



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 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He 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. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, click on the link below.
<http://www.kempklein.com/probate-summaries.php>

DT: August 11, 2011

RE: ESTATE OF JENNIFER M. BARKER
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE COMMENTARY:

SHORT SUBJECTS AND/OR SHORT BASEBALL PLAYERS:

We all know that Eddie Gaedel was the shortest major leaguer, but this 3' 7" midget was a Bill Veeck "put on," batted once and never played a position. The great actor, Bill Batey, a 3' 9" dwarf, an outspoken advocate for smaller people, actually played football and basketball for Los Angeles City College and even played baseball with pros in the Hollywood All Star Games.

But what about "for real"?

Freddy Patek, 5' 5" played for 14 years and it was once said that he would rather be the shortest player in the majors than the tallest player in the minors. He wasn't however.



New Britain Rock Cats “short” stop is 5’ 3” Chris Cates.

Albie Pearson was listed at 5’ 5” but is said to have lost a grounder in the sun.

Tommy Leach and Joe Sewell were 5’ 6”.

The best short man was 5’ 4½” Wee Willie Keeler who had a lifetime batting average of .345.

Kyle Gaedele, though he spells his name with an “e” at the end of his last name, is 6’ 2”, plays college baseball for Valpariso University; Kyle is the grandnephew of Eddie Gaedel. Eddie dropped the “e” because he didn’t want to be called “Ga-dell-e.” Kyle was recently drafted by the Padres in the sixth round.

REVIEW OF CASE:

Reference Files: Distribution – Wrongful Death Proceeds
 Conflict of Interest – Attorney Representing Estate and Claimant
 Right of Offset

This unpublished Court of Appeals’ decision is a good discussion of a multitude of issues; most importantly how to distribute wrongful death proceeds. Decedent had an apparently close relationship with Appellee, and a less close relationship with Appellant.

Appellant also alleged that Appellee’s attorney acted both for Appellee as an individual and as a personal representative [“PR”]. Appellant also alleged that, as PR Appellee was negligent, therefore, that share of the PR, as an individual, should have been reduced. The lower court ruled in favor of the Appellee on all three of these counts and the Court of Appeals affirmed.

Wrongful Death Proceeds:

The most important citations of the Court of Appeals, regarding wrongful death proceeds, are *In re Bennett Estate* combined with *Reed v Breton*, 279 Michigan App 239. Distribution of wrongful death proceeds is reviewed on the basis of clear error.

I believe some of the issues raised in this case would not have been raised had there been a Circuit Court Order of Distribution. Obviously, in this case, no Circuit Court action was filed – giving rise to a dual role by the Probate Court as allowed by statute.

The Court of Appeals sets up the standards of determining who lost what. First it cites *McTaggart v Lindsey*, 202 Mich App 612, saying you have to look for objective behavior the decedent had with the survivor, and cites *May v Grosse Pointe Park*, 122 Mich App, to say that there’s no precise formula and that a Court of Appeals should not disturb the findings of fact by the lower court.

The Court of Appeals goes on to talk about how the decedent had a closer relationship with Appellee rather than Appellant, and had every day problems with Appellee, but deep seated problems with the Appellant based on the feeling of abandonment. The court then postulates the question “while Jennifer’s death destroyed a healthy, strong relationship with Tabor it destroyed a less established, comparatively weak relationship with Manetta.”

The standard used by the Court for assessing loss of society and companionship is problematic. The damage awarded is supposed to be the loss suffered by the survivor and not by the decedent. Looking at the matter from the position of the decedent rather than from the survivor really tells us more of what the decedent lost rather than what the survivor lost.

Query: What would the Barker court have done if a parent had two children – the parent loved child #1 unequivocally and unconditionally and hated child no. #2, but child #1 abandoned the parent and hated the parent. Child #2 did not abandon the parent, took care of the parent on a daily basis and absolutely loved the parent. The Barker court, under its theory of looking at the decedent, would favor child #1. To me this is problematic. I think you have to look at both. I think in reality that is what the Court of Appeals did here because there is a substantial amount of finding of fact. It is the theoretical approach that bothers me.

The Court of Appeals made short shrift of the fact that the trial court increased an amount above what was requested in Appellee's petition.

The Court of Appeals also confirmed the Probate Court's denial of an offset against the Personal Representative's individual share for the loss of the house. This was decided on the basis of the facts. I do not think the Probate Court could have made a ruling on this. Imagine if this had come out of the Circuit Court. The Circuit Court would have said 'I'm sorry there has to be a finding of negligence in the Probate Court first. Then you would have to convert an Order of Surcharge to a Judgment and then you would have to garnishee.'

Loss of society and Companionship runs directly to an individual and not through an estate. Therefore, if there was to be any surcharge it would be against the fiduciary and paid into the estate, not deducted from that person's individual share.

I like the way the Court of Appeals dealt with the conflict of interest issue. It distinguishes *McTaggart* and says under certain circumstances you can represent a claimant for loss of society and companionship and the estate fiduciary. The Court of Appeals points out that after the distribution there were issues that concerned the estate.

AAM:jv:694515v2
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JENNIFER M. BARKER

GARY TABOR, Personal Representative of the
Estate of JENNIFER M. BARKER, and GARY
TABOR, Individually,

Petitioners-Appellees,

v

SUSAN MANETTA,

Respondent-Appellant,

and

MAURICE BARKER,

Respondent.

UNPUBLISHED
June 23, 2011

No. 297289
Macomb Probate Court
LC No. 2003-177431-DE

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Appellant Susan Manetta appeals by right the probate court's order providing for the distribution of the wrongful death proceeds. We affirm.

Manetta maintains that the distribution to her, as compared to appellee Gary Tabor, was grossly inequitable and ignored nearly all of the objective evidence offered during the evidentiary hearing. Manetta consequently argues that the probate court abused its discretion by failing to award her more of the wrongful death proceeds. We cannot agree.

Findings of fact made by a probate court sitting without a jury are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Similarly, a court's "decision concerning the distribution of settlement proceeds in a wrongful-death matter is reviewed for clear error." *Reed v Breton*, 279 Mich App 239, 241; 756 NW2d 89 (2008).

As stated by this Court in *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993):

A claim for loss of society and companionship under the wrongful death act addresses compensation for the destruction of family relationships that results when one family member dies. The only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship. [Citations omitted.]

“[N]o precise formula exists for the loss of society and companionship.” *May v Grosse Pointe Park*, 122 Mich App 295, 298; 332 NW2d 411 (1982). Those determinations are for the trier of fact, “and a reviewing court will not arbitrarily substitute its judgment for that of the fact finder.” *Id.*

The record reflects that decedent Jennifer Barker had a turbulent history with Manetta, who was Jennifer’s mother. When Jennifer was 11 years old, she was very unhappy living with Manetta, and began living with Tabor, her father. Both Manetta and Tabor lived in Warren, Michigan. Shortly thereafter, Manetta moved to Traverse City, Michigan. Although there were frequent telephone conversations between Jennifer and Manetta, Jennifer did not see Manetta often. Jennifer felt abandoned by Manetta because Manetta did not make an effort to see her. Jennifer’s relationship with Manetta also included frequent disagreements, which continued after Manetta moved back to the Warren area in 1995. Carol Devnani, an expert in counseling, treated Jennifer from 1996 through 2003, and it was Devnani’s opinion that Jennifer’s relationship with Manetta was conflicted and characterized by abandonment issues. Devnani testified that Jennifer’s relationship with Manetta was difficult for Jennifer, who felt rejected by Manetta. Hence, although Manetta maintained more contact with Jennifer after Manetta moved back from Traverse City, Jennifer continued to be unhappy with their relationship.

Tabor testified that he was very close with Jennifer while she was growing up. Devnani supported Tabor’s testimony in this regard. Devnani also testified that it was her opinion that Jennifer felt safe with Tabor, Jennifer was attached to Tabor, and Tabor provided Jennifer with stability. Moreover, Jennifer trusted Tabor, who was Jennifer’s primary “caretaker.” Devnani further testified that whereas Jennifer’s conflicts with Tabor related to everyday issues, Jennifer’s conflicts with Manetta were much more severe. Tabor also provided Jennifer with financial support while Manetta did not.

Based on the record before us, we cannot conclude that the probate court’s findings were clearly erroneous. *In re Bennett Estate*, 255 Mich App at 549. Although the record reflects that Jennifer and Manetta did maintain a relationship, there was evidence to support the distribution of wrongful death proceeds on the basis of the comparative strength of Manetta’s and Tabor’s relationships with Jennifer. See *In re Claim of Carr*, 189 Mich App 234, 238; 471 NW2d 637 (1991) (noting that a trial court’s award of loss of society and companionship is reviewed “to determine if there is evidence to support the distribution of the estate on the basis of the parties’ relationships to the decedent”). While Jennifer’s death destroyed a healthy, relatively strong relationship with Tabor, it destroyed a less-established, comparatively weak relationship with

Manetta. See *McTaggart*, 202 Mich App at 616. Manetta has not demonstrated that the award was not fair and equitable in light of the facts of the case. *In re Claim of Carr*, 189 Mich App at 240-241. We perceive no clear error in the probate court's distribution of the wrongful-death settlement proceeds. See *Reed*, 279 Mich App at 241.

Manetta also argues that Tabor's recovery should have been limited to the amount sought in his petition. However, appellant has provided no applicable law to support her position. The only case to which she refers is *Gibeault v Highland Park*, 49 Mich App 736, 741; 212 NW2d 818 (1973). But in *Gibeault*, this Court clearly held that "the trial court *did* have authority to award a greater amount of actual damages than plaintiff had requested . . ." *Id.* (emphasis added). An appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for the claims; nor may she give issues cursory treatment with little or no citation to supporting authority. See MCR 7.212(C)(7); *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). We find no merit in appellant's assertion that Tabor's recovery should have been limited to the amount sought in his petition to distribute the wrongful death proceeds.

Manetta next argues that both the original personal representative and the subsequent personal representative mismanaged the estate assets by allowing Jennifer's home to go into foreclosure. Thus, Manetta argues, the personal representatives' share of the wrongful death proceeds should have been reduced. "[T]he existence of a legal duty is a question of law for the court." *In re Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007). In addition, a probate court's decision whether to surcharge a personal representative is reviewed for an abuse of discretion. *Id.* at 397. "[A] personal representative may be held liable to interested persons for an improper exercise of his or her powers, or an improper failure to exercise powers, if there is a breach of fiduciary duty." *Id.* at 401; see also MCL 700.3712 and MCL 700.1308.

In this case, Manetta stipulated to an immediate distribution of wrongful death proceeds to Jennifer's husband and the original personal representative, Maurice Barker. This amount notably included \$5,000 for the reimbursement of funeral expenses. Manetta has thus waived her claims against Maurice. See *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) (noting that "[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error").

Tabor, who was the subsequent personal representative, testified that Jennifer's house went into foreclosure before he became the successor personal representative of Jennifer's estate and that he "didn't know anything about it until after [he] was made representative of the estate." Based on this record, we find no evidence that Tabor mismanaged the estate assets by allowing Jennifer's home to go into foreclosure. Accordingly, we cannot conclude that the probate court abused its discretion by declining to surcharge Tabor for the loss of equity in Jennifer's home as a result of the home going into foreclosure.

Manetta further argues that the settlement should not have been reduced by any payment to Tabor's attorney after the petition to approve the settlement and distribute the proceeds was filed because any active role by Tabor's attorney after that point would have constituted a conflict of interest. Manetta cites *McTaggart*, 202 Mich App 612, in support of her proposition. We note that this issue is not contained in the statement of questions presented, and is therefore

waived on appeal. MCR 7.212(C)(5); *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). At any rate, however, this issue has no merit. Unlike in *McTaggart*, the same attorney was not representing the personal representative as a fiduciary and as a claimant in the present case. *McTaggart*, 202 Mich App at 618. Also unlike the facts of *McTaggart*, the court in this case did not order that Tabor receive the entire amount of the wrongful death proceeds. *Id.* Indeed, in this case Tabor requested *less* than he was ultimately awarded by the probate court. Quite simply, Manetta has failed to demonstrate that there was a conflict of interest. Moreover, a review of the record reflects that there were matters in which the personal representative's attorney necessarily needed to be involved that occurred *after* the petition to approve the settlement and distribute the proceeds was filed. Consequently, Manetta's assertion that Tabor's attorney should not have been paid attorney fees after the date of the petition lacks merit.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad