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 2012 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: August 31, 2012

RE: In re Estate of Vivian G. Hornak, Deceased
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

Hank Aaron was the best statistical home run hitter.

There are many analyses of baseball statistics by projection. For example, how many home runs would Ted Williams have hit if he did not serve in the military for two wars?

I have compared the top three homerun hitters in a unique manner.

Up until 1904 Major League Baseball played 140 games. In 1904 the total went to 154 and stayed that way until the American League went to 10 teams in 1961 and the National League in 1962. The total was raised in each respective year to 162.

Barry Bonds hit 762 homers, all in the 162 ERA. Ruth hit 714 in the 154 ERA and Aaron in a split error.

The projection works out as follows:

Name	HR	AB Avg. Per Game	AB Avg. x 8 Extra Games	Years w/o More Games Per Year	Total AB Missed 8 Extra Games	HR Per AB	HR Missed	Adjusted Total
Ruth	714	3.35555	26.844	22	590	11.763	50	764
Aaron	755	3.748	29.99	8	239	16.376	17	772

Both, therefore, pass Bonds even – with his steroid use.

REVIEW OF CASE:

Reference Files: Fifth Amendment
Effective Bankruptcy
Judicial Estoppel – Loss of Ownership Rights
Sua Sponte
Summary Disposition

When I started reading this case I suspected that someone was going to try to set aside Deeds on the basis of undue influence or lack of capacity. I discovered otherwise. Decedent deeded four properties and an interest in crop income to Appellant. Appellant did not record the Deeds. Appellant went into bankruptcy and did not disclose the assets on the list of assets with the Bankruptcy Court. The Appellant was discharged in bankruptcy.

The estate pleaded judicial estoppel and prevailed, negating whatever interest the Appellant had in the property. Appellant went back to the Bankruptcy Court, tried to reopen the proceedings and sought to assert the bankruptcy stay against the Probate Court. The Bankruptcy Court followed a rule of law that assets remaining would be returned to the debtor once the plan was approved, and said that the assets were no longer included in the bankruptcy estate and were not subject to the automatic stay.

The Probate Court, correctly, said that the taking of one position regarding the issue of title to land and subsequently taking another constituted judicial estoppel. The Court of Appeals affirmed saying that 'purpose of judicial estoppel was to stop people from playing fast and loose with our legal system.' Thus and of most importance, even if you own property, because you have negated your Title, by not knowingly listing it with a Bankruptcy Court you cannot now assert the Title.

Appellant had invoked the Fifth Amendment and the Court of Appeals correctly pointed out, civilly, one was entitled to an adverse interest.

As stated above, there is no violation of a stay because the property was not in the bankruptcy estate.

The court cited two published cases to the affect that a summary disposition can be granted when the pleadings, on their face, do not state a cause of action or defense.

AAM:jv:doc 721036
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of VIVIAN G. HORNAK, Deceased.

KENNETH J. HORNAK,

Appellant,

v

ROBERT A. JAREMA, Personal Representative of the Estate of VIVIAN G. HORNAK, F. RON HORNAK, and KIRK AMMAN,

Appellees.

UNPUBLISHED
July 5, 2012

No. 301912
Saginaw Probate Court
LC No. 10-125981-DE

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Appellant appeals as of right from an order of the probate court which granted appellees' request to set aside four real estate conveyances that occurred between appellant and the decedent, Vivian G. Hornak. We affirm.

The parties do not have a dispute regarding the essential facts in this matter. The property at issue was owned by the decedent prior to her death and was included in several deeds allegedly executed by the decedent in favor of appellant between 2000 and 2004. However, none of the deeds were recorded until after the decedent's demise in 2010. Of crucial importance to this case is the fact that appellant filed for bankruptcy on October 31, 2007, and that his Chapter 13 plan was confirmed on December 21, 2007. In 2010, appellant's brothers filed a proceeding in the Saginaw County Probate Court. During that will contest over the decedent's estate, appellant claimed ownership over all of the decedent's real property (farmland) pursuant to four previously unknown deeds executed by the decedent in 2000 and 2004. These deeds had remained in appellant's possession since the decedent executed them. Appellant also claimed ownership of $40,000 in crop income from a joint bank account he shared with the decedent, as well as farm equipment.

Noting the discrepancies between the decedent's will and appellant's claims of ownership, as well as appellant's refusal[1] to answer why he failed to disclose these interests to the bankruptcy court, the probate court issued an order barring appellant from asserting ownership over the property under the doctrine of judicial estoppel. The court opined that appellant was attempting to perpetuate fraud on the court by presenting testimony that directly contradicted his prior sworn testimony before the bankruptcy court, wherein he effectively denied ownership over the property.

However, a few hours before the probate court entered its order, appellant filed a notice with the probate court of his motion before the bankruptcy court to reopen his case and amend his schedules to include this property. After the probate court issued its order, appellant filed a motion for reconsideration in which he argued that the order violated the automatic stay imposed by 11 USC 362(a). The probate court promptly denied this motion.

As an initial matter, we reject appellant's claim that the probate court lacked authority to grant petitioner judgment as a matter of law because a dispositive motion seeking this relief was not filed. In the absence of a dispositive motion, a court is still empowered to grant immediate relief without delay to a party where the pleadings clearly demonstrate that one party is entitled to judgment as a matter of law, or the proofs establish that there is no genuine issue of material fact. MCR 2.116(I)(1); *Boulton v Fenton Twp*, 272 Mich App 456, 462; 726 NW2d 733 (2006). So long as the party is presented with an opportunity to respond, the court's action does not offend due process. *In re Duane V Baldwin Trust*, 274 Mich App 387, 398-399; 733 NW2d 419 (2007). Appellant was afforded several opportunities to argue the merits of petitioner's claim of judicial estoppel.

We also reject appellant's assertion that the probate court's order violated the automatic stay imposed on the bankruptcy estate pursuant to 11 USC 362(a). Whether the bankruptcy filing resulted in an automatic stay and whether the probate court issued its order in violation of that stay are questions of law that this Court reviews de novo. *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). Additionally, because this appeal requires interpretation of federal bankruptcy statutes, the lower court's interpretations are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011). When interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765NW2d 31 (2009).

Under the U.S. Bankruptcy Code, 11 USC 101 *et seq.* ("the Code"), an automatic stay is imposed on a debtor and the debtor's estate at the time that he/she files an application for bankruptcy with the bankruptcy court. 11 USC 362(a). The stay applies to all entities (including state courts) and prohibits "any act to obtain possession or property of the estate or of property

[1] Appellant asserted his Fifth Amendment privilege against self-incrimination. Although inadmissible in a criminal trial, a court may make an adverse inference against a party in a civil proceeding where the person refuses to answer questions by invoking his/her right against self-incrimination under the Fifth Amendment. *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995).

from the estate or to exercise control over property of the estate." 11 USC 362(a)(3). At the time of filing, all "legal and equitable interests" in property owned by the debtor (subject to the exclusions in 11 USC 541(b)) becomes property of the bankruptcy estate, which is vested with the trustee and held for the benefit of the debtor's creditors. 11 USC 541(a); see *Young v Independent Bank*, 294 Mich App 141, 143; ____ NW2d ____ (2011). While the bankruptcy court also has authority to grant relief from the stay under certain circumstances under 11 USC 362(d), any court orders or actions in violation of the automatic stay are voidable by the bankruptcy court, subject to its equitable authority to prevent debtor misuse of the bankruptcy system. *Easley v Pettibone Michigan Corp*, 990 F2d 905, 910-911 (CA 6, 1993) (noting that equity should be invoked to prevent a debtor from using the stay "as a shield to avoid an unfavorable result").

As noted above, all property interests owned by a debtor become property of the bankruptcy estate as of the day that the debtor files for bankruptcy. 11 USC 541(a). "A party filing for bankruptcy must list all of his or her assets on the bankruptcy schedule[s] . . . ." *Young*, 294 Mich App at 143, citing 11 USC 521(a). However, unscheduled assets of the debtor are also included as property of the bankruptcy estate. 11 USC 554(d); *Young*, 294 Mich App at 144; *Bauer v Commerce Union Bank*, 859 F2d 438, 440-441 (1988). As appellant's claim to ownership over the decedent's property arose before he filed for bankruptcy in 2007, his interest in these unscheduled assets was included in the bankruptcy estate.[2]

However, appellant's property was no longer included in the bankruptcy estate as of December 2007. Although estate property does not generally revert back to the debtor, "the confirmation of a [Chapter 13 Plan] vests all of the property of the estate in the debtor." 11 USC 1327(b). In appellant's unsuccessful attempt to modify his Chapter 13 Plan, the bankruptcy court noted that appellant's plan was confirmed on December 21, 2007, and held that pursuant to 11 USC 1327(b) all the property of the bankruptcy estate vested with appellant at that time; so, the property was no longer subject to the automatic stay. *In re Kenneth J Hornak and Judy L Hornak*, unpublished opinion of the US Bankruptcy Court (ED Mich, Docket No. 07-22881-DOB, issued September 27, 2011), at pp 1-2, pp 10-12. As appellant's interest in the decedent's property was no longer contained in the bankruptcy estate as of December 21, 2007, the probate court's order did not violate the automatic stay.

Generally, "[f]or judicial estoppel to apply, a party must have successfully and 'unequivocally' asserted a position in a prior proceeding that is 'wholly inconsistent' with the position now taken." *Szyszlo v Akowitz*, ____ Mich App ____; ____ NW2d ____ (Docket No. 299570, issued March 22, 2012), slip op at 6, quoting *Paschke v Retool Indus*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). This equitable doctrine is designed to prevent a party from playing "fast and loose" with our legal system. *Paschke*, 445 Mich at 509.

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[2] Title to property in a deed transfers by both execution and delivery of the deed. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). Accordingly, appellant owned the property under the deeds because the deeds were executed and delivered to him in 2000 and 2004.

This Court recently adopted our federal circuit court's formulation of judicial estoppel in the bankruptcy context, as established in *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 478 (CA 6, 2010). As adopted in *Spohn v Van Dyke Pub Schs*, ____ Mich App ____; ____ NW2d ____ (Docket No. 301196, issued May 8, 2012), slip op at 6, judicial estoppel will bar a bankruptcy debtor from subsequently claiming an interest in unscheduled property when: (1) the debtor assumed a contrary position to the one claimed in the bankruptcy proceedings; (2) the bankruptcy court adopted the position; and (3) the "omission did not result from mistake or inadvertence." Mistake or inadvertence may be inferred where: (1) the debtor was unaware of the factual basis for her property interest; (2) the debtor had no motive to conceal the property; and (3) the evidence presented shows a lack of bad faith by the debtor. *Id.* "In determining whether there was an absence of bad faith, we will look, in particular, at [the debtor's] 'attempts' to advise the bankruptcy court of [the] omitted claim." *White*, 617 F3d at 478.

Based on the uncontested facts submitted to the probate court, it is clear that the probate court correctly invalidated appellant's deeds under the doctrine of judicial estoppel. Appellant asserted wholly inconsistent statements before the probate and the bankruptcy courts. During the bankruptcy proceedings in 2007, under penalty of perjury, appellant omitted from his property schedules any ownership rights that he allegedly possessed under the deeds, and he acknowledged that he believed the deeds were valid. Appellant's subsequent claim of ownership in the property is clearly inconsistent with his prior denial of ownership during the bankruptcy proceedings. Appellant was also successful in his representations to the bankruptcy court, as the court adopted his representations by confirming his Chapter 13 plan and discharging his debt in part based on the omitted information. As a result, appellant received preferential treatment from the bankruptcy court, the trustee in bankruptcy, and his creditors.

Finally, the record clearly establishes that appellant's omission was not a result of mistake or inadvertence. The record clearly shows that he was aware of the deeds and believed them to be valid. He also had a clear pecuniary motive to omit this property from his schedules. His actions evinced bad faith, as his omission appeared intentional. Appellant's bad faith is further established by the fact that he failed to amend his bankruptcy schedules until immediately before a crucial hearing in the long pending probate court proceeding. Under these circumstances, the probate court's decision to estop appellant from asserting ownership over the decedent's property pursuant to the deeds was proper, and judgment as a matter of law was properly entered.

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens