-Appellees,

v

NICOLE FOOTE,

Respondent-Appellant.

UNPUBLISHED
March 11, 2010

No. 287902
Oakland Probate Court
LC No. 2008-314702-DE

Before: HOEKSTRA, P.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

Respondent Nicole Foote appeals as of right the July 11, 2008 default judgment against her that determined she was not James Bryant Boyer's daughter and that required her and her mother to pay petitioners fees and costs in the amount of $14,700. Respondent filed a petition to set aside the default judgment. On September 4, 2008, the probate court denied respondent's petition, holding that respondent failed to establish good cause. We vacate the September 4, 2008 opinion and order and remand for reconsideration of respondent's petition to set aside.

I. FACTS AND PROCEDURAL HISTORY

Respondent, a college student at Michigan State University, was appointed personal representative of Boyer's estate. Petitioners, on the belief that respondent was not Boyer's daughter, filed a petition to remove respondent as personal representative of the estate and to determine Boyer's heirs. Petitioners scheduled the depositions of respondent and her mother for April 7, 2008. Respondent and her mother did not appear for the depositions. Petitioners then filed a motion to compel, and the probate court issued a scheduling order. The order directed respondent and her mother to appear for depositions on May 5, 2008. The scheduling order also set July 11, 2008, as the date for a contested hearing. Respondent and her mother did not appear on May 5, 2008, for the ordered depositions. After petitioners filed a motion to show cause, the trial court ordered respondent and her mother to appear for depositions on July 7, 2008, and to pay petitioners' costs of $4,500. Respondent and her mother did not appear for their depositions, nor did they pay the $4,500.

On July 11, 2008, petitioners, but not respondent, appeared for the contested hearing. At the request of petitioners, the probate court entered a default judgment against respondent. The judgment declared that respondent was not the daughter of Boyer and removed respondent as personal representative of Boyer's estate. The probate court also ordered respondent and her mother to pay $14,700 to petitioners in fees and costs.

Three weeks later, on August 1, 2008, respondent filed a petition to set aside the default judgment. She argued that, because she was Boyer's biological daughter, it would be a manifest injustice to allow the default judgment to stand. She presented the probate court with a copy of her birth certificate that listed Boyer as her father and the results of a DNA test that concluded there was a 99.9997 percent probability that she was Boyer's daughter. Respondent also presented her own affidavit, as well as affidavits from her mother and acquaintances of Boyer, establishing that Boyer publicly recognized her as his daughter. In addition, respondent asserted that her failure to attend the depositions and court hearings was not out of defiance or disrespect for the court. She explained that she was a college student, living away from home, and had relied on her mother for advice. Respondent's mother averred that she had advised respondent not to attend the April 7, 2008, and July 7, 2008 depositions, and that respondent did not attend the May 5, 2008 deposition because she was sick. A physician's note, dated May 5, 2008, was presented to the probate court. Respondent's mother also averred that, because no additional notice of the July 11, 2008 hearing was sent, she and respondent did not know that the scheduling order was still in effect.

The probate court denied the petition to set aside. It stated that "simply not participating in the proceedings is not excusable" and that respondent's "failure to appear at her depositions or the [July 11, 2008] hearing is not good cause and it is not excusable neglect." The probate court, not finding good cause, stated that "it does not reach the issue of a meritorious defense."

II. GOOD CAUSE

Respondent argues that good cause existed to set aside the default judgment. She claims that the probate court erred in not considering her meritorious defense in determining whether good cause existed. We review a lower court's decision on a motion to set aside a default judgment for a clear abuse of discretion. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220; 760 NW2d 674 (2008). "Although defaults are not favored, neither is setting aside defaults." *Saffian v Simmons*, 477 Mich 8, 15; 727 NW2d 132 (2007).

MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

The defaulting party bears the burden of demonstrating good cause and a meritorious defense. *Saffian*, 477 Mich at 15. The elements of good cause and a meritorious defense are separate questions, and the questions are not to be blurred. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229-234; 600 NW2d 638 (1999); *Shawl*, 280 Mich App at 233. Nonetheless, "there is interplay between the two: If a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense

were weaker, in order to prevent a manifest injustice." *Shawl*, 280 Mich App at 237 (quotation and alternation omitted). A court must look at the totality of the circumstances when evaluating the good cause and meritorious defense elements. *Id* at 237-238.[1]

In her petition to set aside the default judgment, respondent presented evidence of an absolute defense. She presented evidence that she was Boyer's daughter and that she and Boyer had a parent-child relationship that began before she was the age of 18 and continued until Boyer's death. See MCL 700.2103(a); MCL 700.2114(1)(b)(iii). Because respondent presented credible evidence of an absolute meritorious defense, respondent only needed to make a lesser showing of good cause. *Shawl*, 280 Mich App at 237.

The probate court failed to analyze respondent's petition to set aside the default judgment under the proper legal framework. It decided the element of good cause without any consideration to respondent's meritorious defense. In doing so, the probate court failed to recognize that the meritorious defense asserted by respondent, which was absolute, lessened the required showing of good cause. *Id.* Because the probate court did not operate under the proper legal framework, we vacate the September 4, 2008 opinion and order, and remand for reconsideration.[2] On remand, the probate court shall determine whether, under the totality of the circumstances, respondent has made the requisite lesser showing of good cause required to prevent manifest injustice in light of respondent's absolute defense.

III. FEES AND COSTS

Respondent also contends that the probate court erred when it ordered her and her mother to pay fees and costs in the amount of $14,700 because petitioners failed to provide documentation supporting the amount actually incurred. The probate court imposed sanctions against respondent and her mother for failure to comply with court orders, and respondent does not argue that the probate court was without authority to impose sanctions. She only challenges the amount of the sanctions. "The party requesting attorney fees must show that the attorney fees were incurred and that they were reasonable." *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). Petitioners, in requesting sanctions, only provided the probate court with estimates of the amounts of the fees and costs they had incurred. On remand, respondent shall be given the opportunity to contest the estimates provided by petitioners.[3]

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[1] This Court has provided a nonexhaustive list of factors a court should consider in determining whether a party has shown good cause. *Shawl*, 280 Mich App at 238.

[2] We decline petitioners' request to affirm the default judgment as a proper exercise of the probate court's discretion to impose discovery sanctions. A review of the record convinces us that the default judgment was entered because respondent failed to appear for the contested hearing. Indeed, the default judgment was entered on July 11, 2008, the day of the contested hearing. In addition, in denying the petition to set aside, the probate court stated that "the default judgment was not entered solely as a discovery sanction."

[3] We note that petitioners attached billing records to their response to the motion to set aside the default judgment.

Vacated and remanded for further proceedings not inconsistent with this opinion. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly