*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).

For those interested in viewing previous Probate Law Case Summaries, click on the link below. http://www.kempklein.com/probate-summaries.php

**DT**: September 25, 2012

**RE**: **Estate of Rudy Jauw**
STATE OF MICHIGAN COURT OF APPEALS

---

**BASEBALL STATISTICS:**

"**Sophomore Jinx**"

I have written a previous article on the Sophomore Jinx; why rookies will have such a great season and drop the second season. I also discussed in a previous article why Norm Cash and others had such great years (Cash at .361 and then never going over .300 again), and drop after that.

I incorporate in this article the best explanation I have seen to-date. There is a psychological theory call 'regression to the mean.' It is best explained by Daniel Kahneman in his recent book "Thinking, Fast and Slow".

TALENT AND LUCK

> "A few years ago, John Brockman, who edits the online magazine *Edge*, asked a number of scientists to report their "favorite equation." These were my offerings:
>
> success = talent + luck
> great success = a little more talent + a lot of luck
>
> The unsurprising idea that luck often contributes to success has surprising consequences when we apply it to the first two days of a high-level golf tournament. To keep things simple, assume that on both days the average score of the competitors was at par 72. We focus on a player who did very well on the first day, closing with a score of 66. What can we learn from that excellent score? An immediate inference is that the golfer is more talented than the average participant in the tournament. The formula for success suggests that another inference is equally justified: the golfer who did so well on day 1 probably enjoyed better-than-average luck on that day. If you accept that talent and luck both contribute to success, the conclusion that the successful golfer was lucky is as warranted as the conclusion that he is talented.
>
> By the same token, if you focus on a player who scored 5 over par on that day, you have reason to infer both that he is rather weak *and* had a bad day. Of course you know that neither of these inferences is certain. It is entirely possible that the player who scored 77 is actually very talented but had an exceptionally dreadful day. Uncertain though they are, the following inferences from the score on day 1 are plausible and will be correct more often than they are wrong.
>
> above-average score on day 1 = above average talent + lucky on day 1
>
> and
>
> below-average score on day 1 = below-average talent + unlucky on day 1
>
> Now, suppose you know a golfer's score on day 1 and are asked to predict his score on day 2. You expect the golfer to retain the same level of talent on the second day, so your best guesses will be "above average" for the first player and "below average" for the second player. Luck, of course, is a different matter. Since you have no way of predicting the golfers' luck on the second (or any) day, your best guess must be that it will be average, neither good nor bad. This means that in the absence of any other information, your best guess about the players' score on day 2 should not be a repeat of their performance on day 1. This is the most you can say:
>
> - The golfer who did well on day 1 is likely to be successful on day 2 as well, but less than on the first, because the unusual luck he probably enjoyed on day 1 is unlikely to hold.
> - The golfer who did poorly on day1 will probably be below average on day 2, but will improve, because his probable streak of bad luck is not likely to continue.

We also expect the difference between the two golfers to shrink on the second day, although our best guess is that the first player will still do better than the second.

My students were always surprised to hear that the best predicted performance on day 2 is more moderate, closer to the average than the evidence on which it is based (the score on day 1). This is why the pattern is called regression to the mean. The more extreme the original score, the more regression we expect, because an extremely good score suggests a very lucky day. The regressive prediction is reasonable, but its accuracy is not guaranteed. A few of the golfers who scored 66 on day 1 will do even better on the second day, if their luck improves. Most will do worse, because their luck will no longer be above average.

Now let us go against the time arrow. Arrange the players by their performance on day 2 and look at their performance on day 1. You will find precisely the same pattern of regression to the mean. The golfers who did best on day 2 were probably lucky on that day, and the best guess is that they had been less lucky and had done less well on day 1. The fact that you observe regression when you predict an early event from a later event should help convince you that regression does not have a causal explanation.

Regression effects are ubiquitous, and so are misguided causal stories to explain them. A well-known example is the *"Sports Illustrated* jinx;' the claim that an athlete whose picture appears on the cover of the magazine is doomed to perform poorly the following season. Overconfidence and the pressure of meeting high expectations are often offered as explanations. But there is a simpler account of the jinx: an athlete who gets to be on the cover of *Sports Illustrated* must have performed exceptionally well in the preceding season, probably with the assistance of a nudge from luck -and luck is fickle.

I happened to watch the men's ski jump event in the Winter Olympics while Amos and I were writing an article about intuitive prediction. Each athlete has two jumps in the event, and the results are combined for the final score. I was startled to hear the sportscaster's comments while athletes were preparing for their second jump: "Norway had a great first jump; he will be tense, hoping to protect his lead and will probably do worse" or "Sweden had a bad first jump and now he knows he has nothing to lose and will be relaxed, which should help him do better: The commentator had obviously detected regression to the mean and had invented a causal story for which there was no evidence. The story itself could even be true. Perhaps if we measured the athletes' pulse before each jump we might find that they are indeed more relaxed after a bad first jump, and perhaps not. The point to remember is that the change from the first to the second jump does not need a causal explanation. It is a mathematically inevitable consequence of the fact that luck played a role in the outcome of the first jump. Not a very satisfactory story - we would all prefer a causal account -but that is all there is."

**REVIEW OF CASE:**

Reference Files: No Contest Provision
Conditions Subsequent
Reverter

In sustaining a Lower Court's summary disposition, the Court of Appeals reached a correct decision, but the Opinion is, in this reviewer's opinion, too broad and, though unpublished, might give rise to unintended consequences. Likewise, the Scrivener (Testator) in an attempt to declare specific intent may have done the same thing; that is producing unintended consequences.

Testator did not want his daughter becoming her brother's fiduciary, as a developmentally disabled person. He attempted to obtain this result by including in his Will a no contest provision which said, inter alia:

1. Thou shalt not serve as your brother's fiduciary.

2. If you directly, or indirectly, join in any contest to this Will or {emphasis added} prevent any provision from being carried out, your benefits are revoked.

Daughter accepted a developmentally disabled ("DD") appointment for her brother and refused to resign. The Personal Representative sought construction. Summary disposition was granted in his favor, saying that the Appellant, the sister, should resign or {emphasis added} her share would be revoked. The Court of Appeals sustained enforcing, what it believed to be, the specific intent of the Testator. The Court also determined that the gift was a gift upon a condition subsequent. The Court of Appeals went further to sustain the finding of 'lack of good faith and probable cause based on the stated specificity of the Will'.

**QUERY**: What was the specific intent of the Testator – to revoke the share upon the appointment of the DD, or to allow resignation?

This case is important because it finds:

1. That an "outside" act can violate a no contest provision.

2. The court should not have said that this was gift upon a condition subsequent. This is an issue of pure revocation. If my conclusion is incorrect then all that the Appellant would have had to do is not accept the position of the fiduciary, have her share distributed and then later on petition for appointment herself years later. This would be legally consistent but a gross frustration of the intent of the Testator.

3. The alternative offered to Appellant by the Probate Court and Court of Appeals of resignation to receive her share is, in the opinion of this reviewer, gracious but incorrect.

   (A) She could resign, get her money and later accept an appointment. See number Two (#2) above.

   (B) The document says "if you serve" {emphasis added} your share is revoked. She served. The document did *not* say "continue to serve".

I am also concerned about the finding of lack of probable cause and good faith based upon "the specificity of the document", although I find it great from a defense point of view.

AAM:jv:722562
Attachment

# STATE OF MICHIGAN

# COURT OF APPEALS

In re Estate of RUDY JAUW.

RONALD R. JAUW,

Petitioner-Appellee,

v

MONIQUE M. JAUW,

Respondent-Appellant.

UNPUBLISHED
September 13, 2012

No. 305902
Kent Probate Court
LC No. 10-189352-DE

Before: WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Respondent, Monique M. Jauw, appeals as of right from an order granting petitioner, Ronald R. Jauw, summary disposition on Ronald's petition for an order confirming construction of the will. We affirm.

## I. BASIC FACTS

The testator had three grown children at the time of his October 11, 2010 death – Ronald, Monique, and Paul, a developmentally disabled individual. On November 30, 2007, the testator executed a will appointing Ronald as personal representative. The will included a provision for the appointment of a guardian and conservator for Paul:

> I am mindful that my daughter, Monique M. Jauw, may wish to seek appointment as the guardian and conservator for my son, Paul P. Jauw and it is my specific direction that Monique M. Jauw shall not serve in any capacity as the guardian or conservator for my son, Paul P. Jauw.

Under the will, Monique was to receive thirty-three percent of the residue of the estate. However, the will contained a "no contest or forfeiture" provision, which provided:

> If any beneficiary of this Will shall contest the validity of this Will or any provision [of] this Will, or shall institute or directly or indirectly join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms

(regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for the beneficiary and the descendants of the beneficiary under this Will are revoked and such benefits shall be administered as if the person or those persons contesting any part of this Will and all of their descendants had predeceased me, and none of them shall have any beneficial interest in this Will.

Specifically, if Monique M. Jauw shall contest the provisions of this Will concerning the appointment of individuals other than herself as Trustee of the Jauw Family Amenities Trust or as guardian or conservator of my son Paul P. Jauw, then all benefits provided for Monique M. Jauw and her descendants shall be revoked.

On March 25, 2011, Ronald filed a petition for order confirming construction of the will. The petition alleged that shortly after the testator's death, Monique sought and obtained appointment as plenary guardian of Paul. Attorneys for testator's estate advised Monique that they believed she was acting contrary to her father's express wishes and that her continued appointment as Paul's guardian would result in forfeiture of her interest under the will. Nevertheless, Monique continued serving as Paul's guardian. As a result, Ronald, as personal representative of his father's estate, moved the probate court to confirm that: 1) the devise to Monique in the will was conditional on her not serving in any capacity as Paul's guardian; 2) the will clearly barred the personal representative from distributing any share of the residuary to Monique unless she resigned as guardian before the estate was fully administered; and 3) unless Monique resigned as guardian, her share would be added to and held in the Jauw Family Trust.

In response, Monique argued that she had not violated the forfeiture provision of the will because she did not do anything to "contest" the provisions of her father's will. Monique explained that she was previously appointed successor plenary guardian and that after her father's death she had a legal duty to obtain an order confirming her status as plenary guardian. Even assuming that her acceptance of the probate court's appointment constituted a "contest" to her father's will, Monique had probable cause for instituting proceedings and the forfeiture provision of her father's will was unenforceable pursuant to MCL 700.2518[1] and MCL 700.3905.[2]

On June 3, 2011, Ronald filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the will unambiguously imposed a condition on the devise to

[1] MCL 700.2518 provides: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."

[2] MCL 700.3905 provides: "In accordance with section 2518, a provision in a will purporting to penalize an interested person for contesting the will or instituting another proceeding relating to the estate shall not be given effect if probable cause exists for instituting a proceeding contesting the will or another proceeding relating to the estate."

Monique. The will prohibits Monique from serving in any capacity as Paul's guardian. Monique's willful disregard of her father's wishes divested her of her share of the residue. Contrary to Monique's contention, she affirmatively sought and obtained appointment by the probate court to become Paul's plenary guardian – a clear attempt to frustrate the testator's desire. Monique's claim that there was no "contest" is hyper technical; the fact remains that she is acting in contravention of her father's wishes. Continuing to serve as Paul's guardian is Monique's prerogative; however, the consequence of doing so is forfeiture of her portion of the residue. Neither MCL 700.2518 nor MCL 700.3905 provide any basis for relief where Monique could not in good conscience argue that she had probable cause to contest any portion of her father's will.

On June 17, 2011, Monique filed her own motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). She argued that the probate court's order appointing her as plenary guardian superseded her father's designation in the will. Instead of seeking to modify the guardianship via Michigan's Mental Health Code[3], Ronald was strong-arming Monique into breaching her fiduciary obligation to her developmentally disabled brother by threatening to divest her of her share of residue. Thus, while framing this action as a petition to confirm construction of the will, Ronald's desire was to have Monique removed as Paul's guardian. In so doing, Ronald was asking the court to disregard its own judicial authority.

A hearing on the competing motions for summary disposition was held on July 6, 2011. After listening to the parties' arguments, the trial court found that "[t]he will is not ambiguous." The court noted that the testator had the right to dispose of his property as he saw fit and to attach a condition subsequent to his devise. The court believed that Monique's act of accepting the plenary guardianship was a contest of her father's will and that she did not have probable cause to do so. On August 5, 2011, the trial court entered an order granting Ronald's motion for summary disposition.

Monique now appeals as of right.

## II. ANALYSIS

Monique argues that the trial court erred in concluding that she forfeited her share of the residue by continuing to act as Paul's guardian. We disagree and conclude that the trial court correctly entered summary judgment in Ronald's favor.

We review de novo a trial court's ruling on a summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and

[3] See MCL 330.1637(1), which provides, in part, "[t]he individual with a developmental disability, the individual's guardian, or any interested person on his or her behalf may petition the court for a discharge or modification order under this section."

the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"[A] probate court's construction of a will is a question of law subject to de novo review." *In re Raymond Estate*, 483 Mich 48, 53, 764 N.W.2d 1 (2009).

"The primary goal of the Court in construing a will is to effectuate, to the extent consistent with the law, the intent of the testator." *Raymond*, 483 Mich at 52 quoting *In re Edgar Estate*, 425 Mich 364, 378; 389 NW2d 696 (1986). It is incumbent upon a probate court to execute the intent of the testator regarding the distribution of the estate, especially 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 testator's intent is to be determined from the four corners of the will. *Id.* at 601. If the plain language of the will is unambiguous, "the Court is to enforce the will as written." *Raymond*, 483 Mich at 52. Because a testator is free to dispose of his property as he sees fit, the intent of the testator is the "guiding polar star." *Id.* at 58. Once the testator's intent is discovered, "it is the duty of the court to give that intention effect if that be legally possible." *Id.* quoting *In re Scheyer's Estate*, 336 Mich 645, 649; 59 NW2d 33 (1953).

The testator could not have been clearer. Monique was not to serve as Paul's guardian if she intended to take under the will.

- Article 3 of the will provides: "I am mindful that my daughter, Monique M. Jauw, may wish to seek appointment as the guardian and conservator for my son, Paul P. Jauw and *it is my specific direction that Monique M. Jauw shall not serve in any capacity as the guardian or conservator for my son, Paul P. Jauw.*" [Emphasis added.]

- Article 4 provides: "[I]f Monique M. Jauw shall contest the provisions of this Will concerning the appointment of individuals other than herself as Trustee of the Jauw Family Amenities Trust or as guardian or conservator of my son Paul P. Jauw, then all benefits provided for Monique M. Jauw and her descendants shall be revoked."

- Also, Article 2.3(B) regarding the Jauw Family Amenities Trust, authorizes the trustee "to retain counsel, physicians, or other medical or legal experts to oppose any attempt by my daughter, Monique M. Jauw, to contest this Will, to appoint Monique M. Jauw as a Trustee of the Jauw Family Amenities Trust, or to appoint Monique M. Jauw as the guardian or conservator for my son, Paul P. Jauw."

The trial court noted that the testator had the right to dispose of his property as he saw fit and to attach a condition subsequent to his devise. It compared the two paragraphs in the forfeiture provision:

> [The first paragraph] is a much broader provision than the second paragraph that talks about the contest of the will by Ms. Jauw regarding both serving as trustee or guardian or conservator. But I believe Ms. Jauw has fallen into the provisions of that first broad paragraph.

> And the reason the Court believes that is she has taken an affirmative act to thwart the desire of her father in that provision of the will by executing an acceptance of trust in the DD guardianship of her disabled brother.

The trial court concluded that, in acting as Paul's guardian, Monique forfeited her share under the will:

> The condition I think is clear . . . Ms. Jauw had a right to decline to serve as the successor guardian, and her motivation really is unimportant in a legal sense to this case.
>
> And, again, I take the filing of the acceptance as an affirmative act . . . because there are many ways to trigger the penalties of the no contest clause. You can either directly or indirectly join in any proceeding to contest the validity of the will or to prevent any provision thereof from being carried out in accordance with its terms.
>
> The provision was I don't want Monique to serve. If you serve in that capacity, the devise is lost. The act of Ms. Monique Jauw in executing the acceptance is an affirmative act which either directly or indirectly prevents the provision of Mr. Jauw's will from being carried out. I find no probable cause exists to contest the provision in the will.

The trial court's findings are supported by the unassailable terms of the will. Monique could not serve as Paul's guardian and take under the will. A condition subsequent is a condition that, if not met by one party, abrogates the other party's obligation to perform. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411-412; 646 NW2d 170 (2002). Monique's interest in the residue vested immediately, but was subject to divestment upon her becoming Paul's plenary guardian. There is simply no other way to read the will.

Monique argues that she took no affirmative step to contest the will and that she merely accepted her obligation to serve as plenary guardian because she was named as successor in the event of her father's death. The argument is disingenuous. As the trial court noted, Monique filed an acceptance of the appointment – an affirmative act. She could have just as easily declined the appointment. By accepting the appointment, Monique clearly frustrated the testator's intent and acted in such a way that thwarted his wishes.

Although Monique claims that only the second paragraph of the forfeiture provision applied to her because it was the more specific of the two clauses, she cites only to a notion in contract law that general provisions of a contract must yield to specific provisions. We are not convinced that such a notion has a place in the context of this case. While it is true that "[t]he rules in interpreting contracts are equally applicable to interpreting wills," it is also true that "[a] cardinal principle of construction is that a contract is to be construed as a whole, and all parts are to be harmonized as far as possible. Every word must be taken to have been used for a purpose and no word should be taken as surplusage if the court can discover any reasonable purpose for it which can be gathered from the whole instrument." *Czapp v Cox*, 179 Mich App 216; 445 NW2d 218 (1989). Again, the polar star in will construction is the testator's intent. The testator

was clear that Monique not serve as Paul's guardian if she hoped to take under the will. Where Monique sought to frustrate the testator's intent, the general forfeiture paragraph applied. A testator may "direct forfeiture of the legacy of one who, by indirection, seeks to harass or frustrate his will." *Saier v Saier*, 366 Mich 515, 521; 115 NW2d 279 (1962). Accordingly, the trial court did not err in concluding that Monique triggered the first paragraph by preventing provisions of the will from being carried out in accordance with the terms thereof.

Monique next argues that even if she "contested" the will by accepting plenary guardianship, she acted in good faith and with probable cause such that the forfeiture provision was unenforceable pursuant to MCL 700.2518 and MCL 700.3905. We disagree.

In *Schiffer v Brenton*, 247 Mich 512; 226 NW 253 (1929), the Supreme Court held that no-contest clauses in wills were valid and enforceable, regardless of whether the will contestant acted in good faith because "[s]uch provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation." *Id.* at 519. However, in 1998, the Legislature enacted MCL 700.2518, which provides that "[a] provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Unlike in the past, a no-contest clause in a will is unenforceable if probable cause exists for instituting proceedings. "'Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.'" *In re Griffin Trust*, 281 Mich App 532, 540; 760 NW2d 318 (2008) rev'd on other grounds 483 Mich 1031 (2009) quoting 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment c, p. 195.

Monique's inheritance was clearly conditioned upon her not serving in any capacity as Paul's guardian or conservator. Given the clear and unequivocal intent of the testator, there was no basis for Monique to believe that there was a substantial likelihood that her challenge would be successful. Accordingly, the forfeiture provision is enforceable against Monique.

Finally, there is no support for Monique's claim that Ronald's motivation was to have her removed as guardian. It must be stressed that the trial court did nothing to remove Monique as guardian; instead, the trial court only found that Monique was in violation of her father's wishes and, as such, would not be able to take under the will. The trial court did not disregard its own judicial authority. Monique must now decide whether she would like to remain Paul's plenary guardian or whether she would like to share in her portion of the residue. But she may not do both based on the clear and unequivocal language of the will.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly