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 2007-2016 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*® 2017 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2016 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, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller."

DT: June 23, 2017

RE: In re Estate of Marian I. Cary
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 STATS:

Casey Stengel

I just finished reading Marty Apple's biography of Casey Stengel; the latest in a long line.

I never tire of reading about the "ole" professor.

I also learned a few new things.

For instance, Casey was rich. He not only married a wealthy woman whose family owned a bank and participated in the bank, he had businesses of his own. He got together with other ball player friends and wildcatted in oil and hit rather big.

He was quite a player himself.

Starting in 1910 he had a better record than I had recalled. He was certainly someone who you would have wanted on your team.

Casey was also in dental school and dropped out because he was left-handed.

Casey had an extensive minor league record but was not very good. He was nothing compared to the success he had with the Yankees.

Casey's testimony before the Senate Committee on Anti-trust Legislation which appears in the appendices is worth the price of the book itself.

I recommend this happy treatise.

Leo Durocher

Also new is Paul Dickson's Prodigal Son. A better read than the Stengel book. Dickson sets straight the famous quote attributed to Durocher and found in Bartlett's Familiar Quotations confirming the attribution. He never said it. What he said was that Mel Orr, the Giant's manager, was the nicest guy in the world. He is in last place, I am in first place, the nice guys over there in that dugout are in last place, not in this dugout.

For the record, the 46' Giants finished in 4th place not last – so if Durocher was theorizing what happens to nice guys – he was wrong. The Giants had a record of 81 and 73. The next year Leo was the Dodgers and when he was fired his record was 37 and 38. Not nice guys can do poorly too.

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

Topics:

In re Sloan
In re Keyes - Medical Reimbursement
Attorney Fees
Burdens of Proof/Standard of Appeal
State Bar Standards

Appellee opposed a DHHS claim brought under the Estate Recovery Act. Evidently the issue was the inadequacy of notice due to the Medicaid recipient. No services were rendered in the defense of the claim while awaiting the published decision by the Court of Appeals in the case of *In re Keyes Estate*, 310 Mich App 266. After the decision in *Keyes* was rendered, Appellee dropped the objections and stipulated to the allowance of the claim.

Attorney fees, of course, come ahead of claims. Appellant took umbrage with Appellee's for and being awarded 50% of the estate as the claim ultimately met with stipulation for approval. The lower court and the court of appeals affirmed the award of attorney fees. The court of appeals affirmed 2 to 1 saying that the defense of the claim, up until the *Keyes* decision, was rendered in good faith as the status of the law was unclear.

Interesting Distinctions on Standards of Appeal

1. Underlying facts on attorney fees – this is reviewed under the standard of whether the decision was clearly erroneous.

2. Reasonableness of attorney fees – this is reviewed under abuse of discretion.

Factors for Consideration of Attorney Fees

The lower court entertained the State Bar's 2014 Economics of Practice survey as part of its decision.

Sloan

Fees on fees did not apply as no services were rendered for collection of fees of the accounting period. (This author believes that the appellate court should read the Sloan footnote. You can get fees on fees if there is a contest.)

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of MARIAN I. CARY.

PHILIP A. CARY, Personal Representative of the ESTATE OF MARIAN I. CARY,

Appellee,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellant.

UNPUBLISHED
June 1, 2017

No. 331287
Branch Probate Court
LC No. 14-033893-DE

Before: O'BRIEN, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

The Department of Health and Human Services (DHHS) appeals as of right the order of the Branch Probate Court settling decedent, Marian I. Cary's, estate. We affirm.

On appeal, the DHHS argues that Philip Cary, the personal representative of the estate, did not provide sufficient evidence for the probate court to determine whether the attorney fees, personal representative fees, and administrative fees charged to the estate were reasonable. We disagree.

An issue is preserved for appeal when it is raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In its objection, the DHHS argued that the personal representative failed to demonstrate that the attorney fees were reasonable. The probate court concluded that the attorney fees were reasonable. Therefore, this issue is preserved. *Id*. However, a review of the lower court record indicates that the DHHS did not properly raise an objection to the personal representative's fee or the estate's other administrative fees and that the probate court approved those fees as submitted due to the absence of a proper objection. Therefore, the DHHS's challenges to the personal representative fee and other administrative fees are unpreserved and this Court "need not consider" them. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992).

With respect to an award of attorney fees, a trial court's "underlying findings of fact" are reviewed "for clear error." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265

(2008). However, as to the trial court's decision whether to award attorney fees and the reasonableness of the attorney fees, this Court reviews those issues for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "The court does not abuse its discretion when its decision is within the range of reasonable and principled outcomes." *In re Temple Marital Trust*, 278 Mich App at 128.

MCL 700.3715(x) states that "a personal representative, acting reasonably for the benefit of interested persons, may . . . [p]rosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties." Furthermore, the personal representative may "[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties . . . ." MCL 700.3715(w). "If a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." MCL 700.3720.

According to MCR 5.313(A), "[a]n attorney is entitled to receive reasonable compensation for legal services rendered on behalf of a personal representative, and to reimbursement for costs incurred in rendering those services. In determining the reasonableness of fees, the court must consider the factors listed in MRPC 1.5(a)." MRPC 1.5(a) lists the following factors that a court should consider when determining whether attorney fees are reasonable:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

"[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them. *Smith*, 481 Mich at 528-529.

In *Smith*, the Michigan Supreme Court articulated an approach to determine whether an attorney fee was reasonable that requires a court to determine a baseline reasonable fee and then

multiply that amount by a reasonable number of hours required for the case. *Id*. at 530-531. Although *Smith* considered an attorney fee award in the context of case evaluation sanctions, the Michigan Supreme Court stated that "[t]he operative language triggering the *Smith* analysis is the Legislature's instruction that an attorney is entitled to a *reasonable fee*." *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 279; 884 NW2d 257 (2016) (emphasis in original). Because MCR 5.313(A) states that a personal representative's attorney "is entitled to receive reasonable compensation[,]" the *Smith* framework applies. See e.g., *Id*. ("Because the plain language of [MCL 500.3148(1)] speaks in terms of awarding a 'reasonable fee,' [this Court concludes] that the *Smith* framework governing reasonable fee determinations is equally applicable in this context.").

Here, the personal representative provided sufficient evidence to support its contention that its attorney fees were reasonable. The personal representative submitted detailed billing records showing each attorney's hourly rate, the work the attorney performed, and the time the attorney spent on each task. *Smith*, 481 Mich at 532 (stating that a "fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness"). See also MCR 5.313(C) and (F) (providing that "the personal representative must append to an accounting, petition, or motion in which compensation is claimed a statement containing… [the following details]: the identity of the person performing the services, the date the services are performed, the amount of time expended in performing the services, and a brief description of the services"). In addition, the personal representative provided evidence showing how his attorneys' rates compared to other attorneys in the state. He provided the 2014 Economics of Law Practice survey from the Michigan State Bar and the curriculum vitae for all three attorneys, which described each attorney's experience and qualifications. *Smith*, 481 Mich at 531-532 (stating that "[t]he fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports"). Finally, the DHHS did not dispute that the attorneys' hourly rates were reasonable. The probate court agreed.

Furthermore, at the evidentiary hearing, the personal representative explained to the probate court why the time spent on the estate was reasonable. The personal representative explained that at the time that the DHHS filed its claim, estate recovery was new in Michigan. As a result, there were relatively few cases on the subject. In order to comply with MRPC 3.3, the personal representative had to remain updated on the law. Therefore, the personal representative followed similar cases around the state. In addition, the personal representative attempted to settle the claim with the DHHS. Finally, the personal representative noted that no work was billed to the estate while awaiting the *In re Keyes Estate*, 310 Mich App 266; 871 NW2d (2015) decision. Based on the detailed billing records and verbal explanation of the time spent on the estate at the evidentiary hearing, the personal representative provided sufficient evidence for the probate court to determine whether the attorney fees were reasonable. *Smith,* 481 Mich at 531-532.

Furthermore, there is evidence to support the probate court's finding that the personal representative acted in good faith by originally denying the DHHS's claim. In *In re Sloan Estate*, 212 Mich App 357, 362; 538 NW2d 47 (1995), this Court stated that "legal services rendered in behalf of an estate are compensable where the services confer a benefit on the estate by either increasing or preserving the estate's assets." However, MCL 700.3720 states that "[i]f

a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." There is support in the record that the personal representative acted in the best interests of the estate by disallowing the DHHS's claim in June 2014 based on the state of the law at the time. In addition, the work and research completed by the personal representative's attorneys to support his position benefited the estate because he was defending against such a large claim and the area of the law relating to estate recovery was unsettled. Furthermore, the personal representative allowed the DHHS's claim once *In re Keyes Estate* was decided and it was apparent that his position was no longer viable. Accordingly, the personal representative "was entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred" for defending against the DHHS's claim. MCL 700.3720.

In addition, the DHHS argues that some of the personal representative's attorney fees are actually "fees for fees" and are not payable by the estate. The fees referenced by the DHHS would arise out of the need to establishment and/or defend a petition for attorney fees. *In re Sloan Estate*, 212 Mich App at 363. These fees "clearly do not benefit the estate because they do not increase or preserve the estate's assets" and are thus not compensable. *Id*. However, in this case, the petition for adjudication of the estate was filed on August 4, 2015. The DHHS's objection to the personal representative's attorney fees was filed on August 18, 2015. The probate court stated that no attorney fees were allowed outside of the estate's final accounting, which was also filed on August 4, 2015. Therefore, the estate was not charged for the personal representative's defense of the DHHS's objection to attorney fees and there are no "fees for fees" concerns in this case. *In re Sloan Estate*, 212 Mich App at 363. Accordingly, the personal representative provided sufficient evidence for the probate court to properly review the reasonableness of the attorney fees.

Next, the DHHS contends that the probate court abused its discretion by approving the personal representative's attorney fees without articulating its findings of fact in regard to each factor in MRPC 1.5(a) on the record. We disagree.

The approach articulated in *Smith* requires a court to first determine a reasonable base fee customarily charged in the locality for similar legal services, which is factor 3 under MRPC 1.5(a), and then to multiply that amount "by the reasonable number of hours expended in the case[,]" which is factor 1 under MRPC 1.5(a). *Smith*, 481 Mich at 530-531. The court should then "consider the remaining [MRPC 1.5(a)] factors to determine whether an up or down adjustment is appropriate." *Id*. at 531. "And, in order to aid appellate review, a [] court should briefly discuss its view of the remaining factors." *Id*.

Here, DHHS does not argue that the hourly rate was unreasonable. Instead, it contends that the time spent disallowing its claim and researching estate recovery law was unreasonable. However, the probate court found that the personal representative disallowed the DHHS claim in June 2014 in good faith based on the state of the law at the time.

Further, the probate court found that the hourly rate for each attorney was reasonable. In addition, the probate court stated that it had reviewed the billing records in detail, and it asked the personal representative several detailed questions regarding some of the billings, such as

whether different attorneys were billing for the same services. The probate court then found that the attorney fees were reasonable. Although the probate court did not specifically address all of the MRPC 1.5(a) factors, the purpose of making detailed factual findings on the record is "to aid appellate review." *Id*. Here, the probate court's factual findings relating to the remaining factors would not aid this Court in its review of the issue on appeal, which is whether the time spent on the DHHS claim was reasonable. As a result, we find that remand is unnecessary. Even if all of the MRPC 1.5(a) factors were not discussed, the probate court specifically addressed whether the time spent on DHHS's claim was reasonable (the specific issue raised by the DHHS). Therefore, the probate court's conclusion that the personal representative's attorney fees were reasonable did not fall "outside the range of reasonable and principled outcomes." *Id*. at 526. Accordingly, the probate court's approval of the personal representative's attorney fees was not an abuse of discretion. *Id*.

Affirmed.

/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of MARIAN I. CARY.

PHILIP A. CARY, Personal Representative of the Estate of MARIAN I. CARY,

Appellee,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellant.

UNPUBLISHED
June 1, 2017

No. 331287
Branch Probate Court
LC No. 14-033893-DE

Before: O'BRIEN, P.J., and SERVITTO and STEPHENS, JJ.

O'BRIEN, P.J. (*dissenting*).

I respectfully dissent.

Marian I. Cary passed away on April 1, 2014, leaving behind only two assets worth $92,451.73: real property valued at $92,000.00 and $451.73 in cash. Between her death and the order appealed, which was entered on January 6, 2016, three attorneys charged Cary's estate $46,390.40 in attorney fees, according to the first annual and final accountings filed before the trial court.[1] The issue presented before the trial court and again on appeal is whether this amount was reasonable under the facts and circumstances of this case. On the record before me, I cannot conclude whether it is or is not. In concluding that this amount was reasonable, the trial court explained, *in full*, as follows:

> What the Court's going to do in this particular case is I am going to approve the attorney fees that have been submitted on the first . . . annual accounting. I will also approve what has been submitted on the final accounting and those will be attorney fees in this case. Nothing since then, so that means everything that

[1] To be clear, this amount reflects only the requested attorney fees. It does not reflect any other expenses sought by the attorneys or their firms.

> you've done today or from the date of that filing up until this day will not be reimbursed for, but I will approve those amounts and that will be the amounts that the Court will approve and nothing else.

In my view, this is simply insufficient. See *Smith v Khouri*, 481 Mich 519, 530-534; 751 NW2d 472 (2008).[2] The decedent received, and appellant sought reimbursement for, $113,196.71 in Medicaid benefits prior to her death. The estate, represented by three attorneys, unsuccessfully defended against appellant's claim in a zealous fashion. According to the invoices provided by each law firm, these three attorneys spent 169.6 hours on this case during that time period. Despite this amount of work, the parties ended up stipulating to allow appellant's claim. Nevertheless, the estate's attorneys sought compensation for their zealous, albeit unsuccessful, efforts. Their charged fees, coupled with various other costs such as funeral expenses, costs related to the sale of the real property, and other fees, reduced the value of the estate from its original value of $92,451.73 to $14,895.42.[3] While attorney fees in an amount that is equal to 50 (50.177969 to be precise) percent of the entire estate might be reasonable in some cases, I believe that a more thorough analysis is required in this matter.[4] Therefore, I would remand to provide the trial court with an opportunity to do exactly that.

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[2] In *Smith*, 481 Mich at 530-531, our Supreme Court explained the proper procedure for evaluating the reasonableness of claimed attorney fees as follows:

> We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expected in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

While it is possible that the trial court may have followed this procedure off the record, the record does not reflect that such a procedure was followed, and, at least in my view, such a lack of record precludes adequate appellate review.

[3] Additionally, that remaining amount, $14,895.42, remains subject to various statutory exemptions. See, e.g., MCL 700.2404.

[4] My review of the record leaves me with serious questions as to the reasonableness of various charges against the estate under the facts and circumstances in this case. For example, I question whether it is reasonable for attorneys in a case such as this, i.e., a case where the estate is valued

Similarly, despite the majority's conclusion to the contrary, I would also conclude that, on remand, the trial court should additionally address the reasonableness of the personal representative's claimed fee, which was a flat-rate $5,000.00 fee. The majority disregards appellant's arguments in this regard due to appellant's failure to "properly raise an objection." My review of the record, however, reflects that these arguments were adequately preserved to facilitate appellate review.[5] Therefore, I am of the view that the trial court should be provided an opportunity to review those as well.

/s/ Colleen A. O'Brien

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at less than $100,000.00 and subject to claims in excess of that amount, for attorneys to charge a client $225.00 per hour to request meeting minutes from the Senate Appropriations Committee. While this is only one example, there are various other charges to the estate that leave me with concerns regarding the reasonableness of the strategy taken by the estate's attorneys. As another example, I also question whether it was reasonable for the estate's attorneys to contact various probate courts to obtain lower-court files regarding cases that were appealed until more information was available before this Court. While it is possible that these extraordinary efforts were requested by the personal representative, it is these concerns, coupled with appellant's assertions that the estate's attorneys were using this case to improve their overall knowledge of estate recovery rather than to actually benefit the estate, that leave me with serious questions as to whether the fees, as requested, were reasonable. I believe that these questions could be adequately answered by the trial court on remand.

[5] Specifically, appellant expressly contested the reasonableness of the fees claimed by the personal representative. For example, it specifically argued that "the attorney fees *and the Personal Representative* cannot justify a large percentage of the fees charged." (Emphasis added.) While this argument could well have been further developed by appellant, I nevertheless believe it was sufficient for preservation purposes. I would note, however, that the fee sought by the personal representative seems, at least at first blush, to be significantly more reasonable than the fees sought by the attorneys in this matter.