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 2010 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. 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: October 11, 2010

RE: Estate of Ernest Fink
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

On February 10th and 18th I gave my 2010 prognostications. Let's see how I did.

Albert Pojois would pass 400 lifetime homeruns – he did. He finished with 408.

Ken Griffey would not pass Willie Mays and this would be his last year – correct.

Jim Thome would likely pass Rafael Palmeiro, Harmon Killebrew and Mark McGwire – correct.

Albert Pujois' lifetime average would go up and Ichiro Suzuki down – half right. Albert dropped, finishing the year at .312.

Magglio Ordonez would top his lifetime average of .312 – He didn't; he hit .303.

REVIEW OF CASE:

Reference Files: Law of The Case – Only Issues Decided
Change In Law – Which Law Applies
Profits from Bequest – Prior to Distribution
Failure to Rule
Extrinsic Evidence to Show Intent

The judicial rulings in this Appellate decision are heavily dependent on the unique facts of the case.

Decedent divorces without later changing provisions of his will. Ex-wife was to inherit, if she did not predecease. She predeceased but two provisions favored her children, an option in a bequest and the residue.

The will was written under RPC, but death of Settlor occurred under EPIC.

In a probate hearing, the lower court applied EPIC 700.2807(1) which modifies wills made preceding divorce and denied Appellants any relief. Things get a little muddled here. Did Appellants' appeal both as to the bequest and residue or just the bequest? (I call it muddled because in this decision the Court of Appeals said "in the court's view" only the bequest was appealed; that's a lot different from "we find you did appeal.")

In the first appeal the Court of Appeals reversed and remanded the matter back for judgment for Appellants as to the issue of the bequest. Their theory was that judging which law to apply was subject to MCL 700.8101(2)(e) which said that a rule of construction applies the law at the time of execution unless there is evidence of intent to the contrary. In this case there was evidence supporting the RPC and MCL 700.8101(2)(e) that Decedent wanted the Appellants to have the farm mentioned in the bequest.

The first Court of Appeal's decision in enforcing the RPC, as to the bequest, had specific language about the farm and not as to the residue. Though the theory of reversal applied to both issues the court, in this appeal, said that since it was clear that they applied the theory only to the bequest that it was the only issue decided. Law of the case only applies to issues actually decided.

Hence, we had an anomaly that had a wrong construction by a lower court was only partially vitiated due to inaction of the parties. This court points to certain things Appellants could have done after the first decision to remedy the matter that they, the Appellants, did not do.

Appellants felt they were entitled to profits from the farm mentioned in the bequest for the time of death and cited *In Re Allen Estate* 240 Mich 661 and *In Re Churchill's Estate* 230 Mich 148, to the effect that there was vesting at the time of death. The court limited their review of this issue by saying this was an option which vested at time of death, not a vesting of fee. Profits, therefore, run from time of purchase.

LESSONS LEARNED:

After a divorce folks should see an estate planner.

Make clear what you are appealing if you take an appeal and if there is a failure to rule by the court of appeals, take action.

AAM:jv:#672244v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ERNEST JOHN JAMES FINK.

MICHAEL POST and STEVEN POST,

Appellants,

v

MARY ANNE TAYLOR and RICHARD SCHULTZ, Co-Personal Representatives

Appellees,

and

DALE TERMUNDE

Appellee.

UNPUBLISHED
August 26, 2010

No. 291268
Van Buren Probate Court
LC No. 2006-001118-DE

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Appellants Michael Post and Steven Post appeal by right the probate court's March 16, 2009 opinion and order that affirmed the court's May 8, 2007 order that appellants were prohibited from sharing in the residue of Earnest Fink's estate and that denied appellants' petitions for payment of farming proceeds and for appointment of an independent personal representative. We affirm

I. BASIC FACTS AND PROCEDURAL HISTORY

Earnest Fink executed a will on April 27, 1990. He left his entire estate to his wife Della, if she should survive him. Della had three sons, appellants and John Post, from a previous marriage. Fink's will contained the following provisions, in the event that Della did not survive Fink:

> A. I give to my two stepsons: STEVEN POST . . . and MICHAEL POST . . . the exclusive privilege of purchasing my farm and any and all farming

tools and equipment for a price of double the state equalized valuation on said farm. . . .

B. I give, devise, and bequeath all of the rest, residue and remainder of my property whether real, personal or mixed, in equal shares, to my three stepsons: STEVEN POST . . . MICHAEL POST . . . and JOHN POST . . . .

Fink and Della divorced in 2001. Fink died five years later in April 2006.

The probate court entered an order of formal proceedings admitting Fink's will to probate in December 2006. The order stated that Fink's will was subject to MCL 700.2807, and Mary Anne Taylor and Richard Schultz were appointed co-special personal representatives of Fink's estate. MCL 700.2807(1)(a)(i), a section of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, provides, in pertinent part, that a divorce revokes "a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse."

On May 8, 2007, the probate court entered an order revoking the devises to appellants in Fink's will. The probate court explained that under the Revised Probate Code (RBC), which was in effect at the time Fink executed his will, a divorce did not revoke dispositions in a will to relatives of the testator's former spouse, but that under EPIC, specifically MCL 700.2807, which was in force at the time Fink died, a divorce revoked dispositions to relatives of the testator's former spouse. The probate court stated that when MCL 700.2807 is applied to Fink's will, appellants and John Post were prohibited from taking under the will. Although the probate court was "troubled by [this] outcome," it could find no valid argument that warranted setting aside MCL 700.2807.

Appellants appealed the probate court's order to this Court, which concluded that the probate court erred in its application of MCL 700.2807. *In re Fink* (*Fink I*), unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 278266). The Court concluded that MCL 700.2807(1) was a rule of construction and, therefore, the exception in MCL 700.8101(2)(e), which provides that "[a] rule of construction . . . applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent" applied to Fink's will. *Id.* at 5. According to the Court, extrinsic evidence could be used to establish a contrary intent, and the extrinsic evidence presented by appellants to the probate court, 11 affidavits from Fink's friends, neighbors, and business associates, established that Fink "intended that appellants have the opportunity to acquire the farm, along with farming tools and equipment even though he and Della were divorced." *Id.* at 5-6. The Court "[r]eversed" the probate court's order and "remanded for entry of judgment in favor of appellants." *Id.* at 7. However, earlier in its opinion, the Court stated that "only one dispositive provision in the will is at issue in this appeal," and that provision was the farm-purchase provision. *Id.* at 2.

Thereafter, appellants provided notice of their intent to purchase the farm and all farming tools and equipment. Appellants also filed a petition requesting a determination of the residue of Fink's estate. They claimed that the Court in *Fink I* "[did] not address the residue" and that the principles announced in *Fink I* should apply to the residue provision. Appellants stated that they were aware of no evidence indicating that Fink intended for John Post to receive a share of the

residue, so they requested that the devise to their brother be revoked and that they each receive one-half of the residue.

After accepting the parties' stipulation that appellants be allowed to purchase the farm, the probate court considered the effect of *Fink I* on the residue provision. The probate court stated that it was unclear why the Court in *Fink I* limited its review to the farm-purchase provision, considering that both the farm-purchase provision and the residue provision were devises to Della's children. It also stated that the same reasoning used by the Court regarding the farm-purchase provision would apply to the residue provision. However, it concluded that this Court's opinion was clear that only the order regarding the farm-purchase provision was reversed; its order regarding the residue provision was not reversed. The probate court held that because the order concerning the residue provision was almost two years old, the order was not subject to rehearing or review and had become "the prevailing law of this case." The probate court also denied appellants' petitions for payment of the farm's net proceeds and to appoint a new personal representative of Fink's estate.

II. LAW OF THE CASE

On appeal, appellants assert that the Court in *Fink I* reversed the probate court's entire May 8, 2007 order and remanded for entry of judgment in their favor. They contend that because the probate court on remand entered an order that prohibited appellants from receiving any share of the residue, the probate court entered an order that was directly contrary to the Court's judgment in *Fink I*. We disagree.

Whether a trial court followed an appellate court's ruling on remand is a question of law that we review de novo. *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

In support of their position that the probate court's May 8, 2007 order was reversed in its entirety, appellants rely on two sentences from the opening paragraph of the *Fink I* opinion. These two sentences state that appellants appeal the probate court's order determining heirs and devisees and that "[f]or the reasons set forth in this opinion, we reverse and remand for entry of judgment in favor of appellants." *Fink I*, unpub op at 1. Appellants also rely on the second-to-last sentence in the opinion, which states, "Reversed and remanded for entry of judgment in favor of appellants." *Id.* at 7. When read in isolation, these sentences in the *Fink I* opinion may suggest that the Court reversed the probate court's entire May 8, 2007 order.

However, the sentences relied on by appellants must be read in context of the entire *Fink I* opinion. Cf. *One's Travel Ltd v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2010) (in construing a statute, this Court reads the statute's words and phrases in context of the entire act). The Court in *Fink I* made it clear that while two provisions in Fink's will referenced appellants, only one of the provisions—the farm-purchase provision—was at issue in the appeal. It stated, "Although the residuary clause in decedent's will also referenced appellants, only one dispositive provision in the will is at issue in this appeal." *Fink I*, unpub op at 2. Similarly, in the opinion's only footnote, the Court stated, "The will provision at issue confers upon appellants a substantial discount on the farm along with all of decedent's farming tools and equipment . . . ." *Id.* at 3, n 1. Thus, when the *Fink I* opinion is read in its entirety, it is apparent that the Court was only reversing the probate court's order regarding the farm-purchase

provision. In the Court's view, appellants did not appeal the probate court's order regarding the residue provision, and the Court did not reverse that order. Accordingly, appellants' assertion that the Court in *Fink I* reversed the entire May 8, 2007 order of the probate court is incorrect.

Moreover, in entering the March 16, 2009 order, which again prohibited appellants from receiving any of the residue, the probate court did not take action inconsistent with the judgment of an appellate court. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case doctrine provides that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009). However, the doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator*, 462 Mich at 260. The law of the case doctrine does not apply to an issue that was raised but not decided by an appellate court. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994). Because the Court did not address the residue provision in *Fink I*, it did not create any law of the case regarding the residue provision. Thus, the probate court's May 8, 2007 order regarding the residue provision remained a valid order, and the order entered by the probate court on March 16, 2009, was consistent with that order.[1]

Appellants also claim that the residue provision was not at issue in *Fink I* because there was not sufficient information in the record to determine disposition of the residue. They reason that because the record contained no information regarding their brother John Post, this Court was not able to determine whether MCL 700.2807 applied to the residue provision. We disagree.

As already explained, the Court in *Fink I* only reversed the probate court's order concerning the farm-purchase provision. While appellees have offered possible explanations for why the Court did not view appellants as appealing the order regarding the residue provision, the fact is that the Court did not explain why it only addressed the farm-purchase provision. Nonetheless, nothing in the *Fink I* opinion suggests that the Court did not address the residue provision because there was no information in the record concerning John Fink. Accordingly, appellants' assertion that the Court in *Fink I* did not address the residue provision because it was not presented with any information about John Fink is nothing but speculation or conjecture. We find no merit to the argument.[2]

Appellants finally argue that even if the Court in *Fink I* chose not to consider the residue provision, the probate court, pursuant to *Manske v Dept of Treasury*, 282 Mich App 464; 766

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[1] If they believed that the Court in *Fink I* erroneously concluded that they were not appealing the probate court's order regarding the residue provision, appellants should have either moved for reconsideration, MCR 7.215(I), or filed an application for leave to appeal in the Supreme Court, MCL 7.303(B)(5). Appellants did neither, seeking no redress from this Court's decision not to review the probate court's order concerning the residue provision.

[2] We also find no merit to appellants' argument that there has been no final order concerning the residue provision. The probate court's May 7, 2008 order which revoked the disposition of the residue to appellants and John Post was a final order. See MCR 5.801(B)(1)(c), (d).

NW2d 300 (2009), could still have addressed the provision. We find that the present case is distinguishable from *Manske*.

In *Manske*, this Court in a prior appeal concluded that the plaintiff's gain on real property transferred in lieu of foreclosure was a casual transaction and that the gain should not have been included in the plaintiff's small business tax base. This Court reversed the Court of Claims' order granting summary disposition to the defendant and remanded for further proceedings. On remand, the defendant refused to give a refund to the plaintiff. It argued that it was entitled to offset the amount it owed to the plaintiff by the unused capital expenditure deduction (CAD). It noted that this Court had not directly addressed whether it was entitled to the unused CAD. The Court of Claims disagreed, concluding that "it was bound by the law of the case doctrine to order a full refund without an offset . . . ." It reasoned that this Court could have addressed the CAD issue, but chose not to and that this Court "typically will rule on only one issue when it feels that issue will resolve all questions." The *Manske* Court disagreed and held that the law of the case doctrine did not prevent the Court of Claims from considering an issue that was not raised on appeal or specifically addressed by the Court. *Manske*, 282 Mich App at 467-468.

In *Manske*, there is no indication that before the first appeal the Court of Claims had ruled on the CAD issue. This fact distinguishes *Manske* from the present case. Here, the probate court issued an order that revoked the devises in Fink's will to appellants. Appellants, pursuant to this Court's opinion in *Fink I*, appealed the order as to the farm-purchase provision but not the order concerning the residue provision, and this Court in *Fink I* reversed the order only as to the farm-purchase provision. On remand, the probate court had no reason to reassess the validity of the residue provision. Its order revoking the residue provision had not been reversed.

III. PAYMENT OF FARMING PROCEEDS

Appellants argue that the trial court erred in denying their petition for payment of the farming proceeds. We disagree.

"The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous." *In re Estate of Bennett*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

In support of their claim that they are entitled to the net profits from the farm since the date of Fink's death, appellants rely on *In re Allen's Estate*, 240 Mich 661, 665; 216 NW 446 (1927), and *In re Churchill's Estate*, 230 Mich 148, 155; 203 NW 118 (1925), both of which indicate that title given by will takes effect on the death of the testator. However, in this case, Fink's will did not give appellants title to the farm. Rather, pursuant to the plain language of the will, Fink only gave appellants the option to purchase the farm for a price double the state equalized value.

While appellants' right to purchase the farm may have vested at Fink's death, appellants only have title to the farm after they pay the purchase price. And only when appellants obtain title to the farm will they have the right to the farm's profits. Accordingly, the probate court did not err in denying appellants' petition for payment of the farm's proceeds.

IV. PERSONAL REPRESENTATIVE

Appellants argue that the probate court erred in denying their petition to appoint an independent general personal representative to replace Taylor and Schultz, who they claim are incapable of impartiality. We disagree.

We review a probate court's decision whether to remove a personal representative for an abuse of discretion. *In re Kramek Estate*, 268 Mich App 565, 575-576; 710 NW2d 753 (200). If the trial court selects a decision that falls within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A special personal representative is a personal representative, MCL 700.1106(o), and a personal representative is a fiduciary, MCL 700.1104(e). MCL 700.1212(1) provides:

> A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in [MCL 700.7803] and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty, impartiality between heirs, devisees, and beneficiaries, care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.

Appellants petitioned the probate court to remove Taylor and Schultz as co-special personal representatives under MCL 700.3611. The statute states, in pertinent part:

> (1) An interested person may petition for removal of a personal representative for cause at any time. . . .
>
> (2) The court may remove a personal representative under any of the following circumstances:
>
> (a) Removal is in the best interests of the estate.
>
> (b) It is shown that the personal representative or the person who sought the personal representative's appointment intentionally misrepresented material facts in a proceeding leading to the appointment.
>
> (c) The personal representative did any of the following:
>
> (i) Disregarded a court order.
>
> (ii) Became incapable of discharging the duties of office.
>
> (iii) Mismanaged the estate.
>
> (iv) Failed to perform a duty pertaining to the office.

In denying appellants' petition, the probate court reasoned that "[t]his case is just too complicated and too well entrenched to bring in another party" and that bringing in a new representative would be costly to the estate. It also reasoned that the issues involved in the case

were legitimate factual and legal questions that needed be resolved, no matter who represented Fink's estate. Based on this reasoning, and appellants' failure to provide any specific evidence showing how Taylor and Schultz breached their fiduciary duties, we find no abuse of discretion by the trial court. We affirm the trial court's order denying appellants' petition to appoint a new personal representative.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering