



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 2007-2017 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*® 2019 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine’s list of 2017 Top Lawyers in the practice area of Trusts and Estates. 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” and “Sons of Adam,” an International Terror Mystery.

DT: January 9, 2019

RE: *In re Kapp Estate*

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

This past Thanksgiving, I pulled out my father's scrap book to show to my children and grandchildren. My father was a titan of the community. Special Agent in charge of the Detroit Office of the FBI, Practicing lawyer defending infamous criminals, counsel for Ford Motor, Army Airforce Intelligence WWII, head of Detroit Loyalty Board, Wayne County Commissioners, President of the Detroit Round Table, National Conference of Chambers and Jews and many other great things. He was also a great baseball fan. He had the best of the Washington Senators in the 20's and the Tigers in the 30's and 40's when he relocated with the Bureau in Detroit. Ball games started at 3:00 p.m. My father and his partner Joe Burton used to close the doors at 2:00 o'clock, grab a quick bite and head to Navin Field next called Briggs Stadium.

Among the miscellaneous items, I came across was an article about the death of the locally famous gent; Patsy O'Toole. I have attached the article, as it speaks for itself.

I do want to mention the things not in the article. After Frank Murphy was Governor of Michigan, he was appointed by President Franklin D. Roosevelt to the United State Supreme Court. When Patsy contracted throat cancer, Murphy paid for the operation.

Next Patsy was a prize fighter. He fought as a featherweight, 10 times had 2 wins, 4 losses and 3 draws. He was the guy they promised as the first fighter to fight an up and comer in his debut. He did that 3 times; won 2 – lost 1.

Me and Patsy. My dad knew Patsy because my dad was part of the Detroit political scene. My father told me that Patsy would stand in front of Briggs Stadium and mooch enough so he could get into the game and have a few dogs. If you didn't pay him, he'd holler through the game "That Jones is a bum - don't go to him as a lawyer."

I would go to games by myself and try to sit near Patsy because he knew his stuff. Once I gave him a buck and told him "Next time you see my dad at the game holler 'Al May's a great attorney – remember the name.'" Well he did and Patsy told him why. My old man always laughed at that.

also offer in-

...rical system. Long life bulbs in tail, turn, marker and identification lamps.

Super Tiger Rooter O'Toole Silenced by Death at 63

Patsy O'Toole, once the Tigers' most strident rooter, and Detroit's most legendary moocher, died Sunday in Wayne County General Hospital.

O'Toole, 63, who had been hospitalized, since January, had been fading from the Detroit scene for more than a decade. But he sat astride a pinnacle of prominence during the baseball wars of the 1930s when the Tigers captured two pennants and a world championship.

HIS BLASTING roars of "Ohboyohboyohboyohboy," at critical moments at old Navin Field (Tiger Stadium), provided at once the greatest nuisance baseball fans had to put up with, and the most furiously loyal rooting the baseballers had, or have, ever known.

O'Toole, born Samuel Ozadowsky, in Kiev, Russia, is credited with once causing President Herbert Hoover to leave



Patsy O'Toole

the game when the Tigers played in Washington during the Hoover Administration.

Conversely, President Franklin D. Roosevelt caused

Dems Bring Freeman to Woo Voters

Agriculture Secretary Orville Freeman arrives in Michigan Monday, the third cabinet member to visit the state this month in an effort to boost Democratic chances in the November election.

Postmaster General J. Forward Day appeared Sunday in Detroit at a benefit sponsored by the...

O'Toole to be removed from a game when the O'Toole bellowing became more irksome than funny.

O'Toole, a gate-crasher extraordinary, forced his own adoption by the Tigers as a sort of pet and lived and dressed well on the largesse of the players.

He once was a self-proclaimed night mayor of Detroit and a hanger-on at old City Hall where he stuck so close to the late Mayor Frank Murphy he was laughingly referred to as his unofficial "bodyguard."

O'TOOLE BEGAN to fade when his lungs and voice gave out and his roars were reduced to whispers. He still "played" the loop area downtown, picking up free beer on his old reputation and picking up a few dollars from friends or brand-new acquaintances.

Funeral services will be at 10:30 a.m. Tuesday at Hebrew Memorial Chapel, 2995 Joy. Burial will be in Hebrew Memorial Park.

Did Central Army Down Plane?

STOCKHOLM, Sweden—(AP)—Defense staff said... Swedish... plane...

CALL LA 6-3770

Open Daily 9 to 2

to t... pick for S "a sides

Hi Vi Ho

LEA Fireme smoula mobile in this day, to of a fir taken t estimat One r tentativ Ciancio victim s tified.

Two in the were not pital in

Two counted said it perished

The with the ager T M

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

REVIEW OF CASE:

RE: In re Kapp Estate

- Appointment of Personal Representative Named in a Will – No Asset Case

Appellee wanted the Conservator to be Personal Representative. Appellant produced a Will in which she was named P.R. The Probate Court denied the Petition for the person nominated in the Will on the basis that there were no assets in the estate. Appellant further believed that actions taken by the Court in the 21 days following the entry of the Order of Denial were done without jurisdiction.

The Court of Appeals reversed in part. The Court of Appeals stated there was no statutory authority to deny the Petition to Appoint a Nominated Personal Representative whose nomination was in a Will because there were no assets in the estate. The Court of Appeals even cited a provision of EPIC that because a P.R. needn't give creditors notice if there were no assets that by inference the legislature presumed that such an appointment could be made.

The Court of Appeals found that the lower court abused its discretion by making an error of law and said that the only grounds that they could deny the Appellant's appointment was unsuitability.

The Court of Appeals, however, did not undo Orders entered during the 21 day period following the denial of appointment of Appellant because it believed the Orders entered were not in furtherance of the decision under Appeal. As such, the lower court had jurisdiction for what it Ordered.

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF JANET KAPP.

MILA KAPUSTA and BONNIE PENTA,

Appellants,

v

JANET LORRAINE KAPP and SANDRA KAPP,

Appellees,

and

MILAN KAPP and THOMAS BRENNAN
FRASER,

Other parties.

UNPUBLISHED

October 18, 2018

No. 341871

Oakland Probate Court

LC No. 2017-380134-DA

Before: SHAPIRO, P.J., and SERVITTO and GADOLA, JJ.

PER CURIAM.

Appellant Mila Kapusta (Mila) was the decedent's nominated personal representative under the terms of her will. The probate court declined to appoint Mila as the personal representative because it believed that there were no assets in the decedent's estate. Mila and her sister Bonnie Penta (appellants) appeal that decision. We reverse and remand.

I. BACKGROUND

Janet Lorraine Kapp (Lorrie) and Mila are both daughters of the decedent. After their mother's death, Lorrie filed a petition asking the probate court to appoint Thomas Fraser as personal representative of the decedent's estate and to appoint a special personal representative pending the appointment of a personal representative. Fraser was the decedent's guardian and conservator and was also serving in that capacity for the decedent's surviving spouse. At the

hearing to address the appointment of a special personal representative,¹ it was established that the decedent's will nominated Mila to serve as personal representative. The probate court denied the request for the appointment of a special personal representative.

Mila then filed a petition to be appointed as the personal representative. At the hearing scheduled to address the competing petitions, Lorrie and the decedent's spouse raised concerns regarding Mila's suitability. Conservator Fraser argued that there was no purpose in appointing a personal representative because there was not "anything left" in the estate. Alternatively, Fraser believed that, at the very least, the probate court should wait to determine whether a personal representative was necessary until after he filed his final accounting as the decedent's conservator. Mila's counsel disputed that the estate contained no assets and advised the court that there were possible causes of action to be brought on the decedent's behalf. Ultimately, after back and forth discussions regarding the existence of estate assets, the probate court concluded: "Okay. I'm just going to make my decision. I'm tired of going around in circles with you. I'm denying the petition to appoint a personal representative. There are no—there are currently no assets to be distributed. That's my decision." The probate court then entered an order denying all pending petitions for the appointment of a personal representative.

Appellants then filed a claim of appeal. The probate court continued to hold proceedings and enter orders in the probate file, which appellants objected to on the basis that the court lacked jurisdiction to take such actions after the filing of the appeal. We granted appellants' motion for an expedited appeal.²

II. ANALYSIS

Appellants first contend that the probate court erred in declining to appoint a personal representative based upon its belief that there were no assets in the estate to probate. We agree.

"We review a probate court's appointment or removal of a fiduciary for an abuse of discretion." *In re Conservatorship of Shirley Bittner*, 312 Mich App 227, 235; 879 NW2d 269 (2015). "A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *In re Redd Guardianship*, 321 Mich App 398, 403; 909 NW2d 289 (2017) (quotation marks and citation omitted). We review a probate court's factual findings for clear error. *Id.* We review de novo issues of statutory interpretation. *In re Estate of Attia*, 317 Mich App 705, 709; 895 NW2d 564 (2016).

A. APPOINTMENT OF PERSONAL REPRESENTATIVE

¹ The hearing also concerned the parties' dispute over the decedent's autopsy. We note that the probate court entered numerous orders pertaining to the decedent's autopsy and funeral arrangements. Because appellants are not appealing any of those orders, we will generally avoid discussion of those matters except when relevant to appellants' arguments on appeal.

² *In re Kapp Estate*, unpublished order of the Court of Appeals, entered August 22, 2018 (Docket No. 341871).

Article III of the Estates and Protected Individuals Code, MCL 700.3101 *et seq.*, governs the probate and administration of wills. MCL 700.3414 governs formal proceedings concerning the appointment of personal representatives and provides that after notice to all interested persons, “the court shall determine who is entitled to appointment under section 3203.” MCL 700.3414(4). MCL 700.3203 provides for the priority of persons seeking appointment as the decedent’s personal representative. The statute provides that a person nominated to act as the personal representative in the will, unless disqualified, is first in priority:

(1) For either formal or informal proceedings, subject to subsection (2), persons who are not disqualified have priority for appointment as personal representative in the following order:

(a) The person with priority as determined by a probated will including a person nominated by a power conferred in a will. [MCL 700.3203(1)(a).]

Thus, the person nominated in the decedent’s will always has priority unless he or she is shown to be “disqualified” or a specified exception applies.³

MCL 700.3203(2) sets forth the two exceptions under which a decedent’s nominee, though qualified, may not be appointed:

(2) An objection to the appointment of a personal representative may be made only in a formal proceeding. If an objection is made, the priorities prescribed by subsection (1) apply except in either of the following circumstances:

(a) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, on petition of creditors, the court may appoint any qualified person.

(b) If a devisee or heir who appears to have a substantial interest in the estate objects to the appointment of a person whose priority is not determined by will, the court may appoint a person who is acceptable to the devisees and heirs whose interests in the estate appear to be worth in total more than 1/2 of the

³ It is clear that in adopting MCL 700.3203, the Legislature chose to respect a decedent’s decision regarding the administrator of his or her estate except in specified circumstances. Indeed, EPIC “shall be liberally construed and applied to promote its underlying purposes and policies,” which includes discovering and effectuating the decedent’s intent. MCL 700.1201(b). This is consistent with the well-established rule that courts should effectuate the testator’s intent. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983) (“A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible.”); *In re Butterfield’s Estate*, 405 Mich 702, 711; 275 NW2d 262 (1979) (“The primary duty of any court faced with the task of resolving a disputed testamentary disposition is to effectuate as nearly as possible the intention of the testator.”).

probable distributable value or, if no person is acceptable to these devisees and heirs, any suitable person. [MCL 700.3203(2)(a)-(b).]

The exception in subsection (a) is not at issue here. And the exception in subsection (b) does not apply because decedent's will nominated a personal representative and the exception is applicable only when a devisee or heir objects "to the appointment of a person whose priority is *not* determined by will" MCL 700.3203(2)(b) (emphasis added). Since neither of these exceptions applies, Mila had priority for appointment so long as she was not "disqualified." MCL 700.3203(1). Disqualification is governed by MCL 700.3204, which provides that "[a] person is not qualified to serve as a personal representative if the person is either under the age of 18 *or is a person whom the court finds unsuitable in formal proceedings.*" MCL 700.3204(3) (emphasis added).

In this case, although Lorrie and the surviving spouse raised concerns regarding Mila's suitability, the probate court did not find her unsuitable and did not disqualify her from serving as the personal representative. Instead, the court concluded that the appointment of a personal representative was unnecessary because there were no assets in the estate to probate. In doing so, however, the probate court did not cite statutory authority that allows a court to deny the appointment of a nominated personal representative on those grounds. To the contrary, a court rule provides that personal representatives do not need to provide notice to creditors when "[t]he estate has no assets[.]" MCR 5.208(D)(3)(a). It follows that personal representatives can be appointed even when the estate has no assets.⁴

The probate court appears to have concluded that it could make the necessary rulings concerning estate matters without the appointment of a personal representative. However, a court's subjective view that it can address estate issues without the appointment of a personal representative is not relevant and is not provided for by EPIC. When the appointment of a personal representative is sought and contested, the court is required to determine the priority and qualification of a nominated personal representative and make an appointment. Thus, in the absence of finding Mila unsuitable to serve as a personal representative, the probate court abused its discretion in not appointing her to that position. See *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012) ("A court by definition abuses its discretion when it makes an error of law.").

⁴ Further, the probate court's finding that there were no assets in the estate was clearly erroneous. It was undisputed that jewelry and funds existed that properly belonged to the estate. The record indicates that the issue was not so much that there were no assets, but that the will expressly provided for the distribution of all existing assets, with the implication being that there was no need for a personal representative. However, the distribution of decedent's estate in accordance with a probated will is one of a personal representative's express duties. MCL 700.3703(1). Therefore, to the extent that the probate court denied the appointment because the will provided for the distribution of all the estate's assets, this was not a reasonable outcome.

B. JURISDICTION

Appellants also argue that the probate court was deprived of jurisdiction to resolve estate matters following the filing of her claim of appeal. MCL 600.867(1) provides:

(1) After an appeal of right from a judgment or order of the probate court is filed with the court of appeals and notice of the appeal is filed with the probate court, all further proceedings in pursuance of the judgment, order, or sentence, appealed from are stayed for a period of 21 days or, if a motion for stay pending appeal is granted, until the appeal is determined, except as provided in subsection (2), section 65(2) of chapter X of the probate code of 1939, 1939 PA 288, MCL 710.65, or supreme court rule.

Appellants appealed from the order denying Mila's petition to be appointed personal representative.⁵ In the following 21 days, the probate court held a hearing to address an emergency motion filed by Fraser, the decedent's conservator and guardian. The probate court then, on its own motion, entered an order appointing Fraser as a special personal representative for the limited purpose of assisting the West Bloomfield Police Department in any investigation relating to the decedent's death. The court also entered an order relating to the decedent's funeral expenses.

With that in mind, we conclude that in the 21 days following appellants' claim of appeal the probate court did not conduct proceedings that were in *furtherance* of its decision to deny an appointment of a personal representative. Specifically, while the manner in which the court ruled on the seemingly constant disputes over the decedent's funeral arrangements is questionable,⁶ we do not see how the court was divested of jurisdiction over those matters by the filing of the appeal. Further, we note that a probate court may appoint a special personal representative on its own motion, MCL 700.3614(b), and that the court appointed Fraser as a special personal representative for a limited purpose, not as a general personal representative. These actions were not barred by MCL 600.867(1).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Michael F. Gadola

⁵ While the order appealed from resolved other matters than the appointment of a personal representative, MCL 600.867's stay applies only to the specific order appellants are contesting. *Comerica Bank v City of Adrian*, 179 Mich App 712, 727; 446 NW2d 553 (1989).

⁶ See MCL 700.3206, MCL 700.3206a, MCL 700.3206b, and MCL 700.3207 (governing matters concerning funeral arrangements).