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 through 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations of *The Best Lawyers in America*. He 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. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

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

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DT: June 22, 2012

RE: **In re Estate of Cory H. Derousie**
William J. Kuczek v Michael C. Derousie
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL RULES:

I am pleased to offer another guest editorial by baseball fan extraordinaire and probate maven Walter Sakowski.

DO YOU KNOW YOUR RULES?

Many times, a pitcher will use his spikes and dig out an area in front of the pitching rubber to allow the pitcher to obtain better leverage (push off) on his delivery to the plate. Some pitchers will go an inch or two deep, resulting in the mound sticking up. As an umpire, rule on this play.

The pitcher digs out the rubber resulting in the rubber standing above the ground approximately an inch and one-half and the batter hits a line drive right through the pitcher's legs that hits the

rubber and rolls directly into the on-deck circle, hitting the batter that is waiting to bat next. The ball does not touch any player in the field, but rolls along the ground in the infield, across the foul line and hits the on-deck batter. FAIR OR FOUL? If it is fair, since it hit a player in the on-deck circle, does the batter get a single, ground rule double, etc.? Answer at the end of this article.

FACT OR FICTION?

In 1927, the Babe Ruth was at his heyday and as lore goes, was quite a party animal. During spring training in 1927 in St. Petersburg, Florida, the Babe tied one on the night before an exhibition game and did not show up to the exhibition game until the sixth inning. As is the propensity for the weather patterns in Florida, an afternoon shower developed that lasted for about fifteen minutes and the game was halted due to the rain. Meanwhile, the Babe, although not feeling too well, did get dressed to play and came strolling into the dugout in the eighth inning. After being berated by his manager, Babe was inserted as a pinch hitter in the bottom of the ninth inning. By this time, it was starting to get dark and remember the ground was quite wet from the fifteen minute deluge.

On the first pitch, the Babe took one of his mighty swings, connected, and went into his famous homerun trot. None of the outfielders moved, but the Babe waddled around the bases and the umpire signaled a home run. The Babe crossed the plate and the Yankees won the exhibition game.

I can hear you asking yourself, nothing unusual about the Babe winning a game with a home run, but this one has a small twist. As I stated, it was starting to get dark and the ground was quite muddy due to the rain. The Babe took his swing and instead of hitting a home run, chopped the ball down into the mud right in front of home plate. Because the ground was muddy, it went into the mud and covered itself up. The groundskeeper after the game was raking the mud out in front of home plate to get it ready for play for the next day and discovered the ball there. The groundskeeper went to talk to the Babe who vehemently denied that he hit it there and claimed he hit a home run. Lore has it that the Babe uttered this denial with a twinkle in his eye.

Although the Babe hit many a home run in gigantic, 'ruthian' distances, this may be the shortest homerun in major league history. FACT OR FICTION? You must remember that it was the Babe who did this and it is an attorney who wrote this short article.

In answer to the ruling of fair or foul? The rules state that the ball must hit a player in fair territory and/or pass first or third base and hit in fair territory. The rubber is part of the field and hence, the ball did not pass first or third base in fair territory nor was it touched by a player in the field, hence, foul ball.

REVIEW OF CASE:

Reference Files: Contract to Make a Will
Claims – Gratuity
Form Over Substance

Plaintiff allowed his mother and her husband (evidentially not his father) to live in his house. The couple made mortgage payments. After the husband died the wife, Plaintiff's mother, continued to live in the house and make mortgage payments until the mortgage was paid off.

Plaintiff claimed that he had an agreement with his mother, as a matter of contract that the rental would be paid after she died. He also cited promissory estoppel, quantum merit and other claims.

The Lower Court granted summary disposition in favor of the mother's estate. It theorized that since the contract would have been enforceable, only post mortem, that it constituted a contract to make a Will and thus must be in writing.

The Lower Court disposed of the balance of Plaintiff's claims because of the special relationship between the parties. Although it was not articulated what this meant, there is a presumption of gratuity when services are rendered by parties who are related. The Court of Appeals affirmed.

Plaintiff articulated in both the Lower Court and Court of Appeals a difference between a contract to pay consideration post mortem and a contract to make a Will. I believe that the Court of Appeals grasped the distinction, but never the less found and cited law to the effect that, since the terms of payment come due after death, the agreement constituted an alleged contract to make a Will, and thus under EPIC had to be in writing. The Court of Appeals cited *In re McKim Estate*, 238 Mich App 457 in support of its theory. This annotator can see certain distinctions. There is a difference between "I will give you a devise" and "I approve your filing a claim against my estate." For one thing, a creditor is preferred over a devisee. Regardless, we at least have a finding, unpublished though it is, that guides the practitioner in how to interpret anything that comes due after death.

The Plaintiff raised two other issues:

- First, that the court applied the applicable law even though it wasn't raised by the other party. The Court of Appeals cited *People v Lanzo Construction Company*, 272 Mich App 470 (2006) and said that the court was entitled to raise issues.
- Second, Plaintiff contended that his case should have construed under contract law rather than contract to make a Will law because that is how he labeled his cause of action. The court appropriately found that labels for causes of action are not dispositive, because that would exalt form over substance and the court cited *Norris v City of Lincoln Park Police Officers*, 292 Mich App 574 (2011).

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Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CORY H. DEROUSIE.

WILLIAM J. KUCZEK,

Plaintiff-Appellant,

V

MICHAEL C. DEROUSIE, Personal Representative of the Estate of Cory H. DeRousie,

Defendant-Appellee.

UNPUBLISHED
May 17, 2012

No. 302818
Oakland Probate Court
LC No. 2010-327310-CZ

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the probate court order disallowing the claims for unpaid rent by granting summary disposition in favor of defendant.[1] We affirm.

This case arises from plaintiff's rental of a condominium to the decedent and his wife, plaintiff's mother. The couple paid the mortgage payment directly to the mortgage holder. After plaintiff's mother died, the decedent continued to live in the residence and pay the mortgage. After the mortgage was paid off, the decedent paid the association fees. Several months after the decedent passed, plaintiff raised a claim for unpaid back rent with the estate. Defendant, as the personal representative of the estate, disallowed the claim. Consequently, plaintiff filed a complaint in probate court alleging breach of contract, promissory estoppel, and quantum meruit. Specifically, plaintiff asserted that he did not charge the couple full rental value during the decedent's lifetime because of the promise that the outstanding balance would be paid via a provision in the decedent's will.

Defendant filed a motion for summary disposition of the complaint, asserting that the contract was unenforceable because it did not comply with the statute of frauds and that plaintiff

[1] A second motion for summary disposition addressed rent and storage fees incurred after the decedent's death. This second motion for summary disposition is not at issue in this appeal.

could not present clear and convincing admissible evidence to support the remaining claims. Plaintiff opposed the dispositive motion. At the hearing regarding the motion for summary disposition, the probate court held that the case was governed by MCL 700.2514 of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*, which required a writing to be enforceable. Accordingly, the probate court granted defendant's motion for summary disposition of the complaint for back rent.

The lower court's decision regarding a motion for summary disposition is reviewed de novo with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute's plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76.

It is the duty of the courts to execute the intent of the testator regarding the distribution of the estate, particularly where the intent has been expressed in the lawful provisions of a will. *In re Howlett's Estate*, 275 Mich 596, 600-601; 267 NW 743 (1936). The intent of the testator is to be determined from the four corners of the will. *Id.* at 601. Actions seeking to enforce an obligation against an estate are scrutinized closely and viewed with great caution. *Teason v Miles*, 368 Mich 414, 416-418; 118 NW2d 475 (1962). The individual seeking specific performance of a contract to leave property pursuant to a will bears the burden of proving the contract. *In re McKim Estate*, 238 Mich App 453, 456; 606 NW2d 30 (1999). This individual must prove "an actual express agreement and not a mere unexecuted intention." *Id.* To obtain specific performance, the claimant must present clear and convincing evidence for enforcement to occur. *King v First Mich Bank & Trust Co*, 11 Mich App 144, 146; 160 NW2d 721 (1968). When the parties are related, there is a presumption that services provided during the decedent's lifetime were rendered gratuitously. *Id.* "[T]he faithful rendering of services . . . over a period of years raises an inference of obligation." *Id.*

First, plaintiff contends that the probate court erred in sua sponte raising the issue of the application of MCL 700.2514. We disagree. The submission of the issues by the parties to the probate court as a standard breach of contract action is not controlling. Stipulations of law are not binding on a court. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). Furthermore, the court is presumed to know the applicable law. *People v Lanzo Constr Co*, 272 Mich App 470, 484-485; 726 NW2d 746 (2006). Accordingly, the probate court was entitled to raise and address the appropriate statute.

Next, plaintiff contends that the trial court erred in applying MCL 700.2514 to the present case when a standard breach of contract dispute was at issue, not a contract to make a will. We disagree. A party's choice of labels for a cause of action is not dispositive. This Court is not bound by a party's choice of label because to do so would exalt form over substance. *Norris v City of Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). "A party cannot avoid the dismissal of a cause of action through artful pleading." *Id.* An exercise in

semantics does not prevent the grant of summary disposition. *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000). In the probate court, plaintiff asserted that this situation did not involve a contract for an inheritance, but rather was a contract to reimburse plaintiff from an inheritance. "[An] alleged oral agreement is properly characterized as an agreement to make a will or devise, because the terms come due after the promisor's death." *McKim Estate*, 238 Mich App at 457. Here, plaintiff alleged that he was to receive payment for back rent after the decedent's death. Therefore, this transaction is appropriately classified as an agreement to make a will or devise. *Id.* Accordingly, plaintiff's characterization is without merit.

Before legislative action, an oral agreement to make a will or devise could be established without a writing provided there were sufficient proofs to establish the oral agreement. See *McDaniels v Schroeder*, 9 Mich App 444, 451-452; 157 NW2d 491 (1968). However, in 1978, Michigan's Probate Code was amended to provide that the "only" way to prove the existence of a contract to make a will or devise was to comply with the writing requirements of MCL 700.140, now repealed. *McKim Estate*, 238 Mich App at 455-456. MCL 700.140 of the Probate Code was replaced in EPIC by MCL 700.2514, but retained the language of MCL 700.140 without substantive changes. *Id.* at 456 n 1. MCL 700.2514 governs contracts to make or not revoke a will or devise and provides:

> (1) If executed after July 1, 1979, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established only by 1 or more of the following:
>
> (a) Provisions of a will stating material provisions of the contract.
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
>
> (c) A writing signed by the decedent evidencing the contract.
>
> (2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The plain language of MCL 700.140, now MCL 700.2514, "evidences the Legislature's intent to bar agreements to make a will or devise absent a writing." *McKim Estate*, 238 Mich App at 459. Exceptions to the writing requirement are not permitted because they would "reintroduce the uncertainties and litigation that the statute was designed to eliminate." *Id.* at 460. The enforcement of an oral contract to make a will or devise is disfavored because at the time of administration one of the parties is deceased and cannot confirm or deny the agreement to enter into a contract. *Id.*

In *McKim Estate*, the petitioner, a nonrelative, cared for the decedent from 1989 until his death in 1997. In 1993, the petitioner asserted that the decedent agreed that, upon his death, she would inherit his home and $100,000 pursuant to the terms of his will. However, the decedent died without a will, leaving three heirs at law. The petitioner filed a petition for court supervision and allowance of her claim. The probate court ruled that the claim was barred by the predecessor to MCL 700.2514, MCL 700.140. *McKim Estate*, 238 Mich App at 454-455.

On appeal, this Court affirmed, stating:

> In the present case, petitioner testified that she and the decedent expressly agreed that the decedent would leave her a bequest under the terms of his will in exchange for personal services. This alleged oral agreement is properly characterized as an agreement to make a will or devise, because the terms come due after the promisor's death. Therefore, the alleged agreement falls within the purview of subsection 140(1). However, the decedent died without a will, and petitioner neither alleged nor offered a writing signed by the decedent evidencing the alleged contract. Accordingly, petitioner failed to meet her burden of proving that an agreement to make a will or devise existed, and the probate court properly ruled that petitioner's claim against the decedent's estate was barred by subsection 140(1). [*McKim Estate*, 238 Mich App at 456-457.]

This Court also rejected petitioner's attempts to recover by alleging theories of implied contract in law and quantum meruit because the couple's special relationship rendered the services gratuitous. *Id.* at 460-461.

Applying the *McKim Estate* decision to the present case, we conclude that the probate court properly granted defendant's motion for summary disposition. *Smith Trust*, 480 Mich at 23-24. The plain language of MCL 700.2514 demonstrates that an agreement to make a will or trust must be in writing. *Klooster*, 488 Mich at 296. The legislative purpose underlying the writing requirement was to bar agreements to make a will or devise absent a writing. *Briggs*, 485 Mich at 76; *McKim Estate*, 238 Mich App at 459-461. Because the terms of plaintiff's purported agreement with the decedent arose after death, this oral agreement is appropriately characterized as an agreement to make a will or devise. *McKim Estate*, 238 Mich App at 457. Therefore, an action for breach of contract cannot be established because it fails to comply with the writing requirements of MCL 700.2514. Furthermore, the claims of promissory estoppel and quantum meruit also fail because a special relationship existed between the parties, and therefore, the reduction of the rental value is deemed gratuitous. *Id.* at 460-461.[2]

Affirmed. Defendant, as the prevailing party, may tax costs. MCR 7.219.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[2] In light of our conclusion regarding these issues, we need not address plaintiff's constructive trust claim.