



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 2007-2014 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®* 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 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).

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DT: August 27, 2015

RE: In Re Sell Estate

STATE OF MICHIGAN COURT OF APPEALS

“Alan, you cannot write about baseball all your life”

- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

BASEBALL LORE:

FRATERNITY MEN

How about an all-star team of players who were in a fraternity? Amazingly, my team is composed of all Hall of Famers. I admit I had to “shoe horn” a few into the lineup.



First Base	-	George Sisler – University of Michigan - Delta Tau Delta
Second Base	-	Eddie Collins – Columbia – Beta Theta Pi
Shortstop	-	Mike Schmidt – Ohio University – Beta Theta Pi (played more than a few games at shortstop and would have been a fulltime shortstop, but for Larry Bowa)
Third Base	-	George Brett – El Camino Jr. College – Alpha Delta Gamma
Outfield	-	Stan Musial – Never Graduated High School – Sigma Tau Gamma
	-	Billy Williams – Illinois State – Lamda Chi Alpha
	-	Jackie Robinson – UCLA – Alpha Phi Alpha (played 76 games in the outfield)
Pitchers	-	L.H. Sandy Koufax – Columbia and Cincinnati – Pi Lamda Chi
	-	R.H. Christy Mathewson – Bucknell – Phi Gamma Delta
Manager	-	Tommy Lasorda - No College – Pi Kappa Phi
D.H.	-	Babe Ruth - No College – Alpha Delta Gamma
Umpire	-	Billy Evans – Cornell – Alpha Tau Omega

REVIEW OF CASE:

Referenced Files: Summary Disposition without Discovery
 Self-Gifting
 Definition of Fiduciary

Appellant held mom and dad’s power of attorney. Dad owned Black Acre. Appellant used the power of attorney and quit claimed Black Acre to himself and his wife. The power of attorney had self-gifting prohibitions. Appellant claimed the conveyance was not a gift, but a part of a care contract. Appellant also claimed his wife was an innocent third party entitled to rely on the conveyance. Appellant was summaried out on all counts. The basis of the Lower Court ruled that since Appellant was an “admitted fiduciary” and EPIC prevented fiduciary self-dealing and because of the document itself, which prohibited self-gifting, the deed was void. The Court of Appeals affirmed.

I believe that the Court of Appeals was not on solid ground in applying EPIC to this situation and correct in voiding the transaction based on the power of attorney itself.

True, Appellant admitted that he was a fiduciary. Lord knows why, in light of the Court of Appeals most recent conservative irritation of what a fiduciary is (cf. *Cederquist*, COA No. 321290, citing *Karmey*, 468 Mich 68, “a fiduciary relationship exists as a fact when ‘there is confidence reposed on one side, and the resulting superiority of influence on the other’”).

Nevertheless, assuming that Appellant was a “fiduciary”, he wasn’t an EPIC fiduciary, therefore MCL 700.1214 does not apply. MCL 700.1214 applied only to fiduciaries as defined by EPIC and the EPIC definition of a fiduciary, though it says “included but not limited to” does not mention holders of powers of attorney (MCL 700.1104(E)). The Court of Appeals in the instant case admits that MCL 700.1214 does not apply generally to all parties who delegate authority by power of attorney. The Court of Appeals goes on to cite *In re Susser Estate*, 254 Mich App 232, that the holder of the power of attorney is a fiduciary. That case and others of its ilk were undue influence cases where the relationship only created “presumptions”, not where there is a statutory prohibition barring the act.

Another reason why EPIC should not apply, is that the legislature saw the absence of power of attorney in the definitional section and amended the act in 2011 to include MCL 700.5501(4), which specifically says no self-dealing unless the power of attorney provides for self-dealing.

Therefore, the more solid ground was that the document itself prohibited self-dealing.

The Court of Appeals does not address the “it wasn’t a gift” argument, but does mention that the deed in question recited that the consideration was less than \$100.

There is a good statement of granting summary disposition prior to the taking of discovery. *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25.

AAM:kjd
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