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: July 13, 2015

RE: In Re Estate of Cliffman
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

CELEBRATION OF EARLE ENDELMAN, ESQ.

Our own partner, Earle Endelman, is the paradigm of estate and tax lawyers. His expertise is known worldwide. He is a beloved member of our community, a great husband, father and grandfather and an avid sports fan.

Few remember that Earle Endelman was the quarterback for Central High School in the mid 50's. But he is known more for being a baseball fan.

Earle will celebrate his 76th on July 29, 2015.

On the day he was about to be born, Earle had a choice of being born or attending a Tiger game against the Philadelphia Athletics where Tommy Bridges would go on to be the winning pitcher (see box score attached). Fortunately for Earle, he decided to be born and baseball became a part of his life.

Baseball influenced him so much that he dropped his slave name of Earl Endelman and replaced it with Earle Endelman out of respect to the great centerfielder of the New York Yankees Earle Combs, a Hall of Famer. It is fitting that we remember and celebrate Earle's 76th birthday with a review of many things that happened on that birthday in Major League Baseball.

We can start off by saying that Earle Endelman should be called Earle "No-Hit" Endelman.

On July 29, 1910, Ed Summers, while pitching for Detroit, faced Patsy Dougherty of the White Sox. Dougherty broke up Summers' no-hitter. It was the fourth time that Patsy Dougherty had done this.

But on the same day in 1911, the Red Sox Smokey Joe Wood threw a no-hitter.

In 1934, Flint Rehm of the Boston Braves, lost a no-hitter against the Dodgers when the Braves third baseman Pinky Whitney failed to charge a bunt down the third-base line and a no-hitter was taken away.

But in 1968, George Culver of the Cincinnati Reds did pitch a no-hitter.

Other events you might like to recall in tribute to Earle are the following:

In 1909, on Earle's birthday, the National League President Harry Pulliam committed suicide.

In 1915, on Earle's birthday, Honus Wagner, age 41, hit a grand slam homerun; inside the park. He was the oldest person ever to do this until this feat was bettered 70 years later by an older player.

In 1928, on Earle's birthday, John Hodapp of Cleveland got two hits in one inning twice as the Tribe routed the Yankee's 24 to 6.

In 1938, on Earle's birthday, Jake Powell of the Yankees told a radio audience that as a cop in the offseason, he would often beat up "N - - - - - -" before he threw them in jail. Jake drew a 10-game suspension.

In 1951, on Earle's birthday, Willie Mays stole his first base, only to be picked off second by Cincinnati Reds pitcher, Willie Randell.

In 1961, on July 29th, Duke Snider hit a pitch-hit homerun.

In 1967, the Cleveland Indians traded Rocky Colavito for the second time in his career.

And Earle's beloved Tigers in 1974 hit four consecutive homeruns in one inning.

Thank you for being a part of our team Earle!

REVIEW OF CASE:

Referenced Files: Wrongful Death Distribution
Child of the Deceased Spouse
Referral Fees to Probate Estate Attorney
Separate Fee for Probate Estate Attorney

Mr. Cliffman died. He left no spouse or I would suppose we would have to say "wife" in light of the Court of Appeals decision. His former spouse had predeceased him. His former spouse had children who sought wrongful death proceeds under the wrongful death act, which allows children of the deceased's spouse to take loss of society and companionship if they so suffered. The sisters of Mr. Cliffman sought to bar this. The sisters cited *In re Combs Estate*, 257 Mich App 622 (2003). That case held that "spouse" refers to a married person and since Mr. Cliffman was not married at the time of death, the children of his predeceased wife were not children of the deceased's spouse.

The attorney in the wrongful death proceeding, received a one-third contingency fee. He gave one-third of that fee to the probate attorney who had referred the case to him. The probate attorney charged his own fee for handling the estate proceedings. The sisters challenged the fee arrangement. The Lower Court determined that the fees did not harm the estate and therefore approved the fee arrangement.

The Court of Appeals in citing *Combs* affirmed the Lower Court's ruling. Further, that even if *Combs* was wrongfully decided, they had no power to overturn existing precedent. The Court of Appeals went on to say that it approved the *Combs* decision.

Query, was *Combs* correctly decided? This annotator does not think so. For those of us who remember the old "MacDonald" controversy, we also recall the genesis of the newest version of the wrongful death act. It clearly broadened those with a right to receive loss of society and companionship from children to step-children although I admit not articulately so. If the logic of *Combs* is true and that you are no longer married when your spouse dies, then a surviving spouse is no longer a surviving spouse because when a spouse died, the survivor was no longer married at the time their former spouse died. Thus, a surviving spouse isn't a spouse and can't inherit through intestacy. In both cases the legislature could have used the word "former." This twisted logic would in normal legal jargon be "silly." It is of course true that the decedent could have drawn a will naming those children and thus would have qualified under a different section of the wrongful death act. Normally, most of us don't anticipate that their death will be "wrongful" and it would not be usual for a scrivener to draft with this in mind. Query, under *Combs*, could it not be said that sisters aren't decedent's sisters because their brother died?

I actually won a case once with Cliffman circumstances by arguing equitable adoption.

Regarding the attorney fee issue, I think the Court of Appeals is correct on the reference fee. The legal requirements are that the client must be aware of the reference fee agreement. The Court of Appeals backs into this with the legal standard by saying that the appealing party did not prove that the client was not "unaware" of the fee arrangement. The law however does not say not unaware, it says aware.

The Court of Appeals did not touch the issue as to whether the lawyer receiving a reference fee who was also the attorney for the estate should also receive an estate fee. By not touching the issue the Court of Appeals is confirming that the Lower Court was correct.

If there is an "estate", I think the duel fee should be allowed. But in this case and in all wrongful death cases in which the decedent left no property himself, there is no "estate". The estate is merely a conduit on behalf of the plaintiffs who lost society and companionship or who suffered pecuniary loss. Therefore, in light of the fact that there was no "estate" and the only proceeds were wrongful death proceeds, those wrongful death proceeds are the only corpus from which to take the monies. In light of the fact that the "estate" attorney received a reference fee, wouldn't that more than cover the situation? Could it merely be considered the personal injury attorney's cost?

AAM:kjd
Attachment
803262

[Box Score]		1	2	3	4	5	6	7	8	9	R	H	E
√	Detroit Tigers (46-46)	0	0	3	3	0	1	0	0	0	07	14	2
	Philadelphia Athletics (34-55-1)	0	1	0	0	0	0	3	0	2	06	11	2

Game of 7/29/1939 -- Detroit at Philadelphia (D)

Detroit	AB	R	H	RBI	Philadelphia	AB	R	H	RBI
McCosky B, cf	5	0	3	1	Moses W, rf	5	1	1	1
McCoy B, 2b	5	2	3	0	Siebert D, 1b	4	1	1	1
Averill E, lf	3	0	1	2	Miles D, cf	4	0	1	3
York R, c	4	1	1	2	Chapman S, ph	1	0	1	0
Greenberg H, 1b	5	0	1	0	Johnson B, lf	5	1	1	0
Higgins M, 3b	4	0	0	0	Hayes F, c	5	0	3	0
Fox P, rf	5	1	3	0	Nagel B, 2b	4	0	0	0
Croucher F, ss	4	1	1	0	Newsome S, ss	4	1	2	1
Bridges T, p	5	2	1	0	Lodigiani D, 3b	3	0	1	0
McKain A, p	0	0	0	0	Nelson L, p	1	0	0	0
Thomas B, p	0	0	0	0	Joyce B, p	1	0	0	0
					Collins E, ph	1	1	0	0
					Dean C, p	0	1	0	0
	40	7	14	5		38	6	11	6

Detroit	003	301	000	--	7
Philadelphia	010	000	302	--	6

Detroit	IP	H	R	ER	BB	SO
Bridges T (W)*	8.0	10	6	6	4	8
McKain A+	0.0	1	0	0	0	0
Thomas B (S)	1.0	0	0	0	0	0

Philadelphia	IP	H	R	ER	BB	SO
Nelson L (L)#	3.0	8	6	4	2	4
Joyce B	4.0	4	1	1	0	3
Dean C	2.0	2	0	0	2	1

* Pitched to 3 batters in 9th
\+ Pitched to 1 batter in 9th
\# Pitched to 5 batters in 4th

E -- Greenberg H, Nelson L, Miles D, Croucher F
DP -- Detroit 2, Philadelphia 1
LOB -- Detroit 11, Philadelphia 9
2B -- Fox P, McCoy B, Hayes F
3B -- Miles D, Moses W
HR -- York R
SB -- Averill E, McCosky B
SF -- Averill E
WP -- Bridges T
T -- 2:25
A -- 6000

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CLIFFMAN.

PHILLIP CARTER, ELMER CARTER, DAVID CARTER, and DOUG CARTER,

Appellants/Cross-Appellees,

v

RICHARD D. PERSINGER, Personal Representative of the Estate of GORDON JOHN CLIFFMAN,

Appellee,

and

BETTY WOODWYK and VIRGINIA WILSON,

Appellees/Cross-Appellants.

UNPUBLISHED
June 9, 2015

No. 321174
Allegan Probate Court
LC No. 13-058358-DE

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Appellants/cross-appellees Phillip, Elmer, David and Doug Carter appeal as of right the probate court's order granting appellees/cross-appellants Betty Woodwyk and Virgina Wilson's petition for declaratory relief, which precluded appellants from sharing in a wrongful-death settlement. Appellees/cross-appellants cross-appeal the order denying Woodwyk's motion to set aside an earlier order approving the settlement as well as attorney fees paid from the settlement. Because appellants are not entitled to a share in the proceeds of the wrongful-death settlement and the trial court did not err by approving a disputed attorney referral fee, we affirm.

On October 2, 2012, John Gordon Cliffman died from injuries he suffered in an automobile accident. It is undisputed that Cliffman had no children, he died intestate, and his wife Betty Carter died in 1996. Appellants are Betty Carter's sons, and appellees Woodwyk and Wilson are Cliffman's sisters.

The probate court appointed Phillip Carter as personal representative of the Estate. Phillip hired attorney Jeffrey Buckman to represent the Estate in a wrongful-death action and agreed that Buckman would receive a contingency fee of one-third of what he obtained on behalf of the Estate. Phillip also hired attorney Kenneth Puzycki at an hourly rate to perform the necessary services to process the Estate through probate.

On December 18, 2013, the probate court approved a settlement between the Estate, Progressive Insurance Company, and Citizens Insurance Company. This settlement resulted in $300,000 for the estate minus a one-third contingency fee paid to Buckman. From his contingency fee, Buckman also paid Puzycki a referral fee. Woodwyk then moved the probate court to set aside its December 18, 2013 order approving the settlement, alleging that, among other matters, the referral fee paid by Buckman to Puzycki was improper because the Estate was already paying Puzycki an hourly rate. The probate court denied the motion, stating that the referral fee to Puzycki did not harm the Estate; rather, fee sharing was standard practice and burdened only Buckman because the Estate would be paying the same percentage regardless.

Thereafter, Woodwyk and Wilson petitioned the probate court to declare that appellants could not claim a share of the proceeds from the wrongful-death settlement, arguing that, pursuant to *In re Combs Estate*, 257 Mich App 622; 669 NW2d 313 (2003), appellants could not recover damages under MCL 600.2922(3)(b) because their mother, Betty Carter, predeceased Cliffman. The probate court granted Woodwyk and Wilson's petition. Appellants now appeal as of right seeking a share in the wrongful-death settlement, and appellees have filed a cross appeal challenging the propriety of the referral fee Buckman paid to Puzycki.

On appeal, appellant's claim that they are entitled to share in the wrongful-death settlement proceeds because, under MCL 600.2922(3)(b), when there has been a settlement of a wrongful death claim, "[t]he children of the deceased's spouse" may be entitled to a share in the recovery if they suffered damages and survived the deceased. This argument is plainly without merit, however, because the issue of whether a decedent's stepchildren may share in a recovery from a wrongful-death settlement, when their parent who was married to the decedent has predeceased the decedent, was unequivocally settled by this Court in *In re Combs Estate*, 257 Mich App at 625. There, this Court considered the plain language of MCL 600.2922(3)(b) and succinctly explained that the term "spouse" refers to "a married person." *Id.*, citing *Cornwell v Dempsey*, 111 Mich App 68, 70; 315 NW2d 150 (1981). As a matter of law, it is well-settled in Michigan that the death of a spouse terminates a marriage. See *In re Certified Question from US Dist Court for W Mich*, 493 Mich 70, 79; 825 NW2d 566 (2012); *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). Given that death terminates a marriage, upon one party's death, the individuals are no longer married and the surviving individual no longer has a "spouse" within the meaning of MCL 600.2922(3)(b). *In re Combs Estate*, 257 Mich App at 625. As a result, stepchildren are not entitled to damages under MCL 600.2922(3)(b) when their parent, who was married to the decedent, has predeceased the decedent because these children are not "children of the deceased's *spouse*." *In re Combs Estate*, 257 Mich App at 625.

It follows that, in this case, appellants are not entitled to a share in the wrongful-death settlement proceeds because their mother predeceased Cliffman in 1996, meaning that, at the time of his death in 2012, Cliffman had no "spouse" and thus there are no spouse's children

entitled to recovery under MCL 600.2922(3)(b). See *In re Combs Estate*, 257 Mich App at 625. Indeed, appellants do not contest that this Court's holding in *In re Combs Estate* precludes their recovery under MCL 600.2922(3)(b). Instead, appellants argue that *In re Combs Estate* was wrongly decided. *In re Combs Estate* is, however, binding precedent of this Court. See MCR 7.215(J)(1). Moreover, we do not disagree with *In re Combs Estate*, and we decline appellants' request to express such disagreement or to convene a special panel on this issue. See MCR 7.215(J)(2), (3). In short, under binding appellate precedent, appellants are not entitled to recovery under MCL 600.2922(3)(b), and thus the trial court did not err by concluding that they could not share in the wrongful-death settlement proceeds at issue in this case.

Next, in their cross-appeal, Woodwyk and Wilson argue that the probate court erred by determining that the referral fee paid by Buckman to Puzycki was valid. Contrary to this assertion, MRPC 1.5(e) permits attorneys who do not work in the same firm to divide a fee between each other. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 45; 672 NW2d 884 (2003). Specifically, "[a] division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable." MRPC 1.5(e). Here, at all relevant times, the client was Philip acting as personal representative of the Estate. Appellees offer no evidence to indicate that Philip was unaware of the referral fee or that he objected to this fee or Puzycki's participation. Indeed, at this time it is Woodwyk and Wilson, not Philip, objecting to this fee. Moreover, Woodwyk and Wilson also do not argue that the one-third contingency fee to Buckman is unreasonable. And, indeed, "the receipt, retention, or sharing" of a one-third contingency fee in a wrongful-death case is "deemed fair and reasonable" according to MCR 8.121(A) and (B). Thus, it appears that MRPC 1.5(e) permits Buckman to pay Puzycki a referral fee from his contingency fee.

Woodwyk and Wilson complain on appeal that Puzycki's referral agreement with Buckman was not specifically set forth in writing. However, Buckman's contingent fee agreement with the Estate was set forth in writing as required by MCR 8.121(F) and MCR 5.313(B), and appellees point to no authority requiring that the referral-fee agreement between Puzycki and Buckman also be in writing. Indeed, it is not disputed that the referral fee to Puzycki was paid from Buckman's contingency fee rather than from the Estate. Therefore, even if the referral-fee agreement were invalid, it is unclear why Woodwyk and Wilson contend that this referral fee should revert to the Estate rather than to Buckman given that Buckman had a written agreement to receive one-third of the settlement and Puzycki was paid from Buckman's existing fee. Woodwyk and Wilson make no argument to support this contention and have thus abandoned it. *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 366-367; 824 NW2d 609 (2012). In sum, because there is no indication that Philip was unaware of, or objected to, Puzycki's referral fee, and because the total fee agreement was reasonable, the probate court properly held that the referral fee was valid. MRPC 1.5(e).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Christopher M. Murray