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.

DT: February 18, 2010

RE: Estate of Vera Esther Windham
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

Continuing with the prospective statistical changes for next season, we go from lifetime homerun rankings which are easily affected to lifetime batting average leaders which is seldom affected. This is simply because it is harder to climb the lifetime ladder of yesterday's stars. Over time, homeruns are cumulative based on total; batting average usually declines over time. Remember, it has been 69 years since anyone hit over .400. Keep in mind that most stat guys won't count a player with less than 5,000 at bats. (Joe Mauer, for instance, has a lifetime batting average of .327 but only 2,582 at bats).

With this said, Albert Pujols is tied for 17th place with Al Simmons and Sam Thompson with a cumulative average of .334. Ichiro Suzuki is in 20th place with .333. My prediction is that Albert goes up and Ichiro goes down. For Tiger fans, Magglio Ordonez is in 70th place, at .312 and any guess is a good guess. I say he is still capable of topping .312 and his lifetime average will rise.

REVIEW OF CASE:

Reference Files: Interlineations
Copies of Wills
Holographic Will
Burden of Proof
Extrinsic Evidence
Mental Incapacity

Decedent signed a will which her attorney/scrivener kept for safekeeping. She retained a copy upon which she made interlineations. In her past, this procedure of marking up copies was a precursor to the making of a new will when the marked copy was presented to, and then redrafted by, attorney/scrivener. Decedent also wrote Appellant a card evidencing some intent for him to inherit. The lower court and the Court of Appeals ruled that, under the circumstances, the marked up copy was not a revocatory instrument or valid Will and also ruled that the card was not a will.

The Court of Appeals said:

1. The party proffering the interlineated copy of a document has the burden of proof by clear and convincing evidence that this marked up copy was intended as a revocation of the original. This makes sense, as the proponent of the document with interlineations is really an objecting party to the original unmarked instrument.

2. Mere drafts are inadmissible as wills.

3. It was probative that the marked copies, in the past, "led" to new wills and shows there was a lack of testamentary intent in making the interlineations. This was supported by decedent's calls to the attorney/scrivener to effectuate the changes which were never made on a new document. Let's stop for a moment. This is a very meaningful ruling. In a general sense the mark up certainly shows testamentary intent, but not the type of testamentary intent necessary to be efficacious. To have legal effect, the query is – is this document intended as a will? This is a specific kind of testamentary intent. The marked up copy is similar to "I want you to have all my money when I die." The phrase is redolent with a general testamentary intent, but lacks a completed act which is a specific testamentary intent.

4. After reviewing all of the above extrinsic evidence, the Court of Appeals then said that a court should not go outside the document to glean testamentary intent. This makes sense because the extrinsic evidence was used here not to determine testamentary intent, but to determine whether there was a revocatory act. Extrinsic evidence was not used to interpret a document.

5. He who proffers an alleged holographic will has the burden of proof to show that it is one. The card was not a holographic will, because the card was not witnessed.

6. An Appellant Court can rule on an issue not decided by a Trial Court if there are facts admitted into evidence to make the determination.

7. One looks at the date of execution of a document to determine competency, unless there is a condition before or after which is competently related to the date of execution. Here, the

Court of Appeals and Trial Court placed emphasis on a discharge summary of fourth stage dementia, issued three weeks before the event of execution, which supported the decision of the Court of Appeals and Trial Court.

I would have phrased it differently. I would have placed penultimate emphasis on the date of execution and not talked about "competent relation." This is a new legal term subject to differing interpretations. I would have said since the evidence of diagnosis found in the Discharge Summary was such that there could not have been a cogent moment, three weeks hence, there was no competency at the time of execution. I know I am making an assumption about the evidence admitted at trial, but I cannot see the document having been admitted without supporting medical testimony.

AAM:jv:654836v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of VERA ESTHER WINDHAM.

EDWARD L. FLOYD, Personal Representative of the Estate of VERA ESTHER WINDHAM,

Appellee,

v

TERESA D. CARR,

Appellant.

UNPUBLISHED
January 26, 2010

No. 287937
Calhoun Probate Court
LC No. 2006-000092-DE

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Appellant Teresa Carr appeals as of right the trial court's order denying the admission of a marked-up January 17, 2003, will, an April 4, 2003, letter, and a card dated August 9, 2005, as either holographic wills, revocations of previous wills, or writings intended as wills. We affirm.

Esther Vera Windham, deceased, properly executed a January 17, 2003, will, which devised her estate to her son, appellee Edward Floyd. Subsequent handwritten changes on Windham's copy of the January 17, 2003, will showed Floyd being crossed-out as the sole devisee and Carr, who is Windham's daughter, being written in as the sole devisee. Windham also wrote a letter to Carr dated April 4, 2003, which Carr asserts reflects Windham's desire for Carr to get all of Windham's property upon her death. On July 6, 2005, Windham was hospitalized at the Fieldstone Center psychiatric unit in Battle Creek, Michigan, where she was under the care of Dr. Marjanen Rouhani, a psychiatrist. On July 21, 2005, Windham was discharged to Alterra Assisted Living Center. On August 9, 2005, Windham signed and dated a card that she previously sent to Carr, which Carr also asserts reflects Windham's desire for Carr to get all of Windham's property upon her death. On January 18, 2006, Windham passed away at Alterra.

Carr argues that the trial court erred in refusing to give testamentary effect to the handwritten changes to testator's copy of her January 17, 2003, will, pursuant to MCL 700.2507(1)(b). The standard of review of findings of fact made by a probate court sitting without a jury is whether those findings are clearly erroneous. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is said to be clearly erroneous when the

reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings of fact made by the probate court because of the probate court's unique vantage point regarding witnesses, their testimony, and other influencing factors not readily ascertainable to the reviewing court. *Id.*; MCR 2.613(C). "This Court reviews de novo the proper interpretation of statutes . . . ." *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). Likewise, we review de novo the language used in wills and the probate court's construction of a will. *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009); *In re Reisman Estate*, 266 Mich App at 526.

We conclude that the trial court did not clearly err by finding that Carr did not establish by clear and convincing evidence that Windham intended for the marked-up copy of the January 17, 2003, will to result in a revocation of her original January 17, 2003, will. MCL 700.2503(b); MCL 700.2507(1)(b). A review of the marked-up copy of the January 17, 2003, will reveals that several handwritten comments surround the area where Windham changed her devisee to Carr. These comments appear to relate to Windham trying to organize her thoughts regarding how she wanted the will to read and how she was going to explain the family dynamic and her reasoning for her devise to the person who was going to revise her will. Hence, these comments suggest that she lacked testamentary intent when she marked up her copy of the original January 17, 2003, will and was only thinking of this marked-up copy as a draft. Mere drafts of wills are inadmissible to probate. *In re Cosgrove's Estate*, 290 Mich 258, 262; 287 NW 456 (1939). Moreover, this finding is consistent with the recollection of Patrick Hirzel, Windham's attorney who drafted several of Windham's wills for her, that on a few occasions before Windham met with Hirzel in order to make changes to her estate plan, Windham would make handwritten changes on her copy of the will and then present this marked-up copy to Hirzel to incorporate the changes into her formal will. Further, Hirzel reported that sometimes these marked-up copies would not reflect the changes that Windham wanted, which also suggests that Windham lacked testamentary intent and this was a draft.

Carr next argues that Windham possessed knowledge that her modifications to the will could have legal effect and treated this marked-up document as having legal significance. We disagree. First, there is no language on the will indicating an intention to revoke the portions of the will that were crossed out. Second, Carr testified that she received the marked-up copy of the January 17, 2003, will within two weeks of January 17, 2003, and the testimony shows that it was after this that Windham contacted Hirzel on several occasions and expressed her intention to change her will. This behavior by Windham clearly shows that she did not believe that she revoked her original January 17, 2003, will simply by marking up some of the provisions. Although Hirzel told Windham that he was unwilling to make any more changes to her will and warned her that making changes to her copy of the will may have legal effect, Windham did not appear to take any stock in this warning because she repeatedly sought for Hirzel to formally modify her will. In addition, although Windham may have told Carr that the marked-up copy was important and that she should file it, Windham did not refer to the marked-up copy as a revocation of her previous will. Hence, there is no evidence that Windham possessed the intent for the document to operate as a revocation of her previous will. Based on the foregoing, we conclude that the trial court did not clearly err by finding that there was not clear and convincing

evidence that the marked-up copy of the January 17, 2003, will was a testamentary document resulting in a revocation. *In re Bennett Estate*, 255 Mich App at 549.

Carr also argues that it was not necessary for the changes to be written on the original document in order for the changes to constitute a revocation of the original will. In this case, the original January 17, 2003, will existed and was held by Hirzel. Although Windham altered her copy of the will, she was very aware that Hirzel retained the original will. Based on the foregoing, it was not clearly erroneous for the trial court to find that Windham altering her copy of the will, as opposed to the original, was insufficient to establish a revocatory act. *Id.*

Carr argues that the April 4, 2003, letter that Windham wrote to her constituted a holographic will, pursuant to MCL 700.2502(2). We disagree.

To constitute a will, the writing must have been designed to operate to dispose of the testator's property upon the testator's death. *In re Henry Estate*, 263 Mich 410, 418-419; 248 NW 853 (1933). Moreover, this Court may not go outside the will to supply an intention that cannot be found in it, but rather only to ascertain the intention that accompanied the execution of the will. *Leonard v Leonard*, 145 Mich 563, 566; 108 NW 985 (1906). In other words, "[t]he role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will." *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). "Absent an ambiguity, the court is to glean the testator's intent from the four corners of the testamentary instrument." *Id.*

We recognize that the April 4, 2003, letter does not meet the requirements of a formal will under MCL 700.2502(1), because it was not properly witnessed. The writing also does not appear to have been designed to operate to dispose of the testator's property. Rather, this letter appears to be a plea for Carr to visit Windham. Moreover, although Carr indicates that there is unrebutted extrinsic evidence indicating that the document was written with testamentary intent, that intention is not included in the writing, and the writing is unambiguous. Thus, extrinsic evidence is not admissible. *Leonard*, 145 Mich at 566; *In re McPeak Estate*, 210 Mich App at 412. Based on the foregoing, we conclude that the trial court's finding that the April 4, 2003, writing was not a holographic will was not clearly erroneous. *In re Bennett Estate*, 255 Mich App at 549.

Carr also argues that the writing made a complete disposition of the testator's assets and, therefore, constituted a revocation of previous wills under MCL 700.2507(1)(b). Because this issue was not contained in the statement of questions presented, the issue is waived. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Regardless, this issue has no merit because this letter does not appear to have been written with the intent, or for the purpose, of revoking a previous will.

In addition, Carr argues that the burden of establishing lack of testamentary intent rests with the contestant of the will, and thus Floyd should have had the burden of proof. This issue was also not contained in the statement of questions presented and, therefore, is waived. *Id.* Regardless, this issue has no merit because Carr, as the proponent of the April 4, 2003, letter as either a holographic will or a revocation of the original January 17, 2003, will, had the burden of proof.

Carr next argues that the card that Windham sent her, which was subsequently signed and dated August 9, 2005, made a testamentary disposition and thus should have been admitted as a holographic will. The trial court did not determine whether this writing was a valid holographic will. "However, where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). In this case, the record contains the necessary facts, and we conclude that Carr's argument has no merit. We recognize that the August 9, 2005, card does not meet the requirements of a formal will under MCL 700.2502(1), because it was not properly witnessed. Further, the writing does not appear to have been designed to operate to dispose of the testator's property. Moreover, although Carr indicates that there is unrebutted extrinsic evidence indicating that the document was written with testamentary intent, that intention is not included in the writing, and the writing is unambiguous. Extrinsic evidence is not admissible under these circumstances. *Leonard*, 145 Mich at 566; *In re McPeak Estate*, 210 Mich App at 412. Based on the foregoing, we conclude that Carr's argument that the August 9, 2005, writing was a holographic will is without merit.

We also reject Carr's challenge to the trial court's determination that Windham lacked the requisite mental capacity when she signed and dated the card. Carr argues that there was testimony that Windham was able to grasp the natural objects of her bounty on August 9, 2005, and other testimony that Windham appeared competent during the summer of 2005. Under these circumstances, according to Carr, the trial court erred in relying on the speculative testimony of Dr. Rouhani and placed too much weight on it, as a whole, in light of the conflicting testimony.

The Michigan Supreme Court indicated in *In re Thayer's Estate*, 309 Mich 473, 476-477; 15 NW2d 712 (1944):

> One of the well-established rules of law in this State is that any person has the right to make a will; and that so long as the person has the mental capacity to understand the business in which he is engaged, to know the extent and value of his property, to know the natural objects of his bounty and to keep these facts in mind long enough to dictate his will without prompting from others, such a person has capacity to make a valid will.

In *In re Erickson Estate*, 202 Mich App 329, 333; 508 NW2d 181 (1993), this Court indicated that

> [a] mentally incompetent person is one who is so affected mentally as to be deprived of sane and normal action. A person may be incapable of conducting his business successfully and still not be mentally incompetent. Where there is evidence pro and con, much weight should ordinarily be given to the conclusion reached by the probate judge, who has had the opportunity of seeing and hearing the witnesses. Where insanity or mental incompetency is claimed, it should be proved by a preponderance of the evidence. [Citations omitted.]

"The rule is clear that mental incompetency must be established as of the time the will is made in order to invalidate it," unless the condition of the testator before or after the execution of the will is competently related to the time of execution. *In re Rowling's Estate*, 291 Mich 218, 224-225; 289 NW 136 (1939); see also *In re Powers' Estate*, 375 Mich 150, 158; 134 NW2d 148

(1965). There is also a presumption that a testatrix has the mental capacity to make a will. *In re Johnson's Estate*, 308 Mich 366, 369; 13 NW2d 852 (1944). Thus, "[t]he burden of proof was upon contestant to show by competent evidence that she did not have such capacity." *Id.* at 369-370.

Because the only people who were able to testify as to Windham's apparent mental state on August 9, 2005, were people who were interested parties, other competent evidence regarding Windham's mental state surrounding August 9, 2005, was properly considered by the trial court. *In re Rowling's Estate*, 291 Mich at 224-225; see also *In re Powers' Estate*, 375 Mich at 158. During the summer of 2005, the testimony reflected that Windham showed other signs of potentially being mentally competent. Jan Stern, who was appointed guardian and conservator for Windham, visited Windham at Fieldstone on July 18, 2005, and indicated that Windham knew the names of her children. Subsequently, on September 7, 2005, when Stern visited Windham at Alterra, Windham appeared to recall Stern and Windham also appeared to know who her children were. Sandra Frankhauser, the executive director of Alterra, also noticed that while at Alterra, Windham appeared to recognize Floyd whenever he would visit her.

However, there was also competing evidence demonstrating that Windham may have lacked the mental capacity on August 9, 2005, to execute a testamentary instrument. The pertinent testimony reflected that as early as between one and four months after January 17, 2003, Hirzel expressed concern about Windham's memory. The April 3, 2003, letter to Carr also reflected a lapse in memory because Windham indicated in that letter that she had never been married to Frederick Hewitt, when, in fact, she had. Floyd testified that shortly before July 6, 2005, Windham visited him and indicated that "she didn't know who that man was in the—in the vehicle," even though the man was Hewitt. On July 6, 2005, Windham was hospitalized at Fieldstone after Carr petitioned for hospitalization. Also, on July 15, 2005, Carr moved to have herself appointed guardian and conservator of Windham alleging that her mother was incapacitated due to mental deficiency, reflecting that even Carr thought that Windham was incapacitated due to mental deficiency. In addition, Stern testified that when she visited Windham at Fieldstone on July 18, 2005, Windham did not know why she was at Fieldstone nor was she aware of her estate. Also, while at Fieldstone, Dr. Rouhani diagnosed Windham with dementia with delusions. In fact, the testimony provided that during the period that Windham was at Fieldstone, she continued to have hallucinations, delusions, impoverished thought processes, paranoia, confusion, impaired comprehension, memory deficits, and illogical pacing. Dr. Rouhani testified that, at the time of discharge, Windham was unable to recall the natural objects of her bounty. Further, she believed that Windham would have "definitely not" been able to comprehend any documents placed in front of her. Moreover, Floyd testified that, while at Alterra, Windham's condition worsened and that she needed prompting to recognize him and did not know where her home was located.

Based on the foregoing, there was sufficient evidence in the record to support the trial court's conclusion by a preponderance of the evidence that Windham lacked mental capacity when she signed and dated the August 9, 2005, card. Because we give broad deference to the trial court's finding of facts, we are not left with a definite and firm conviction that a mistake was made. *In re Miller*, 433 Mich at 337. The trial court's conclusion that Windham lacked the mental capacity on August 9, 2005, to grasp the objects of her bounty or to possess testamentary intent, was not clearly erroneous. *In re Bennett Estate*, 255 Mich App at 549. Floyd met his

burden of proof in rebutting the presumption that Windham possessed the requisite mental capacity to make a will. *In re Johnson's Estate*, 308 Mich at 369-370.

Carr's argument that the trial court impermissibly relied on the testimony of Dr. Rouhani, which the trial court specifically indicated was excluded, lacks merit. We conclude that instead of relying on Dr. Rouhani's specific testimony regarding Windham's likely condition on August 9, 2005, the trial court appeared to be using the information that was provided by Dr. Rouhani regarding Windham's condition at the time she was discharged from Fieldstone and Dr. Rouhani's comments about stage-four dementia in general, to determine whether Windham possessed the mental capacity to execute a will merely three weeks after she was discharged from Fieldstone. This extrapolation by the trial court was supported by the record. *In re Bennett Estate*, 255 Mich App at 549.

Finally, Carr argues that the trial court failed to consider other testimony by Dr. Rouhani, which indicated that there may have been other reasons for Windham's mental deficiencies. However, although Dr. Rouhani testified that sometimes there are other reasons for mental deficiencies, Dr. Rouhani unequivocally testified that Windham had stage-four dementia. In sum, we are not left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich at 337; MCR 2.613(C).

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens