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 2007-2014 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*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 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: May 13, 2015

RE: In Re Estate of Hornak
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

WHY I LIKED 1948

The best thing about 1948 was that I got to watch the World Series on our Philco projector TV with my father and my grandfather.

1948 was what I called the year of the whisker. Ted Williams led the American League in RBI's and homeruns, but missed out by a whisker on winning a third Triple Crown as George Kell of the Detroit Tigers nosed him out for the batting championship. Kell won by .0002 of a point, .3429 to .3427.

A similar thing happened in the seniors circuit with Stan Musial winning the batting championship and leading the league in RBI's, but lost the homerun title by a whisker 40 to 39 to big John Mize. He really did hit 40 homeruns himself, but that homerun happened on a rain shortened game. Stan had held out that spring training for a larger salary and finally signed for $31,000. During the 1948 season, he got 5 hits in a game four times.

Satchel Paige made his rookie debut at age 42 for the Tribe.

A couple of interesting things happened with the Detroit Tigers. George Vico was a rookie Tiger first sacker. On the first major league pitch that was served up to him, George homered.

The Tigers had their first night game in 1948.

Finally, we said goodbye to the Bambino, who died on August 16th.

REVIEW OF CASE:

Referenced Files: Clearly Erroneous – Definition
Growing Crops Passing with Real Estate and Exceptions
Due Process

This unpublished case is a continuation of a previous unpublished case decided July 5, 2012. In the previous case, a person was estopped from asserting his own title because he failed to disclose his deed rights in a bankruptcy proceeding.

This Court of Appeals decision - results from Lower Court decision after remand.

Appellee and Appellant entered into a settlement agreement wherein Appellant was supposed to receive 50 acres of a total of 70.58 acres after the land division was approved by the township. Appellant said he would go through with the settlement once he received the monies from the sale of crops on the 50 acres of land.

The Lower Court and the Court of Appeals ruled as follows:

I. Clearly Erroneous. The court recites *In re Bennett Estate*, 255 Mich App 545 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding."

II. Crops. The common law rule is that growing crops pass with land which is conveyed. There are exceptions, which are called reservations, one of which is called severance. There is a severance when there is a sharecropping agreement. The Court treats the growing crops as harvested because the Court says they are personalty and the agreement can be established by parole evidence. Such was the case here and Appellant did not get the proceeds of the harvested crops. The Court iterated another case where access to a crop of Christmas trees to maintain and

harvest them constituted such a severance. A separate provision regarding the crops or the proceeds of crops could have solved Appellant's problem.

III. Due Process. In dealing with the invalidity of notice on an accounting, the Court said that notice was proper and that due process required only "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

Questions. I think there may be a contradiction in the Court of Appeals decision. At page 2, the Court of Appeals says "As of May 21, 2013, all of the decedent's property had been transferred to the LLC with the exception of a 70-acre parcel that had yet to be resolved." I am assuming that the 70-acre parcel mentioned was the same as the 70.58-acre parcel, which is the relevant parcel to this case. If that is so, there appears to be a contradiction because the Court relies on the following in determining that the will doesn't govern, but the LLC does. At page 3, the Court of Appeals says "The court also found that because the property belonged to the LLC and not the estate, the decedent's will did not control that distribution." If I am wrong and that 70-acres was in the LLC, then the conclusion is correct. If I am right and it is the same parcel, if the will contemplated some other distribution with the proceeds of the crops, then the Court of Appeals is in error.

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STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of HORNAK.

JAMES P. BOARDMAN, Personal Representative of the Estate of VIVIAN G. HORNAK, F. RON HORNAK, KIRK AMMAN, Former Personal Representative of the Estate of VIVIAN G. HORNAK, KEITH AMMAN, CRAIG HUFF, AARON TITHOF, BRYAN TITHOF, and AMY WAUBEN,

Appellees,

v

KENNETH J. HORNAK,

Appellant.

UNPUBLISHED
April 23, 2015

No. 319955
Saginaw Probate Court
LC No. 10-125981-DE

Before: OWENS, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Appellant Kenneth Hornak appeals as of right the decision of the probate court that (1) overruled all of appellant Kenneth Hornak's objections to appellee Kirk Amman's and appellee F. Ron Hornak's petitions to allow accounts and payment of attorney fees, and (2) affirmed its prior order allowing those accounts and attorney fees. The court also allowed appellee James Boardman's final account and closed the estate. Appellant and appellee F. Ron Hornak are brothers and the sons of the decedent, Vivian Hornak. We affirm.

I. FACTUAL BACKGROUND

In addition to her sons, appellant and appellee F. Ron Hornak, the decedent was survived by grandchildren from two daughters that predeceased her. One of these grandchildren is appellee Amman. The decedent left a will that was admitted to probate which included a specific devise of an 80-acre parcel of land and accompanying fixtures to appellee Amman. The remainder of her property was to be distributed "one share for each child of mine who survives me and one share for the decedents, per stirpes of each child of mine who fails to survive me." Appellant thereafter produced four unrecorded deeds, two from 2010 that deeded all of the

decedent's property solely to him, and two from 2004 that deeded all of the decedent's property to her and appellant jointly with "right of sole survivorship." Those deeds were eventually set aside by the probate court, which determined that appellant was judicially estopped from asserting their validity because he had failed to disclose the deeds in bankruptcy schedules when he filed for Chapter 13 bankruptcy. We affirmed the probate court's decision to set aside the deeds in *In re Estate of Hornak*, unpublished opinion per curiam of the Court of Appeals, issued July 5, 2012 (Docket No. 301912).

Following this Court's decision, an LLC was formed that was owned by all the heirs accounted for in the decedent's will with the exception of appellant, for the purpose of transferring most of the real property to the LLC. As of May 21, 2013, all of the decedent's property had been transferred to the LLC with the exception of a 70-acre parcel that had yet to be resolved. On September 4, 2013, the probate court entered an order approving a settlement agreement signed by all the heirs to the decedent's will that provided as follows:

> All real estate remaining in the ESTATE OF VIVIAN G. HORNAK, DECEASED, namely a 70.58 acre parcel on Ditch Road, Chesaning, Michigan shall be deeded by the personal representative to HORNAK FARMS, LLC. HORNAK FARMS, LLC shall then deed 50 acres of the parcel as identified by KENNETH HORNAK to him, free of any security interest for attorney fees and expenses, as soon as a land division application has been approved by Chesaning Township.

As further part of the settlement, appellant agreed to waive any and all claims against the estate or remaining heirs, and they agreed to waive any and all claims against him. Appellee Boardman submitted a quitclaim deed, deeding the 70.58 acres to the LLC on October 22, 2013.

Prior to settlement, appellee Amman had filed a petition to allow accounts for the time he had spent as personal representative of the estate. Appellant objected. Appellee F. Ron Hornak then filed a petition to allow payment of his attorney fees. Appellee Boardman filed a response, asking the probate court to take the petition under advisement until all expenses, costs, and fees allowable to be paid by the estate had been determined. Thereafter, appellant submitted a response to appellee F. Ron Hornak's petition, asking that it be denied. A hearing on appellee F. Ron Hornak's petition was held on November 12, 2013. The court decided to take the matter under advisement because appellee Boardman could not be present and because the court wanted more information on the total amount of expenses and claims.

Appellee Boardman filed a petition to allow accounts on December 4, 2013, asking for allowance of his final account, for his attorney and fiduciary fees, and for the estate to be closed. The probate court entered an order on December 9, 2013, allowing the account of appellee Amman and the attorney fees of appellee F. Ron Hornak. Subsequently, appellant filed an objection to appellee Boardman's petition for an accounting and closing of the estate, arguing in part that the estate should not be closed until he received a check for crops that had been harvested on 50 acres of the estate that was to be deeded to him as part of the settlement. Appellant then filed an amendment to his previous objection to the petition of appellee Amman, asking for an evidentiary hearing. At the hearing held on the matter, the probate court reiterated

that it had already held an evidentiary hearing on this matter. The court denied and dismissed appellant's amended objection.

A hearing was thereafter held on appellee Boardman's petition. Appellee Boardman explained that the harvested crops appellant wanted money from were part of a sharecrop agreement with a farmer named Schneider. Appellant neither disputed this at the hearing nor does he dispute it in his briefs filed with this Court in the present appeal. Appellee Boardman stated that all that remains is for the LLC to deed the 50 acres to appellant. Appellee F. Ron Hornak's attorney stated that the LLC was prepared to deed the 50 acres as soon as appellant submitted a division of 50 acres that would be approved by the township. Appellee F. Ron Hornak's attorney stated that the one division appellant had already requested would have left the LLC a landlocked parcel and that the township "basically laughed at it."

The probate court found that the agreement did not have any separate provision regarding the disputed harvested crops. The court also found that because the property belonged to the LLC and not the estate, the decedent's will did not control that distribution. The court found that appellant had agreed as part of the settlement to waive any and all claims against the estate. The court approved the fiduciary and attorney fees and any other distributions set forth in its previous rulings. The probate court also entered an order stating that all of appellant's objections were overruled and allowing the accounts and attorney fees of appellee Amman and appellee F. Ron Hornak. The same day, the court entered an order allowing the personal representative's final account, discharged the personal representative, and closed the estate.

II. STANDARD OF REVIEW

This Court reviews findings of the probate court, when it sits without a jury, to determine whether or not they are clearly erroneous. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.*

III. ANALYSIS

Appellant argues that he is entitled to cash from the grain harvest on part of the 70 acres that was the subject of the settlement agreement. Because the agreement gave him 50 of the 70 acres, he argues, cash from the grain harvested on 50 acres of the land belongs to him. A necessary assumption of this argument is that growing crops are part of the real property that passes with a conveyance of the land. As support for his argument, appellant cites *Blough v Steffens*, 349 Mich 365; 84 NW2d 854 (1957).

In *Blough*, the owner of real property had entered into an agreement with a third party to have the third party cultivate and grow crops on the owner's land, and in exchange the third party would receive 2/3 of the crop and the owner would receive 1/3. *Id.* at 367. Prior to the harvest the owner sold the real property to the defendant, who thereafter refused to allow the third party access to harvest the crop. *Id.* at 367-368. The trial court and the Supreme Court determined that the defendant had express notice that the prior owner and the third party had entered the sharecrop agreement and there was an "oral understanding to reserve the corn crop entered into

prior to the sale of the farm." *Id.* at 369-370. The court cited in support of its decision the following passage from 15 Am Jur, Crops, § 13:

> "The common-law rule that growing crops pass with the title to the land upon a conveyance thereof in fee by one who owns both the crops and the land assumes the absence of a reservation of the crops. The modern authorities hold that an effectual reservation of an annual crop may be made and established by parole without violating the statute of frauds or the parole evidence rule. A reservation of the natural products of the earth, however, must be in writing." [*Id.* at 371.]

Appellant argues that it was both the presence of a sharecrop agreement and an oral notice of that sharecrop agreement in *Blough* that served to sever the crops from the real estate. He argues, accordingly, that in the absence of an oral reservation, growing crops on conveyed property follow the conveyance and that, therefore, he should receive the profit from the harvested crops. Appellant's argument misperceives the facts of *Blough*. The Supreme Court did not find that there was an express oral reservation, merely that the purchaser had knowledge of a sharecrop agreement and that this knowledge created "an oral understanding" that the crops were severed from the realty. *Id.*

This Court has also determined that a "Christmas tree crop was constructively severed from the real estate" by way of an agreement that third parties "had a right of entry to spray, prune, care for, as well as to harvest and remove" the trees. *Groth v Stillson*, 20 Mich App 704, 706-707; 174 NW2d 596 (1969). When the land on which the trees were growing was sold, the trial court found that the purchasers "had notice of the sale of the trees to third parties prior to their deed." *Id.* at 706. Noticeably absent from the facts in *Groth* is a specific reservation of the trees in the deed between the buyer and seller. See *id.* at 705-706. What the *Groth* Court focused on was the fact that the seller and the third parties considered the trees a crop and that the buyers of the real property had notice of the sale of the trees prior to receiving the deed. *Id.* at 706.

Consistent with caselaw, we conclude that the sharecrop agreement with farmer Schneider severed the crops from the realty and required that they be treated as goods or personal property, not as part of the realty. See *Blough*, 349 Mich at 374; *Groth*, 20 Mich App at 706-707. It is not important that the crops were not orally reserved. What is important is that appellant had knowledge of the sharecrop agreement at the time he entered the settlement agreement. See *Blough*, 349 Mich at 369-370, 373-374; *Groth*, 20 Mich App at 706-707.[1]

Appellant also argues that the probate court erred by issuing an order allowing appellee F. Ron Hornak's petition for attorney fees and appellee Amman's petition for personal representative fees before a scheduled hearing on December 17, 2013. He is arguing, essentially,

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[1] Additionally, even if appellant's argument that growing crops pass to the owner of the real estate is accepted, he does not yet own the real estate. While he has an interest in the property by means of the settlement agreement, the current title owner is the LLC.

that his procedural due process rights were violated. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Matthews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965). This requires that parties be given notice and an opportunity to present their objections. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008).

The probate court record shows that appellee Amman submitted his petition to allow accounts on August 7, 2013, and that appellee F. Ron Hornak submitted his petition for attorney fees on October 16, 2013. Appellant was able to file written responses to both petitions prior to the probate court's December 9, 2013 order. While a hearing held on November 12, 2013, primarily concerned appellee F. Ron Hornak's request for attorney fees, the record shows that the Court inquired about the fees of appellee Amman as well. Additionally, when asked to present arguments, appellant's attorney simply referred the probate court to the arguments he presented in his written responses. The probate court took the matter under advisement only because it still needed to hear from appellee Boardman.

Despite the opportunity given at the November 12, 2013 hearing, the probate court listened to the objections of appellee on this issue during the December 17, 2013 hearing. Accordingly, appellant was given "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " His due process rights were not violated.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Christopher M. Murray