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 2007-2013 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2014 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2013 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

He is a member of the Society of American Baseball Research (SABR).

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DT: February 5, 2014

RE: In re Genevieve Garcia Revocable Living Trust
STATE OF MICHIGAN COURT OF APPEALS

REVIEW OF CASE:

Reference Files: Attorney Fees
Election of Remedy
Election – Distinguish from Election of Remedy
(Estoppel by Acceptance)

I liked this case for two reasons. Joe Buttiglieri was the expert on the prevailing side, on the issue of attorney fees, and also the attorney who years ago handled the published case, cited by the Court of Appeals, *Beglinger* on the issue of estoppel by acceptance.

I know of no other lawyer to which this has happened.

Petitioner was a distributee, under a Trust. Respondent was the trustee. Trustee gave Petitioner notice of a final accounting, and distributed a share to Petitioner. Petitioner accepted the proceeds of the distribution. Two years later, Petitioner tried to set aside the Trust on the basis of undue influence and challenged certain actions of the trustee. Trustee, responded; asserted that the actions were time barred and claimed estoppel by acceptance. Petitioner persisted in arguing an exception to the time bar - fraud. The Lower Court ruled that to invoke the exception of fraud one had to tender back the proceeds which one received.

The persistence, in the view of the Lower Court, amounted to frivolity under the court rules and RJA and awarded attorney fees.

The Court of Appeals sustained, but remanded the attorney fee portion back to determine what services were rendered by Respondent after the persistence became frivolous. The Court of Appeals pointed to the duty to conduct a reasonable inquiry into the legal ramifications of the Doctrine of Election. Petitioner failed to do this.

Judge Murphy concurs, but points out the difference between elections (estoppel by acceptance) and election of remedies, which would be the pursuing of one remedy over another doctrine which exists to prevent double redress. The majority had found these to be synonymous.

Murphy also correctly notes an exception to the fraud exception and that is if you would be entitled to the "tender" whether you win or lose you need not "tender back".

Murphy would have also approved the sanction under the court rules and not the court rules and the statute because the stature applies to civil actions.

This case should also apply to alleged wrongdoing by trustees, as well as to the challenging of documents. The language supporting the court's ruling appears broad enough to accomplish this.

AAM:jv:761088
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In Re Genevieve Garcia Revocable Living Trust.

JAMES M STEFANEK,

Petitioner-Appellant,

v

ROBERT STEFANEK,

Trustee/Respondent-Appellee.

UNPUBLISHED
January 7, 2014

Nos. 309170 & 311123
Oakland Circuit Court
Family Division
LC No. 2007-310798-TV

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals by right the trial court orders of summary disposition and payment of attorney fees in favor of respondent and the trial court orders denying petitioner reconsideration of both. For the reasons set forth below, this Court affirms the trial court's summary disposition, but remands the case for a redetermination of attorney fees.

I. BACKGROUND

On October 27, 2006, Genevieve Garcia established the Genevieve Garcia Revocable Living Trust (Trust). Petitioner and Respondent are two brothers, who are Garcia's nephews and named trust beneficiaries. Garcia and Respondent were designated as initial co-trustees with respondent to act as the first sole successor trustee upon Garcia's death. Garcia died on December 29, 2006.

On June 28, 2008, respondent sent petitioner an accounting of the Trust from December 29, 2006 through May 31, 2008. The accounting indicated that petitioner was to receive $177,032.23, and that he had already received checks in the amount of $161,000.00. Three years later, on June 23, 2011, petitioner filed a petition to remove respondent as the trustee alleging that respondent failed to pay petitioner his entitled amount and engaged in forms of self-dealing and fraud. On July 25, 2011, respondent countered that petitioner's petition was time barred because it was not brought within one year of the final accounting of June 28, 2008.

On November 1, 2011, respondent filed a motion to dismiss petitioner's petition. Respondent claimed that the Trust was terminated and all trust assets had been distributed. He also claimed that the petition was untimely filed and that respondent had complied with all of petitioner's requests for trust and tax documents. His motion further claimed that the petitioner had failed to timely file any amended petition specifying the "alleged acts of wrongdoing" resulting in respondent incurring unnecessary attorney fees and costs, and

> [8.] (b) there simply is no merit to [petitioner's argument] that he was "shortchanged" in that [petitioner] apparently did not realize that the money which passed to him from the decedent outside of the trust would be taxable to the estate and that both the trust and EPIC provide for allocation of taxes among beneficiaries which include assets which pass outside the trust as well as trust assets.

On November 23, 2011, petitioner filed his first amended petition. It alleged that respondent had breached his fiduciary duty by improperly filing a Form 706 without the Schedule I which precluded petitioner from taking tax deductions to which he was entitled. The amended petition also alleged that respondent secured Garcia's signature on the Trust while she was hospitalized and dying and lacking the mental capacity to execute a trust through undue influence and fraud. Further, the petition alleged that the Trust did not reflect Garcia's wishes. Petitioner moreover, alleged that at the time the Trust was executed there existed a confidential/fiduciary relationship between Garcia and respondent by which respondent benefited, but did not describe it in more detail. The amended petition again requested that respondent be removed as trustee, that respondent be held personally liable, and attorney fees and costs be awarded.

On December 19, 2011, respondent filed his motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). Respondent argued that the claim of undue influence was time-barred because it was brought three years after the Trust's termination and legally barred by the doctrine of election. Respondent requested that the court dismiss petitioner's claims and also requested attorney fees and sanctions.

Petitioner filed his response to respondent's motion for summary disposition on January 5, 2012 which more fully developed the allegation of undue influence against respondent. He attached an affidavit from Garcia's accountant, Dennis Diebolt, who averred that he had spoken to Garcia about the need for a trust, and Garcia told him that she intended to leave petitioner and respondents equal shares. Diebolt also averred that he had referred Garcia to an attorney to draft a trust, but in the end, respondent's attorney Steven Stokfisz drafted the Trust. Petitioner argued that respondent influenced Garcia by having his attorney draft her trust and name him as a co-trustee and beneficiary. Moreover, that in Garcia's final months she had a degenerative eye disease and could not read without the aid of a special machine. Garcia signed the Trust while in hospice without the special reading aid. Therefore, petitioner believed that Garcia was at the "mercy of respondent . . . to read and explain the Trust to her."

On January 27, 2012, the court filed its opinion and order granting summary disposition. The court found grounds for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8) and MCR 2.116(C)(10). MCR 2.116(C)(7) was appropriate because MCL 700.7604(1) barred an

attack to the validity of a trust that was filed more than two years after the settlor's death; MCL 700.7905 limited the commencement of breach of trust proceedings by a trust beneficiary against a trustee to one year after the beneficiary was sent a report adequately disclosing the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for the commencement of such proceeding; and the doctrine of election barred petitioner's claim because based on the various court proceedings, distributions, and final accounting, petitioner was on notice of any potential claims related to the validity of the Trust. The court acknowledged an exception to this doctrine for fraud, but stated that even if there was evidence of concealment, petitioner failed to tender the amounts distributed to him from the Trust prior to initiating the proceedings, thereby falling outside of this exception.

The court also held summary disposition appropriate under MCR 2.116(C)(8) because the trustee was only obligated by MCL 700.7814 to provide "a copy of the terms of the trust that described or affect the trust beneficiary's interest," and was not obligated to provide a copy of the entire trust agreement. Further, MCL 700.7814(1) did not require a trustee to keep qualified beneficiaries informed of material facts necessary to protect ancillary pecuniary interests; therefore, the trustee was not obligated to provide a copy of the Trust or estate tax returns. The court also noted that petitioner failed to explain how having a copy of the "Trust's Federal Income Tax Return" would prevent him from making an election for his tax purposes.

The court lastly found summary disposition established under MCR 2.116(C)(8). The court explained that pursuant to MCL 700.7814(2)(a) a trustee is not required to provide qualified trust beneficiaries a complete copy of the trust agreement and petitioner received 12 of the 17 pages of the trust agreement on June 4, 2007, which he made no objections to until June 23, 2011. Additionally, there was no requirement that a trustee provide a copy of the trust's tax returns to beneficiaries and petitioner failed to explain how failure to provide the Form 706 prevented petitioner from claiming income in respect of a decedent when he would have received a Form 1099R for the IRA distribution; hence there was no concealment. The court also held that it would grant respondent attorney fees and ordered respondent to file a bill of particulars.

On February 15, 2012, respondent filed his bill of attorney fees and costs, totaling $44,634.05. Petitioner filed a Motion for Reconsideration on February 16, 2012 and objections to respondent's bill of attorney fees and costs on February 22, 2012. Petitioner asserted respondent failed to establish the reasonableness of his attorney fees because respondent merely attested that the fees were accurate and necessary.

On February 29, 2012, the court filed its opinion and order denying petitioner's Motion for Reconsideration. The court reasserted that the doctrine of election required a trust beneficiary to tender its share of trust assets back to the trust. It also determined a lack of any fiduciary relationship between Garcia and respondent prior to the drafting of the revocable trust.

An evidentiary hearing regarding the reasonableness of attorney fees was held on May 1, 2012, in response to petitioner's objections. Joseph Buttiglieri, respondent's expert witness, testified that the range of attorney fees for probate matters in Oakland County was approximately $270 to $600. Further, that respondent's counsel's hourly rate was reasonable and "on the low side for Oakland County." He also thought that the hours and effort applied were reasonable and necessary with the exception of respondent charging fees for fees. Buttiglieri based his opinion

on: (1) Rule 1.5 of the Michigan Rules of Professional Conduct; (2) the time and labor required; (3) the difficulty of the issues involved; (4) the requisite skills to perform the legal services; (5) the customary fees charged within the locality for similar services; (6) the amount in controversy; and (7) the experience, reputation, and ability of counsel. Accounting for the amount of fees inappropriately billed, Buttiglieri testified, the reasonable amount of attorney fees was approximately $37,600 and with costs the total would be $43,584.05.

After consideration of those factors enunciated in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), and the Michigan rules of professional conduct, the court held petitioner and petitioner's counsel jointly and severally responsible for costs and fees in the amount of $43,584.05. Petitioner motioned the court for reconsideration of its ruling on May 12, 2012, and was denied without oral argument. The court declined to reconsider its holding.

II. SUMMARY DISPOSITION AND RECONSIDERATION

Petitioner raised a number of issues on appeal to challenge the trial court's grant of summary disposition and later denial for reconsideration. However, because the doctrine of election is dispositive we decline to discuss the other issues.

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Equitable estoppel issues are also reviewed de novo. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). However, the trial court's factual findings will not be reversed unless they were clearly erroneous. *Id.*

Motions for reconsideration are governed by MCR 2.119(F). This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson,* 240 Mich App 223; 611 NW2d 333 (2000); *In re Beglinger Trust*, 221 Mich App 273; 561 NW2d 130 (1997). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

The trial court did not err in granting summary disposition to respondent, because petitioner's claims were barred by the doctrine of election. The doctrine of election, also termed the doctrine of election of remedies, is a "procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both. Its purpose is not to prevent recourse to alternative remedies, but to prevent double redress for a single injury." *Riverview Cooperative, Inc v First Nat'l Bank & Trust Co,* 417 Mich 307, 311–312; 337 NW2d 225 (1983) (internal citation omitted). The elements of the doctrine are "(1) *The existence of two or more remedies;* (2) *the inconsistency between such remedies; and* (3) *a choice of one of them.* If any one of these elements is absent, the result of preclusion does not follow.'" *Id.* at 313, quoting *Ielmini v Bessemer National Bank,* 298 Mich 59, 66-67; 298 NW 404 (1941), quoting 18 Am Jur, Election of Remedies, § 9, pp 132–133) (emphasis in original). Petitioner had the choice to accept disbursements under the Trust and therefore, acquiesce to the validity of the Trust, or not accept

In consideration of the procedural background of the instant case, respondent initially raised the doctrine of estoppel as an affirmative defense in his response to the Amended Response to the Removal Petition, and later refined that argument to include the doctrine of election in his Amended Response to the Amended Petition. Once those affirmative defenses were raised, petitioner was on notice and should have exercised diligence in proceeding with his claim. Pursuant to MCR 2.114(D), petitioner had an affirmative duty to conduct a reasonable inquiry into the legal ramifications of the doctrine of elections. It was not an abuse of discretion for the court to award attorney fees based on petitioner's continued litigation of defenses that were barred and factually unsupported. This conclusion applies similarly to the court's actions on reconsideration. It is however, unclear from the trial record whether the court determined the procedural point in time when petitioner's claims became frivolous. Once that time is determined, attorney fees should be calculated henceforth.

Petitioner further argues that the trial court erred by awarding attorney fees that were unreasonable. We decline to address the issue of reasonable attorney fees in light of our decision to remand with the understanding that the amount of fees may change or that petitioner and respondent might reach an agreement as to what is reasonable.

We affirm the orders of the trial court granting summary disposition to respondent based on the doctrine of election. We further affirm the trial court's order awarding attorney fees, but remand the case for clarification and a redetermination consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

In re GENEVIEVE GARCIA REVOCABLE LIVING TRUST.

JAMES M. STEFANEK,

Petitioner-Appellant,

v

ROBERT STEFANEK,

Respondent-Appellee.

UNPUBLISHED
January 7, 2014

Nos. 309170 & 311123
Oakland Circuit Court
LC No. 2007-310798-TV

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

MURPHY, C.J. (*concurring*).

Viewing the issue as limited by the particular arguments posed by petitioner, I agree that the doctrine of election bars petitioner's action. However, because I disagree with some of the majority's analysis and wish to discuss, without invoking, an exception to the doctrine, I write separately to voice my thoughts. I would also resolve the sanction issue solely under MCR 2.114(D) and (E), without any reliance on MCL 600.2591. Accordingly, I respectfully concur.

I disagree with the majority's proposition that the doctrine of election and the doctrine of election of remedies are synonymous. They are, in my view, two distinct doctrines that the majority improperly conflates. The doctrine of election is predicated on the law of equitable estoppel, and it precludes a beneficiary under a trust or will from accepting a distribution or devise made pursuant to the instrument *and* then proceed with litigation in an attempt to invalidate the very instrument under which the distribution or devise was made. *Holzbaugh v Detroit Bank & Trust Co*, 371 Mich 432, 435-437; 124 NW2d 267 (1963); *Aiken v Gonser*, 342 Mich 29, 34-35; 69 NW2d 180 (1955); *In re Beglinger Trust*, 221 Mich App 273, 276-279; 561 NW2d 130 (1997). Quoting favorably the lower court's ruling, the *Holzbaugh* Court stated, "'If one accepts benefits because she was then satisfied with the will or because she has made up her mind to accept its provisions, then she is estopped from contesting the will.'" *Holzbaugh*, 371 Mich at 435. In *Aiken*, 342 Mich at 35, our Supreme Court ruled:

> "A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to

deeds, wills, and all other instruments whatever. . . . This doctrine of election, which prevents the assertion of repugnant rights, is but an extension of the law of equitable estoppel." [Citation omitted.]

This Court noted that "[t]he doctrine of election (also termed estoppel by acceptance) is an extension of the law of equitable estoppel," that a person is not permitted to accept and reject an instrument under the doctrine, and that pursuant to the doctrine, "a party who accepts a benefit under a will adopts the whole and renounces every right inconsistent with it," which principle applies equally to trusts. *Beglinger Trust*, 221 Mich App at 276-277.

On the other hand, the doctrine of election *of remedies* is a doctrine whose purpose "is not to prevent recourse to alternate remedies, but to prevent double redress for a single injury." *Riverview Coop, Inc v The First Nat'l Bank & Trust Co of Mich*, 417 Mich 307, 312; 337 NW2d 225 (1983). The elements of the doctrine, which must all be satisfied to result in preclusion, are: (1) the existence of two or more remedies; (2) an inconsistency between those remedies; and (3) the exercise of a choice of one of the remedies. *Id.* at 312-313. In *Riverview Coop*, the first condition of showing two or more remedies was satisfied, where there was "one remedy against the converters of" certain funds and one remedy "against the bank for wrongful payment of the funds." *Id.* at 313.

The doctrine of election, at issue here, does not concern the existence of two or more remedies; accepting a distribution under a trust does not constitute a "remedy" or the exercise or pursuit of a "remedy." A remedy is "legal or equitable relief" or "'anything a court can do for a litigant who has been wronged or is about to be wronged.'" Black's Law Dictionary (7th ed) (citation omitted). A court was not involved when petitioner accepted and decided to keep his trust distributions. Moreover, the doctrine of election, as opposed to the doctrine of election of remedies, does not regard concerns about double redress for a single injury. Although the aim of the doctrines is somewhat comparable, they are distinct doctrines and should be recognized as such. As aptly noted by respondent on appeal, *Riverview Coop* "is inapposite because the election doctrine being applied in the present case is a form of estoppel by acceptance, not an election between two separate lawsuits for the same recovery." (Emphasis omitted.) Petitioner incorrectly formulates his appellate argument on the basis of the doctrine of election of remedies.

Ultimately, the presence of alleged fraud or deception or petitioner's lack of knowledge of the facts allegedly establishing the invalidity of the trust do not provide a basis for us to avoid imposition of the doctrine of election, considering that, indisputably, petitioner failed to "'pay into court the benefits received.'" *Beglinger Trust*, 221 Mich App at 278 (citation omitted). Resolution of this appeal, aside from the sanction issue, is that simple. That said, I do wish to briefly discuss an exception to the doctrine of election, which has been recognized. "Although it is the general rule that one who accepts and retains benefits under a will is estopped to contest the will's validity, one cannot be estopped by accepting that which he would be legally entitled to receive in any event." 95 CJS, Wills, § 533. This principle was recently discussed by the Florida Court of Appeals in *Fintak v Fintak*, 120 So3d 177 (Fla App, 2013), wherein the court observed:

The trial court's second justification for granting Thomas and John's motion for summary judgment was its finding that Shirley [personal

representative] was estopped from asserting claims for undue influence and lack of testamentary capacity because Edmund received and accepted disbursements from the Trust.

First, we conclude that the concept of estoppel based upon the acceptance and retention of benefits is practically identical to the renunciation rule. And, in fact, the only differentiating feature is the context in which the two doctrines developed. Generally, the doctrine of estoppel holds "that a person should not be permitted to unfairly assert, assume or maintain inconsistent positions." One "form of estoppel occurs where a person attempts to repudiate the obligations and validity of a transaction after accepting the benefits resulting from it." However, . . . *an individual cannot be estopped from challenging an instrument by accepting that which he or she is legally entitled to receive regardless of whether the instrument is sustained or overthrown. . . . Ford v Yost*, 299 Ky 682; 186 SW2d 896 (1944)("As a general rule of the doctrine . . ., one cannot be estopped by reason of accepting that which he is legally entitled to receive in any event."); *In re Will of Smith*, 158 NC App 722; 582 SE2d 356 (2003)(finding that estoppel did not bar a challenge to the validity of a will because the devisee would have been entitled to the property even if the will was declared invalid); *In re Will of Peacock*, 18 NC App 554; 197 SE2d 254 (1973)(concluding that it would not be inequitable to allow a party to challenge the validity of a will even though he already accepted a benefit under the will because the party would be entitled to the benefit even if the will was declared invalid).

[A]s discussed at length above, Edmund would have been legally entitled to the assets of the Trust if the Trust was never created and in the event the Trust is declared invalid. [Citations omitted; emphasis added.]

In *Beglinger Trust*, this Court briefly touched on and acknowledged the exception. In *Beglinger Trust*, 221 Mich App at 274-275, the contestant petitioners demanded, received, and accepted $10,001 due to each one of them under the decedent's will and trust, and they later filed a petition to set aside the trust based on allegations of lack of capacity, undue influence, misrepresentation, and failure to reflect the decedent's intent. In applying the doctrine of election, this Court rejected the contestant petitioners' "claim that they were each entitled to at least $10,000 under any disposition of [the decedent's] estate." *Id.* at 279. But the Court did not reject the argument on substantive grounds; rather, citing *In re Joffe*, 143 Ill App 3d 438, 443; 493 NE2d 70 (1986), it simply ruled that it did "not wish to engage in speculation with respect to what petitioners would have been entitled to had the trust been set aside." *Beglinger Trust*, 221 Mich App at 279.

Here, petitioner has not argued nor made any attempt to invoke the exception, let alone meaningfully explain the consequences of invalidating the trust and its impact on the distribution of Garcia's estate. Although one must assume that petitioner is of the belief that invalidating the

trust will result in a larger personal distribution, and perhaps that is the case, I am not prepared to perform the analysis for his benefit, assuming it can be undertaken absent any speculation.[1]

Finally, with respect to attorney fees and costs, I agree with the majority's analysis under MCR 2.114, but would restrict the analysis to said provision, absent any reliance on MCL 600.2591, which is triggered when a frivolous "civil action" is filed. Once petitioner was made aware that respondent was raising estoppel defenses and the doctrine of election, petitioner's execution of court-filed documents thereafter was unwarranted by law and not made with the benefit of reasonable inquiry, MCR 2.114(D), given the failure to "'pay into court the benefits received.'" *Beglinger Trust*, 221 Mich App at 278 (citation omitted).

I respectfully concur.

/s/ William B. Murphy

[1] I note that a pour-over will executed by Garcia, which would be implicated if the "[t]rust is not in effect," contains the same distributions as those in the trust that are being challenged by petitioner, yet petitioner, on my review of his amended petition, does not challenge the validity of the pour-over will.