



*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 2007-2017, 2019 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*® 2019 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine’s list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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” and “Sons of Adam,” an International Terror Mystery.

**DT:** July 11, 2019

**RE:** *In re Vandine Trust*

STATE OF MICHIGAN COURT OF APPEALS

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

- Mrs. Pollinger
- 12<sup>th</sup> Grade English Comp
- Mumford High - 1959

## **BASEBALL**

### **Teaching the Tigers**

The last place failing Detroit Tigers just extended General Manager, Al Avila's contract. Awful Al's extension can only mean that the pizza heir thinks he's performing well. Perhaps the Tigers should learn a little of their pre-pepperoni history and maybe they wouldn't be so cheesy.

True the Bengals, as of 1950, had only one World Series under their belt, but they were always competitive, gave the fans Hall of Famers to enjoy and had never finished in last place in the 50 years they belonged to the Junior Circuit.

The 1950 Tigers were my idols. Games started at 3:00 p.m. Hampton School let out at 3:15, and I raced home to watch them on t.v. (Yes, in 1950 the May family had a t.v., a 20" reflector, projection model made by Philco, not a little tube model). What a team we had. They fought until the end of the season and finished in second. Three games behind a loaded Yankee team. They would have won the Pennant but for Aaron Robinson's boo-boo, but that's a story for a later day.

They had a General Manager by the name of Billy Evans who was probably in some way genetically linked to awful Al Avila. Neither the pizza heir, nor the Havana born Cubano learned from Evans ineptness.

Evans proceeded to trade away:

1. George Kell, a future Hall of Famer who hit .340 in 1950, finished second in 1950 in batting.
2. Hard hitting .323 Hoot Evers.
3. 17 game winner, Fred Hutchinson.
4. 13-5 pitcher, Dizzy Trout.
5. .293 hitting short stop, Johnny Lipon.

The result? The Tigers finished last in 1952, the first time in history.

Sound familiar – Verlander, Sherzer, Price, JD Martinez?

Tiger history 101 pizza boy.

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

**REVIEW OF CASE:**

**RE:** *In re Vandine Trust*

- Latent and Patent Ambiguity
- Use of External Evidence
- Ambiguity
- Resolution of Ambiguity

A Trustee spouse used the assets after her husband's death in a manner she thought was consistent with the Trust. This included transferring property to another Trust. A remainder person objected, claiming it was beyond the terms of the Trust. The Trustee who was challenged raised the issue of Appellant's lack of present interest. The Court did not get into the argument of present interest, but issued a C(8) Summary Disposition, finding that the Trust was clear and that the surviving spouse, Trustee could use the property for her own benefit, consistent with a phrase of Article II of the Trust.

The matter was Appealed. The Court of Appeals found a patent ambiguity and remanded the matter back to the Probate Court to decide if it was the intent of the Settlor to limit or expand the rights of the surviving spouse.

The second Article of the Trust allowed broad use by the Settlor Trustees (husband and wife). They were referred to in the plural. According to the Court of Appeals this constituted a patent ambiguity, as it conflicted with Article III of the Trust which called for the property to be held for the remainder people.

I frankly see no patent ambiguity. Article II clearly had a death provision about "the first of us to die". To me, that was unambiguous as to what would happen and what the powers of distribution would be post-mortem of the first Settlor, i.e., the holding of the property with no rights of invasion of the surviving spouse. Frankly, I think the scrivener made a mistake in not putting in the normal rights of invasion that may occur to a spouse post-mortem of the first spouse.

Inter alia, the Court of Appeals did cite some interesting law.

1. A mere disagreement between the parties regarding the interpretation of a Trust does not mean that the Trust is ambiguous. *In re Brown Trust*, 312 Mich App 693.
2. If an extrinsic fact could give a secondary meaning to a fact, extrinsic evidence could be used to resolve that conflict.

3. When confronted with an ambiguous document, two sources may be consulted. (1) The circumstances with respect to the drafting of Trust instrument, and (2) Rules of construction, otherwise the four corners of the document should be used.

4. "Present witness" was not discussed.

Based on what I've read, I think Summary Judgment should have been granted in favor of the Appellant and not the Appellee, but there may be more to this than I have read in the Court of Appeals Opinion.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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*In re* ESTATE OF JOSEPH VERGA.

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LAWRENCE D. VERGA, JR., Personal  
Representative,

UNPUBLISHED  
October 11, 2018

Petitioner-Appellee,

v

JAMES WASWICK, ELIZABETH J. MOSS,  
MARY MEDICH, NANCY LOU GOOD, and  
DOROTHY MAE CLYMER,

Nos. 340980; 341346  
Huron Probate Court  
LC No. 13-039469-DA

Respondents-Appellants.

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Before: JANSEN, P.J., and METER and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, appellants appeal as of right (1) an order denying their motion to remove appellee as personal representative of the estate of Joseph Verga and (2) an order reiterating this denial and also denying appellants' motion for summary disposition in which they sought to invalidate a will, power of attorney, and deed.

Joseph Verga (hereinafter "Verga") passed away on June 27, 2013, and appellee was appointed personal representative of his estate on August 5, 2013. Appellants, heirs of Verga, filed a motion to remove appellee as personal representative, arguing that appellee had been reckless and self-serving in administering the estate. Appellants also filed a motion to invalidate Verga's will, appellee's power of attorney, and a deed whereby Verga's home was transferred to appellee upon Verga's death. They alleged that the will and power-of-attorney documents were executed on February 16, 2012, and that Verga was incompetent at this time due to cognitive impairment. Appellants argued that the deed was signed on March 14, 2013, and that Verga was incompetent at that time as well. The trial court denied the motion to invalidate the three documents and instead set the matter for trial. After an evidentiary hearing, the court denied the motion to remove appellee as personal representative.

Appellants argue that the trial court erred by denying their motion for summary disposition concerning the validity of the will, power of attorney, and deed.<sup>1</sup> We review de novo a trial court's ruling regarding a motion for summary disposition. *Dillard v Schlussel*, 308 Mich App 429, 444; 865 NW2d 648 (2014).

Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the evidence submitted might permit inferences contrary to the facts as asserted by the movant. When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. [*Id.* at 444-445 (quotation marks and citations omitted).]

MCL 700.3407(1)(c) states that “[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.” Appellants spend a considerable portion of their appellate brief arguing that they established undue influence. However, appellants *did not raise* the issue of undue influence in the trial court. They themselves acknowledge as much when they argue that the trial court should have “seen fit to re-label [the] contest over disputed documents as an issue of ‘undue influence[.]’ ” We decline to consider this heavily fact-dependent issue that was not raised, developed, and ruled upon in the lower court. *Adam v Sylvan Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

Appellants also argue that they established that Verga lacked capacity at the time of signing the will,<sup>2</sup> power of attorney, and deed. MCL 700.2501 states:

(2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:

(a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.

(b) The individual has the ability to know the nature and extent of his or her property.

(c) The individual knows the natural objects of his or her bounty.

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<sup>1</sup> While the motion was not styled as such, the court and parties all agreed to treat the motion as a motion for summary disposition under MCR 2.116(C)(10).

<sup>2</sup> We note that the will was nearly identical to the will prepared several years prior.

(d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.<sup>[3]</sup>

Appellants did produce a physician's affidavit indicating that Verga lacked testamentary capacity because of cognitive impairment. However, appellee produced evidence—specifically, the deposition testimony of the attorney who prepared the will and witnessed the signing of the will and the power of attorney—that Verga was lucid and understanding at the time of the signing. This same attorney witnessed the signing of the deed and testified that Verga did not seem amiss at all mentally and appeared to be competent and understanding at the time. This attorney emphasized, in fact, that Verga was *adamant* about wanting appellee to be deeded the house. Appellants argue that because they provided medical evidence and appellee did not, the trial court was bound to grant their motion. But appellants cite no legal authority that *medical* testimony on behalf of the nonmoving party is necessary to counter a motion for summary disposition such as that filed by appellants. When the evidence is viewed in the light most favorable to the nonmoving party, *Dillard*, 308 Mich App at 445, a genuine issue of material fact is apparent. The trial court did not err by denying appellants' motion.

Appellants also argue that the trial court erred by denying their motion to remove appellee as personal representative of the estate. We review for an abuse of discretion a trial court's decision regarding the removal of a personal representative. See *In re Kramek Estate*, 268 Mich App 565; 710 NW2d 753 (2005); see also, generally, *Comerica Bank v Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). In addition, the parties agree that the trial court's factual findings are to be reviewed for clear error. See *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

MCL 700.3611 states:

(2) The court may remove a personal representative under any of the following circumstances:

(a) Removal is in the best interests of the estate.

(b) It is shown that the personal representative or the person who sought the personal representative's appointment intentionally misrepresented material facts in a proceeding leading to the appointment.

(c) The personal representative did any of the following:

(i) Disregarded a court order.

(ii) Became incapable of discharging the duties of office.

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<sup>3</sup> Appellants focus on the standard of incompetency regarding wills as opposed to any standards applying to a power of attorney or a deed, implicitly conceding that the "will" standard applies to all three documents.

(iii) Mismanaged the estate.

(iv) Failed to perform a duty pertaining to the office.

Appellants pose five categories relating to appellee's alleged misdeeds: items missing from Verga's household, improper maintenance of Verga's home, the failure to list the purpose of certain checks on the inventories filed with the court, the issuance of a check from the estate to appellee's father, and the failure to list a \$5,622 asset on the inventories. While some errors did occur, we cannot find that they rise to such a level that the trial court abused its discretion by denying appellants' motion.

With regard to items missing from the household, while appellants produced some evidence that items previously in the home were not accounted for, there was no evidence that appellee did anything nefarious to cause these items to go missing. As stated by the trial court, "Nobody has provided this court with any type of linkage that [appellee] himself has done something in regard to that . . . ." With regard to the maintenance of the home, the home was, at the time in question, not an asset of the estate. The court explicitly stated, in its ruling from the bench, that it would address later "the necessary action as it relates to [the home]." As for the checks, appellants object that appellee could not determine for what these checks were written when he was shown the check numbers listed on an estate bank statement. Appellants appear to be arguing that appellee should have listed the purpose for each of these checks on the inventory forms filed with the court. But the inventory forms involved estate *assets*, not debits. Appellee did list estate expenses on the "account of fiduciary" form filed with the court, and this "account of fiduciary" form does not have a section requiring a description for each check issued from the estate bank accounts. From the record before us we find no error with regard to these checks.

There *were* two errors committed by appellee. First, appellee improperly issued a check to his father (Verga's brother) from the estate, given that the heirs in the will were Verga's nieces and nephews; from the hearing testimony it appears that appellee mistakenly believed that his father was supposed to receive this money under the will.<sup>4</sup> However, no objections were issued to the distribution form that listed the father as receiving the check. Under all the circumstances, the error does not persuade us that the trial court abused its discretion by failing to remove appellee as the personal representative. As for the second error, appellee failed to list a \$5,622 asset, from an inherited certificate of deposit, on the inventory forms. Appellee admitted the oversight in his hearing testimony. Importantly, the money *was* deposited into the account, and appellants do not argue that appellee wrongfully retained this money. Accordingly, this error, too, fails to persuade us that the trial court abused its discretion by failing to remove appellee as the personal representative. Appellee, who is not an accountant or an attorney, has not performed *perfectly* in his role as personal representative, but the trial court did not err in finding that appellants failed to prove that appellee "mismanage[d]" the estate or undertook other actions requiring his removal.

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<sup>4</sup> Appellee issued the check for the same amount as the checks issued to the nieces and nephews (\$3,074.67).



Affirmed.

/s/ Kathleen Jansen  
/s/ Patrick M. Meter  
/s/ Cynthia Diane Stephens