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: 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,

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.