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 2007-2018 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: May 8, 2018

RE: ***In re Rosalie Naomi Kolinski***
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

With Tommy Pham getting accolades as a 29 year old rookie breaking into the Bigs, I thought I would explore other aged rookies.

Pham is worthy of some honor. Although he did get called up for a cup of coffee, 2017 was his first full season. He posted a .306 batting average with 23 dingers.

The first aged rookie that comes to mind is the legendary Satchel Paige. A rookie due to race, he entered the Bigs in 1948 at 42 and went 6 and 1 with the World Series winning Indians. He averaged 5.57 strike outs per nine inning game.

Diomedes Olivo was either 40 or 41 when he signed on with the Pirates.

Chuck Hostetler was 38 when he joined the Tigers (1944 war year). He got a hit in his first game.

Another war time wonder was Joe Berry who pitched for the Philadelphia A's in 1944.

Pat Scantlebury was 38 when he joined the Reds.

Don't forget Dennis Quaid starring in "The Rookie."

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

Issues:

- Will Contest – Coat-tail Objectors.
- Effect of Will Contest Settlement Agreement

An heir-at-law, Thomas, neither Appellant nor Appellee, filed a contest against the admission of decedent's Will. Appellant agreed with Thomas's objections and took no action herself and did not attend a mediation where a settlement was reached with the parties who were at mediation. A Will Contest Settlement Agreement was entered into without reference to

Appellant. At a final settlement hearing, Appellant objected to complete settlement of the estate, as there was nothing there for her. The Emmet County Probate Court entered an Order allowing complete estate settlement. The Court allowed Appellant to file for rehearing and same was denied. The Court of Appeals reversed, vacated the lower Court Orders and allowed Appellant to plead to the cause.

Inter alia the Court of Appeals said:

1. You can call a horse a cow but if you try to milk it, you will get kicked. An agreement to the validity of a Will doesn't bind a non-party- MCL 700.3914.

2. Objections can be entered orally.

3. Failure to attend a mediation doesn't have an effect on a non-appearing party.

4. Its reasonable not to file your own objections when someone else has articulated your objections, but that person must keep you apprised. Filing "the Agreement" is the time when Appellant should have acted and she did.

Lessons for the practitioner.

1. Watch for coat-tailers. If you can't bring them under the tent when you make your agreement, drop your objections and force the coat-tailer to plead to the cause at his or her own expense.

2. Make sure in the Will contest settlement agreement what happens to the "agreeing" parties in the event of a subsequent contest.

3. I'm most interested in a lawyer doing a Will and never meeting the testator. This was not germane to the Appeal, but to me it's akin to giving someone a loaded gun. There is little law on this issue.

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF ROSALIE NAOMI KOLINSKI, decedent.

THERESA L PETERSON, an interested person,

Appellant,

v

MARK KOLINSKE, personal representative of the Estate of ROSALIE NAOMI KOLINSKI, decedent,

Appellee.

UNPUBLISHED
April 17, 2018

No. 338327
Emmet Probate Court
LC No. 15-013106-DE

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Appellant Theresa Peterson (Theresa)[1] appeals by right the January 31, 2017 order of the probate court granting Appellee Mark Kolinske's (Mark) petition for complete settlement of the decedent's estate, and its April 4, 2017 order denying Theresa's objection to the admission of decedent's will and motion for reconsideration.[2] We vacate both orders and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Rosalie Kolinske (decedent) was the mother of both Theresa and Mark, as well as their four other siblings. On December 14, 2014, she was admitted to Northern Michigan Hospital

[1] Because many of the persons involved are siblings and share the same surname, we will sometimes refer to them using first names.

[2] As discussed later in this opinion, and although Theresa also claims an appeal by right from the November 8, 2016 stipulated order approving a settlement after mediation, this Court lacks jurisdiction over that order.

(NMH) after breaking her hip. She was discharged to a rehabilitation facility on December 23, but was readmitted to NMH on December 26 with shortness of breath. She was placed on a ventilator. The parties dispute her mental and physical condition, but agree that she was unable to speak. Decedent was diagnosed with Amytrophic Lateral Sclerosis (ALS) as well as Chronic Obstructive Pulmonary Disease (COPD) and pneumonia. On January 19, 2015, Mark contacted an attorney and requested an "emergency" will for decedent. The attorney drafted a will without meeting or speaking to decedent. The parties dispute whether decedent signed the will or her signature was forged; they also dispute whether the will was properly witnessed. The will made Mark the personal representative of decedent's estate and devised all of the estate's property to him, to be distributed to decedent's six children "according to [decedent's] expressed wishes." Decedent died on January 21, 2015.

On February 24, 2015, Mark applied to the probate court for an informal probate of decedent's estate and sought to admit the will that is the subject of this dispute. On October 1, 2015, Thomas Kolinske (Thomas), another of decedent's children, filed an objection to the will, arguing that decedent did not have the mental capacity or physical ability to sign the will and that the will was a forgery. During the course of the proceedings, the will was forensically examined by two different experts, who reached opposite conclusions concerning its validity.

The probate court's pretrial conference order provided for a mediation deadline of November 1, 2016. A mediation was held on October 26, 2016, and was attended by all of decedent's children except Theresa.[3] The parties who were in attendance at the mediation eventually signed a Settlement Agreement (the Agreement). The Agreement provided in relevant parts that (1) the parties "hereby agree and stipulate that the Rosalie N. Kolinske Last Will and Testament dated January 19, 2015 is valid and admitted to the Emmet County Probate Court," (2) in exchange for Thomas's withdrawal of his objections to the will, decedent's estate would transfer "the River Road property" to Thomas, as well as ownership of any scrap metal and items on the property, and (3) broad release provisions stating that decedent's estate and Mark both individually and in his capacity as personal representative would release Thomas from all claims that could have arisen from any conduct prior to the effective date of the Agreement, and stating that Thomas would release the estate and Mark from the same. The Agreement made no mention of Theresa. The Agreement was signed by all of the parties in attendance as well as attorneys for Mark and Thomas; it was not signed by Theresa or anyone purporting to represent Theresa.

The Agreement was submitted to the probate court along with a proposed stipulated order signed only by Mark's counsel and Thomas's counsel. No objections to the proposed order were

[3] Theresa was not represented by counsel at that time, but subsequently her counsel indicated that Theresa did not attend the mediation because she lived in Florida, could not afford to fly to attend the mediation, and thought that her interests would be represented by Thomas. The record is confusing and inconclusive about whether Theresa was not allowed to participate in the mediation by conference call, and whether she was told that Thomas and his counsel could not represent her there.

filed, and the order incorporating the Agreement was entered on November 8, 2016. The order did not make any findings about the validity of the will, but instead merely recited that "the parties hav[e] agreed to settled [sic] their claims by signing a settlement agreement," and indicated that the Agreement was "incorporated" into the order and "shall be approved by this court."[4] On November 15, 2016, Thomas filed a motion to enforce the Agreement, seeking to expedite the transfer of the River Road property to him; the probate court granted the motion. On November 23, 2016, Mark filed a petition with the probate court for complete estate settlement of a previously-adjudicated estate (the petition). On December 6, 2016, Theresa, acting in propria persona, filed a handwritten document entitled Theresa Peterson's Objections to Petition for Complete Estate Settlement with the probate court. The probate court set a date for a hearing on Theresa's objections to be held on the same day as the hearing on the petition.

On January 31, 2017, the probate court held a hearing on Mark's petition and Theresa's objections. At the hearing, Theresa appeared without legal counsel. Theresa sought initially to raise her concerns about the decedent's competency to communicate her desires and sign the will, stating that a handwriting expert retained by Thomas's attorney "pretty much just said that my mother didn't sign that will" and making reference to her familiarity with ALS and her observations of the decedent's decline in motor skills "to the point where she couldn't point to what she wanted on a big cardboard." The probate court interrupted her to say, "we're not really prepared to go into all of that today."

Dialogue ensued regarding a $2,500 payment to be made to Theresa (from the estate) for decedent's funeral expenses. Theresa agreed that she should be paid the $2,500, and initially agreed that the estate "needs to be settled" and that she was agreeable to settling the estate if she received the $2,500. However, when the court appeared to interpret that as an agreement to the particular estate settlement that Mark had proposed in his petition, she quickly interjected, "Wait a minute. . . . Judge, that's not the only reason I'm here." She then elaborated:

> The significant thing is I've just been brushed aside. Never once has there been a conference call for me to be on decisions. And all the literature I've gotten I was not asked that I should be present. And I don't--I just feel that--as far as my brother's and my one sister I was told [sic] Mr. Ryke here the other day the reason why there's no written documentation that they refused anything from the estate is that when Mark sells the property they will get their money. I was never told that, ever; never in writing, never orally.
>
> I have tried repeatedly to call three telephone numbers at the residence; never answered. I've gone up there in the past and they're walking around and don't want to talk to me; I sat on the porch. But I feel that my voice has not been heard

[4] Because the Agreement merely reflected that the signatories to the Agreement had agreed upon its terms, the order, by its plain language, therefore merely incorporated and approved the fact that those parties had so agreed. It made no findings beyond that.

> what-so-ever. I'm the first person mentioned in the will as a sibling because I am the oldest. I've [sic] never apart[sic] of anything.

The probate court granted Mark's petition for complete estate settlement, and informed Theresa that she had 21 days to file a motion for rehearing or an appeal; the court further advised Theresa to hire an attorney. Although it did not specifically rule on Theresa's objections, the order issued following the hearing stated that decedent had died "with a valid, unrevoked will dated 1/19/2015."

Theresa obtained representation and timely filed a motion for reconsideration, contemporaneously filing a written Objection to Admission of Last Will & Testament of Rosalie N. Kolinske. The probate court held a hearing on Theresa's motion on April 4, 2017. At the hearing, Theresa's counsel argued that because she did not attend the mediation (for the reasons noted) and was not part of the settlement, the settlement's validity was questionable:

> I just want to make sure I've stated something clearly enough about the mediation portion of this, Your Honor. It's my understanding under the 1aw settlement cannot be valid without all of the interested persons signing off. In this particular case, that would mean that Ms. Peterson would have had to have been sanctioned for failing to appear at the mediation in such a fashion that would constitute her waiving her right in that regard.

The probate court found that Theresa had not presented any new arguments concerning the will's validity, stating, "the Court finds that the expert's report that would support the argument that the will was not valid was known to all the parties at the time of any kind of relevant proceeding here." The probate court also found that Theresa had notice of the mediation and stated that she was "responsible to make her own arrangements for her own appearance or somebody to represent her." The probate court therefore denied Theresa's motion for rehearing and her objection to the admission of the will.

This appeal followed.

II. STANDARD OF REVIEW

We review for clear error a probate court's factual findings, and review its dispositional rulings for an abuse of discretion. *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed." *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000) (quotation marks omitted). A probate court abuses its discretion when it choses an outcome outside the range of principled outcomes. See *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

We review a probate court's decision on a motion for reconsideration for an abuse of discretion. See *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). We review questions of contract interpretation, including settlement agreements, de novo as

questions of a law. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

III. ANALYSIS

Although Theresa raises several challenges on appeal, we need not address all of them at length because we agree that the probate court should not have entered an order for complete estate settlement. We do note that the parties dispute whether Theresa's challenges to the Agreement and the stipulated order reflecting that Agreement are properly before this Court. We conclude that they are not. The November 8, 2016 order was a "final order [of the probate court] affecting the rights or interests of an interested person in a proceeding involving a decedent estate," inasmuch as it "approv[ed] . . . a settlement relating to a governing instrument as defined in MCL 700.1104(m). MCR 5.801(A)(2)(e), It therefore was subject to an appeal by right from "a party or an interested person aggrieved by" the November 8, 2016 order. MCR 5.801(A). Theresa, although not a party[5] to the proceeding, was an interested person, yet she did not take an appeal by right from that order. See MCR 5.125(C); nor did Theresa seek leave to appeal that order. MCR 5.801(B). Nor did any other party or interested person appeal or seek to appeal the November 8, 2016 order. This Court therefore lacks jurisdiction to affirm, vacate, or modify that particular order. MCR 7.203(A). Nonetheless, that lack of jurisdiction is not fatal to Theresa's claims overall, because we conclude, notwithstanding the probate court's and Mark's belief to the contrary, that the November 8, 2016 order did not function as an order establishing the will's validity or effecting the release of Theresa's right to object to the petition for complete estate settlement.

By its plain language, the Agreement indicates only that the persons who signed it had agreed to its terms. It does not indicate that Theresa agreed to its terms, agreed that the will was valid, or otherwise agreed to release claims against the estate or its personal representative. If a contract's language is clear and unambiguous, we must construe it according to its plain sense and meaning, without reference to extrinsic evidence. See *City of Grosse Point v Mich Municipal Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005), citing *New Amsterdam Cas Co v Solokowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). The Agreement does not, by its language, reflect any agreement between Theresa and the estate (or its other heirs) about the validity of the decedent's will or the disposition of the estate, nor, again, does it release the estate from claims by Theresa. Further, although the probate court found it important that Theresa had been given notice of the mediation, stating that it was her "responsibility" to attend or have someone represent her, we note that, although she was an interested person and was therefore required to receive notice of developments in the proceedings, see MCR 5.125(C), she was not a party to the proceedings. Moreover, even if Theresa were subject to the scheduling order and the probate court were authorized to compel her attendance (or that of her

[5] A party is "one by or against whom a lawsuit is brought. For the purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit . . . ." Black's Law Dictionary (10th ed).

representative) at the mediation, the scheduling order does not purport to order any parties to attend mediation, it merely gives a mediation deadline.

Additionally, MCL 700.3914 governs agreements among successors[6] to alter their entitlement to the assets of an estate, and provides that

> Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in *a written agreement executed by all who are affected by its provisions*. [Emphasis added.]

Therefore, to the extent that the probate court believed, regardless of any issues with the will, that the Agreement itself represented a basis for distributing the assets of the estate, it was mistaken. The record suggests that the probate court may have believed that the Agreement was dispositive of the issue inasmuch as it told Theresa, "we're not really prepared to go into all of that today" and, during the reconsideration hearing, referred to Theresa's obligation to attend the mediation or have her interests represented. The simple fact is that the Agreement (and the order approving it) do not function to foreclose Theresa's right to object to a complete settlement of decedent's estate, either to the extent that it determines the validity of the will or to the extent it determines what each successor is entitled to receive from decedent's estate; nor do they release the estate from claims by Theresa.

We also conclude that Theresa did not act with undue delay to protect her rights in this matter. It appears from her statements at the January 31, 2017 hearing, and those of her counsel at the April 4, 2017 hearing, that until the order approving the Agreement was entered on November 8, Theresa believed that her interests were represented by Thomas's actions in contesting the validity of decedent's will. Once the order was entered, Theresa objected less than a month later, and nearly immediately after Mark filed his petition for complete estate settlement. Although Mark attempts (as he did in the probate court) to paint Theresa's claims as untimely and suggests that she waived or forfeited her rights by inaction, we find no support for that characterization in the record. Until the Agreement was filed, it was reasonable for Theresa not to file her own petition or objection raising identical claims to Thomas's. And although she could have joined in Thomas's objection, the fact that she did not do so does not support a conclusion that she either forfeited or waived her rights. Rather, shortly after Theresa realized that Thomas's objection had been resolved (by Thomas receiving the River Road property in return for withdrawing his objection), she acted to make her own challenge to the will's validity by responding to Mark's petition.

We note that the probate court, despite telling Theresa that it was "not prepared to get into [her objections to the petition and validity of the will] possessed the power to inquire into

[6] " 'Successor' means a person, other than a creditor, who is entitled to property of a decedent under the decedent's will or this act." MCL 700.1107((g).

whether Theresa had been omitted from the prior testacy proceeding,[7] and, if so, to take various actions, including hearing objections to the validity of the decedent's will. MCL 700.3952 governs petitions for an order of complete estate settlement. MCL 700.3952(3) provides:

> If 1 or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, on proper petition for an order of complete estate settlement under this section and after notice to the omitted or unnotified persons and other interested persons determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, the court may determine testacy as it affects the omitted persons, and confirm or alter the previous testacy order as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding constitutes prima facie proof of due execution of a will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceeding determined this fact.

Although the probate court and Mark focused on the fact that Theresa had notice of the prior testacy proceeding, Theresa argues that she was an interested person who was omitted as a party from the previous formal testacy proceeding; although she was not represented by counsel at the hearing on the petition for complete estate settlement and did not cite MCL 700.3952(3), she did state her belief that she had been omitted from the prior proceedings. And despite Theresa's apparent belief that Thomas was to represent her interests at the mediation, it appears that Thomas did not do so. He did not, for example, endorse the Agreement as her agent or representative, or apparently take any steps to ensure that the Agreement even purported to express an agreement by Theresa regarding the validity of the will or a release of her claims against the estate. Yet he withdrew his objection (knowing that Theresa agreed with it and was relying on him to assert it) in return for his receipt of the River Road property. We conclude that there was at least a legitimate question regarding whether Theresa had been "omitted" from the mediation proceedings under MCL 700.3952(3), such that the probate court should have explored the issue and taken further action if appropriate.

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[7] Although Mark originally petitioned the probate court for an informal probate of decedent's will, Thomas's objection to the will requested that the probate court find decedent's will invalid, remove Mark as a personal representative, appoint a neutral representative, and begin supervised proceedings, including a hearing before the probate court if necessary. "A formal testacy proceeding is litigation to determine whether a decedent left a valid will" and may be commenced by petitioning the probate court for an order determining the validity of the will after notice and hearing; or by petitioning the court for a judicial finding that the decedent left no will and stating whether supervised administration is sought. MCL 700.3401; MCL 700.3402. Therefore, when Thomas objected to the will, a formal testacy proceeding commenced, ultimately resulting in the settlement of Thomas's objection and the entry of the order approving the Agreement.

Regardless, however, of whether Theresa was omitted as a party from the prior testacy proceeding, the fact remains, as previously noted, that the prior testacy proceeding concluded with the entry of an order that, by its plain language, merely incorporated and approved the Agreement, which by its own plain language, merely reflected that certain parties and interested persons (notably not including Theresa) had agreed to certain terms. The order did not purport to make any determinations beyond that, and it consequently did not serve as a judicial determination of the validity of the will.

Moreover, Theresa raised timely objections to the petition for an order of complete estate settlement. At the hearing on that petition, she attempted to raise her objections to the will's validity. MCR 5.119(B) permits an interested person to object to a pending petition orally at the hearing on that petition. Nonetheless, the probate court would not entertain her objections to the order at that time, nor, as permitted by the court rules, did it adjourn the hearing to require written objections or briefing. See MCR 5.119(B), (D). And further, when Theresa moved for rehearing, the probate court faulted Theresa for presenting arguments that could have been presented earlier, despite the fact that at the hearing on her objections, the court had declined to hear those arguments.

In sum, we hold that the probate court abused its discretion by granting Mark's petition for complete estate settlement without considering Theresa's objections, either during the hearing or by adjourning the hearing and requiring further filings. *In re Lundy Estate*, 291 Mich App at 352. The Agreement (and the order approving it) did not preclude Theresa's objections to the petition, nor did the fact that she did not attend the mediation bar those objections. The probate court therefore also abused its discretion, in denying Theresa's motion for reconsideration, by declining to consider her objections on the ground that they could have been raised earlier, when it fact it had foreclosed her objections at the earlier proceeding. *Churchman*, 240 Mich App at 233. We therefore vacate the probate court's orders granting Mark's petition for an order of complete estate settlement and denying Theresa's motion for reconsideration and objections to the will. Because the probate court never ruled on the merits of Theresa's objections, we decline to review them in the first instance. On remand, the probate court should consider Theresa's objections to the validity of decedent's will, and should conduct such further proceedings as are appropriate and necessary for the probate court to make a judicial determination of the validity of the will.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause