



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, 2020 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*® 2020 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: March 24, 2021

RE: *In re Barker Estate*

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 LORE

We're now into right field, and once again we're looking for the best players I have seen in person and not seen on television or just know about.

At the southern most part of Briggs Stadium, the best right fielder far and away was Al Kaline. It took 14 years to build a team around him to win a Pennant, but even in those 14 years he provided enough thrills to keep me coming to the park.

I've written before about his two home runs in one inning, three for the game in 1955. I've never seen former at any other time. I saw Charlie Maxwell do the latter in 1959. It was still quite a feat.

Most articles that I write deal with batting rather than fielding. I recognize that Kaline ended his career with a .299 average, or thereabouts, and won the batting title at the earliest age of a baseball player, but his fielding was superb.

I saw superb play by Kaline in the field over the years. I saw one thing he did and saw it only once. I don't remember who the Bengals were playing, but someone singled to right. Kaline rushed to the ball, one-handed it and threw the runner out at first base.

Kaline had a lot of assists. I remember one game in 1954 against the White Sox Kaline did something I have never seen since by any player.

The first thing Kaline did was throw a runner out at the plate from deep right field to Frank House.

Next, Johnny Groth came up. He got a lot of applause because he was an ex-Tiger. He singled and runners scored. Jim Rivera, one of the fastest men in the league, streaked from first base to third. Kaline hurls the ball to Ray Boone at third and Rivera is out.

Later, Minnie Minoso (who I always called Minno Minosee) doubles to deep right. Minnie is as fast as Rivera. He rounds second base headed for third. Kaline chucks the ball to Frank House, the cut-off man, who relays it to Harvey Kuenn, who gets it to Ray Boone in time to nail the fleet-footed Cubano.

The Tigers still lose 9 to nothing, but it was like Kaline's first 14 years, he mitigated the loss.

**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 Barker Estate*

- Latent Ambiguity
- Patent Ambiguity
- Unresolved Ambiguity – Literal Interpretation

This neat little case is fact specific but it cites good law to reach its conclusion.

Decedent left a Will naming daughter “A” personal representative and sole beneficiary. Decedent made a Codicil removing daughter “A” as personal representative and appointing daughter “B”. The Codicil went on to say, “If B fails to survive me, my residue goes to “C”. No mention is made as to the change of beneficiary.

“A” says I get the money. “B” says she meant me to be personal representative and the new beneficiary. “B” claimed there was an ambiguity in the Codicil. The lower Court looked beyond the Codicil (extrinsic evidence) to resolve the conflict. The lower Court was not provided with guidance as to the actual intent. The lower Court then made a literal interpretation that since there was no change of beneficiary, the residue went to “A” unless a subsequent event occurred that is the death of “B” then the money would pass to “C”.

Remember when you were taking trust and estate law and you learned the difference between conditions subsequent and conditions precedent? You do now.

The Court of Appeals found no error and affirmed, and said inter alia:

1. “A patent ambiguity exists if there is uncertainty on the face of the instrument and arises from the use of defective, obscure or insensible language.” [*Woodworth Tr* 196 Mich App 326 (1992)].
2. A latent ambiguity “exists when the meaning of the language is clear but some extrinsic fact creates the possibility of more than one meaning.” (*Woodworth Tr* at 328).
3. Don’t over scrutinize the plain language of the Will. [*In re Bem Estate*, 247 Mich Ap 427 (2001)].
4. When an ambiguity “may exist” you may use extrinsic evidence to:
 - a. Prove the existence of an ambiguity.
 - b. Show actual intent.
 - c. Actual intent of the parties to aid in construction, [*Matter of Kremlick’s Estate*, 417 Mich 237 (1983)].

Caveat to the reader, the Court could have thrown out the whole Codicil because the language was suggestive and not absolute. "I wish". It's best that they didn't and ruled the way that they ruled.

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF LORRAINE GOLDIE BARKER.

LINDA OLEKSY,

Petitioner-Appellant,

v

RHONDA BRAULT,

Respondent-Appellee.

UNPUBLISHED
February 25, 2021

No. 352644
Dickinson Probate Court
LC No. 15-000007-DE

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Petitioner, Linda Oleksy, appeals as of right the January 20, 2020, opinion and order of the trial court finding that the codicil to the decedent's will would be interpreted literally, with no expanded or interpreted meaning. We affirm.

Decedent, Lorraine Goldie Barker (Barker), executed her will in 2008 and executed a codicil to that will in 2011. In her will, Barker named her niece, Rhonda Brault, as her personal representative, with her other niece, Linda Oleksy, to take the position if Brault could or would not. In the codicil, however, Barker named Oleksy as her personal representative. Barker passed away in 2014. On January 12, 2015, Oleksy, applied for informal probate of Baker's will and for the appointment of herself as personal representative. She was duly appointed as personal representative of Barker's estate, with no objections, on January 16, 2015.

Thereafter, Oleksy properly served the application and appointment on all interested parties, including Brault, who is Oleksy's sister. An inventory was provided to all interested parties as well. The 2015 inventory listed an investment account with a value of \$130,896.21 as the primary estate asset. Despite the relatively low assets of the estate, no progress was made on the informal probate of the will for several years and no distributions were made. Finally, in November 2018, Brault petitioned for the removal of Oleksy as the personal representative and Oleksy raised an issue concerning whether Brault was a devisee. Oleksy filed a petition asserting

that Barker's codicil entitled Oleksy to the residue of Barker's estate and removed Brault as a devisee or beneficiary under the will. The trial court thereafter scheduled a hearing to address the request for removal of Oleksy as personal representative and for the interpretation of Barker's codicil.

In June 2019, the trial court ordered that Oleksy be removed as personal representative due to her lack of administration of the estate. The trial court appointed an attorney unassociated with either party as the successor personal representative.¹ Finding that a patent ambiguity existed in the codicil (and possibly a latent ambiguity) the trial court held a hearing to assist in the interpretation of the codicil. At the conclusion of the hearing, the trial court determined that the hearing testimony did not assist in its interpretation of the codicil and that it would thus interpret the codicil literally. Oleksy now appeals that determination.

On appeal, Oleksy contends that there is a patent ambiguity in Barker's codicil and that an interpretation of the codicil requires a finding that Oleksy is the beneficiary, to Brault's exclusion of the residue of Barker's estate. We review a court's factual findings for clear error, but a court's construction of a will (and by extension a codicil) is a question of law subject to de novo review. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009).

As our Supreme Court succinctly stated:

The primary goal of the Court in construing a will is to effectuate, to the extent consistent with the law, the intent of the testator. To accomplish this, a court gives effect to the drafter's intent as indicated in the plain language of the will. The will must be read as a whole and harmonized, if possible, with the intent expressed in the document. If there is no ambiguity, the Court is to enforce the will as written. However, if the intent of the testator cannot be gleaned solely by reference to the will because there is an ambiguity, the Court may discern the intent of the testator through extrinsic sources. [*Id.* at 52. (footnotes removed)]

The above applies not only to wills, but other testamentary documents, such as a codicil.

“A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language.” *In re Woodworth Tr*, 196 Mich App 326, 327–28; 492 NW2d 818 (1992). A latent ambiguity, on the other hand, “exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning.” *Id.* at 328.

¹ At the next hearing, the successor personal representative advised the trial court that at the time of her death, Barker's investment account held approximately \$350,000, but that shortly after Oleksy had been appointed personal representative of Barker's estate, Oleksy had transferred the bulk of those monies into an account in her name only. Oleksy admitted that she had transferred the funds to herself, that she had used the money for herself and her children, and that only approximately \$20,000 of the original monies remained.

Given their complex nature, a court should not “hyperanalyze” or “overscrutinize” the clear, plain language used in estate planning documents. *In re Bem Estate*, 247 Mich App 427, 434; 637 NW2d 506 (2001), citing *In re Coe Trusts*, 233 Mich App 525, 535; 593 NW2d 190 (1999). A court may not rewrite the plain and unambiguous terms of a document in the guise of interpretation but rather must enforce them as they are written. *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005).

Our Supreme Court has directed that, in interpreting wills and other documents

where an ambiguity *may exist*, extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the actual intent of the parties; and (3) to indicate the actual intent of the parties as an aid in construction. . . . Thus, not only may extrinsic evidence be used to clarify the meaning of a latent ambiguity, but it may be used to demonstrate that an ambiguity exists in the first place and to establish intent. [*Matter of Kremlick’s Estate*, 417 Mich 237, 241; 331 NW2d 228 (1983) (emphasis in original)].

In this matter, Barker initially named Brault as personal representative and trustee in her 2008 will, with Oleksy to be personal representative and trustee if Brault predeceased Barker, declined to act, resigned, died, or was removed. Barker further indicated that her mobile home (and contents) and car were given to Oleksy and that it was her intent that when the mobile home was sold, the proceeds of the sale were to go to Oleksy’s children, at Oleksy’s discretion. If she did not own a mobile home at the time of her death, however, Barker’s tangible personal property was given to Brault to keep or distribute as she saw fit. Barker also directed that \$25,000 of her estate be given to the First Presbyterian Church in Kingsford, Michigan. All other property (the estate residue) was given to Brault.

The 2011 codicil to Barker’s will states, in its entirety:

I, Lorraine Barker, date of birth July 10, 1927 on this date May 12, 2011, being of sound mind and under no constraint or undue influence wish to change the personal representative of my estate. I wish to remove Rhonda Brault and replace her with a new personal representative. I wish to have Linda Oleksy as my new personal representative of my estate. If Linda Oleksy fails to survive me, I give all of my property to Angela Lentner.

I wish to give \$25,000 to Spring Hill Animal Shelter.

I wish to have all my jewelry and four paintings left to Linda Oleksy, for herself and to share with her children.

God Bless

Love You all

We agree with the trial court and the parties that the codicil contains a patent ambiguity with respect to whether Barker intended Brault to be removed as a beneficiary of her estate. Barker’s will clearly stated that Brault was intended to be a beneficiary of the will, specifically,

she was to receive the residue of Barker's estate. While the codicil clearly specifies an intent to remove Brault as Barker's personal representative, it is not so clear as to whether the codicil also modified the distribution of Barker's residual estate. An uncertainty (ambiguity) appears only because the codicil changes the personal representative without specifying whether that change was also intended to include a change as to the estate residue. In other words, because the residuary estate was, in Barker's will, designated for personal representative Brault, the codicil created an ambiguity as to whether the residue of the estate was intended to be given to the personal representative, whomever that may be.

The uncertainty stems from the sentence in the codicil immediately after the one naming Oleksy as personal representative. That sentence provides that if Oleksy predeceases Barker, "I give all of my property to Angela Lentner [one of Oleksy's daughters]." The codicil did not specifically state an intent that Oleksy was to receive the residue of Barker's estate. However, the provision of the codicil leaving all of her property to Lentner if Oleksy predeceased Barker creates confusion. Several interpretations of that provision are possible. One interpretation, and the one advocated by Oleksy, is that Barker intended to leave all of her property (including the residue of her estate) to Oleksy but, if Oleksy predeceased Barker, to have all of her property and the residue of her estate go to Lentner. It is equally plausible, however, that Barker intended to leave her property distribution as previously stated in her will (with the residue to Brault). And that Barker intended to change only the will's previous direction that the property specifically left to Oleksy (Barker's mobile home with contents and car) was for all of Oleksy's children in equal shares if Oleksy predeceased Barker, to a direction that if Oleksy predeceased her, all of the property specified in Barker's will for Oleksy would pass to Lentner alone.

Adding further confusion is the provision in the codicil leaving all of Barker's jewelry and four paintings to Oleksy to share with her children. If, in fact, Barker intended Oleksy to receive the residue of her estate, there would be no need for a provision leaving Oleksy any specific property, such as the paintings. Thus, the codicil uses defective, incomplete, and incomprehensible words that create uncertainty regarding the meaning of the codicil's terms and presents a patent ambiguity. *In re Woodworth Tr*, 196 Mich App at 328. We also agree with the trial court's assessment that there is arguably a latent ambiguity in the codicil because extrinsic evidence showed that Barker and Brault had a falling out and may not have been on speaking terms when the codicil was drafted, and also showed that Barker told both Brault and Oleksy at different times that she wanted each of them to have her entire estate.

Because there is an uncertainty concerning the meaning of Barker's codicil, the trial court could look beyond the codicil to ascertain Barker's intent. *Matter of Kremlick's Estate*, 417 Mich at 241. Unfortunately, the only extrinsic evidence made available to the trial court to determine whether Barker intended Brault to remain a beneficiary of her estate was the conflicting hearing testimony of Brault and Oleksy. The court did not find Oleksy to be credible, and found Brault to be generally credible. Ultimately, however, the trial court determined that because the actual evidence presented to it did not provide any real guidance to resolve the patent ambiguity concerning Barker's intent with respect to the residue of her estate, it would simply look at the unambiguous language that was present in the codicil and apply it as written. We see no error on this determination.

As indicated by the trial court, the very first sentence of the codicil states that Barker wished “to change the personal representative of my estate.” That unambiguous wish is furthered in the next two sentences of the codicil, where Barker specifically stated that she wished to remove Brault and replace her with Oleksy “as my new personal representative of my estate.” Consistent with this unambiguous desire, Oleksy did, in fact, serve as the personal representative of Barker’s estate, with no protestation or challenge by Brault (until Oleksy allowed the probate of the estate to linger for over four years with no distributions).

The statement in the codicil that “[i]f Linda Oleksy fails to survive me, I give all my property to Angela Lentner” is also unambiguous when viewed on its own. Oleksy’s death, if it occurred prior to Barker’s death, triggered a devise of all of Barker’s property to Lentner. Oleksy survived Barker, so the triggering event did not occur. Also unambiguous are the codicil provisions bequeathing \$25,000 to the Spring Hill Animal Shelter, and all of Barker’s jewelry and four of her paintings to Oleksy. The codicil did not require further interpretation or expansion beyond the specific statements contained therein.

Affirmed. Respondent having prevailed in this appeal, costs are taxed against petitioner and in favor of respondent pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron