



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



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DT: January 20, 2015

RE: **In Re Lillian M. Faulhaber Trust**
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

Because I had to write two probate articles in one week, I came up a little short on baseball. So I offer the following limericks:

Cy Young winner Verlander
was known as a mighty right-hander
he is no longer the best because of the chest
of a model with whom he did pander

Miguel was once known as a drunk
was stopped by a cop with a fifth in this trunk
he puffed out his chest and resisted arrest
sobriety test he did flunk
but since he has been away from the bottle
the cowhide he's given a throttle
with titles galore he does add to the score
and for kids he is now a role model

Next year Alex comes back
and he thinks he'll pick up the old slack
he'll hit for the boids in the absence of roids
without which he's just lost his knack

Some might call it just fate
this fact about Lou Gehrig great
his homerun the first
was a 9-27-23 burst
and his last 9-27-38

p.s. On the last article I stated Hack Wilson set a league record of 109 RBI's, when in fact he had 190 RBI's.

REVIEW OF CASE:

Reference Files: In Re Hammond
Assessment Fiduciary Fees Successful Defense

The first five pages of this case dealt with the Lower Court's proper exclusion of testimony of a forensic accountant proffered to prove fiduciary wrongdoing. The Court of Appeals ruled that the exclusion was not an abuse of discretion for a variety of reasons.

Thereafter, the Court of Appeals deals with the rights of the fiduciary who has been not found guilty of wrongdoing.

I believe there is either a clarification or extension of existing law.

1. The trustee may charge the trust for his or her defense when "no wrongdoing is proved." The Court of Appeals cites *In re Temple Marital Trust*, 278 Mich App 122. Courts usually cite *In re Valentino*, 128 Mich App 87. The difference is *Valentino* requires "total exoneration." That's like not guilty vs. innocent. This is a better, and newer supportive case for fiduciary defense.
2. The Court of Appeals next utilized *In re Hammond Estate*, 215 Mich App 379. Assume numerous heirs, one attacks trustee, others don't. It is unfair to charge the trust for the trustee's defense fees, so you charge the challenger, and:
 - a. cites the *Hammond* principal that there is this assessment when it would be grossly unjust and unequitable to charge the other heirs;
 - b. allows the setting up a reserve to come out of that losers share for subsequent proceedings (appeal?). This hold back is not a "predetermination" of liability which

might be a de-priority of due process. (Allows for expenses incidental to the allowance of account MCL 700.7821(2).

All this against a loser who has not in any way been declared “frivolous.” The liability arises because equity must be done for others, i.e. the non-objecting heirs.

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STATE OF MICHIGAN
COURT OF APPEALS

In re LILLIAN M. FAULHABER TRUST.

JON BORMAN, trustee for the LILLIAN M.
FAULHABER TRUST,

UNPUBLISHED
November 25, 2014

Petitioner-Appellee,

v

No. 317751
Mason Probate Court
LC No. 07-160-TV

ADRIENNE BORMAN,

Respondent,

and

JEANNE CERISANO,

Respondent-Appellant.

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Respondent¹ appeals by right the order of the probate court allowing the final account for the Lillian M. Faulhaber Trust.² We affirm.

¹ We use the term “respondent” to refer to Jeanne Cerisano. The term “respondents” refers to both Cerisano and Adrienne Borman.

² Petitioner argues that respondent’s appeal is untimely. Petitioner contends that the issues raised by respondent were decided in earlier orders of the probate court and that respondent failed to timely file appeals in response to these orders, divesting this Court of jurisdiction over her appeal. We disagree. Respondent claims an appeal by right from a final order of the probate court. See MCR 5.801(B)(2)(x); MCR 7.203(A)(1). Respondent timely filed an appeal within 21 days of that order as required by MCR 7.204(A)(1)(a). The earlier orders that petitioner alleges to be “final orders” were not orders that disposed of all the claims and adjudicated the

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Lillian Faulhaber created the Lillian M. Faulhaber Trust in 1998. In 2007, petitioner, Faulhaber's son and a beneficiary of the trust, was named successor trustee.³ Lillian Faulhaber died in 2011.

Following petitioner's appointment as successor trustee, respondent alleged in the probate court that petitioner had denied her access to information affecting her status as a beneficiary of the trust. Respondent does not dispute that petitioner did send quarterly and annual reports as required by statute. However, respondent claimed that petitioner had failed to respond to requests for documentation related to some of the trust's expenditures. Respondent eventually moved the probate court to adjourn the hearing on the trust's final account and for permission to have a forensic accountant review the trust's financial records. The probate court denied respondent's request to perform forensic accountings of the first four annual accountings issued by petitioner, because respondent had not timely filed objections to those accounts. The court's order allowed respondent to perform a forensic examination of the trust's final accounting. The order further required respondent to be responsible for any and all fees and expenses "related to the furnishing of trust account financial records" to respondent's attorney, and listed hourly fees for various relevant parties, including petitioner's attorney. The order additionally specified that money for these expenses would be taken from respondent's share of the trust distribution.

In November of 2012, in conjunction with petitioner's motion to distribute the trust residue to the beneficiaries, petitioner requested that \$30,000 be withheld from respondent's share of the trust to cover future expenses related to the forensic accounting. A hearing was held regarding the final distribution on December 4, 2012.⁴ The probate court granted the request. At the hearing, respondent's forensic accountant was able to listen to the proceedings by telephone; however, the probate court denied respondent's request to have the accountant testify over the phone, or for an adjournment.

The probate court granted petitioner's motion to distribute the trust residue. This appeal followed.

rights and liabilities of all the parties, or otherwise final orders. MCR 7.202(6)(a)(i)-(v). Further, "a party in a civil action may raise previous interlocutory decisions when it brings an appeal of right from a final order." *Southfield Jeep, Inc v Preferred Auto Sales, Inc*, 477 Mich 1061, 1061; 728 NW2d 459 (2007) (quotation marks and citation omitted). We therefore conclude that this Court is properly vested with jurisdiction over respondent's appeal.

³ Respondents opposed the appointment of petitioner as successor trustee. This Court affirmed the appointment in 2009. See *In re Faulhaber Trust*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2009 (Docket No. 283701).

⁴ At this motion hearing, the probate court also denied respondent's motion for reconsideration of the portion of its order denying a forensic accounting for the first four annual accounting periods, as discussed further below.

II. STANDARD OF REVIEW

We review a probate court's decision regarding a request to allow witness testimony, or a request for adjournment, for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995); *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). In addition, a party must show prejudice as a result of the probate court's abuse of discretion. See *Bauman v Grand Trunk Western R.R.*, 363 Mich 604, 609; 110 NW2d 628 (1961).

We review unpreserved claims of constitutional error for plain error that was outcome determinative. *In re Application of Consumers Energy Co.*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

III. DENIAL OF TELEPHONIC TESTIMONY

Respondent alleges that the probate court abused its discretion by refusing to allow her forensic accountant, Elizabeth McMaster, to testify by phone at the December 4, 2012 motion hearing on respondent's motion for reconsideration of the trial court's order denying respondent's request for forensic accounting of the first four annual accountings issued by petitioner, or in the alternative to grant an adjournment to allow her counsel to make an offer of proof as to the content of McMaster's testimony. We disagree.

The probate court, in denying respondent's request to have McMaster testify telephonically, stated:

No, no. This hearing has been scheduled and knew about it and everything is done at the last minute, and it's, it's clumsy to have someone speaking on a phone. We . . . et cetera. It's just unwieldy and it's been dumped in the Court's lap the very last second and that's not the way to . . . as they say, that's not the way to run a railroad.

Respondent spends a great deal of time informing this Court of the issues that prompted respondent to request forensic review of the trust's financial records. However, the issue before this Court is whether the probate court's refusal to allow McMaster to testify or to adjourn the hearing was an abuse of discretion. A reiteration of the alleged "red flags" that led respondent to request, and receive permission for, a forensic accounting, is only minimally related to this inquiry. Although respondent argues that the trial court's failure to allow her forensic accountant to testify by phone rendered her unable to present "key evidence" regarding these "red flags," the record reflects otherwise. The record instead reflects that respondent's forensic accountant was not prepared to testify at the December hearing regarding the trust's financial records. McMaster, despite being hired in October, did not speak with petitioner or the trust accountant, Elizabeth Borman, until the day before the motion hearing. Borman testified that McMaster called in the afternoon of the previous day and requested "reports of general ledger, an income statement, and a balance sheet." Respondent's counsel indicated that McMaster had not received a general ledger or "a list of the check numbers and who they were to for the last accounting period." Thus, even if McMaster had testified, it is unclear what the content of her testimony would have been; respondent presents no evidence indicating that McMaster's testimony would

have supported her claim before the probate court for reconsideration of the trial court's order on the grounds of either newly discovered evidence or fraud, misrepresentation, or other misconduct on the part of respondent.

The probate court was required to exercise "reasonable control over the mode and order of interrogating witnesses," MRE 611(a), and to admit relevant evidence and exclude irrelevant evidence, MRE 402, provided that the relevant evidence's value was not substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. In this case, respondent requested, on the day of the hearing, that McMaster be allowed to testify by telephone from Washington, D.C. The probate court noted that respondent's counsel had called the previous Friday to discuss the issue of McMaster testifying telephonically:

THE COURT: And on that day if you asked if she could participate by phone, I told you, expressly, call Mr. Betz [petitioner's counsel], talk to him about it, have you got the accountants talked [sic] to one another yet, no they haven't and that's where we left it.

The record does not reflect that respondent's counsel attempted to secure a stipulation or otherwise discuss the issue of McMaster's testimony with petitioner's counsel; nor did respondent provide any definite notice to the court that respondent would seek to have McMaster testify telephonically. Nor, as stated above, did McMaster speak to petitioner or Borman until the day before the motion hearing, at which point she requested several financial records that she had not previously requested or received.

Under these circumstances, we conclude that the probate court did not abuse its discretion in not allowing McMaster to testify by phone at the December 4, 2012 hearing. The probate court had the authority to manage the presentation of witnesses, MRE 611, and noted that the procedures for requesting telephonic testimony were not followed. Additionally, the record reflects that McMaster's testimony likely would have been irrelevant or outweighed by considerations of unfair prejudice and undue delay, as she apparently had only begun her forensic accounting review the previous day, despite the lapse of two and one-half months between the probate court's order granting a forensic accounting and the motion hearing. MRE 402, 403. Respondent thus cannot demonstrate an abuse of discretion. *Richardson*, 213 Mich App at 454-455.

Further, the probate court did not abuse its discretion in declining respondent's request for an adjournment. In order to invoke the probate court's discretion to grant an adjournment, a party must demonstrate good cause. MCR 2.503(B)(1). Further, MCR 2.503(C) provides in relevant part:

- (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
- (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

“Where a motion to adjourn is requested in order to complete discovery, the inquiry focuses on whether the movant has shown an adequate explanation for the failure to complete discovery and whether the failure was due to a lack of diligence in preparation.” *Ruffin v Kent*, 139 Mich App 479, 481; 363 NW2d 14 (1984).

The transcript of the motion hearing does not reveal precisely when respondent knew that McMaster would be unavailable to testify in person. However, respondent’s counsel did state that she spoke to the probate court on the phone on “Friday” concerning the possibility of McMaster testifying by phone because she “was informed by Ms. McMaster that she would be unable to be there because she is in Washington D.C.” The record does not indicate whether respondent’s counsel also requested an adjournment during this call. Nor is there evidence that respondent attempted to speak to petitioner’s counsel concerning McMaster’s inability to be physically present at the hearing, or attempted to provide advance notice to the probate court regarding a request for telephonic testimony or in the alternative an adjournment. Under the circumstances of this case, the probate court could conclude that respondent did not move for an adjournment “as soon as possible after ascertaining the facts” nor made diligent efforts to produce the witness through telephonic testimony. MCR 2.503(C)(1)-(2). Finally, as McMaster apparently had only begun to collect financial records despite having been hired months before, and respondent’s counsel admitted that McMaster had not yet even compiled all the records she needed for her review (much less formed any expert opinions or located any relevant evidence as a result of a forensic accounting), the probate court could also conclude the offered testimony would not be material, or that respondent had not shown an adequate reason for the failure to complete the forensic accounting. MCR 2.503(C)(2); *Ruffin*, 139 Mich App at 48. For the same reason, respondent cannot demonstrate that she was prejudiced by the probate court’s decision, but can only speculate that McMaster would have found something in the trust’s financial records to substantiate her claim that reconsideration was warranted either due to newly discovered evidence or fraud, misrepresentation, and adverse conduct on the part of petitioner. *Bauman*, 363 Mich at 609.⁵

⁵ We note that at the motion hearing regarding the final account of the trust, held several months later on July 29, 2013, the probate court stated:

THE COURT: I mean this whole last seven or eight months, I adjourned the matter waiting for today, to accommodate your client to come in with something to justify her complaints, unspecified complaints. And to date I’ve heard nothing. There’s been nothing, no malfeasants [sic] no misfeasance, no clerical errors no mathematic errors. I haven’t received anything yet.

* * *

Beth McMaster was going to be assisting her in doing this forensic accounting and in the seven, in the time since December till now the Court has received no evidence whatsoever to conclude that there’s anything inconsistent or not accurate regarding accounting.

We accordingly find no error requiring reversal in the probate court's refusal to allow McMaster to testify by phone, or in the alternative to adjourn the motion hearing.

IV. DUE PROCESS

Respondent also argues that the probate court violated her rights to due process of law when it ordered, while allowing the final distribution of trust assets, that \$30,000 be withheld from her share of the trust in order to pay for future expenses incurred by the trustee after the distribution. We disagree.

The order of the trial court ordering distribution of trust assets states in relevant part:

IT IS FURTHER ORDERED AND ADJUDGED that from the one-third (1/3) share of the trust assets to be distributed to Jeanne Cerisano the sum of Thirty-Thousand dollars (\$30,000.00) shall be withheld by the trustee to be used for unexpected expenses that may be incurred after this date and that such funds shall not be distributed without written agreement of the attorneys or Order of the Court.

The probate court, in granting petitioner's request to have funds withheld, stated as follows:

Well, maybe, maybe the thing to do is to, is to withhold \$30,000.00 from Jeanne's share, not . . . and then that's what would be . . . so if you had, you know thirds, her on third would be reduced by thirty. And it wouldn't be . . . and that's the way it would be, the money in the account wouldn't be retained it would actually be in Trust for her to pay these bills. That's probably the best way to do it. In fact, that's what we're going to do.

Respondent's attorney did not object at the motion hearing to the \$30,000 being withheld, but did request that no fees should be paid without further order of the court "so that we have the opportunity to object to" the fees paid. Respondent's request was effectuated in the final language of the order. We thus review respondent's claim of violation of due process for plain error that was outcome determinative. *In re Application of Consumers Energy Co*, 278 Mich App at 568.

The United States and Michigan Constitutions prohibit the government from depriving a person of life, liberty, or property without due process of law." US Const, Am V, XIV; Const 1963, art 1, § 17. A probate court's authority is broad with respect to the administration and internal affairs of a trust. See MCL 700.1302(b). Consistent with due process, a probate court possesses the authority to allow a trustee to charge against trust assets reasonable expenses, including attorney fees, that are incurred while rendering services to the trustee in his or her capacity as a trustee. *In re Temple Marital Trust*, 278 Mich App 122, 134; 748 NW2d 265 (2008). Further, a trustee may charge attorney fees and expenses to the trust estate incurred in

defending an action challenging the performance of the trustee's duties "where no wrongdoing is proved." *Id.* at 135, quoting *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). A probate court may allow a trustee's attorney's fees to be charged against the petitioning beneficiary or beneficiaries rather than against the entire trust, where it would be "grossly unjust and inequitable to assess a portion of the attorney fees against the beneficiaries who declined to participate" in the action against the trustee. *In re Hammond Estate*, 215 Mich App at 387. The fees charged must be reasonable; a probate court should consider several factors in making this determination of reasonableness. *Id.* at 138. Finally, a trustee may "retain a reasonable reserve" of trust assets "for the payment of debts, taxes, and expenses, including attorney fees and other expenses incidental to the allowance of the trustee's accounts." MCL 700.7821(2).

Petitioner does not argue with the general principles described above; but rather argues that it was plain error for the probate court to order funds withheld from a single beneficiary in advance of a claim for fees and costs from the trustee. Under the circumstances of this case, we disagree.

Due process is a flexible concept; analysis of what process is due in a particular proceeding depends on the nature of the interests affected and the risk of erroneous deprivation. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). The fundamental requirement of due process is the opportunity to be heard. *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011). Generally, sufficient due process for a deprivation of a property interest requires notice of the nature of the proceedings, an opportunity to be heard, and an impartial decision-maker. *Hinky Dinky Supermarket, Inc, v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004).

In this case, respondent argues that it was fundamentally unfair for the probate court to "predetermine" that she would be liable for expenses not yet incurred, and because of this predetermination, to deprive her of her property. This argument ignores two pertinent facts. The first is that respondent had the opportunity, prior to the order withholding the \$30,000 being issued, to object to such an order. Respondent's counsel not only failed to object to the order, but affirmatively acquiesced to the order and requested that certain language be added to protect respondent's interests. Such acquiescence could allow this Court to conclude that appellate review of this issue has been waived. See *In re Utera*, 281 Mich App 1, 11; 761 NW2d 253 (2008). More importantly, this fact demonstrates that respondent in fact had a pre-deprivation opportunity to be heard before an impartial decision maker; the fact that she did not avail herself of this opportunity does not deprive her of due process.

The second fact is the language of the order itself, which states that "funds shall not be distributed without written agreement of the attorneys or Order of the Court." As stated above, respondent's counsel requested that this language be placed in the order so that respondent could have the opportunity to object to amounts requested to be paid from the withheld \$30,000. Thus, rather than having her liability "predetermined", respondent would have another chance to be heard before an impartial decision-maker before any funds would be expended from the \$30,000.

We hold that the probate court's order contains no plain error requiring reversal. Respondent presents no evidence that, upon petitioner's request for fees to be charged against the

withheld \$30,000, the probate court would not hear her objections, if any, and determine if the fees are both reasonable and appropriately charged against the assets of a single beneficiary, as described above. We note that in fact the probate court ordered that certain costs and fees be charged against the \$30,000, without objection by either party, at the July 29, 2013 motion hearing regarding the final account of the trust (which at that point consisted only of the \$30,000 reserved from respondent's share). The probate court further stated:

THE COURT: If there will be no objections the Court finds the order to be appropriate and the Court would affix its signature to it.

Again, just to make sure the record is abundantly clear, the delay and time of wrapping this Trust up was the direct consequence of Jeanne Cerisano making claims that she felt that there was malfeasance or misfeasance on behalf of the trustee, her brother Jon Borman, who is here today. . . . [I]n the seven, in the time since December till now the Court has received no evidence whatsoever to conclude that there's anything inconsistent or not accurate regarding accounting.

Although respondent argues that at the motion hearing the probate court "refused to rule on the method by which Ms. Cerisano could recover the balance that is rightfully hers[,] our review of the record reveals that the probate court was in fact ready to order that the balance of the \$30,000 (minus the fees and costs to which respondent did not object) be returned to respondent. However, at the hearing, respondent's counsel raised the possibility of additional litigation on new issues, including stating that respondent had hired "a lawyer in Virginia" to notify a contingent beneficiary, a religious organization in Italy, of the proceedings and to investigate service of process on that entity. The probate court noted that the possibility of "new disputes or new crisis's [sic] or possible litigation" precluded it from ordering the return of respondent's money at that particular motion hearing. The trial court noted that the issue of continued litigation "wasn't noticed for today and I'm not going to even address it." We find no denial of due process in the probate court's refusal to rule "off the cuff" when the specter of additional litigation was raised for the first time orally at the motion hearing. See MCR 2.119(E)(3) (permitting a court to manage oral arguments on motions and require briefs in support and opposition to a motion). We thus conclude that the requirements of due process were satisfied with regard to the withheld portion of respondent's share of the trust assets. *In re Application of Consumers Energy Co*, 278 Mich App at 568.

Affirmed. As the prevailing party, petitioner may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher