



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).

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

DT: January 9, 2012

RE: In re Daniel Mannes
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL RULES:

I favor unified rules between the American and National Leagues.

Under the present system, the American League has a designated hitter and the National none.

With the pitcher batting and the opposing pitcher facing, effectively, eight hitters the quality of pitching in the National is subpar compared to the American League. This means the average hitter in the National League will fare better than his American League counterpart. This skews averages and inflates and deflates records.

So too with the paucity of players expansion has wrought aging players who can play an additional number of years as designated hitters. This factor bloats their statistics for recordkeeping purposes.



If both leagues had designated hitters the quality of pitchers, in each league, would be more equal and eventually the hitters.

If the above is correct, Albert Puljos will not do as well with the Angels as he did as a Cardinal.

REVIEW OF CASE:

Reference Files: Expert Testimony – Probate/Legal Issues
 Violation of Injunction
 Holographic Wills
 Joint Accounts and Claims

Husband and wife were parties to a Circuit Court divorce action. They had a joint account at “Fidelity” which was subject to an injunction prohibiting withdrawal. Husband and wife made a withdrawal of one-half (1/2) each. Husband issued two “Notes”, one to his wife and another to a friend in the nature of a Holographic Will (Codicil). The Note to his wife referred to the Note to the Best Friend and the disposition referred to in that Note. Husband committed suicide. Wife opened an estate for her husband and took the half of Fidelity decedent husband had withdrawn as surviving spouse, not tendering either Note to the court. Those mentioned in the Notes found out about their existence from a police report.

Petitioners sued in Circuit Court and there was a remand to probate, as one of the counts was wrongful distribution. The Lower Court ruled it could enforce a Circuit Court injunction; said the res was still in the joint account as a matter of law and, therefore, passed to wife as a matter of law. Finally, the Lower Court found that the document in question was a valid Holographic Codicil.

The Court of Appeals found that, as a joint account holder, the rights she asserted were claims, and since the period for asserting claims had passed she could not assert her claims. The “res” was an estate asset and subject to the Holographic Codicil on remand.

The ruling is a good result. The inferences which arise are somewhat troubling. For instance, the violation of an injunction doesn’t make you a “non” widow.

Also, can one court enforce another’s injunction? Since the Court of Appeals went off on the narrow grounds stated above – the issue became moot. If the probate had such a power “unclean hands” would have been appropriately mentioned. This case does not decide the issue either way.

The legal expert testimony issue is not addressed by the Court of Appeals. Lower Courts go both ways on this issue. It is, I believe, discretionary with the Lower Court.

In calling the surviving joint holder a “claimant” the Court of Appeals is focusing on individual rights rather than looking at the account as a “res” and making the matter “in rem”. I like this. It narrows the issue to “right to title” rather than title.

The Court of Appeals’ rationales could have been much different depending upon what was raised below and how the issues were framed. As a probate practitioner, I’m sure we all have ideas how we would have done the framing.

STATE OF MICHIGAN
COURT OF APPEALS

In re DANIEL MANNES

ROXANNE JELSONE, LAURIE TESTOLIN, and
TERRY MANNES,

UNPUBLISHED
October 20, 2011

Petitioners-Appellants,

v

STEPHANIE MANNES,

No. 297977
Oakland Probate Court
LC No. 2003-289535-DE

Respondent-Appellee.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Petitioners appeal as of right the probate court's order granting a directed verdict in respondent's favor. We reverse and remand for proceedings consistent with this opinion.

Respondent was married to Daniel Mannes (decedent) at the time he committed suicide on June 17, 2003. They had wills and a revocable trust agreement dated from 2000. At the time of decedent's death, a divorce proceeding filed by respondent was pending and an asset injunction had been entered by the presiding court. Days before his death, decedent had transferred about one-half of the money held jointly with respondent in a Fidelity investment account to a Fidelity account only in his own name. Respondent did the same, transferring the other half of the jointly held Fidelity investment account into a Fidelity account only in her name. Before he died, decedent wrote at least two notes dated June 16, 2003. One note was to respondent and one note was to his best friend, Richard Gamarra. The note to Gamarra included directions as to how he wanted his individual Fidelity account handled after his death. In pertinent part, the note said that decedent wanted petitioners Jelsone and Testolin, his sisters, to receive \$50,000 each, and his brother, petitioner Mannes, to receive \$30,000. The note to respondent indicated that decedent wanted respondent to have most of his "stuff," but that he wrote a letter to Gamarra detailing how he wanted his individual Fidelity account funds handled.

After decedent's death, respondent filed a petition for probate of decedent's estate in the Oakland Probate Court and indicated that decedent had a will dated February 17, 2000, which was offered for probate. She also nominated herself as personal representative. Respondent did

not submit decedent's notes to the probate court and decedent's siblings referenced in the notes were neither shown the notes nor notified about the probate estate matter. In fact, respondent actively refused to allow decedent's siblings to see the notes. The will was admitted into probate and respondent was appointed personal representative. Respondent submitted an initial inventory which detailed decedent's personal property as: (1) Fidelity Investments totaling \$354,680 and (2) a Fifth Third Bank account of \$8,001. On September 25, 2003, an amended inventory was submitted which added a third item, an account with D & S Investment Group, LLC in the amount of \$62,181. Thus, decedent's total estate was valued at \$425,181. After the inventory fee was paid and the requisite notice to creditors was published, the estate was closed on November 22, 2004.

In August of 2007, petitioners found out the contents of decedent's final notes after they obtained a copy of the police file regarding decedent's death. They then filed, in the Oakland Circuit Court, their complaint and petition to set aside probate court orders on the basis of fraud. Petitioners alleged that decedent's note to Gamarra constituted a valid holographic codicil to his 2000 will, and that respondent intentionally failed to disclose the note to the probate court for the purpose of depriving petitioners of their special bequests. In Count I of petitioners' complaint and petition, they alleged that respondent's actions constituted extrinsic fraud on the court as set forth in MCR 2.612(C)(3), resulting in the court being deceived into distributing the Fidelity account funds to respondent. Petitioners requested that the court: (1) set aside the probate court orders distributing the Fidelity account to respondent as a consequence of her extrinsic fraud, (2) award each petitioner the devise bequeathed in the codicil, (3) award petitioners interest, and (4) award petitioners attorney fees and costs.

Respondent answered the complaint, primarily denying that the note written by decedent was a valid holographic codicil. In respondent's affirmative defenses, she averred that the Fidelity account at issue was not decedent's separate property, but was marital property that decedent had removed from a joint bank account about ten days before his death, without respondent's consent.

Subsequently, respondent filed a motion for removal of the case to Oakland Probate Court. Respondent argued that the probate court had jurisdiction over this matter that involved a decedent's estate. Petitioners opposed the motion, arguing that this was not an action to redistribute estate assets but an action for fraud in procuring an order from the probate court. The circuit court, however, agreed with respondent and entered an order removing the case to the probate court. Thereafter, the Oakland Probate Court entered an order reopening decedent's estate. Then respondent filed a motion to preclude petitioners from recovering "damages" in this action because petitioners' request for relief was primarily for the probate court's orders to be set aside. Respondent also filed a motion in limine to preclude petitioners' expert from offering legal opinions regarding probate law. Respondent argued that petitioners' expert should not be allowed to testify about his interpretation and application of the applicable law.

And petitioners filed a motion in limine, requesting that the probate court prohibit testimony regarding the existence, and claimed violation, of any asset injunction issued in the divorce case because that matter was irrelevant to the issue of respondent's fraud in failing to disclose the holographic codicil to the probate court. Further, petitioners argued, respondent never previously challenged the transfer of funds or ownership of the individual Fidelity account;

thus, the probate court lacked jurisdiction to consider respondent's claims that the injunction was violated and that she was the rightful owner of the funds.

On February 4, 2010, the probate court decided the various motions. First, the court denied respondent's motion to strike petitioners' request for damages resulting from respondent's alleged fraud. Second, the court granted respondent's motion in limine to preclude petitioners' expert's legal opinions with regard to the law that was applicable to the case. However, the court held, the expert "may phrase his opinions in terms of familiar legal standards." "[H]e may testify under appropriate circumstances as to whether the fiduciary breached the standard of care of a fiduciary." Third, petitioners' motion to prohibit evidence concerning the asset injunction issued in the divorce case was denied. While the court agreed with petitioners' counsel that it could not decide whether decedent violated the asset injunction, i.e., hold decedent in contempt, the court held that it could determine what assets belonged to decedent at the time of his death, including whether he improperly removed assets from a joint account.

On March 15, 2010, a bench trial began and petitioners offered their testimony, respondent's testimony, the testimony of respondent's probate attorney, and the testimony of petitioners' expert witness. Petitioners testified that they did not know the contents of decedent's notes until the police file was obtained. Respondent testified that she knew that decedent had transferred about one-half of the money from their joint account into an account in his name and that she did the same. She also admitted that she did not give decedent's notes to the probate court or her probate attorney. Respondent's probate attorney confirmed that he was not aware of decedent's notes. Petitioners' expert, a probate attorney, testified that decedent's note to Gamarra was a valid holographic codicil and should have been presented with the petition for probate. Further, the Fidelity account in decedent's name was an estate asset.

At the conclusion of petitioners' case-in-chief, respondent moved for a directed verdict and argued that the injunction prevented decedent from transferring jointly held account funds into an account in his name only; thus, that transfer was void. Because that money should have remained in a joint account, there were no funds to distribute to petitioners even if the note was a codicil. Petitioners opposed the motion, arguing that respondent's failure to challenge decedent's purported violation of the injunction made the issue a dead issue—any such claim was untimely and the probate court did not have jurisdiction to decide whether the asset injunction was violated.

After a short recess, the probate court granted the motion for directed verdict. First, the court noted that it had jurisdiction to enforce the asset injunction issued during the divorce proceedings. Second, the Fidelity account funds belonged in the joint account and thus those funds were not an estate asset. Third, the letter to Gamarra was a valid holographic codicil and should have been submitted to the probate court. Fourth, parties to a civil case cannot stipulate to violate a court order like an injunction; thus, respondent's "consent," if she did consent, was irrelevant. And finally, the court concluded that, because the Fidelity account funds were not an asset of the estate, the subject matter of the codicil did not exist; therefore, the case was dismissed. After petitioners' motion for reconsideration was denied, this appeal followed.

Petitioners first argue that the circuit court erred in granting respondent's motion to remove this matter to the probate court because the probate court did not have subject-matter jurisdiction over this fraud case filed several years after decedent's estate was closed. After de novo review of this challenge to jurisdiction, we disagree. See *Adams v Adams*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007).

The gravamen of an action is determined by reading the complaint as a whole to determine the exact nature of the claim. *Id.* at 710-711. Here, petitioners sued respondent claiming that she was a wrongful distributee of a portion of an asset in decedent's estate that was devised to petitioners by codicil. The estate asset was decedent's individual Fidelity account that had a balance of \$354,680, and petitioners alleged that they were entitled to \$130,000 of those funds. MCL 700.3957 of the Estates and Protected Individual's Code (EPIC) provides:

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling a personal representative's accounts, or otherwise barred, a claimant's claim to recover from a distributee who is liable to pay the claim and the right of an heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or its value from a distributee are forever barred at the later of 3 years after the decedent's death or 1 year after the time of the property's distribution. However, all claims of the decedent's creditors are barred in accordance with the time periods specified in section 3803. This section does not bar an action to recover property or value received as a result of fraud.

Petitioners argued that their claim was not barred because the order distributing the Fidelity account funds to respondent was procured by fraud—respondent's fraud. The alleged fraudulent acts were (1) respondent's affirmative statement that decedent's 2000 will was decedent's only testamentary document and (2) respondent's failure to submit decedent's codicil to the probate court for administration. MCL 700.1205(3) of the EPIC provides:

If fraud is perpetrated in connection with a proceeding or in a statement filed under this act or if fraud is used to avoid or circumvent the provisions or purposes of this act, a person injured by the fraud may obtain appropriate relief against the perpetrator of the fraud or restitution from a person, other than a bona fide purchaser, that benefited from the fraud, whether innocent or not. An action under this subsection shall be commenced within 2 years after the discovery of the fraud

MCL 700.2516 also mandates that a person in possession of a codicil forward it to the court with reasonable promptness and provides that "[a] person who neglects to perform this duty without reasonable cause is liable for damages that are sustained by the neglect."

Consistent with the law set forth above, petitioners requested that the order granting the wrongful distribution to respondent be set aside and that they be awarded the value of their devise, damages, and other "appropriate relief" against respondent, the alleged perpetrator of the fraud. Considering the gravamen of petitioners' entire claim, this action is a proceeding regarding the administration, settlement, and distribution of decedent's estate and the probate

court had exclusive legal and equitable jurisdiction over this matter. See MCL 700.1107(d); 700.1302(a). Therefore, petitioners' argument opposing the removal of this action from the circuit court to the probate court is without merit.

Next, petitioners challenge the probate court's order granting a directed verdict in respondent's favor. In particular, petitioners argue that the probate court did not have jurisdiction to consider respondent's tardy claim that decedent violated an injunction when he established the Fidelity account and, thus, its conclusion that the estate asset did not exist must be vacated. We agree.

We review de novo a court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of MI*, 469 Mich 124, 131; 666 NW2d 186 (2003). Issues of law, including questions of statutory construction and subject-matter jurisdiction are also reviewed de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008).

MCL 700.3101 of the EPIC provides:

An individual's power to leave property by will, and the rights of creditors, devisees, and heirs to his or her property, are subject to the restrictions and limitations contained in this act to facilitate the prompt settlement of estates.

The property at issue here is decedent's individual Fidelity account funds. In defense of petitioners' claim to recover a portion of the funds that had been in that account, respondent argued that the funds were not an estate asset. Respondent asserted that the account was not an estate asset because decedent established that account with joint funds before he died, in violation of an injunction that had been issued in their divorce proceeding. Accordingly, respondent's claim of right to the Fidelity account funds in decedent's estate arose before decedent's death and was based on the alleged violation of an asset injunction.

MCL 700.3803 provides:

(1) A claim against a decedent's estate that arose before the decedent's death, including a claim of the state or a subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated, or based on contract, tort, or another legal basis, if not barred earlier by another statute of limitations or nonclaim statute, is barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801, within 4 months after the date of the publication of notice to creditors

(b) In the case of a creditor whom the personal representative knows at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.

In this case, respondent's claim that she was entitled to all of the Fidelity account funds because the funds were not an estate asset was (1) a claim against decedent's estate, (2) that arose before his death, (3) was legally based on decedent's alleged violation of a court injunction, and (4) was barred against the estate and decedent's devisees, unless (5) presented within 4 months after the date of publication of notice to creditors.

As required by MCL 700.3801 and MCR 5.208, in 2003 respondent, as personal representative, published a notice to creditors indicating that "all claims against the estate will be forever barred unless presented . . . within 4 months after the date of publication of this notice." Respondent did not make a claim against decedent's estate challenging decedent's ownership of the Fidelity account funds. See MCL 700.3803(1); MCL 700.3804(3); MCR 5.307(D). If respondent had made a legal claim against the estate, a formal proceeding would have been required. *Id.* At that proceeding, her allegation that decedent violated an injunction could have been raised and her claim of joint ownership or entitlement to the account funds would have been decided by the probate court.

Instead, respondent sought, essentially, to reopen decedent's estate to contest the legal ownership of an asset that had been in decedent's estate—an estate that had been closed for several years. That respondent's efforts in this regard were a defensive response to petitioners' claim of entitlement to a portion of that estate asset is irrelevant. Respondent's claim, whether or not viable, was untimely and expired by operation of law. See MCL 700.3803(1). Accordingly, the probate court did not have jurisdiction to reopen decedent's estate to review and determine respondent's untimely legal claim against decedent's estate. See MCL 600.848; *In re Washburn Estate*, 195 Mich App 42, 49; 488 NW2d 787 (1992). That is, the probate court did not have jurisdiction to consider and decide that the Fidelity account funds rightfully belonged to respondent and were not an estate asset. Petitioners' claims, however, did not expire by operation of law because they were premised on fraud, as discussed above. Therefore, the probate court order of directed verdict in favor of respondent, premised on the holding that the subject matter—the Fidelity account funds—of the purported codicil did not exist, is vacated. The Fidelity account funds were an uncontested estate asset. In light of our resolution of this issue, we need not consider petitioners' other arguments on appeal pertaining to the enforceability of the asset injunction. And respondent did not file a cross-appeal challenging the probate court's conclusion that decedent's suicide note to Gamarra was a valid holographic codicil that respondent was required to submit to the court for administration; thus, that holding is conclusive. See MCR 7.207; *Canjar v Cole*, 283 Mich App 723, 732 n 1; 770 NW2d 449 (2009). Accordingly, this matter is remanded solely for the purpose of determining the relief to which petitioners are entitled.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Petitioners are entitled to costs as the prevailing parties. See MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen