YOUR LEGAL ADVISORS

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 2007-2016 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*® 2017 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2016 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller."

DT: December 19, 2017

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

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

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BASEBALL

When I last left you, I proposed what some might consider a ridiculous suggestion that the best Minor Leaguer ever should have a place in the Hall of Fame. I suggested Buzz Arlett. For those of you who can't think back a week or two, Buzz spent one year in the Bigs with the Phillies, appeared in 418 games, batted .313, had 18 homers and 72 RBI. In the Minors he posted a .341 over 20 years most of which was in the Pacific Coast League's Oakland Seals. He hit 432 home runs, batted in 1,786, with 598 double baggers. He also pitched and won over 20 games 3 times.

Point – Scott Simkus has a great stat book out called "Outsider Baseball". He analyzes all non-Big Leagues and develops equations to determine comparative values. A great book with a lot of thought, compares the bigs verses the blacks, the minors, the colleges and semi-pro's. He considers the Negro League akin to high Minor League. So if pre-Robinson blacks made it to the dance, why not Arlett. Minor League salaries were commensurate with the Bigs and Buzz was a California boy. No need for him to leave. In fact Simkus said he wanted to stay in California. More on that later.

Counterpoint – Buzz was white, wasn't excluded and didn't make it for more than one year.

Point – Would each black non-pitcher have been able to come into the bigs for 1 year at age 32 and hit like Arlett?

Counterpoint – The 31' Phillies were a 6th place team with one star; Chuck Klein. Arlett was second to Klein in homers and third in RBI's. If he was so good – why not sign him for 32'?

Point – there were no affiliates during Arlette's career. The Phillies sold Arlette to Baltimore of the International League – maybe the Phillies needed money (The O's had two players in 32' named Buzz- Buzz Arlett and Buzz Boyle)..

Counterpoint – He still could have been asked back by one of the Big 16!

Point – It was the Depression. Maybe Baltimore's asking price was too high – He hit 54 dingers in 1932 and batted .331.

Point – Buzz left the Oakland Oaks for the Phillies 31' season after 13 seasons with Oakland. In 1932 Mrs. Arlett sued for divorce claiming desertion. Maybe from 1918 through 1930 Buzz wanted to preserve his marriage.

Intermezzo – Trammel and Morris in the Hall of Fame; Garvey and Mattingly not in? This is crazy. Garvey was a much better player than Alan Trammel. You can't compare Mattingly to Morris. But there were 43 more pitchers who had more wins including Tommy John (34 more) and Jack Morris never had a surgery named after him!

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

In re Estate of Guise

· Interpretation of Will
· Standard of Review
· Standard for Facts to Interpret
· Interpretation Per Se
· Latent and Patent Ambiguities
· General Rules of Construction
· The Right to Identify verses the Right to Distribute

This is a very well-reasoned case involving on analysis of the above headings.

Decedent's Will gave two people the authority to identify personal property to decide who should get what and what should be sold.

The Will went on to say after the words personal property: "and identify those items which will stay within the Guise and Knapp family." Appellee said this phrase modified the prior language and therefore personal property referred to in this section was restricted to heirlooms. I guess the reasoning was that things that should stay within a family are heirlooms. Appellant believed personal property meant just that and even distributed some of it.

The Court made the following determinations:

1) Interpretation by a lower court is judged on Appeal De Novo.

2) Facts found by a lower court to reach an interpretation is reviewed under the Standard of "Clearly Erroneous".

The Court went on to define Clearly Erroneous to mean. "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."

The Court then went on to say that interpreting a statute is similar to interpreting a Will and they say if there is no patent or latent ambiguity the Probate Court must ascertain Testator's intent from the four corners of the Will. The Court later "admitted" that a latent ambiguity can arise even if the document is clear but extrinsic facts create the possibility of more than one meaning.

The Court of Appeals said that no one extrinsic fact need be ascertained. That the Will had a plain meaning and personal property meant personal property. The fact that some personal property would remain within the ownership of the families didn't give rise to an interpretation of heirlooms.

The lower court thus was incorrect in its determination that the reference to family phrase restricted property only to heirlooms. However, just because one had the authority to determine what should go where, there was no authority for those people to distribute. Only the P.R. could distribute and, therefore, that section of a lower court's opinion was sustained and certain property which was distributed by someone other than the P.R. had to be returned.

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF RANDALL W. GUISE.

DAVID PAVKA, Personal Representative of the ESTATE OF RANDALL W. GUISE,

Appellee,

v

SUSAN NULL,

Appellant.

UNPUBLISHED
November 21, 2017

No. 334771
Hillsdale Probate Court
LC No. 15-035435-DE

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Respondent Susan Null appeals by right the probate court's order granting the motion of personal representative David Pavka to return property. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This appeal arises from a probate proceeding following the death of Randall W. Guise on October 28, 2015. At the time of his death, Randall was survived by 12 nieces and nephews. Pavka was appointed personal representative to proceed with the informal probate of the estate in November 2015.

Randall executed his last will and testament on July 21, 2015. The will contains the following provision at issue in this case:

> ARTICLE III
>
> I, Randall W. Guise, upon my death, direct that all of my personal belongings shall be distributed as follows:
>
> Andrew Guise and Susan Null shall sort through all of the household goods, antiques, tools, and all other items of personal property and identify those items which shall stay within the Guise and Knapp family. Those items identified shall be distributed to members of those families, with the exception of Rhonda

Duchette and Bob Guise. Neither of these individuals shall take from my estate and are being purposely omitted.

The remainder of personal property shall be placed for sale at auction and any proceeds therefrom shall be distributed pursuant to Article VII below.

Article VII provides a list of persons and charities to which the proceeds should be given.

In February 2016, Null met with five other nieces and nephews and distributed Randall's personal belongings. Null retained a John Deere tractor for herself and later sold it for $2,000. Pavka subsequently moved the probate court for an order requiring Null to return the $2,000 and any other items removed from Randall's home. According to the motion, Article III only allowed the identification and distribution of heirlooms, not all personal property. Pavka argued that the John Deere tractor and other valuable items were not heirlooms and should not have been distributed to Null. Null responded that Article III mandated the identification and distribution of all of Randall's personal property and that she had not acted beyond the scope of her authority. Later, Thomas Guise—Randall's nephew—objected to the distribution, stating that he had not been informed of the February 2016 meeting and that the distribution was unfair.

The probate court adopted Pavka's interpretation of the will, holding that Article III only provided for the identification and distribution of heirlooms due to Article III's language of "shall stay within . . . the family." The probate court ordered Null to return the $2,000 received from the sale of the tractor. It also ordered that a family-only auction should be held as to certain items—a golf cart, a Ford tractor, and a Great Dane semi-trailer—with the proceeds being distributed under Article VII.

On appeal, Null argues that the probate court erred in its interpretation of Article III as including only heirlooms and not all personal property. We agree.

This Court reviews the probate court's interpretation of the language of a will de novo. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). Any fact-finding by the probate court because of latent ambiguity is reviewed for clear error. *Id.* "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 Bennet Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

The primary goal of will interpretation, similar to statutory construction, is to give effect to the intent of the testator. *Bem Estate*, 247 Mich App at 433-434. Accordingly, the testator's intent at the time of the will's execution should be ascertained from the will itself and carried out as closely as possible. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). Thus, unless a patent or latent ambiguity is present, the probate court must ascertain the testator's intent from the four corners of the will. *Id.*; *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). A patent ambiguity exists where an uncertainty as to meaning arises due to the language used in the document. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). A latent ambiguity exists where, although the language used in the document is clear, extrinsic facts or extraneous evidence creates the possibility of more than one meaning. *Id.*

Pursuant to the plain language contained within Randall's will, we conclude that Article III directed Null and Andrew to identify which of Randall's personal belongings would be distributed to the family members versus which would be sold at auction. Null's and Andrew's authority to identify these items was limited only to personal property. The words "which shall stay within" defines a subset of the personal property of items that were not to be sold at auction by operation of the will based on Null's and Andrew's discretion. The will's language does not expressly limit Null and Andrew to identifying only items that would be considered heirlooms. The probate court even appeared to acknowledge this, stating that "there's *an inference* that [the probate court] read into [Article III] . . . [that] he wanted those [items] to be given to family members for them to retain for their lifetime." As described, the will's plain language does not support such an inference. Contrary to petitioner's argument, the language is unambiguous, and without ambiguity the probate court was not permitted to entertain extrinsic evidence. *McPeak Estate*, 210 Mich App at 412. The mere fact that the parties provided differing interpretations of the text does not mean there is an ambiguity that permits the use of extrinsic evidence in interpretation. See *Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143; 84 NW2d 441 (1957) ("The mere filing of a bill for construction of a will does not thereby make the will or any of its terms ambiguous any more than does the fact that competing litigants differ in their views as to the proper construction of the language or provisions in a will."). Therefore, because there are no ambiguities in the will, the probate court erred to the extent that it considered the statement of petitioner's counsel, who also witnessed the will, as evidence of Randall's intent that only heirlooms be distributed to the family members. *Maloney Trust*, 423 Mich at 639; *McPeak Estate*, 210 Mich App at 412.

The language of will as a whole also gives no support to petitioner's argument that Randall did not want anything other than heirlooms going to the family. The will contains no language supporting such an assumption. To the extent that it undermines this assumption, we note that Randall provided a purchase option for family members as to his Michigan real property in Article IV and devised his personal belongings to family members in Article III. Moreover, although petitioner argues that interpreting Article III as including all personal property rather than only heirlooms means that the family members are entitled to distribution of the entirety of Randall's estate other than real property, Article V expressly devises all retirement and savings accounts for the benefit of the persons and charities identified in Article VII.

The probate court erred in its determination that Article III only allowed for the identification and distribution of heirlooms to Randall's family rather than all personal property. However, although Article III gave Null and Andrew the authority to identify which personal belongings should be distributed to Randall's family and which personal belongings should be auctioned for the benefit of the persons and charities named in Article, VII, Article III did not give Null and Andrew the authority to distribute the personal belongings. Accordingly, Null's distribution of Randall's personal belongings was beyond the scope of her authority. We therefore affirm the probate court's order that Null return to the estate the $2,000 she took from her sale of the John Deere tractor: Null did not have the authority to distribute the tractor to herself and to then subsequently sell it and retain the proceeds. On remand, the personal representative shall exercise his authority to distribute to Randall's nieces and nephews the personal property Null identified.

We reverse the probate court's order requiring the auction of the golf cart, Ford tractor, and Great Dane semi-trailer within the family and mandating that proceeds be distributed according to Article VII, as this personal property is required to be distributed to Randall's nieces and nephews in accordance with Article III. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey