



*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).

For those interested in viewing previous Probate Law Case Summaries, go online to: <http://www.kempklein.com/probate-summaries.php>

**DT:** March 2, 2015

**RE:** **In Re Poling Estate**  
STATE OF MICHIGAN COURT OF APPEALS

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### **BASEBALL STATS:**

**Guest Editorial by Barbara Andruccioli – Tigers Fan!**

IT’S THAT MAGICAL TIME OF YEAR – SPRING TRAINING!

In Major League Baseball, spring training allows new players to try out for roster and position spots, and gives existing team players practice time prior to competitive play. It has always attracted fan attention, drawing crowds who travel to the warmer climates to enjoy the weather and watch their favorite teams play.

Spring training typically starts in mid-February and continues until just before Opening Day of the regular season, traditionally the first week of April. Team members normally wear their batting

practice uniforms for the duration of spring training and only wear their normal jerseys beginning on Opening Day, which this year for the Detroit Tigers will be Monday, April 6th versus the Minnesota Twins.

The Tigers, part of the Florida–playing Grapefruit League, play at Joker Marchant Stadium, located in Lakeland, Florida. Lakeland is a city in Polk County, located just outside of Tampa. The stadium was named after local resident and former Lakeland Parks and Recreation Director Marcus "Joker" Marchant. Although the stadium opened in 1966, it was renovated in 2003 and now holds 8,500 people. Besides being the spring training home of the Detroit Tigers, it is also the regular season home for the minor league affiliates Lakeland Flying Tigers and Gulf Coast Tigers. On March 15, 2011, the largest crowd in the stadium's history (10,307 people) watched a spring training game between the Tigers and the Boston Red Sox.

Games at Joker Marchant Stadium have a different feel, as the stadium, being smaller than Comerica Park, allows you to be closer to the action and enjoy the game in a more relaxed environment. Spring training games are very popular in Lakeland. Don't be surprised if you try to get tickets to a certain game and it's sold out. If you're a baseball fan and haven't been to a game in Lakeland, you're missing out on a treat, it is truly worth the trip... and Disney World is only 40 miles away!

### **REVIEW OF CASE:**

Referenced Files:     Fiduciary Fees

Appellant Personal Representative was in the "insurance business." He administered a \$764,000 estate. He asked to be compensated in the amount of \$18,200. He pleaded that this was based on \$200 per hour, which was a 20% discount from what he charged his insurance clients. He also reiterated that he had been in the insurance business for 35 years, and that the Chemical Bank would have charged \$22,000 and the Citizens Bank would have charged a base fee of \$3,000, plus \$150 per hour. The Ogemaw County Probate Court awarded him \$8,190, which the Court of Appeals ruled was not an abuse of discretion.

What makes this simple fee dispute of interest is the following:

- 1) The Lower Court in Ogemaw determined that a \$90 per hour rate as reasonable based upon what was paid to the fiduciaries in the Wayne County Probate Court.
- 2) The Court of Appeals in laying out the multiple factors to determine a reasonable rate is basically saying what appellant could have done to have prevailed; show special skill, the nature and complexity of the matter, animosity between the parties involved, etc.
- 3) The Court of Appeals in evaluating the fees of the two banks in question said that those rates were "inapposite" as the banks had a higher level of skill.

Appellant could have cleared the matter up before embarking on his fiduciaryship by consultation with the heirs or the Court. It also seems that if he had the necessary ammunition, he may have under-pleaded his case.

I refer the reader to two articles by Richard Siriani, Esq. in the Michigan Bar Journal for two good discussions of fiduciary and attorney fees in probate estates. I consider them more thorough than the January 2015 rendition in the Michigan Bar Journal.

STATE OF MICHIGAN  
COURT OF APPEALS

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In re POLING Estate.

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KEVIN ELLIOTT, Personal Representative for the  
Estate of PAUL A. POLING,

Appellant,

v

TOLFREE FOUNDATION,

Appellee.

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UNPUBLISHED  
December 16, 2014

No. 317763  
Ogemaw Probate Court  
LC No. 11-014636-DE

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

In this fee dispute, Kevin Elliott appeals by right the trial court's order approving a substantially smaller fee than requested for his services as the personal representative for the Estate of Paul A. Poling. Because we conclude the trial court's decision to order compensation at the lower rate was reasonable under the totality of the circumstances, we affirm.

Poling died in 2012. After Poling died, Elliott administered his estate, as provided in Poling's will. Poling was survived by one daughter, Janis Fontenot, and two siblings, Ben Poling and Mary Jackson. Poling's estate was worth approximately \$764,000; it included two residences,<sup>1</sup> bank accounts, an annuity, and vendor interests in several land contracts.

After Elliott filed a final accounting for the estate, he requested compensation for 91 hours of work at \$200 per hour. He testified that his hourly rate represented a 20 percent reduction from the rate he usually billed his clients in his insurance agency and was premised on his 35 years of experience in the insurance business. The probate court, however, concluded that Elliott was not entitled to an hourly rate of \$200. It determined that Elliott's experience and the nature of the work performed was commensurate with that of a fiduciary that would normally

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<sup>1</sup> Poling left one residence to the Tolfree Foundation to fund a scholarship program.

charge \$90 per hour. Accordingly, it approved a total fee of \$8,190, which amounted to 91 hours at \$90 per hour.

On appeal, Elliott argues the probate court abused its discretion when it approved a fee that was more than 50% lower than he requested. This Court reviews the factual findings underlying a probate court's decision for clear error, but reviews the court's dispositional ruling for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128.

"A personal representative is entitled to reasonable compensation for services performed." MCL 700.3719(1). The probate court may review the reasonableness of the personal representative's compensation and order a refund if the court determines that the fee is excessive. MCL 700.3721. "The determination of reasonable compensation to the personal representative is, in general, the same as for the attorney." *In re Krueger Estate*, 176 Mich App 241, 251, 438 NW2d 898 (1989). And, as is the case with attorney fees, there is no precise fee schedule or formula for computing the amount of compensation to be paid a personal representative. See *In re Temple Marital Trust*, 278 Mich App at 138. The probate court has the "broadest discretion to evaluate the worth of the services rendered in light of its experience and knowledge of such matters." *In re Thacker Estate*, 137 Mich App 253, 258; 358 NW2d 342 (1984). The burden of proof is on the claimant to satisfy the court that services rendered were necessary and that charges were reasonable. *Comerica Bank v City of Adrian*, 179 Mich App 712, 724; 446 NW2d 553 (1989).

The court thought Elliott's proposed hourly rate was excessive and lowered it to \$90 per hour on the basis of evidence that this was the fiduciary rate charged by attorneys and corporate fiduciaries in Wayne County. It also considered Elliott's income level, the services rendered, the time spent on estate administration, the nature and complexity of administration, the existence of any animosity between the persons involved, and his skills.<sup>2</sup> The administration of this estate was straightforward. It did not involve a great number of creditors or beneficiaries, and it did not require a high level of expertise or skill to finalize the estate. Nor did Elliott have unusual professional expertise that would entitle him to a premium rate.

Elliott submitted the fee schedules of Citizens State Bank and Chemical Bank to the probate court. Relying on these schedules, he maintains that Citizens State Bank would have cost the estate over \$22,000 and Chemical Bank would have charged a base fee of \$3,000 plus an hourly rate of \$150 per hour for its trust officer's time. Both comparisons are inapposite. The fee that Citizens State Bank would purportedly have charged is based on a percentage fee

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<sup>2</sup> We note that Elliott relies on the factors enumerated in *Comerica Bank* and the probate court utilized the factors listed in *In re Krueger*. However, the factors listed in *In re Krueger* substantially mirror those listed in *Comerica Bank*. Moreover, both lists are not exhaustive. See *Comerica Bank*, 179 Mich App at 724; *In re Krueger*, 176 Mich App at 248.

arrangement, not on an hourly rate. In addition, under Chemical Bank's fee schedule, considering that Elliott is not a fiduciary skilled in estate administration, he would be equivalent to a non-trust officer with an hourly rate of \$80. Thus, Chemical Bank's schedule actually supports the probate court's determination.

Examining the totality of the circumstances surrounding Elliott's administration of the estate, we cannot conclude that the trial court's decision to order compensation at \$90 per hour for the requested number of hours fell outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128.

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter