



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 2009 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. 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: March 19, 2010

RE: Kay T. Hills Revocable Living Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATISTICS:

Brother can you spare a dime?

There have been a gaggle of brothers who have made it to the bigs. Some were more successful as a pair, some as individuals.

Phil and Joe Niekro won 318 and 221 games, respectively. Christy and Henry Mathewson totaled 373 and Christy won them all.

There have been three brothers in the majors many times, but four only twice – Ed, Tom, Jim and Frank Delahanty and Mike, Jack, Steve and Jim O’Neill.

The best hitting brothers were Big and Little Poison, Paul and Lloyd Waner, with a lifetime batting average of .325 and .316, respectively, the most home runs by brothers are Hank and Tommie Aaron 768, though Tommie had only 13.

The source today is Joe Reichler's "The Great All-Time Baseball Record Book" reprinted in 1993 after Joe's death when Barry and Bobby Bonds (father and son) had only 508 home runs.

REVIEW OF CASE:

Reference Files: Opponent's Attorney Fees
Evaluation v. Mediation
Standard of Review
Surcharge and Removal
Apportionment by Percentages
De minimis Errors
Good Faith Belief Defense
Bartering for Administrative Services

There are a lot of gems in this case and perhaps a few unanswered questions.

SANCTIONS AFTER MEDIATION

The court rules provide for sanctions after case evaluation not mediation. Therefore, that portion of the lower court's opinion was overturned.

APPORTIONMENT OF RESIDUE

1. The Trust in question provided for an adjustment of a 50-50 residue division to take into consideration non-probate transfers. The Court of Appeals ruled that if someone received an IRA, outside of the probate estate which had income tax consequences, it was not an abuse of discretion to have an upward adjustment out of the residue to make up for loss of taxes that person had to pay. It is phrased in the negative that this is not an abuse of discretion. The scrivener grantor should be careful to cover this if it is going to be an issue for a drafter.

2. Because of non-probate transfers, the Appellant was entitled to a greater percentage of the residue. What the probate court did regarding personal property was, instead of apportioning upward the share of personal property like it did liquid assets to the Appellant, it crafted a remedy so that person could take some of the personal property up to 50%. The court did this because the value of the personal property was de minimis, and that is not an abuse of discretion. One can imagine the cost of appraisal to get to a proper percentage of distribution. Remember we are dealing with a chancellor in equity, and it is the crafting of the remedy which is not an abuse of discretion. The ruling would not have been appropriate, in my opinion, if there had been, for instance, one piece of personal property with an absolute high value. Under those circumstances, I would have thought that the Appellant should have her share apportioned upward. The key to the Court of Appeals ruling in this section is that the lower court was correct "under these circumstances."

BARTERING FOR SERVICES

When not dealing with the fiduciary seeking a fee for herself, giving property to another in exchange for administrative services would not require court approval and, therefore, giving someone property to perform clean up services was proper and not a breach of fiduciary duty.

Kay T. Hills Revocable Living Trust
STATE OF MICHIGAN COURT OF APPEALS

TRUSTEE REMOVAL

What the court is doing is saying that if there is a remedy outside of removal, removal won't lie.

The court applied the "good faith" rule, that when the duties are performed in good faith, even though wrong, surcharge and removal does not lie. Disbursing personal property, thought to be covered by a "gift list," was good faith when no list was found.

AAM:jv:657541v2
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KAY T. HILLS REVOCABLE
LIVING TRUST.

ELIZABETH A. MOELLER, as Trust Beneficiary
of the KAY T. HILLS Revocable Living Trust,

UNPUBLISHED
March 9, 2010

Petitioner-Appellant,

v

NILA CLEMONS and KAREN WINFORD, as
Trustee of the KAY T. HILLS Revocable Living
Trust,

No. 287285
Genesee Probate Court
LC No. 07-181307-TV

Respondents-Appellees.

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

This case involves a revocable living trust agreement executed by Kay T. Hills in 2002, in which she named as beneficiaries petitioner Elizabeth Moeller (her stepdaughter), respondent Nila Clemons (her sister), and respondent Karen Winford (a close friend). Hills died in October 2006, and Winford assumed the role as successor trustee of Hills' trust agreement. After Moeller became dissatisfied with Winford's handling of the trust estate, she filed a petition to enforce the trust, to surcharge and remove Winford as trustee, and for other relief. Following an evidentiary hearing, the probate court found that Moeller was entitled to 50 percent of the trust's personal property in the possession of Winford and Clemons, but held that Winford did not breach any fiduciary duties. Accordingly, the court denied Moeller's request to surcharge Winford or remove Winford as trustee. The court also held Moeller liable for Winford's attorney fees and costs incurred since mediation, which were to be deducted from Moeller's share of the trust estate and added to Winford's share. Moeller now appeals as of right. Because we conclude that the trial court did not have the authority to compel Moeller to pay Winford's attorney fees and court costs, we vacate the probate court's award of attorney fees and costs. We affirm in all other respects.

I. Attorney Fees and Costs

Moeller first argues that the probate court erred in holding her liable for a portion of Winford's attorney fees and costs. Whether attorney fees and costs may be awarded to a litigant is a question of law, which this Court reviews de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

There is no indication in the record that Winford requested an award of attorney fees. The general rule in Michigan is that attorney fees are not recoverable unless authorized by a statute, court rule, or contract. *In re Clarence W Temple and Florence A Temple Marital Trust*, 278 Mich App 122, 129; 748 NW2d 265 (2008). Absent such authority, parties are responsible for their own fees. *Id.* at 139.

Pursuant to the parties' agreement, this matter was submitted to mediation, but the parties' disputes were not resolved. The probate court's order after the subsequent evidentiary hearing directs that "the trustee's attorney fees and costs directly associated with this litigation after the unsuccessful mediation shall be born solely by Elizabeth Moeller." It appears from this order that the probate court required Moeller to pay a portion of Winford's attorney fees as a sanction for Moeller's rejection of mediation.

MCR 5.143, which applies to proceedings in probate court, provides:

(A) The court may submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding. MCR 2.410 applies to the extent feasible.

(B) If a dispute is submitted to case evaluation, MCR 2.403 and 2.404 shall apply to the extent feasible, except that sanctions must not be awarded unless the subject matter of the case evaluation involves money damages or division of property.

This case was submitted to mediation, not case evaluation. Although MCR 5.143 recognizes that sanctions may be awarded if a case is submitted to case evaluation, there is no similar provision for cases submitted to mediation. Thus, MCR 5.143 does not support the probate court's decision to hold Moeller liable for Winford's attorney fees. The mediation court rule, MCR 2.411, also does not contain a provision allowing for attorney fees or costs as a sanction for unsuccessful mediation. Accordingly, the probate court erred to the extent that it held Moeller liable for Winford's attorney fees as a sanction for Moeller's failure to accept the mediator's decision.

The probate court did not identify any other authority for its decision to hold Moeller liable for Winford's attorney fees and costs. Although Winford suggests that the probate court had the inherent authority to sanction Moeller for violating the court rules or to prevent abuses of the judicial process, no such violations or abuses were found in this case. Indeed, Moeller partially prevailed on her petition by obtaining relief on her request to recover personal property.

For these reasons, we conclude that the probate court erred in holding Moeller liable for a portion of Winford's attorney fees and costs, and accordingly, we vacate the portion of the

probate court's order directing that "the trustee's attorney fees and costs directly associated with this litigation after the unsuccessful mediation shall be born solely by Elizabeth Moeller."

II. Personal Property

Moeller next argues that the probate court, having determined that she was entitled to 85.52 percent of the remaining liquid assets that were part of the trust residue, should have also awarded her 85.52 percent of the personal property.

This issue entails review of the probate court's findings of fact at the evidentiary hearing. We review the court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id.*

The terms of the trust provided that Moeller was to receive 50 percent of the trust residue, and the remaining 50 percent was to be divided equally between Winford and Clemons. The trust also provided that any jointly held assets received by a beneficiary outside the trust were to be counted against that beneficiary's share. Because both Clemons and Winford received other assets outside the trust, the probate court reduced their respective shares under the trust by the amounts they received outside the trust. The net result was that Moeller was entitled to receive 85.52 percent of the liquid assets in the trust residue, Winford was entitled to the remaining 14.48 percent, and Clemons was not entitled to anything further.

With respect to personal property, the evidence disclosed that most of the personal property items had been taken by Winford or Clemons, but they still had possession of the items. Accordingly, the probate court directed that they both make the items in their possession available for review by Moeller, who could "choose to maintain for her own possession up to 50% of the personal property provided for review." Because the personal property items received by Winford and Clemons are properly considered part of the trust residue rather than assets received outside the trust, and were still in the possession of Winford and Clemons, it was not improper for the probate court to fashion a remedy that allowed the property to be distributed in accordance with the terms of the trust.

To the extent that Moeller argues that Winford improperly allowed some property items to be taken by friends or relatives who were not trust beneficiaries, as discussed below, the probate court approved Winford's decision to allow some personal items to be bartered for cleaning services. Therefore, that use of the property was properly considered an administrative expense and was not part of the trust residue subject to distribution. Nor has Moeller demonstrated that Winford's assumption of Hills's automobile lease necessitates an adjustment to the distribution of the personal property. The evidence did not establish that the lease, with its attendant financial obligations, was an asset of the estate. By assuming the lease and taking over the payments, Winford relieved the trust of its obligation to continue payments. Moeller's share of the trust residue was not affected.

Furthermore, an underlying problem with the division of the personal property was the valuation of the property. The probate court found that it could not properly value the personal property because petitioner failed to offer evidence of value, and further, the testimony established that the value was de minimis.

Under these circumstances, the probate court did not clearly err in finding that Moeller was only entitled to 50 percent of the personal property, consistent with the terms of the trust.

III. Bartered Property

Testimony indicated that after Hills died, her house required substantial cleaning and some repairs to prepare it for sale. Winford determined that it would cost approximately \$6,000 to hire an outside service to clean and prepare the house. Instead, she engaged various friends and relatives to help her prepare the house for sale, and allowed them to take some items of personal property in exchange for their services. According to an appraisal, the value of the property items given to others in exchange for their work was approximately \$1,700. On appeal, Moeller now challenges the probate court's determination that "[a]ny personal property that has been bartered in exchange for cleaning services is deemed to be a legitimate administrative cost of the estate."

Contrary to what Moeller argues, the probate court's decision did not violate the trust provision prohibiting the trustee from collecting a fee for her trustee services. The court's ruling did not apply to property received by Winford, but rather only to property received by third parties in exchange for their services. Any personal property received by Winford was subject to the probate court's requirement that it be made available for review by Moeller, who was entitled to receive 50 percent of the property consistent with the terms of the trust.

Further, the probate court did not err in approving the use of bartering. The testimony indicated that the trust estate would have been subject to an administrative expense of approximately \$6,000 if outside workers were hired to prepare the house for sale. Instead, Winford engaged the services of friends and relatives in exchange for property valued at approximately \$1,700. Thus, the probate court did not clearly err in finding that Winford's use of bartering benefited the trust estate.

IV. Removal and Surcharge of Trustee

Moeller lastly argues that the probate court erred by not surcharging or removing Winford as trustee for breach of her fiduciary duties.

A probate court's decision whether to remove a trustee is reviewed for an abuse of discretion. *In re Duane V Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007). The court's decision whether to surcharge a trustee is also reviewed for an abuse of discretion. *Id.* at 397.

To determine the powers and duties of a trustee, it is necessary to consult the trust instrument itself and the settlor's intent regarding the purpose of the trust. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983). Relevant statutes and case law also define a trustee's duties. *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988).

Whether there has been a breach of duty and any resulting liability is dependent on the facts of each case. *Id.*

Generally, a trustee must meet the standard of care of a prudent person when dealing with trust property. *Id.*; see also MCL 700.7302. To be prudent means to act with care, diligence, integrity, fidelity, and sound business judgment. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). In addition, a trustee is bound by the fiduciary duties of honesty, loyalty, good faith, and restraint from self-interest. *In re Green Charitable Trust*, 172 Mich App at 313. Further, a trustee must act impartially between beneficiaries, unless a different intent is clearly expressed in the trust itself. *In re Butterfield Estate*, 418 Mich at 257. But “[g]iving trustees discretionary or broad powers does not mean that there are no limits to those powers.” *In re Green Charitable Trust*, 172 Mich App at 313. The trustee’s actions may still be reviewed for an abuse of discretion, and the trustee is required to exercise discretion honestly and in good faith. *Id.*

A beneficiary may petition the probate court to surcharge a trustee for breach of a fiduciary duty. See *In re Tolfree Estate*, 347 Mich 272; 79 NW2d 629 (1956); MCL 700.7306(4). MCL 700.7306(2) provides that “[a] trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally at fault.” Otherwise, under the common law, “trustees may not be liable for mere mistakes or errors of judgment where they acted in good faith and within the limits of the law and of the trust.” *In re Green Charitable Trust*, 172 Mich App at 314. See also *In re Estate of Norris*, 151 Mich App 502, 512; 391 NW2d 391 (1986); *In re Tolfree Estate*, 347 Mich at 285-286.

Moeller argues that Winford acted in disregard of her rights to a portion of the personal property held by the trust, thereby violating her fiduciary duties to act impartially and loyally, see MCL 700.1212, and also failed to keep her reasonably informed of the trust’s administration, contrary to MCL 700.7303. The evidence established that Winford initially believed that Moeller was not entitled to a share of the personal property because of a good-faith belief, after consulting her attorney, that a gift list that Winford discovered was valid. This good-faith belief led to some of the communication problems between Winford and Moeller, and was the basis for Winford not allowing Moeller to be more involved in the collection of the personal property. Further, Moeller was not adversely affected by Winford’s initial erroneous belief regarding the validity of the gift list because the probate court found that most of Hills’s personal property had only a de minimis value and the court was able to fashion a remedy that allowed Moeller to recover her share of the personal property in the possession of Clemons and Winford. The probate court did not err in determining that these circumstances did not justify either surcharging or removing Winford as trustee.

We also disagree with Moeller’s claim that Winford’s decision to compensate Clemons for an increased tax liability she would incur because of the distribution of Hills’s IRA was contrary to the terms of the trust.¹ It is clear from the terms of the trust that Hills intended for the

¹ The record does not support Moeller’s claim that Clemons received the payment under a bartering arrangement for Clemons’s services.

named beneficiaries to receive distributions, including those outside the trust, consistent with the percentages specified in the trust. Because the tax liability on the IRA distribution affected the ultimate value of that distribution, Winford's decision to compensate Clemons in an amount equal to the tax liability was consistent with the settlor's intent as expressed in the terms of the trust. Moeller has not shown that other assets were similarly subject to any adverse tax consequences, or that the amount awarded to Clemons for the IRA tax liability was erroneous.

We find no merit to Moeller's argument that Winford failed to act expeditiously or as a prudent person in administering the trust. Indeed, the probate court found that Winford did "an outstanding job acting quickly" in a rapidly declining real estate market to successfully sell Hill's house, the principal asset of the trust, at market value. That finding is not clearly erroneous. Further, in light of the probate court's finding that the value of the personal property was de minimis, which has not been shown to be clearly erroneous, Moeller has not established that Winford failed to act as a prudent person by failing to inventory those items or have them appraised.

For these reasons, the probate court did not abuse its discretion by failing to surcharge or remove Winford as trustee.

V. Conclusion

In sum, we vacate the portion of the probate court's order adjudicating Moeller responsible for Winford's attorney fees and costs associated with this matter after mediation, but affirm the probate court's order in all other respects

Affirmed in part and vacated in part in accordance with this opinion. Because none of the parties prevailed in full on appeal, none may tax costs. See MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly