



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 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.

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DT: June 28, 2010

RE: Estate of Gloria Tice v Scott Missouri Tice and Barbara Ellen Tice
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL MEMORIES:

This publication, although it postdates Father's Day, was actually composed on Father's Day, and I thought about baseball games I went to with my father. Sports have always been a way for parents to relate to their children. Sports help parent and child avoid topics which are probably more important, but highly emotive. My experiences with my father and baseball were fantastic, providing a segue to the more important, not a substitute for them.

I remember in 1952 attending a Cleveland Indian game where Art Houtteman pitched a one hitter and had his no hitter broken up in the top of the ninth inning. With two outs; Suitcase Simpson got a single. There is nothing better than experiencing the thrill of victory and agony of defeat with your dad.

The 1968 World Series saw Mayo Smith, Manager, allowing Mickey Lolich to hit rather than putting in a pinch hitter and Lolich got a base hit. That was a shared memory.

Every game I attended with my father usually brought back memories of the games he had attended in the past, without me. He grew up in Washington DC and would never admit that anyone he saw was better than Walter Johnson. He might have been right.

Think about your memories. I invite you to share them with me.

REVIEW OF CASE:

Reference Files: MCR Relation Back Doctrine
EPIC Relation Back Doctrine
Statute of Limitations – Substitution of Estate for an Heir

Plaintiff, as an Individual, brought an action, based on fraud, to set aside a Deed given to Defendant by Plaintiff's deceased mother. Defendant properly said the action was reposed in the estate and not in the Plaintiff, and brought a motion for summary disposition. The lower Court allowed Plaintiff to amend and add the estate, with himself as personal representative. Defendant claimed the statute of limitations had run in the interim. Plaintiff claimed the estate's action related back to his original filing, prior to the running of the statute of limitations. Defendant cited *Employers Mutual Casualty Company v Petroleum Equipment, Inc.*, 190 Mich 57. That case bars the invocation of the relation back doctrine when there is a new party. Plaintiff cited *Stamp v Mill Street Inn*, 152 Mich App 290; saying that if only the identity of the parties changed and as the first party had an interest in the proceedings the relation back doctrine applies.

The Court of Appeals ruled for the Plaintiff and relied upon *Stamp* rather than *Employers Mutual*.

The Court of Appeals also properly cited the relation back doctrine of EPIC, MCL 700.3701. That provision says that when a person is appointed personal representative his appointment relates back to the time he performed those acts as an individual if the acts are beneficial to the estate.

I believe this is a sound decision based on EPIC. I have doubt whether extending *Stamp* to estates, as substitute for individuals, is a proper extension of *Stamp*.

Suppose a non heir-at-law, who was a nominated personal representative, brought the action. EPIC would apply but not the court rule if *Stamp* were limited to those "having an interest." Why not cite the "wrong capacity" language of *Stamp* and allow relation back if the Plaintiff had an interest or brought the action in the wrong capacity?

The Michigan Wrongful Death Act requires that an action be brought in the name of the estate. Potential recipients of proceeds of a wrongful death action include non heirs-at-law and go beyond those entitled to inherit under the laws of descent and distribution. Can any heir-at-law now bring a lawsuit, violating the wrongful death act and have it relate back if anyone is thereafter appointed personal representative? Certainly if that person is appointed personal representative they have a good chance of prevailing under MCL 700.3701, but should MCR

2.118 (D) be invoked? Wouldn't that lead to the possibility of a multiplicity of lawsuits sought to be prevented under the Michigan Wrongful Death Act?

Query: Suppose the beneficial actor was not the person appointed personal representative? MCL 700.3701 allows the personal representative to ratify the act but the relation back doctrine seems limited to the same person being appointed. If the antecedent actor was a person not appointed personal representative but was an heir-at-law, it would appear the court rule of relation back would apply as he, in the words of Tice "had an interest."

Also, what is the interplay with the current tolling of statute of limitations, based on the death of the party who has the cause of action? The Tice court made no reference to this.

The dicta is interesting. The Court of Appeals said that the purpose of the statute of limitations was not undermined because the Defendants knew of the action anyway. How many times does this happen – and how many times will this argument now be made?

This is a published Decision and has no obvious flaws, only large implications.

AAM:jv:#665509v2
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF GLORIA TICE, by its Personal
Representative, ROBERT PORTER,

Plaintiff-Appellant,

v

SCOTT MISSOURI TICE and BARBARA
ELLEN TICE,

Defendants-Appellees.

FOR PUBLICATION
June 10, 2010
9:05 a.m.

No. 290716
Muskegon Circuit Court
LC No. 08-045906-CZ

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

In this dispute over a parcel of real property, plaintiff, the Estate of Gloria Tice (Estate), appeals as of right the trial court's order granting summary disposition to defendants based on the statute of limitations. Because we conclude that the relation-back doctrine of MCR 2.118(D) applies to the amended complaint, we reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

Gloria Tice was the owner of a five-acre parcel of real property in Holton, Michigan. Defendant Barbara Tice, who was related to Gloria's deceased husband, served as Gloria's caregiver in 1999. On August 30, 1999, Gloria executed a quitclaim deed transferring the property to Barbara for \$1.00. Barbara subsequently transferred the property to her son, defendant Scott Tice.

Gloria died on January 24, 2004, leaving her son, Robert Porter, as the personal representative of her estate. Porter testified that he believed Gloria had transferred either an acre or an acre-and-a-half of the parcel to Barbara, but he was unaware that she had transferred the entire five-acre parcel to Barbara. According to Porter, he discovered that defendants were claiming title to the entire property in June 2006.

Porter brought suit in his own name against defendants on April 16, 2008. He sought title to the property, alleging that the transfer to Barbara was fraudulent and that the quitclaim deed to her was insufficient. Defendants moved for summary disposition under MCR 2.116(C)(5), arguing that Porter was not the real party in interest and that Porter should have brought the suit

as the personal representative of the Estate. The trial court agreed with defendants that the case was improperly brought by Porter, but granted Porter's motion for leave to file an amended complaint. After reopening the Estate, which had been administratively closed, Porter, on November 3, 2008, filed an amended complaint as the personal representative of the Estate. Defendants filed a second motion for summary disposition under MCR 2.116(C)(7), contending that the case was barred by the statute of limitations. The trial court agreed and granted summary disposition to defendants.

II. ANALYSIS

The Estate argues that because the amended complaint only changed the "name" of the plaintiff, rather than adding a new plaintiff, the trial court erred in holding that the amended complaint was barred by the statute of limitations. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(7) if "[t]he claim is barred because of... statute of limitations..." "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002) (quotation and alteration omitted).

Porter relied on MCL 600.5855 in asserting the timeliness of the original complaint. MCL 600.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

The trial court found that there was an issue of fact whether Porter was aware of the alleged fraudulent conveyance in 1999 or whether he discovered it in June 2006. However, because the complaint was not amended to reflect that the Estate was the plaintiff until after the two-year period arguably provided by MCL 600.5855 expired, the trial court determined that the action was not timely filed. In so holding, the court ruled that the relation-back doctrine of MCR 2.118(D) did not apply because the Estate was a new party.

MCR 2.118(D) provides:

An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

This Court has previously held that “the relation-back doctrine does not extend to the addition of new parties.” *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991); see also *Hurt v Michael's Food Ctr, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). We conclude, however, that the present case is distinguishable from *Employers Mut Cas Co* and *Hurt* based on *Stamp v Mill Street Inn*, 152 Mich App 290; 393 NW2d 614 (1986). In *Stamp*, which concerned the substitution of a party rather than the addition of a new party, the Court held:

[A]mendment of pleadings may be allowed to change the identity of a party plaintiff where the plaintiff originally brought an action in the wrong capacity and the new plaintiff may be allowed to take advantage of the former action if the original plaintiff had, in any capacity, either before or after commencement of the action, an interest in the subject matter of the controversy. [*Id.* at 298.]

In this case, Porter, as Gloria's sole heir, had an interest in the subject matter of the controversy. Presuming for the sake of analysis that the Estate's action will be successful, Porter will be the ultimate beneficiary. Thus, under the *Stamp* rule, the Estate should be allowed to take advantage of Porter's filing of the original complaint.

Peculiar to this case, there is also statutory support for such a holding. MCL 700.3701 provides:

A personal representative's duties and powers commence upon appointment. A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment. Subject to [MCL 700.3206 to 700.3208], before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.

Under this statute, it appears that Porter's act of commencing the suit should be given the same effect as if, in April 2008, he was the personal representative of the Estate. If Porter had been the Estate's personal representative at the time he filed suit, then the only issue would be that the case was not properly captioned. This Court has held that the form of the caption is generally not of particular importance. *Howard v Bouwman*, 251 Mich App 136, 145; 650 NW2d 114 (2002), citing *Stamp*, 152 Mich App at 296.

Based on the foregoing, we conclude that the amended complaint relates back in time to the filing of the original complaint. The relation-back doctrine does not extend to the addition of new parties, *Employers Mut Cas Co*, 190 Mich App at 63, but when a plaintiff has brought an action in the wrong capacity, a new plaintiff is allowed to take advantage of the original action if the original plaintiff had an interest in the subject matter of the controversy, *Stamp*, 152 Mich App at 298. Under the *Stamp* rule, the Estate may take advantage of the original filing because Porter, as Gloria's heir, had an interest in the subject matter of the controversy. Permitting relation-back is also supported by MCL 700.3701, under which Porter's act of commencing the suit should be given the same effect as if, at the time, he was appointed personal representative

of the Estate. Notably, defendants had notice within the statutory period that they would have to defend against claims for a fraudulent transfer and an insufficient deed. Thus, ruling in the Estate's favor will not undermine the purpose of the statute of limitations. See *Stamp*, 152 Mich App at 299, citing 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 416.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis