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 2007-2017 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: February 21, 2019
RE: ***In re Rokosky 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 STATS

I believe I know baseball. Being a long-time member of SABR, I believe I know statistics and their impact on the game. After reading Tom Verduccis's article "Baseball Economy" in the February 11, 2019 issue of *Sports Illustrated*, I will rank myself at best a 2 out of 10.

Verducci sets the tenor of his article in a one sentence paragraph, "A gig economy upends the traditional labor paradigm in favor of short-term work and independent contractors."

Verducci opines that the better teams are winning more by using more players but in fewer games. This not only produces more wins, but pays middle range players more money and stars less. If true, this busts the "collusion theory" as to why expensive free agents aren't signed. It's the money. Younger players are paid less. Their number is up. Older players are paid more but the number of older players has decreased while the younger player numbers increase.

Emma Baccellieri continues the analysis in the same issue and delineates five reasons for the phenomenon.

1. Increased supply.
2. Advanced analytics.
3. Specialized pitching.
4. Bias against older players.
5. Group think.

Kyler Murray has his choice of baseball on football. If he considered himself a homerun hitter who would be measured by the above, would he play baseball knowing he would play less games as he aged and way down on the all-time home run list? No Hall of Fame for you or your ilk.

Me, I want to see Cy Young pitchers and batters who whack the ball, I don't want to see a bunch of cheapies battle each other.

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 Rokosky Estate*

- Genuine Issue of Material Fact
- Competency Before, During and After the Event

This well-reasoned Opinion is one in which the beneficiary of a subsequent Will was able to prevail over a prior Will in the Probate Court when her Motion for Summary Disposition was granted. The lower Court discounted testimony and evidence of what occurred before and after the event and looked specifically at what happened during the event. The lower Court ruled that the subsequent Will should be admitted by way of Summary Disposition, as there was, in its opinion, no genuine issue of material fact as to its propriety of the subsequent document. As a concomitant part of this case, the lower Court ruled that a subsequent deed by the decedent was invalid because of lack of capacity and Summary Disposition was granted in favor of the Appellant on that issue.

The Court of Appeals reversed the finding by the lower Court that the subsequent Will should be admitted by way of Summary Disposition because it found, de novo, a genuine issue of material fact. The Court of Appeals did a good job of weighing testimony both pro and con and its opinion believed that the lower Court should have considered substantial evidence of what occurred, both "before" and "after" the event in question. In doing so, they created a standard of when, before and after testimony could be admitted in evaluating the issue of incapacity at the time of the event in question. At page 6 of the Opinion, the Court of Appeals says:

> "Initially, we note that, although the decedent's medical records were created, and Dr. Dines' opinion was rendered, after execution of the 2011 Will, they are nevertheless 'competently related to the time of execution' and therefore are relevant to decedent's testamentary capacity." The Court of Appeals cites the recent case of *In re Mardigian Estate*, 312 Mich App at 565.

Thus, evidence before and after can determine what the mental status of testator was at the time of execution.

Its worthy to note that the lower Court didn't do the Appellant any favors by ruling in her favor on the issue of deed. All that did was place the deed back into the name of decedent and the "winner" would have lost that property because it would have passed under the Will which favored the Appellee.

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF AURELIA M. ROKOSKY.

KELLY DAILY, Personal Representative of the ESTATE OF AURELIA M. ROKOSKY,

Petitioner-Appellee,

v

JOYCE M. THIEMAN,

Respondent-Appellant.

UNPUBLISHED
February 12, 2019

No. 341693
Wayne Probate Court
LC No. 15-809781-DE

Before: K. F. KELLY, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Respondent appeals as of right the probate court's opinion granting in part summary disposition in favor of petitioner under MCR 2.116(I)(2), arguing that a question of fact exists with respect to decedent Aurelia M. Rokosky's testamentary capacity. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS

On April 16, 1976, decedent executed a will (the "1976 will") naming respondent, her only child, as personal representative and the sole beneficiary of her entire estate. Decedent resided in her home in Grosse Ile, Michigan, while respondent lived in Portland, Oregon. Petitioner and her family lived next door to decedent until they sold their house in 1994. For many years when petitioner was growing up, decedent was her caregiver. In 2008, when decedent was approximately 86 years old, petitioner began assisting decedent with tasks such as grocery shopping, housework, and personal hygiene. Petitioner visited decedent nearly every day, and, at most, three days would pass between petitioner's visits. In 2010, petitioner became concerned because decedent was forgetting to do things such as turn off the oven, stove, and water faucets. Because of decedent's forgetfulness, petitioner also began assisting with her banking to ensure that decedent's bills were paid on time.

Decedent's next-door neighbor, William Schear, became friends with her over the years and would sometimes assist her by cutting her grass and performing minor maintenance around her house. Beginning in early 2010, Schear observed that decedent was becoming more forgetful. For example, decedent called Schear almost every evening for help with using her television, became confused when scheduling appointments, and frequently repeated herself in conversation. Because decedent also stopped driving around this time, Schear began to drive her to the bank, grocery store, and pharmacy once a week. In mid-2010, Schear's relationship with decedent deteriorated, and Schear believed that she had become paranoid and fearful of him. However, on one occasion, decedent asked that Schear take her to a fast-food restaurant, where she ordered six or seven hamburgers because, she explained, she was "starving." On another occasion, Schear became aware that respondent sent a friend with whom decedent was familiar to the house to check on decedent. Decedent refused to answer the door and denied knowing the friend. Concerned that decedent was "having trouble mentally" and was no longer capable of living by herself, Schear contacted the police department on June 12, 2010, to perform a welfare check. The responding officers noted in the report that decedent was mobile and alert, had food in the house, and that the condition of the house was "not that bad."

On January 24, 2011, decedent executed a new will (the "2011 will") revoking all prior wills and naming petitioner as her sole beneficiary, personal representative, and patient advocate, and giving petitioner power of attorney. In the event that petitioner did not survive her, decedent devised her estate to petitioner's parents in equal shares. The 2011 will was prepared by attorney Guy C. Vining, who had previously prepared estate planning documents for decedent. Vining executed an affidavit stating that during his meeting and conversations with decedent, he observed that she was "clear and coherent," "demonstrated a clear memory of her history," and "understood and clearly communicated" her intention to leave her assets to a non-family member. As such, Vining opined that decedent was mentally competent to execute the 2011 will. Later that day, decedent called Schear and told him that she had "put everything in [petitioner's] name." Schear recalled that she sounded upset and that she hung up the phone only to call back six or seven times, each time repeating that she had "signed everything over to [petitioner]."

For the next two to three days, neither Schear nor any other neighbor saw or heard from decedent, causing Schear to grow concerned. Ultimately, on January 28, 2011, decedent was discovered fully clothed in her bathtub and was transported by ambulance to the hospital. Though decedent's family and neighbors suspected she had been in the bathtub for two days, decedent claimed she was there for only an hour. A medical examination of decedent revealed she was "confused and lethargic and demented," and she was admitted to the hospital with a final primary diagnosis of acute dehydration with altered mental status. On February 1, 2011, Pawan K. Garg, M.D., a physician specializing in geriatric psychiatry, evaluated decedent, observing her to be "profoundly confused" and unable to identify the year or recall any of the events leading up to her hospitalization. Dr. Garg diagnosed decedent with dementia and recommended a supervised living arrangement. Based on this recommendation, decedent was transported from the hospital to a long-term care facility, where she continued living until her death on August 14, 2013, at the age of 92.

On September 29, 2011, decedent executed a life estate deed conveying to petitioner her house in Grosse Ile upon decedent's death. This document was prepared by attorney Kevin

Gilhool, who was originally retained by petitioner to advise her regarding her responsibilities as decedent's patient advocate and any that might arise from her power of attorney. Gilhool executed an affidavit providing that he met with decedent alone to execute the life estate deed and that, in his opinion, decedent "was competent to sign the deed and did so freely without undue influence." However, respondent obtained an affidavit from Philipp Dines, M.D., Ph.D., a specialist in geriatric psychiatry who reviewed decedent's medical records and clinical history. In this affidavit, Dr. Dines concluded that, based on a reasonable degree of medical certainty, decedent lacked "the ability to meet testamentary capacity from January 24, 2011, through June of 2011, and the rest of her life."

On July 28, 2015, the probate court granted respondent's application for informal probate of the 1976 will and appointed her as personal representative of decedent's estate. Respondent subsequently learned of the 2011 will and the life estate deed, and, on January 14, 2016, she filed in the circuit court a complaint to quiet title to decedent's house. In the complaint, respondent alleged that the life estate deed was void due to lack of consideration, decedent's incapacity, and petitioner's undue influence over decedent. Shortly thereafter, on February 3, 2016, petitioner filed in the probate court a petition to set aside informal probate of the 1976 will and to replace respondent as personal representative on the grounds that the 1976 will was superseded by the 2011 will. On December 1, 2016, upon stipulation by the parties, the probate court dismissed without prejudice petitioner's petition. The probate court's order further provided that the petition would be reinstated if any issues remained following resolution of the quiet title action pending in the circuit court. On May 24, 2017, after the parties had fully briefed respondent's motion for summary disposition, the circuit court found that it lacked jurisdiction and entered an order reassigning the quiet title action to the probate court for joint resolution of decedent's testamentary capacity and the validity of the life estate deed.

Respondent filed in the probate court a motion for summary disposition under MCR 2.116(C)(9) and (C)(10), arguing that the 2011 will and the life estate deed must be declared void due to petitioner's undue influence over decedent and decedent's lack of capacity to execute the documents. The probate court issued its opinion and order on December 7, 2017, denying in part and granting in part respondent's motion for summary disposition.[1] Specifically, the probate court granted respondent's motion for summary disposition under MCR 2.116(C)(10) with respect to her petition to quiet title to decedent's house. However, under MCR 2.116(I)(2), the probate court granted summary disposition in favor of petitioner with respect to her petition to set aside informal probate of the 1976 will. The probate court reasoned that the evidence demonstrated no genuine issues of fact that (1) decedent had the capacity to execute the 2011 will and that (2) decedent lacked the capacity to execute the life estate deed. Accordingly, the 1976 will was set aside, the 2011 will was admitted, and petitioner was appointed as successor

[1] The probate court's opinion reinstated petitioner's earlier-dismissed petition to set aside informal probate of the 1976 will and to replace respondent as personal representative. Additionally, respondent's complaint to quiet title to decedent's house, originally filed in the circuit court, was deemed a petition to quiet title in the probate court.

personal representative. Respondent now appeals the probate court's conclusion that decedent had the capacity to execute the 2011 will.

II. ANALYSIS

On appeal, respondent contends that the probate court erred in granting in part summary disposition in favor of petitioner and admitting the 2011 will. Respondent maintains that there is a question of fact regarding decedent's testamentary capacity at the time the 2011 will was executed. We agree.

This Court reviews a probate court's decision on a motion for summary disposition de novo. *In re Mardigian Estate*, 312 Mich App 553, 557; 879 NW2d 313 (2015). Summary disposition is appropriately granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." Under MCR 2.116(I)(2), a court may render judgment in favor of a party opposing a motion for summary disposition if it appears to the court that the opposing party rather than the moving party is entitled to judgment. A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a court must consider " 'the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence.' " *In re Mardigian Estate*, 312 Mich App at 557-558, quoting *Dillard v Schlussel*, 308 Mich App 429, 444-445; 865 NW2d 648 (2014).

Under MCL 700.2501(2), an individual has sufficient mental capacity to execute a will if all of the following conditions are met:

> (a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
>
> (b) The individual has the ability to know the nature and extent of his or her property.
>
> (c) The individual knows the natural objects of his or her bounty.
>
> (d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

A testator is presumed to have the capacity to execute a will, *In re Mardigian Estate*, 312 Mich App at 565, and a party contesting the validity of a will "has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation," MCL 700.3407(1)(c). Testamentary capacity " 'is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution.' " *In re Mardigian Estate*, 312 Mich App at 565-566, quoting *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). Further, "[w]eakness of mind and forgetfulness are insufficient to invalidate a will if it appears that the mind of the testator was

capable of attention and exertion when aroused . . . ." *In re Paquin's Estate*, 328 Mich 293, 302; 43 NW2d 858 (1950).

Upon examination of the record, we find there is a question of fact with respect to decedent's testamentary capacity on January 24, 2011, the date she executed the 2011 will. Certain evidence would permit a reasonable factfinder to conclude that decedent had sufficient testamentary capacity. Although petitioner and Schear recounted that in 2010, decedent became increasingly confused and forgetful and began requiring assistance with household chores, this dependence reveals nothing more than the usual forgetfulness attendant to advanced age. See *In re Grow's Estate*, 299 Mich 133, 138; 299 NW 836 (1941) ("Instances of forgetfulness, habits of untidiness increasing with advancing years, and failure to exhaust the subject of conversations, afford no evidence of lack of testamentary capacity." (quotation marks and citation omitted)). Officers who conducted a welfare check in June 2010 reported that decedent was mobile, aware of what was happening, and had food in the house. The officers further reported that the living conditions inside decedent's home were "not that bad." When decedent was hospitalized on January 28, 2011, her "altered mental status" was initially attributed to dehydration. Indeed, petitioner noted that after decedent began living in the long-term care facility, she appeared less confused and was aware of where she was and why she was there.

Decedent's attorneys, Vining and Gilhool, both believed that she had sufficient testamentary capacity at the time she executed the 2011 will and at the time she executed the life estate deed. Vining, who had previously assisted decedent with preparing estate planning documents, observed nothing concerning about her behavior when he met with her on January 24, 2011, to execute the 2011 will. Specifically, he stated that decedent was "clear and coherent," "spoke easily and freely during the meeting," and "understood and clearly communicated that her main asset was her home and she intended to give it to someone other than a family member, specifically [petitioner]." Additionally, when decedent spoke with Schear on the telephone later that day, she was aware that she had executed a will leaving the entirety of her estate to petitioner. Gilhool met with decedent on September 29, 2011, to execute the life estate deed. He observed that decedent "knew who she was, that she owned a home on Grosse Ile and confirmed she wanted to leave her home to [petitioner]." As such, Gilhool concluded that she was "competent to sign the deed and did so freely and without undue influence."

However, ample evidence would also permit a reasonable factfinder to conclude that decedent lacked testamentary capacity on January 24, 2011. Both petitioner and Schear noticed that decedent was becoming confused and forgetful in 2010. In particular, Schear recalled certain instances of forgetfulness that were more concerning than simple "weakness of mind," including ordering six or seven hamburgers at a fast-food restaurant because she was "starving," not recognizing a familiar friend, and calling Schear six or seven times throughout an evening, each time repeating that she had executed a new will leaving her estate to petitioner. Indeed, when the police department contacted petitioner and her mother regarding the welfare check on decedent, they echoed the same concerns voiced by Schear.

Significantly, on January 28, 2011 only four days after decedent executed the 2011 will, she was hospitalized, presenting with mental status changes, disorientation, and confusion. This hospitalization occurred after decedent was found at home fully clothed in her bathtub. Another

four days later, on February 1, 2011, Dr. Garg diagnosed decedent with dementia and made the following observations:

> On mental status examination, she is alert and awake, however, profoundly disoriented. Had no recollection of her premorbid history or events leading up to her hospitalization. Her memory for short and long-term events is grossly impaired. She is unable to retain information, do serial 7[2] or simple arithmetic mental calculations. Her retention, recall is impaired. Her gross difficulties in word finding is also noted.

As a result of Dr. Garg's evaluation and diagnosis, decedent was unable to return home and was instead transferred to a long-term care facility, where she lived for the rest of her life. After reviewing numerous documents, including decedent's medical records and history, Dr. Dines concluded within a reasonable degree of medical certainty that decedent lacked testamentary capacity "from January 24, 2011, through June of 2011, and the rest of her life."

Several of the medical records mistakenly refer to petitioner as decedent's daughter, and petitioner confirmed that decedent frequently referred to her as her daughter. It is unclear from the record whether decedent mistakenly believed that petitioner was her daughter or whether decedent simply considered petitioner to be like a daughter. The record additionally reveals that, while decedent reported to Dr. Garg that her husband had passed away five years previously, petitioner testified that decedent was divorced and that she subsequently lived with a male companion who passed away in 1994 or 1995. The 2011 will makes no reference to respondent, and Vining's affidavit does not specify whether decedent mentioned her during their discussions. Accordingly, a reasonable factfinder could determine that decedent did not know the natural objects of her bounty and that she was unaware of the consequences of executing the 2011 will.

The probate court discounted decedent's medical records and Dr. Dines' opinion, reasoning that these documents were created after decedent executed the 2011 will. Relying primarily on Vining's affidavit, the probate court thus found there to be no question of fact that decedent had sufficient mental capacity to execute the 2011 will. Initially, we note that, although decedent's medical records were created, and Dr. Dines' opinion was rendered, after execution of the 2011 will, they are nevertheless "competently related to the time of execution" and therefore are relevant to decedent's testamentary capacity. See *In re Mardigian Estate*, 312 Mich App at 565-566 (quotation marks and citation omitted). Given that a mere four days passed between decedent's execution of the 2011 will and her hospitalization for confusion and ultimate diagnosis of dementia, it is probable that she suffered from dementia at the time she executed the will. However, by discounting this evidence in favor of Vining's affidavit, the probate court improperly weighed the evidence and made a credibility determination. See *id*. at 558. The record evidence thus would permit reasonable minds to differ regarding whether decedent lacked testamentary capacity on January 24, 2011, and the probate court erred in granting summary disposition in favor of petitioner.

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[2] "Serial sevens" is a clinical test used to test mental status and diagnose suspected cases of dementia. The patient is asked to count down from 100 by intervals of seven.

Because neither party challenges on appeal the probate court's determination that decedent lacked testamentary capacity at the time she executed the life estate deed on September 29, 2011, we will not review that issue. Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan
/s/ Michael F. Gadola