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 2009 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.

DT: March 3, 2010

RE: In re Loyer Estate
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

How great was Ty Cobb? He was clearly the best hitter of all time. We all know that he had the highest lifetime batting average of .367. An analysis of his career shows that he was even better than this statistic shows.

Let's suppose a batter had to face three great pitchers every day for a whole year, how would he have done? During his lifetime Cobb faced two right hand Hall of Famers, Walter Johnson in 92 games and the immortal Cy Young in 25 games. Now let's throw in a left hander, Babe Ruth, who pitched to Cobb in 21 games. Remember, Babe Ruth had two 20 game win seasons, a lifetime record of 94 and 46 and an ERA of 2.28.

In order to win a batting title, at the time Cobb played, one would have had to have had more than 440 at bats. If we add these three great pitchers' appearances together, Ty Cobb had 505

times at bat and had 186 hits. This is an average of .368 against three of the best pitchers in the game. To put it another way, had Cobb faced nothing but these three pitchers, for an entire season, his batting average would have been one point higher than his lifetime average.

The only team Cobb ever faced, where he had a batting average less than .350, was when he joined Philadelphia and played against the Tigers at the end of his career. His home and away batting average was within 3,000ths of a point away from each other.

When he was 70 years of age, he was asked how he would fair against the pitchers of today. He said he probably would have batted around .340. The sportscaster who asked the question inquired as to whether the pitchers were that much better today than in the past. No replied Cobb, I would have batted .340 because I am 70 years old. He was right.

REVIEW OF CASE:

Reference Files: Deed Delivery
Delivery to Third Party

Ralph Goldsmith was a great probate lawyer. He re-taught me what I learned in kindergarten; "possession is 9 points of the law." When he opened a safe deposit box and others were present, his philosophy was "grab it."

In the instant case, decedent and her husband deeded Blackacre to defendants, jointly with rights of survivorship. The Deed was placed in decedent's box to which plaintiff, unknowingly, had access. Plaintiff was decedent's personal representative. The box was opened, and the defendant got hold of the Deed and recorded it. (Defendant actually added a date to make it recordable, but the court does not go into this). Plaintiff sued to set aside the Deed. The Trial Court and the Court of Appeals ruled in plaintiff's favor because there was no delivery to the grantee or to a third party. (As the plaintiff did not know he had access to the box or what its contents were, the court ruled there was no third party delivery.) A note found in the box, on the Deed, which said this is "for" the defendants did not constitute a delivery of the Deed.

If plaintiff had lawyer Goldsmith with him, at least the issue of recordation would have been moot. Also, if the plaintiff had retained possession of the Deed and defendant had sued, plaintiff could have pleaded his theories in a Motion for Summary Disposition or a Motion for Security of Costs and prevailed without trial.

More Thoughts About My Last Annotation

A caveat regarding my recent annotation of the Vera Esther Windham case; that case discussed interlineations. Even though the Court of Appeals ruled that the "marked-up" copy was neither a revocatory instrument nor a Will under the facts of the case, to avoid trying the issue anew, a Scrivener might consider warning the Settlor/Testator against the practice of interlineations or even stamping on a client's copies something to the effect that mark-ups shall not be deemed revocatory or constitute a new Will.

AAM:jv:655789v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re LOYER Estate.

LARRY DIEM, Personal Representative of the Estate of Margaret Loyer,

Plaintiff-Appellee,

v

EMERALD LOYER and HAROLD LOYER,

Defendant-Appellants.

UNPUBLISHED
February 2, 2010

No. 289015
Alcona Probate Court
LC No. 08-004578-DE

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendants appeal by right from an order of the probate court determining the estate assets of decedent Margaret Loyer. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue in this matter is a parcel of real property located in Alcona County, Michigan, and referred to by the parties as "the farm." Decedent and her husband moved to the farm in 1975. In 1988, decedent and her husband enlisted the services of attorney David Cook to assist them with estate planning matters. At the direction of his clients, Cook drafted a deed transferring ownership of the farm to defendants as joint tenants with full rights of survivorship and reserving a life estate for the grantors. Cook also drafted wills for both decedent and her husband which set forth that the farm would go to defendants, subject to their paying a cash amount to their sisters. Cook testified that the purpose of the deed was to avoid probate and inheritance taxes in place at the time the wills and deed were drafted. Cook further testified it was his understanding that the deed was to be signed, but not recorded. There was some discussion between Cook and the grantors that they would retain control and maintain the option changing their minds at a later date by not recording the deed.

Decedent's husband passed away in 1992. Decedent had Cook draft a new will for her in 1998. Under the terms of the new will, decedent's estate was to be split equally among defendant Emerald Loyer, plaintiff, and Arlene Hemp. The 1998 will did not specifically mention the farm or the previously drafted deed. A third will was drafted in 2007, adding a

specific bequest of cemetery plots to plaintiff and removing Hemp as a beneficiary. Cook testified it was his belief that the changes in the subsequent wills indicated that decedent's intent as to the farm had changed and that he was surprised that the deed had turned up after decedent's passing.

Decedent passed away on November 11, 2007. Following decedent's passing, the parties were going through some of her personal papers and discovered that she had a safety deposit box. The two went to the bank to retrieve the contents of the safety deposit box and discovered that decedent had listed plaintiff as having access to the safety deposit box. The contents of the safety deposit box were removed, including the deed in question. Defendant Emerald Loyer attempted to have the deed recorded, but was informed that he could not do so without a date on the deed. As a result he added the date June 5, 1975, and initialed the changes. The deed was recorded and Emerald informed plaintiff that he and Harold were the rightful owners of the farm.

Plaintiff then filed a motion to have the deed set aside. Following a hearing, the probate court determined that the deed in question was ineffective for want of delivery. Defendants argue that the trial court erred in this determination. We review the findings of a probate court sitting without a jury for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). This Court defers to the probate court on matters of credibility due to its "unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), MCR 2.613(C).

A deed becomes effective when delivery occurs, not when the deed is executed or recorded. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). Delivery is required to show that the grantor intended to convey the property described in the deed. *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). A rebutable presumption of delivery is raised when the grantee physically possesses the deed. *In re Herbert's Estate*, 311 Mich 608, 613, 19 NW2d 115 (1945). The subsequent conduct of the parties may be taken into consideration in determining whether the grantor intended to pass title. Generally, a deed is ineffective when delivery does not occur during the grantor's lifetime. *Phelps v Pipher*, 320 Mich 663, 672-673; 31 NW2d 836 (1948).

Emerald Loyer obtained physical possession of the deed when the safety deposit box was opened. But, the circumstances of his possession and the conduct of the grantors subsequent to the creation of the deed rebut any presumption of delivery by possession. See *Tighe v Davis*, 283 Mich 244, 250; 278 NW 60 (1938). Emerald came into possession of the deed by happenstance. Such an occurrence does not evidence an intent by the grantors to convey a present interest in the property. Indeed, the placement of the deed in the safety deposit box evidences just the opposite. The 1998 and 2007 wills also support the conclusion that delivery did not occur.

Further, there is no evidence that the deceased instructed plaintiff to covey the deed upon her death. Admittedly decedent had listed plaintiff as having access to the safety deposit box, but it is uncontested that plaintiff did not know the safety deposit box or its contents existed until after decedent's death. See *McMahon v Dorsey*, 353 Mich 623, 627; 91 NW2d 893 (1958).

Defendants also argue that the note found in decedent's handwriting listing items in the safety deposit box is proof of decedent's intent because it contained a reference "deed for Emerald and Harold." Defendants conclude the word "for" constituted a directive to decedent's personal representative to deliver the deed. We disagree. The parties found the list as they were going through decedent's papers after her passing. There is no indication that list was anything more than an inventory of items. The preposition "for" does indicate that defendants are the beneficiaries of the deed, but in context it only serves as an adjectival phrase, i.e., it specifies the identified conveyees. Moreover, even if this Court were to conclude that the list was a directive to decedent's personal representative, there is no dispute that plaintiff was unaware that decedent had a safety deposit box or that he had access to it before her passing. As such, defendants' claim that decedent had placed the deed with a third person is without merit. Nor can it be reasonably argued that decedent reserved no right of recall over the deed when the deed remained in her safety deposit box.

Therefore, the probate court did not commit clear err in concluding that there was insufficient evidence presented below to establish the essential element of delivery and the deed was therefore ineffective. *In re Bennett Estate*, *supra* at 549.[1]

In light of our conclusion that the deed in question was ineffective for want of delivery, we need not address defendants' assertion that the deed was not rendered void by the failure of grantors to affix a date of transfer.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[1] Plaintiffs also argue that the trial court erroneously prevented Emerald from providing testimony related to conversations he had about the deed with his father and stepmother. However, defendants did not raise this issue in their statement of questions presented, *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001), nor have they provided citation to authority to support the argument, *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) (a party waives a claim by merely announcing a position and providing no authority to support it).