



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 is listed in the 2011 compilation 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.

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DT: September 21, 2011

RE: Estate of Connie Mae Vickerson
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

Remember the baseball song from the 40's "Van Lingle Mungo"? I'll bet some of you do. The lyrics were composed solely of the rhythmical names of the players of the era.

In honor of the Tigers capturing the flag, let's see what we can do for them to the tune of "April Showers."

Alex Avila
He's caught since May
He strikes the towers
Jim Leyland's way.

Justin Verlander
Doug Fister too
They blank the other team with lots of k's
The way they ought to do.

And big Cabrera
with Young at base
he drives in Delmon
Inge a disgrace.

Boesh, Ordonez,
Guillen, Santiago,
Martinez, Benemit,
Dirks, Rayburn & Peralta
they can hit.

REVIEW OF CASE:

Reference Files: Surcharge
Timely Appeal

This is a heavily fact weighted case where the Opinion of the lower court was sustained.

Appellant was surcharged for a variety of items among which were:

1. The personal representative mortgaged the property and did not account for the proceeds. Appellant said “I did account” although nothing appeared on the accountings, and furthermore I spent the money on the estate. The Appellant had no receipts.
2. Failure to turnover cash. Appellant said that this was part of the mortgage money and that Appellant was being double charged. The trial court said that was additional cash.
3. Listing expenditures on an accounting and not having back-up receipts.

Appellant argued the Will as invalid though the Order admitting the Will was entered years before. This could not be challenged in the context of the instant Order, said the Court of Appeals.¹

Although the argument of the Appellant in the lower court was factually incorrect regarding failure to turnover cash, it is conceivable that the surcharge for reimbursement without receipt(s) might have been included in the mortgage receipt. We don't know. If the actual amount of the estate was the mortgage money plus additional cash then certainly this was not a double surcharge.

Lessons Learned:

- Sometimes it's good to restrict Letters of Authority.
- It is always good for a Personal Representative to keep receipts, if indeed the Personal Representative has receipts.
- One should not argue something was an account when it clearly isn't. Courts can read and sanction for frivolity.

AAM:jv:696802v2
Attachment

¹ Did the latest Order make reference to the previous Order admitting the Will?

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of CONNIE MAE VICKERSON,
DECEASED.

CHARLES VICKERSON, BETTIE
VICKERSON, SHEILA RENTIE, and MEDDIE
JOHNSON,

UNPUBLISHED
August 9, 2011

Petitioners-Appellees,¹

v

CONNIE V. COUNCIL and DEBRA LINEAR,

No. 294178
Wayne Probate Court
LC No. 2005-694545-DA

Respondents-Appellants.

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Respondents, former co-personal representatives of the estate of Connie Mae Vickerson, appeal as of right the probate court's order surcharging them a total of \$82,076. We affirm.

Respondents first argue that the probate court erred by failing to consider the factors listed in MRPC 1.5(a) and MCR 5.313 in determining the reasonableness of the attorney fees awarded to Robert Essick. The law of the case doctrine precludes this Court's consideration of this issue. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Respondents raised the identical issue in this Court previously, and this Court affirmed the probate court's decision. *In re Estate of Vickerson*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008 (Docket No. 278963). Because there have been no intervening changes in the law since that

¹ Betty Vickerson, Sheila Rentie, and Meddie Johnson, filed the petition at issue in this appeal. Therefore, we refer to them as "petitioners." Charles Vickerson was removed from this litigation pursuant to the probate court's May 14, 2007, order.

decision, this Court is bound by the previous decision. *Ashker*, 245 Mich App at 13. Thus, the law of the case doctrine precludes reconsideration of this issue.

Respondents next contend that the trial court erroneously surcharged them \$82,076. We disagree. We review for an abuse of discretion a probate court's determination whether to surcharge a fiduciary. *In re Baldwin V Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007). An abuse of discretion occurs when the lower court's decision falls outside the range of reasonable and principled outcomes. *Id.*

The probate court did not abuse its discretion by surcharging respondents a total of \$82,076. Respondents argue that the surcharge should be reduced by \$55,000, the approximate value of the mortgage proceeds of the home located at 5918 Coplin. Respondents admit that they mortgaged the property and received \$54,656 in mortgage proceeds, but they contend that the annual account reflected the proceeds. Contrary to respondents' argument, the second annual account of the estate did not include the mortgage proceeds. At the July 22, 2008, hearing, the probate court asked respondent Connie Council why she did not account for the proceeds in the annual account, to which she responded, "I didn't realize I had to – by keeping up the Estate, I do have, like I say, my receipts and stuff . . ." Thus, Council admitted that the annual account did not include the mortgage proceeds. Our review of the second, third, and final accounts shows that at no time did respondents account for the full mortgage proceeds. Rather, the second annual account reflects only \$1,076 of the proceeds, which is the difference between the approximate value of the property at \$53,580 and the mortgage proceeds of \$54,656. In addition, respondents failed to transfer the property back to the estate in violation of the probate court's order. Although respondents claim that they spent the mortgage proceeds on estate expenses, they failed to support their claim with receipts or canceled checks. Accordingly, the probate court did not abuse its discretion by surcharging respondents \$53,580² for the mortgage proceeds.

Respondents also argue that they should not have been surcharged \$4,400 for Curtis Vickerson's rent payments with respect to the real property located on Forrer Street. Because the record shows that respondents were not surcharged for the amount of Vickerson's rent payments, respondents are not entitled to relief.

Respondents next contend that the probate court "triple charged" them \$7,000 for amounts that it determined should have been turned over to the successor personal representative. Respondents argue that this amount was part of the mortgage proceeds that were "allowed as a cash influx to the estate[.]" It appears that respondents are referring to the amount of mortgage proceeds that Council admitted remained from the total mortgage proceeds. As previously discussed, the probate court surcharged respondents for the total mortgage proceeds,

² The probate court actually surcharged respondents \$54,656 for the mortgage proceeds, but, because the second annual account reflected \$1,076 of the proceeds, only \$53,580 was properly chargeable. Because the total of the surcharges equaled \$84,830, and the probate court's order surcharged respondents only \$82,076, however, this discrepancy is immaterial.

including the \$7,000. The court did not surcharge respondents for the \$7,000 three times, or even twice. Thus, respondents' argument lacks merit.

Respondents next argue that the probate court improperly surcharged them for rent payments on the Atkinson property that Council had already paid to the estate. When asked why such rent was not reflected on the third annual account, Council responded that she gave her attorney a check in the amount of \$3,000 at one point to partially cover her rent payments. Her attorney, however, denied receiving the check. The surcharge was proper in light of Council's failure to substantiate the rent payments that she alleges she paid to the estate. In fact, neither the second, third, nor the final annual accounts reflect rent payments for the Atkinson property. Accordingly, the probate court did not abuse its discretion by surcharging respondents \$6,000 for rent payments missing from the third annual account and \$5,000 for rent payments missing from the final account.

Respondents next contend that the probate court improperly surcharged them for various household repair expenses reflected on the second, third, and final annual accounts. The record shows that respondents failed to substantiate those expenses. Accordingly, the probate court allowed approximately one-half of the unsubstantiated expenses and surcharged respondents for the other half. Under these circumstances, the probate court did not abuse its discretion by surcharging respondents a total of \$20,250 with respect to the alleged household repairs.

Therefore, the amounts that the probate court properly surcharged totaled \$84,830: \$53,580 in mortgage proceeds, \$11,000 in rent for the Atkinson home, and \$20,250 for home improvement expenses. Because of an apparent mathematical error, however, the probate court's order reflected a surcharge in the amount of only \$82,076. Because the record supports a surcharge in that amount, however, the probate court did not abuse its discretion by surcharging respondents \$82,076.

Finally, respondents argue that the probate court erred by determining that decedent's will is invalid based on the lack of testamentary capacity and undue influence. This issue is not properly before this Court because respondents failed to appeal the probate court's May 8, 2008, determination regarding the validity of the will. Pursuant to former MCR 5.801(B)(1)(b) and (c),³ the order was appealable as of right to this Court. Those provisions provided, in relevant part:

Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order affecting the rights or interests of an interested person in a decedent estate These are defined as and limited to orders resolving the following matters:

* * *

³ Effective April 1, 2010, MCR 5.801(B)(1) was renumbered to subrule (B)(2).

(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(c) interpreting or construing a testamentary instrument or inter vivos trust[.]

Having failed to appeal the May 8, 2008, order, respondents may not now challenge the court's decisions regarding the admission and validity of the will in the context of this appeal involving the May 29, 2009, order. This Court lacks jurisdiction to review the previous order. Further, respondents waived appellate review of this issue by failing to file the necessary transcripts. See MCR 7.210(B)(1)(a).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder

/s/ Donald S. Owens