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: February 11, 2016

RE: In Re Beverly J. LaForest Living Trust & Beverly J. LaForest Family Trust
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

BASEBALL STATS:

JEWISH SHORTSTOP

Errata!

Earle Endelman correctly pointed out that in 1952 Al Federoff played some games at short. He played 7. Not that Al should make any All-Star team, he only played a total of 76 games. As long

as we are cheating, third sacker and real All-Star Al Rosen played 5 games at short. I decided to explore.

Jesse Baker played 1 game at shortstop for the Senators in 1919. He drove in a run without a hit or a walk – all at short.

Lou Brower played 21 games for the Tigers in 1931. He hit .161 – 20 at short.

Rube Ewing played 3 games for the Cards in 1921 – 1 game at short.

Eddie Feinberg played 16 games for the Phillies in 1938 & 1939 – 5 games at short.

Moe Franklin played 61 games for the Tigers in 1941 & 1942 – 36 games at short.

Jonah Goldman played 148 games for the Indians in the early 1930's – 130 games at short.

Jim Levey got into over 400 games for the Browns – 437 at short.

Al Richter played 4 games for the Red Sox – all at short.

Eddie Zosky played for 4 teams in the 1990's – mostly at short.

REVIEW OF CASE:

Referenced Files: Limitation of Action – Pleading
Reversal of Facts – Credibility
Gift vs. Taking
Self-Dealing

Appellant was the donee of a power of attorney from Beverly. She was also Beverly's trustee. Through self-dealing she took $134,152 in assets. She claimed it was a gift to bring Beverly within Medicaid asset limits. In addition to pleading gift, appellant pleaded limitation of action, one year rule. She attempted to allege a five year statute of limitation of action provision though not in her initial pleading. The Lower Court ruled against appellant on all counts.

The Court of Appeals affirmed and said:

1. "A party must state the affirmative defense (limitation of action) under a separate heading and must include the facts constituting the defense." The Court of Appeals cited *Attorney General v Bulk Petroleum Corp,* 276 Mich App 654. Bob Zawideh, in our offices critiques this holding saying:

a. Citing the general provision of limitation of assets created no conflict between the one year and five year provisions. A general pleading of the statute of limitation should suffice.

b. MCR 2.112(B)(1) requires fraud be pleaded with particularly and since no other rule apples this requirement, the court's requirement is in error.

c. MCR 1.105 requires no "gotcha" litigation.

The practitioner should be aware of the "Bulk Petroleum" case in pleading limitations or action. Also, the Court of Appeals is not saying Bob is wrong as Bob's thoughts may not have been pleaded by appellant. Also, the Court of Appeals only found "the probate court did not abuse its discretion."

The Court of Appeals cited many facts that supported gift in evidence, but found that the Lower Court found appellees witnesses more credible. The Court of Appeals said the Lower Court was in a better position to judge credibility. The Court of Appeals went on to cite EPIC and trust document language which mediate against self-dealing.

What is missing is an analysis of whether the "gifts" were within the five year lookback period which would make them suspect and a discussion of MCL 700.1214. Perhaps the Court of Appeals didn't want to go beyond the record.

AAM:kjd
Attachment
827087

STATE OF MICHIGAN

COURT OF APPEALS

In re BEVERLY J. LAFOREST LIVING TRUST & BEVERLY J. LAFOREST FAMILY TRUST.

JOSEPH LAFOREST and MARK LAFOREST, Co-Trustees for the BEVERLY J. LAFOREST LIVING TRUST and the BEVERLY J. LAFOREST FAMILY TRUST, and MICHAEL LAFOREST, ANDREW LAFOREST, and JAMES LAFOREST,

Petitioners-Appellees,

v

PATRICIA ANN SWISS,

Respondent-Appellant.

UNPUBLISHED
January 5, 2016

No. 323296
Emmet Probate Court
LC No. 13-012905-TV

Before: Saad, P.J., and Stephens and O'Brien, JJ.

PER CURIAM.

The probate court entered a judgment that removed appellant as trustee for the Beverly J. La Forest Living Trust (the Living Trust) and the Beverly J. La Forest Family Trust (the Family Trust). It also awarded appellees $134,152 after determining that appellant engaged in self-dealing and breached her fiduciary duties. Appellant appeals as of right this final order, see MCR 5.801(B)(2)(a). We affirm.

Appellant first argues that the trial court erred in refusing to dismiss the petition against her based on a statute of limitations defense. We disagree.

We review whether an action is barred by an applicable statute of limitations de novo. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). Our review of the probate court "on a written transcript of the record made in the probate court" however, is not de novo. MCL 600.866(1). "The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion." *In re Estate of Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "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." *In re Estate of Bennett*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

The trial court concluded that appellant's failure to raise the five-year statute of limitations in her initial responsive pleading resulted in that affirmative defense being waived. We agree.

The statute of limitations is an affirmative defense that must be affirmatively pleaded or it is waived. *Attorney General v Bulk Petroleum Corp*, 276 Mich App 654, 665; 741 NW2d 857 (2007). A party must state the affirmative defense "under a separate heading and must include the facts constituting such a defense." *Id.* Appellant argues that general citations to MCL 700.7905 were sufficient to put appellees on notice. However, this contention is without merit since both the answer and motion to dismiss explicitly refer to the one-year statute of limitations in MCL 700.7905(1)(a), giving the impression that the general references to MCL 700.7905 also refer to the one-year statute of limitations and not to the five-year limitations period that was never mentioned. The probate court did not abuse its discretion in denying appellant the affirmative defense.

Appellant next argues that the trial court erred in concluding that the assets she transferred to herself were not gifts from Beverly. Again, we disagree. The trial court did not clearly err in its factual determinations that Beverly did not make any outright gift to appellant and that therefore, when appellant transferred assets to herself for her sole benefit she engaged in self-dealing contrary to the wishes of Beverly and violated her fiduciary duties both as trustee and pursuant to the power of attorney. In finding that this conclusion was not clearly erroneous, we acknowledge that certain evidence in the record does support appellant's contentions that such transfers were intended as outright gifts. Appellant, her ex-husband, and, most credibly, attorney Ternes all testified that Beverly intended for appellant to have all of her possessions as part of the Medicaid planning. Letters also revealed that appellees were told about the transfers to appellant, but did not object until after their mother's death. It was also true that of all the siblings appellant was the only one who frequently visited with and cared for their mother. The record shows that many of the appellees did not visit their mother more than once or twice in the eleven years she was at the nursing home, while appellant visited her almost daily. However, we must give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). With this in mind, we cannot conclude that the probate court's factual findings were clearly erroneous. Appellees testified that, despite several transfers being labeled in letters as "gifts" "rent" or "quit-claimed", the transfers to appellant were merely to protect their mother's assets and qualify her for Medicaid, and were not represented as outright gifts to appellant. The probate court found their testimony credible and we defer to the probate court because it was in the position to see and hear the witnesses and to judge their credibility.

We must now examine three individual transfers: the condominium, an annuity, and cash. We begin with the condominium which was the only transfer made from the Living Trust. Beverly initially placed this asset in the Living Trust and then it was transferred out of the Living Trust by appellant to herself and Beverly jointly. On June 4, 2003, appellant, using her power of attorney, executed a quit-claim deed transferring the condominium from herself and Beverly as joint tenants to herself solely. Appellant then sold the condominium for $83,500, receiving

$73,000 after taxes and real estate fees. Appellant used $53,000 to make a down payment on a home for herself and placed the remaining amount in the Family Trust. As a co-trustee, appellant owed the beneficiaries, appellees, a duty of loyalty provided for in MCL 700.7802(1) and (2), which state:

> (1) A trustee shall administer the trust solely in the interests of the trust beneficiaries.
>
> (2) Subject to the rights of a person dealing with or assisting the trustee as provided in section 7912, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a trust beneficiary affected by the transaction unless 1 or more of the following apply:
>
> (a) The transaction was authorized by the terms of the trust.
>
> (b) The transaction was approved by the court after notice to the interested persons.
>
> (c) The trust beneficiary did not commence a judicial proceeding within the time allowed by section 7905.
>
> (d) The trust beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7909.
>
> (e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
>
> (f) The transaction is otherwise permitted by statute.

By using her powers as co-trustee to transfer the condominium out of the trust and to herself and Beverly as joint tenants with rights of survivorship, appellant engaged in a sale of trust property in which she had a personal interest as a recipient. Therefore, the transaction is voidable by the trustees unless one of the enumerated sub-sections applies. While the trust granted appellant the power as trustee to make transfers of trust property, it did not grant her the right to engage in self-dealing. The transaction was not approved by the court. There is no evidence that any of the beneficiaries consented to a transaction that was an outright gift of the condominium and not merely a means to make Beverly eligible for Medicaid. Finally, the transaction was not entered into before appellant became trustee, and it is not otherwise permitted by statute.

The other transfers were done not as trustee but under the power of attorney. The five-year annuity was purchased by appellant, pursuant to the power of attorney. It was purchased to pay Beverly small monthly benefits and then make a large balloon payment at the end of the five years. In the event Beverly died before the balloon payment was made, it was to go to the Family Trust. In 2007, the annuity's balloon payment came due. Appellant purchased a funeral

contract and bought a car jointly with Beverly, a GMC Acadia for $37,152.40. Appellant contributed to the purchase price by trading in her old car, and used the new vehicle to drive her mother to appointments and social events. The vehicle was initially titled in both names, but appellant removed Beverly's name from the title about a year later. The third transfers took place collectively in June and July of 2002 when appellant had two checks written to herself from Beverly's credit union account totaling $13,500; she testified that Beverly gave her this money to enable her to pay rent and maintenance on the condominium.

Since the funds appellant used to purchase the vehicle and the $13,500 in checks that she had written to herself were assets that were never placed into the Living Trust, MCL 700.7802 has no applicability. Appellant transferred the assets to herself by using the power of attorney. Powers of attorney are subject to the laws of agency, including the principle that "a person who undertakes to act as agent for another may not pervert his powers to his own personal ends and purposes without the consent of the principal after a full disclosure of the details of the transaction." *Vander Wall v Midkiff*, 166 Mich App 668, 677-678; 421 NW2d 263 (1988). In *Saari v Susser*, this Court affirmed *Vander Wall*, and went on to state that an agent is to act only for the principal's benefit and has a duty "not to compete with the principal on his own account." 254 Mich App 232, 235; 657 NW2d 147 (2002) quoting Restatement, 2d, § 13, comment a, p. 58. When an attorney-in-fact acts in his or her own interest and not under the direction of the principal, he or she may be liable to the principal's estate for the amounts obtained wrongfully. *Id.* at 234-235.

The dispositive question becomes whether Beverly authorized appellant to make these transfers or whether appellant made them for her own personal benefit without the consent of her mother. We conclude the latter. When appellant removed Beverly's name from the title, she deprived her mother of an asset while increasing her own personal interest in that asset. Absent her mother's consent, which the probate court found did not exist, such a transfer was a violation of appellant's fiduciary duty. Moreover, the $13,500 in checks clearly harmed Beverly's account and benefitted appellant's personal account. Again, the factual findings of the probate court, which we accept, show that no such transfer, to the extent it represented a permanent gift, was authorized by Beverly.

Because we conclude that the probate court's factual findings were not clearly erroneous, we also conclude that the court did not err in finding that appellant held the assets she received from Beverly in a constructive trust for the benefit of all the beneficiaries of Beverly's initial 2001 estate plan. Therefore, it was not an abuse of discretion for the court to enter judgment against appellant for the amount of $134,152.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Colleen A. O'Brien