



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 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations 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).

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DT: December 19, 2011

RE: Loretta B. Brown Estate
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

“MEMORIES OF A PITTSBURGH FAN”

Guest Editorial by: Barbara Andruccioli of Kemp Klein Law Firm

Being born and raised in Pittsburgh, Pennsylvania and genetically predisposed to being a sports fan, I have some wonderful sports memories the most memorable occurring during the 1970's. The Steelers won the Super Bowl four times in that decade (yes, for all you Lions fans, there is a post season in football) and the Pittsburgh Pirates won the World Series twice – 1971 and 1979. Hard to imagine today, as they haven't had a winning season in far too many years.

Although the 1979 World Series Champion Pirates had the catchy theme song of “We are Family” by the Pointer Sisters and the ugliest baseball uniforms in history the 1971 World Series



will always be the most memorable to me, especially with the tragedy which occurred so shortly afterward. That year, like so many before, the Pirates were led by a legendary right fielder and my hero – Roberto Clemente.

Roberto Clemente Walker (August 18, 1934 – December 31, 1972) was born in Carolina, Puerto Rico. He played his entire 18 year baseball career with the Pittsburgh Pirates (1955–72). He was awarded the National League’s Most Valuable Player Award in 1966. Clemente was selected to participate in the league’s All Star Game on 12 occasions. He won 12 Gold Glove Awards and he led the league in batting average in four different seasons. He was also involved in humanitarian work in Puerto Rico and other Latin American countries, often delivering baseball equipment and food to them.

In the 1971 season the Pirates won the National League pennant and faced the Baltimore Orioles in the World Series. Baltimore had won 100 games and swept the American League Championship Series, both for the third consecutive year, and were the defending World Series champions. The Orioles won the first two games in the series, but Pittsburgh came back and won the championship in seven games. This marked the second occasion that Clemente had won a World Series with the Pirates. (They also won in 1960.) Over the course of the 1971 series, Clemente batted a .414 average (12 hits in 29 at-bats); performed well defensively and hit a solo home run in the deciding 2-1 seventh game victory.

Following the conclusion of the season, he received the World Series Most Valuable Player Award.

On September 30, 1972 in a game at Three Rivers Stadium, he hit a double off Jon Matlack of the New York Mets for his 3,000th hit. It was the last at-bat of his career during a regular season. I will always remember him standing at second base, cap raised in his hand, as the crowd erupted in applause.

When Managua, the capital city of Nicaragua, was affected by a massive earthquake on December 23, 1972, Clemente (who had been visiting Managua three weeks before the quake) began arranging emergency relief flights. He soon learned, however, that the aid packages on the first three flights had been diverted by corrupt officials of the Somoza government, never reaching victims of the quake. Clemente accompanied the fourth relief flight, hoping that his presence would ensure that the aid would be delivered to the survivors. The airplane crashed into the ocean off the coast of Isla Verde, Puerto Rico immediately after takeoff on December 31, 1972. A few days after the crash, the body of the pilot and part of the fuselage of the plane were found. Clemente’s body was never recovered.

At the time of his death, Clemente had established several records with the Pirates, including most triples in a game (three) and hits in two consecutive games (ten). He tied the record for most Gold Glove Awards won among outfielders with 12, which he shares with Willie Mays. He also became the only player to have ever hit a walk-off inside-the park grand slam. He accomplished this historic baseball event on July 25, 1956 in a 9-8 Pittsburgh win against the Chicago Cubs, at Forbes Field. A little before my time, but I would have loved to have seen it.

He was elected to the Hall of Fame posthumously in 1973, becoming the first Latin American to be selected and the only current Hall of Famer for whom the mandatory five year waiting period has been waived since the wait was instituted in 1954. Clemente is also the first Hispanic player to win a World Series as a starter (1960), win a league MVP award (1966) and win a World Series MVP award (1971).

Clemente’s Hall of Fame plaque had originally read “Roberto Walker Clemente.” In 2000 the plaque was recast to express his name in the proper Hispanic format, “Roberto Clemente Walker.”

REVIEW OF CASE:

Reference Files: Due Process
 Closing an Estate Before Rights are Determined
 Abuse of Discretion

Without an extensive analysis of the facts, the following occurred. Defendant sold decedent’s property through a Power of Attorney and placed the proceeds in a joint bank account with decedent and his own brother. Defendant said the decedent told him to do so. The Probate Court approved an independent personal representative to investigate the transaction and the disposition of the proceeds. The lower court said that if the independent personal representative found no problems that he would be discharged and the “taker” would be appointed the personal representative.

The independent personal representative investigated and never made a report as to the bona fides of the transaction or disposition, but decided not to litigate. The independent personal representative entered into an agreement with the aggrieved party that he would remain as personal representative but that the aggrieved party could be a special personal representative and sue, if he wished.

The judge “inferred” that the independent personal representative believed that there was no cause of action and closed the estate. The Court of Appeals said that this was an improper inference and that closing the estate was an abuse of discretion.

The matter was remanded back to the Probate Court for disposition.

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Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In re LORETTA B. BROWN

CURTIS TAFT, Personal Representative for the
Estate of LORETTA B. BROWN,

Appellee,

v

RONALD BARKER,

Appellant,

and

MICHAEL TAFT, CLIFFORD BARKER,
DEBORAH KOMONDY, KATHLEEN
BAXTER, and NANCY BARKER,

Intervening Plaintiffs.

UNPUBLISHED
November 3, 2011

No. 299957
Macomb Probate Court
LC No. 2009-198339-DE

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Appellant, Ronald Barker, appeals as of right from the order of the Macomb County Probate Court closing the estate of decedent, Loretta Brown. For the reasons stated in this opinion, we vacate the order closing the estate and remand for further proceedings consistent with this opinion.¹

Decedent Loretta Brown died in 2008 at the age of 89. Decedent's named heirs include seven nieces and nephews, among them appellant Ronald Barker ("Barker") and appellee Curtis Taft ("Taft"). Prior to her death, decedent executed a last will and testament and a revocable

¹ This opinion governs both documents entered by the trial court on August 11, 2010: the "Order for Complete Estate Settlement" and the "Order of Discharge."

trust. Taft was the nominated personal representative under decedent's will. The parties apparently agree that decedent also executed a durable power of attorney naming Taft as her attorney-in-fact (the power of attorney document is not contained in the probate court record). In 2007, Taft utilized his powers under the durable power of attorney to sell decedent's home. Taft deposited the proceeds into a joint checking account that decedent had opened with Taft and his brother, Michael Taft.

Following decedent's death, Barker filed a petition for probate and appointment of a personal representative in the Macomb County Probate Court. Taft, the nominated personal representative, objected to Barker's petition. A hearing was held, after which the probate court appointed attorney Robert Kirk, a neutral third party, to serve as personal representative. The probate court indicated that Kirk was to investigate the sale of decedent's home and the disposition of the proceeds. If Kirk found no problems with the transaction, then he would be discharged and Taft would be appointed to serve as personal representative.

After being appointed, Kirk met with Taft and his attorney to investigate the sale of the home. Taft informed Kirk that he used his powers under the durable power of attorney to consummate the sale of decedent's home. Taft asserted that decedent had instructed him and his brother to sell her home and to use the proceeds to pay her ongoing expenses, which included payments to decedent's assisted living facility. Additionally, Taft stated that decedent instructed him to deposit the money into the joint checking account. Taft further asserted that decedent wanted him and his brother to split any remaining proceeds upon her death because they had a close relationship with decedent.

After conducting his investigation, attorney Kirk decided not to pursue a civil action against Taft. Barker then filed a petition for the appointment of himself as special personal representative, to proceed with claims against Taft regarding the sale of decedent's home. Barker proposed that Kirk would remain the court-appointed personal representative in all other aspects. Barker's attorney consulted with Kirk regarding this arrangement, and Kirk had no objection to the appointment of Barker as special personal representative for the sole purpose of pursuing the claims against Taft.

A hearing on Barker's petition for appointment of a personal representative was held on May 26, 2010. Attorney Kirk did not appear at the hearing; instead his colleague Robert Cella appeared on Kirk's behalf. After hearing arguments from the parties and questioning attorney Cella about the investigation, the probate court denied Barker's petition. The probate court also discharged Kirk as personal representative and appointed Taft.

On June 14, 2010, shortly after being discharged, Kirk filed a motion for reconsideration. Kirk asked the probate court to reconsider its previous order denying Barker's petition to be appointed special personal representative of the estate. Kirk stated that appointment of Barker as special personal representative under MCL 700.3617 would permit Kirk to continue serving as the personal representative and avoid a potential conflict of interests between the beneficiaries named in decedent's will. Kirk further stated that the fact that he did not wish to proceed with litigation against Taft should not foreclose Barker's opportunity to litigate the matter. Kirk requested that the probate court set aside its previous order, reappoint Kirk as personal representative, and appoint Barker as special personal representative.

On June 15, 2010, the probate court issued an order denying the motion for reconsideration. After the probate court denied the motion for reconsideration, Taft filed a petition for complete estate settlement. Taft attached an account of fiduciary and listed the income, expenses, distributions, and itemized assets of the estate as zero. Taft also attached a distribution schedule and listed no distributions or payments.

Barker filed an objection to the petition for complete estate settlement and requested that the probate court enter an order finding that the proceeds from the sale of decedent's home were assets of the decedent's estate. A hearing was held on Taft's petition to close the estate on August 11, 2010. After hearing the arguments of the parties, the probate court denied Barker's objection and granted Taft's petition.

Barker now appeals from the order granting Taft's petition for complete estate settlement. Barker argues that the probate court erred when it closed the estate without first determining title to the property. Barker further argues that once he objected to the petition for complete estate settlement, the matter should have been scheduled for a pre-trial conference where discovery deadlines would have been established.

Taft argues that the issues raised in Barker's appeal are unpreserved because he failed to notice his objection to the petition for complete settlement for a hearing. We disagree. MCR 5.102 states that a petitioner "must cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons." Although Barker did not notice his objection for a hearing, MCR 5.119(B) states that "[a]n interested person may object to a pending petition orally at the hearing" Here, Barker orally objected to the closing of the estate at the hearing on Taft's petition for complete settlement of the estate. Barker raised the same objections at the hearing that he raised in his written objection, and the probate court ruled on the objections. Therefore, the issues are preserved.

This Court reviews a probate court's factual findings for clear error. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). We review the probate court's dispositional rulings for an abuse of discretion. See *In re Baldwin Trust*, 274 Mich App 387, 396-397; 733 NW2d 419 (2007). The probate court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *Id.* at 397.

Having reviewed the record, we conclude that the probate court abused its discretion by relying upon erroneous factual assumptions when it granted the petition for complete estate settlement. The probate court based its decision on its assumption that attorney Kirk had investigated the challenged transaction and had determined that Barker's claim was without merit. This assumption is unsupported by the record. The probate court appointed Kirk as a neutral personal representative to investigate the sale of decedent's home and the disposition of the proceeds. Kirk investigated the underlying facts; however, there is no indication that he made a determination of the merits of Barker's claim. Kirk did not prepare a written report for the probate court, nor did he appear before the probate court to make any affirmative statements regarding the merits of the case.

Kirk was not present at the hearing on Barker's petition to be appointed special personal representative; rather, attorney Cella was present on his behalf. After questioning Cella, the probate court determined that Kirk had concluded there was no merit to Barker's claim. However, a full review of the transcript reveals that Cella repeatedly avoided making any statements regarding the merits of the case. Cella indicated that Kirk had investigated the facts surrounding the sale of the home and disposition of the assets. Cella stated "[w]ell, he was appointed to determine the status of the sale of the Moravian property and then to find out what was done with the proceeds and I think we did both of those with our answer" The "answer" that Cella referred to was apparently Kirk's response to Barker's petition to be appointed special personal representative. In the response, Kirk simply outlined the underlying facts that were represented to him by Taft and Taft's attorney. Kirk made no representations regarding the legal merits.

Further, even to the extent that Cella's statements can be viewed as a representation of the merits of the claim, we note that Cella was not the personal representative appointed by the probate court. Kirk was the appointed personal representative, and the probate court never questioned Kirk about his investigation. Instead, the court relied on Cella's unsworn statements. The only facts that had been introduced were the facts alleged by Barker and Taft and the facts alluded to by Kirk in his response to Barker's petition to be appointed special personal representative. There was no documentary evidence submitted to the probate court on the issue of the sale of decedent's home; moreover, the court received no sworn testimony concerning the disputed proceeds from the sale. In short, there was no admissible evidence from which the probate court could make a ruling with regard to those proceeds. Therefore, the probate court erred when it conclusively determined that Barker's objections were meritless.²

Because the probate court relied on the erroneous assumption that Kirk had determined Barker's assertion was meritless, we conclude the court abused its discretion when it closed the estate.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

² We express no opinion on whether Barker's objections have merit.