



*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.

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**DT:** April 16, 2014

**RE:** In re Estate of Anna Metcalfe  
STATE OF MICHIGAN COURT OF APPEALS

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### **BASEBALL STATS:**

The following is taken from Thomas Wolfe’s “On Time and the River” as found in Nicholas Dawidoff’s *Baseball* a literally anthology.

“The batter stands swinging his bat and grimly waiting at the plate, crouched, tense, the catcher crouched, the umpire bent, hands clasped behind his back, and peering forward. All of them are set now in the cold blue of that slanting shadow except the pitcher who stands out there all alone, calm, desperate, and forsaken in his isolation, with the gold – red swiftly fading light upon him, his figure legible with all the resolution, despair and lonely dignity which that slanting, somehow fade of light can give him. Deep lilac light is eating swiftly in and from every corner of the field

now, and off there is a vision of the misty, golden and October towers of the terrific city. The scene is unforgettable in the beauty, intoxication and heroic feeling of its incredible design, and yet, as overwhelming as the spectacle may be for him who sees it, it is doubtful if the eyewitness has ever felt its mystery, beauty, and strange loveliness as did that unseen and unseen audience in a little town”.

**REVIEW OF CASE:**

Reference Files:       Summary Disposition  
                              Standard on Appeal:  
                                  Factual Findings – Clear Error  
                                  Disposition Rulings – Abuse of Discretion  
                              Discovery

Appellee obtained the admission of a Holographic Will. Appellant did not file objections, but wrote a letter stating objections. She alleged incapacity. The Court of Appeals ruled that the letter did not rise to the level of a pleading. Therefore, there was no “pending action or petition”. Hence, if there was no pending action or petition for commencement discovery could not be taken, MCR 5.101 (B), MCR 2.302 (A) (1) and (B) (1).

Although the Opinion found that the law on summary disposition was not applicable, if it had been applicable the allegation that discovery is necessary to bar a summary disposition, requires that “the party must at least assert that a dispute does, indeed, exist and support that allegation by some independent evidence”. In this unpublished Opinion the Court of Appeals goes on to cite *Davis v City of Detroit*, 269 Mich App 376, 379-380.

AAM:jv:767129  
Attachment

STATE OF MICHIGAN  
COURT OF APPEALS

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In re Estate of ANNA METCALFE.

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ANGELA DESILVA and DEBRA DESILVA,

Appellees,

v

LAURA LYNN EARNSHAW DEBORD,

Appellant.

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UNPUBLISHED

March 27, 2014

No. 312377

Oakland Probate Court

LC No. 2008-320789-DA

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Appellant, niece of the decedent, appeals by right from the probate court order approving the personal representative's final account and the closing of the Estate of Anna Metcalfe. We affirm.

Appellant contends that the probate court erred in issuing an order for complete estate settlement before she had completed her discovery. We disagree. In appeals from a probate court decision, the court's factual findings are reviewed for clear error, but its dispositional rulings are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

In the probate court, a proceeding is commenced by filing an application or a petition with the court. MCR 5.101(B). MCR 2.302(A)(1) and (B)(1) provide that parties may obtain discovery "[a]fter commencement of an action" as long as the discovery is "relevant to the subject matter involved in the pending action[.]" MCL 700.3404 provides that "[a] party to a formal proceeding who opposes the probate of a will for any reason shall state in his or her pleadings the party's objections to probate of the will." MCL 700.3407 provides that "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."

Under the court rule and statutes, it is clear that there must first be a "commencement of an action" and a "pending action" for there to be formal and legal discovery. Personal investigations, absent the commencement of an action, do not constitute "discovery." Appellant

never commenced an action by filing an application or a petition in the probate court. Thus, there never was a "pending action." Her "written objections" letter did not rise to the level of "pleadings" and did not create a pending action. Consequently, appellant did not have a legal or enforceable right to obtain formal discovery. Therefore, her claim that the trial court "erred" in closing the estate before she completed her discovery has no merit.

We further find no merit to appellant's contention that this case "is analogous to civil cases where the general rule is that an order of summary disposition is premature if granted before discovery on a disputed issue is complete." Appellant is correct that summary disposition is generally premature if discovery is incomplete. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, the rules of discovery are not interpreted to permit "fishing expeditions." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Davis v City of Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005). See also MCR 2.116(C)(10) and MCR 2.116(G)(5).

Here, even if we deemed the probate court's order to be analogous to a grant of summary disposition, appellant's request for more time for discovery would clearly have been a fishing expedition. Between the March 11, 2011 order admitting the holographic will to probate and the July 17, 2012 petition for order of complete estate settlement, the personal representative had aided appellant in locating medical documents and other information that she had requested. At the August 29, 2012 hearing on the petition, the court permitted appellant to present her position. However, after 17 months, appellant was not able to support her position that the decedent was not competent when she executed the holographic will, and appellant could not produce any independent evidence that a factual dispute existed. See *Davis*, 269 Mich App at 379-380. The errors that appellant found in the accounting were merely typographical errors that were corrected on the record. Accordingly, the probate court did not abuse its discretion when it issued an order for complete estate settlement in this matter.

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood