



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

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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.

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DT: January 5, 2011

RE: Estate of John G. Underwood, Deceased
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

In the last case review we looked at great first years by rookies. We did this by position. In this article we take a look at other great firsts by a rookie which constituted records. Rather than doing this by position – we look at various categories:

Plate Appearances – Chuck Schilling, 736

At Bats – Juan Samuel, 701

Walks – Bill Joyce, 123

Hits – Ichiro Suzuki, 242

Doubles – Johnny Frederick, 52

Triples – Jimmy Williams, 28

Homeruns – Mark McGwire, 49

RBI's – Ted Williams, 145

Highest batting average – Benny Kauff (Federal league), .370

Hitting streak – Benito Santiago, 34

Regarding pitchers – the highest win/loss percentage was obtained by Emil Yde, .848

The greatest number of wins in the modern era was Bill Hoffer's 31

Russ Ford led the rookies with shut-outs with eight (8), and in the modern era the greatest strikeout rookie king was Dwight Gooden with 246.

Harry Krause led rookies with lowest ERA at 1.39.

REVIEW OF CASE:

Reference Files: Res Adjudicata
Statute of Limitations
Split Jurisdictions
Doctrine of Opportunity to Be Heard

The most interesting thing about the Underwood case is that it applies the doctrine of res adjudicata to litigation that was conducted in a different court. Respondent resorted to self payment, out of partnership assets, in which the decedent was a partner. The other partners sued. The Oakland County Circuit Court took into consideration the amount of care that partner had given the decedent, made an offset and ruled accordingly.

Many years later, the petitioner sought to reopen the decedent's estate to surcharge the Respondent as guardian for the same negligent actions. The court appropriately defined the third element of res adjudicata as claims that could have been raised and said that you pragmatically look at the circumstances and facts, by considering whether the facts are related in time, space and origin or motivation. Here the court properly concluded that they were related. Essentially, Petitioner and Appellant are raising a new theory only, but there was a ruling on proper compensation. The court goes on to enforce statute of limitations; noting the accrual date of the breach of fiduciary duty.

The court also goes into the doctrine of opportunity to be heard. The court cites the Cummings v Wayne County, 210 Mich App 249, properly to the effect that an opportunity to be heard doesn't require a full scale trial and here there was oral argument without limitation. The court goes into this even though it was not raised in the lower court, but saying that since it is a substantial right they will review it and apply the doctrine of plain error. This is well reasoned. The oddities of the case are as follows:

How could you surcharge a guardian by reopening decedent's estate?

How can you surcharge a guardian when guardians aren't even supposed to be handling money?

I want to draw to the reader's attention a change in the Michigan Court Rules. Specifically, MCR 508 (B)(2) which still contains the words "on the record," but as of June 1, 2010 no longer contains the language "and not de novo." Hence, to make sense of the instant Court of Appeals ruling that a summary disposition motion for the Court of Appeals is de novo they must mean "de novo on the record." Yet the court, in this case, reviewed legal doctrines de novo.

AAM:jv:doc#678641v2
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JOHN G. UNDERWOOD,
Deceased.

GLENN R. UNDERWOOD,

Petitioner-Appellant,

UNPUBLISHED
December 7, 2010

v

PATRICIA R. SELENT,

Respondent-Appellee.

No. 291852
Oakland Probate Court
LC No. 1977-130773-DD

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Petitioner appeals by right the probate court's order denying his petition to open the estate and surcharge respondent, who was the decedent's former guardian. We affirm.

As an initial matter, we note that the probate court did not identify or explain why it denied the petition. Rather, it denied the petition without comment. However, we conclude that remand for clarification is unnecessary because, based on the record and the parties' arguments, the relevant statute of limitations and res judicata barred petitioner's claims.

Petitioner argues that res judicata does not bar his petition because the claims had yet to be fully litigated. We disagree. We review de novo the application of a legal doctrine such as res judicata. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The doctrine of res judicata bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 212-213; 699 NW2d 707 (2005).

The instant case is related to a prior case decided by Oakland Circuit Court Judge John J. McDonald, which was decided on appeal by this Court in *Carto v Underwood Property Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747). *Carto* involved a lawsuit in which several of petitioner's siblings, including respondent, sued him for mismanagement of the family partnership in which petitioner's and

respondent's brother, the decedent, was also a partner. As a part of one of his affirmative defenses, petitioner did not deny that he took money from the partnership, but claimed that he was entitled to the money as compensation for the care, room, and board he provided for the decedent, who had Down syndrome, from November 1981 to May 1998.

After deciding motions for summary disposition both for and against the plaintiffs and the defendants in *Carto*, the circuit court conducted a trial on damages, which included reasonable compensation for the care petitioner provided for the decedent. The damages trial and the circuit court's decisions on the motions for summary disposition together constituted a final decision on the merits. In addition, both petitioner and respondent were a part of the circuit court case as adverse parties and are parties in the instant case. Although appellate litigation ensued, this Court's opinion in *Carto* did not alter the circuit court's decision on the merits; rather, it merely remanded for clarification on portions of the damages calculations. Because the prior action was decided on the merits and both actions involve the same parties, the first and second elements of res judicata are satisfied.

The third requirement for the application of res judicata is that the matter in the second case was, or could have been, resolved in the first. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 420; 733 NW2d 755 (2007). A transactional test is used to determine if the matter could have been resolved in the first case, under which the courts look to whether "a single group of operative facts give rise to the assertion of relief." *Id.* (quotations and citations omitted); see also *Adair v Michigan*, 470 Mich 105, 124; 680 NW2d 386 (2004). "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation[.]" *Washington*, 478 Mich at 420 (quotations and citations omitted); see also *Adair*, 470 Mich at 125.

The crux of the petition is that respondent's breaches of her fiduciary duties as the decedent's guardian resulted in the mishandling and improper accounting of the decedent's assets, which included the decedent's share of the partnership cash distributions and Social Security distributions. Petitioner requests that respondent be surcharged for these breaches in order that he may be properly compensated for the care he provided to the decedent.

Based on the record in *Carto*, we conclude that the third element of res judicata is satisfied because petitioner's claim could have been resolved in the underlying circuit court case. The facts of the instant case are intimately related in time and motivation to the facts of *Carto*, and concern how much petitioner should be compensated for his care of the decedent. The circuit court conducted a trial on damages and made a specific determination regarding how much petitioner was entitled to for his care of the decedent, offsetting that amount against what petitioner had taken for himself from the partnership account without authorization. Moreover, the circuit court considered the decedent's partnership cash distributions and the Social Security distributions in making its decision. Thus, petitioner's compensation and how the decedent's assets were used as compensation constitute operative facts in both actions. Further, petitioner admits that he became aware of respondent's actions during the circuit court case. Although petitioner believes he is entitled to greater compensation and is clearly motivated by that fact, the issues regarding respondent's actions as the decedent's guardian and how they related to what petitioner was owed could have been resolved during the previous case and do not alter the fact that petitioner has already been awarded reasonable compensation for his care of the decedent.

We accordingly conclude that petitioner's instant claim is barred by res judicata. Based on our resolution of this issue, it is unnecessary to address petitioner's arguments regarding the law of the case doctrine and collateral estoppel.

In addition, even if petitioner's claim were not barred by res judicata, the three-year statute of limitations period contained in MCL 600.5805(10) bars his petition. When there are no disputed questions of fact, we review de novo whether a cause of action is barred by the statute of limitations. *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005).

The applicable limitations period is three years for the tort of breach of fiduciary duty. MCL 600.5805(10); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). A breach of fiduciary duty claim accrues when the petitioner knew or should have known of the breach. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005). The phrase "knew or should have known" indicates that an objective standard applies when determining when the claim accrues. *Id.* at 47-48. As the decedent's plenary guardian, respondent was a fiduciary. MCL 700.1104(e).

The facts of *Carto*, which were presented to the probate court in the instant case, establish that petitioner knew or should have known both in February 1998, and in November 2003, that his breach of fiduciary duty claim had accrued. In 1998, petitioner ceased caring for the decedent and respondent turned over the accumulated Social Security funds to the partnership pursuant to petitioner's request. Petitioner then took a portion of those funds for himself and distributed the rest to the other partners. Any issues regarding possible breaches of respondent's fiduciary duty pertaining to the Social Security funds should have become apparent at the time when petitioner requested that respondent turn over the accumulated funds. Further, because petitioner was heavily involved with both the management of the partnership and the decedent's care, he should have been aware of any breaches of fiduciary duty regarding the decedent's share of the partnership and the Social Security funds. Petitioner fails to explain how his allegations of fraud prevented him from learning of these alleged breaches by respondent.

In addition, even if the statute of limitations period began to run from the close of the decedent's estate on November 13, 2003, petitioner did not file this claim until almost six years later. Although petitioner commenced other litigation in the probate court regarding his compensation for the decedent's care in October 2006, that litigation did not include claims against respondent for breaching her fiduciary duty and she was not a party in that case. Rather, the petition in the instant case constituted a new and distinct cause of action. Because respondent's alleged breaches of her fiduciary duty reasonably could have been discovered prior to 2009, petitioner's claims are barred by the three-year period of limitations. MCL 600.5805(10).

Petitioner also argues that he was denied a fair opportunity to be heard because he only received a response to his petition the day before the hearing. We disagree. Because this issue is unpreserved, we review petitioner's claim for plain error affecting his substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decisionmaker. *Cummings v Wayne*

Co, 210 Mich App 249, 253; 533 NW2d 13 (1995). However, an opportunity to be heard does not require a full trial-like proceeding. *Id.*

The record reflects that petitioner originally noticed his petition to be heard at a hearing of March 25, 2009. On March 24, 2009, the probate court entered an order adjourning the hearing until April 8, 2009, and respondent filed a response on April 6, 2009. The probate court entertained oral argument at the petition hearing and did not limit petitioner in his argument. In other words, the record establishes that petitioner was given a full and fair opportunity to be heard on his petition. Petitioner fails to cite to any authority to support his argument that he was entitled to a more meaningful hearing.

Moreover, as discussed above, further briefing by petitioner or additional discovery would have been futile because the probate court properly dismissed the petition without considering the merits. In addition, petitioner did not request an adjournment to reply to respondent's filing. Instead, he acquiesced to the probate court's consideration of the petition at the hearing of April 8, 2009. Therefore, petitioner has failed to show any error.

Petitioner further argues that the probate court overlooked evidence establishing that respondent's wrongdoing constituted a violation of MCL 700.5315 and that the probate court erroneously believed that a valid care-provider agreement existed in this case. However, for reasons already discussed, the probate court did not err by failing to consider the merits of these allegations because the petition was barred by the doctrine of *res judicata* and the relevant statute of limitations.

Lastly, petitioner argues that the probate court had an obligation to explain its lack of oversight of respondent as the decedent's guardian, which permitted respondent to engage in fraud. However, petitioner has failed to mention or explain any specific instance in which the probate court's oversight of respondent was lacking. Further, petitioner fails to cite to any authority in support of his position. We will not search for authority to sustain or reject a party's position. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995). Petitioner's failure to cite sufficient authority constitutes an abandonment of this issue on appeal. *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642, 658; 708 NW2d 740 (2005), *aff'd* 479 Mich 554 (2007).

Affirmed. As the prevailing party, respondent may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Talbot