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, 2019 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*® 2020 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.

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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: December 20, 2019
RE: ***In re Thompson/Caldwell, Minors***
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

Population Paradox

As a member of the Society of Baseball Researchers, I have a fascination with statistics. No one would deny that the quality of baseball was better in 1940 than today. The growth, the number of teams 16 to 30 is the usual reason given for this lack of quality. I believe this is an excuse rather than even "A" reason and the following will conclusively show this excuse is erroneous.

In 1940 there were 400 Major League Players, without regard to those who made train trips up and back. Today there are 750 players in Major League baseball. The population of the United States, the sole source of those players, was 132,164,000. Half were women reducing the source to 66,082.000.

In 1940 there were no African Americans allowed in MLB. The African American population in 1940 was 9.8% or 6,474,036. Let us subtract the available male 1940 population and we are left with a base of players in gross from which to draw. 59,607,964.

There is an additional factor. The cohort for ages 18 to 44 was .0063 percent greater in 1940 than today, as people are now living longer. Given this cohort, we must adjust this figure upward by .0063% or 375,530. The adjusted population figure for 1940 is therefore 59,983,494.

Let us round to 60,000,000, therefore, 60,000,000 men account for 400 MLP Players. Setting up a simple equation, we can determine how many people it would take to produce 750 players, or conversely, how many people would it take to produce 750 players.

$$\frac{400}{60{,}000{,}000} = \frac{750}{X}$$

$$X = 112{,}000{,}000$$

If we have now 330,000,000 people in the U.S., we have 115,000,000 males. (We have already adjusted for the age and race cohort in the 1940 analysis).

The new equation is:

$$\frac{750}{112{,}000{,}000} = \frac{X}{115{,}000{,}000}$$

$$X = 770$$

Therefore, we would have ample people to produce 750 quality players. (770 players).

But wait, today 27% of MLB players are foreign born. This would raise the availability by 27% or 31,000,000. The new cohort is about 146,000,000.

The final equation, therefore, is:

$$\frac{770}{112{,}000{,}000} = \frac{X}{146{,}000}$$

$$X = 997$$

So, population wise, we ought to be producing 997 quality players. But we aren't. The simple reason, in my opinion, is this - You play professional sports because you like the sport, you are good at it, and you make money. I suspect that if you trace the growth of football, basketball, and hockey player growth, you can account for the absence of baseball quality players. Now add in soccer and golf and you can see that there is an exodus to other promised lands.

In mathematical summary:

MLB = AAA

AAA = AA

AA = A+

A = Short season

Short season – Rookie advances

Rookie advances – Rookie

Rookie - Tigers

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 Thompson/Caldwell, Minors*

- Residence
- Proper Petitioners
- Appointment of Guardian of a Minor
- Burden of Proof

Petitioners for Guardianship of Minors were grandparents. Parent gave permission to grandparents to have the children live with them while he rehabilitated himself. Respondent/father came to the grandparent's home and resided there temporarily himself. Respondent/father gave no Power of Attorney. At one time the father announced that residence would be transitional because he was buying his own home and would take the children with him. The grandparents filed for Guardianship and then the father took the children.

The lower Court found that since the grandparents knew the children would be moving out, permission ended. Even though the lower Court assumed facts most favorably to the grandparents, the Court said that knowledge of the transitional plan plus a change in visitation, ended the permission which was required by EPIC to be an entitled petitioner.

The Court of Appeals reversed and remanded saying that you look at permission to reside at the time of the filing. Residence, according to the Court of Appeals, has a common meaning which should be used. The Court of Appeals gave no definition of residency in any particular situation. They went on to say that a transition plan does not constitute revocation of consent to residency and that the Petitioners have the burden of proof that permission is given and that the children are not residing with the parent.

Analysis

1. Usually Appellate Courts stay away from moot issues. During the Trial and Appeal, the parent clearly had custody of his child. To look at the time of filing as the sine qua non of residence is awfully strict. True, the published case of *Deschaine v St. Germain*, 256 Mich App 670 looks to "permission currently occurring." Yet, this reviewer thinks that mootness is an issue. Remember the Michigan Supreme Court favored parents over grandparents when in 2003 it held

a grandparent's visitation Bill unconstitutional. (later replaced by a more restrictive statute.) Now there is going to be a remand and the children, the parent and the grandparents are going to have litigation to resolve this issue. Wouldn't it have been better for anyone believing that the parent was not a proper parent to file with the local Child Protection Agency?

2. The Court of Appeals says that it uses the "common meaning" of residence but doesn't define what that is. It is the reviewer's opinion that there is ample case law on this issue which should have been cited.

3. I would concur the future intent does not amount to a change of consent.

4. The practitioner should note that custody allowed to another "with legal authority" negates the right to petition for guardianship of a minor. When in doubt provide a limited Power of Attorney.

STATE OF MICHIGAN

COURT OF APPEALS

In re THOMPSON/CALDWELL, Minors.

UNPUBLISHED
November 26, 2019

Nos. 348025; 348027; 348029
Berrien Circuit Court
Probate Division
LC Nos. 2018-000570-GM;
2018-000571-GM;
2018-000572-GM

Before: MURRAY, C.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In this minor guardianship proceeding, petitioners, the paternal grandparents of the three minor children at issue, appeal as of right the trial court's orders denying their petitions for the appointment of a guardian for each of the children.[1] The circuit court ruled that petitioners had failed to meet the threshold statutory requirements that would enable a court to appoint a guardian pursuant to MCL 700.5204(2)(b). We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of petitioners' long-term housing and care for three minor children of their son, the respondent in this matter. The parties agree that in 2007, respondent telephoned petitioner-grandmother from California and asked her to come to California to pick up the children[2] and take them with her back to Michigan so that he and his wife, the children's mother,

[1] This Court consolidated Docket Numbers 348025, 348027, and 348029, separate appeals with respect to each child, for purposes of administrative efficiency. *In re Thompson/Caldwell, Minors*, unpublished order of the Court of Appeals, entered April 10, 2019 (Docket Numbers 348025, 348027, and 348029).

[2] At the time, there were only two children. The third child at issue was born in 2008, shortly before respondent and the children's mother divorced. Respondent has sole physical and joint

who had been hospitalized for suicidal thoughts, could address marital and mental health issues. Petitioner-grandmother complied. The children lived with petitioners for the next eleven years, from 2007 until respondent moved them out on July 27, 2018 at 7:00 p.m. The parties also agree that respondent never provided petitioners with a power of attorney or other legal document granting petitioners the legal authority to make decisions about the children's care and maintenance.

Respondent lived with petitioners from June 2007 until February 2012, and again from late November 2017 until June 2018. In May 2018, respondent began to search for a house to buy and move into with his fiancé. He purchased a house on June 29, 2018 and moved in the next day. Respondent allowed the children to continue to live with petitioners while he settled into the new home, bought furniture, and prepared for the children to live with him. His planned move-in date for the children was August 1, 2018. In the weeks preceding the planned move-in date, respondent, sometimes aided by petitioner-grandmother, moved some of the children's belongings into the new house, and they spent several overnights with him.

On July 27, 2018, petitioners filed petitions for appointment of a guardian for each of the children, requesting that petitioners be appointed as co-guardians. Respondent took the children hours later and they have lived with him since that date. Respondent objected to the petitions, contending among other things that at the time petitioners filed the petitions, the minors were no longer residing with them with permission for purposes of MCL 700.5204(2)(b)[3], because respondent had allegedly announced to them his family relocation plans as of May, 2018. The trial court held an evidentiary hearing limited to the threshold issue of whether petitioner satisfied the requirements of MCL 700.5204(2)(b); assuming the threshold was met, the court would proceed to an analysis of the best interests of the children.

At the evidentiary hearing, respondent testified that he had moved out of petitioners' home in February 2012 because he had PTSD (post-traumatic stress disorder) associated with his prior service in Iraq with the Marine Corps, and he thought his conditions were worsening. The minor children continued to reside with petitioners, and for a few years, respondent saw his children about once a month. Respondent testified that in mid-2014, his therapy was going much better, he was off medications, and he began seeing the children at petitioners' home two to four days a week for most of the day, and sometimes in the afternoon, as he did not work and the

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legal custody of the children and, according to him, the last contact the children's mother had with the children was in 2008 or 2009.

[3] MCL 700.5204(2)(b) provides:

> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
>
> * * *
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

children were home-schooled by petitioners. In late November 2017, respondent moved back in with petitioners.

According to respondent, on May 9, 2018, his birthday, he informed petitioner-grandmother that he "revoked" his permission for the children to continue to reside with petitioners because he planned to buy a house, move out, and have the children move in with him. Respondent described the period from when he first told his mother of his plans to move out until the day he had the children move in with him as a "transition period." He admitted that the children continued to live with petitioners with his consent during this transition period.

Petitioner-grandmother testified that she parented the children during their 11 years in her home, making all of the medical, nutritional, educational, disciplinary, clothing, and other decisions for them. Even while respondent lived in the house with the children, he did not participate in parental decisions due to his PTSD and struggles with his divorce. She testified that respondent never objected or expressed any desire to take over the parenting decisions until the spring of 2018.[4] May 26, 2018, marked the first time the children were ever away with their father for the day without petitioner-grandmother being present.[5]

Petitioner-grandmother further testified that even after respondent announced his intention to move and take the children along, she understood that she and respondent still had an agreement that she was parenting the children, and that respondent would reintroduce himself to them gradually, by having weekend overnight visits. She understood that respondent had a weekend visitation schedule, but thought the children would continue to live primarily with her. Petitioner-grandmother testified that she had no recollection of respondent telling her on his birthday that he planned to move the children out and take over the parenting. She said that her suspicions were aroused when respondent started house shopping, and that she expressed her concerns about the wisdom of a sudden transition, but whenever she brought up the issue, respondent would deflect the conversation.

By mid-July of 2018, respondent's plans were increasingly clear to her, so she hired a lawyer. On July 16, respondent used the word "transition" at one of the children's therapy sessions, but there was never any talk about a permanent move-out. Instead, petitioner-grandmother thought of the children living with her and with respondent as analogous to shared

[4] The children suffered from reactive attachment disorder. They had been seeing a therapist with their mother. When she left, petitioner-grandmother started seeing the children's therapist in 2009. In August 2009, with respondent's agreement, the therapist undertook a course of treatment that involved attaching the children to petitioner-grandmother as a permanent mother figure. Petitioner-grandmother testified that respondent has never sought to come to the children's therapy to change the permanent attachment person to himself. The family therapist testified at the evidentiary hearing, but the patient/therapist privilege with respect to the kids bound him to such a degree that his testimony was of minimal value.

[5] Petitioner-grandmother testified that respondent moved out of petitioner's house and into his girlfriend's apartment in May, 2018, and he started house shopping in June 2018.

parenting by divorced parents. Toward the end of July, petitioner-grandmother received from respondent an August 2018 calendar showing that the children would be with respondent during the weekdays and with petitioners the second, third, and fourth weekends of the month. Once she served respondent with the petitions for guardianship, he canceled her August visitation.[6]

Following the testimony at the evidentiary hearing, the trial court reiterated that the sole issue before it was the threshold determination of whether petitioners had established the factors set forth in MCL 700.5204(2)(b) before turning to a best interests review. Specifically, the court addressed whether the minors were residing with petitioners with respondent's consent, absent legal authority for their care and maintenance, at the time the petition was filed. It equated its decision to a motion for summary disposition pursuant to MCR 2.116(C)(10), such that it must review the evidence in the light most favorable to petitioners. The court noted that it was undisputed that respondent had not formally executed any legal authority for petitioners' care, custody, or maintenance of the minors; rather, the arrangement was informal. But the trial court rejected petitioner's assertion that at the time of filing the petitions for guardianship, the minors were residing with them with respondent's permission. In support of its finding, the court cited the transitional plan and alluded to the changing pattern of visits in light of that plan. With that, it denied the petitions for guardianship and entered corresponding orders, which "denied on the merits" the petitions for appointment of a guardian. This appeal followed.

II. ANALYSIS

On appeal, petitioners first allege that the trial court erred when it found that the children did not reside with petitioners at the time their petitions for guardianship were filed. As petitioners duly note, this Court reviews the trial court's factual findings for clear error, and we review de novo issues of statutory interpretation. *Deschaine v St. Germain*, 256 Mich App 665, 668-669; 671 NW2d 79 (2003).

MCL 700.5204 governs petitions for the appointment of a guardian and provides in relevant part:

> (1) A person interested in the welfare of a minor, or a minor if 14 years of age or older, may petition for the appointment of a guardian for the minor. . . .
>
> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:

[6] Petitioners provided an offer of proof that if petitioner-grandfather were to testify, he would confirm everything petitioner-grandmother testified to, and respondent consented to the court's acceptance of the offer of proof. Petitioners consented to respondent's offer of proof that respondent would further testify that he made a gradual transition from living at petitioners' house to his own. Petitioners suggested that the court still make credibility determinations with respect to the testimony.

* * *

> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

Thus, pursuant to MCL 700.5204(2)(b), in order for a court to consider appointing a guardian, a petitioner must first establish that 1) the parent permits the minor child to reside with another person; 2) the parent does not provide the other person with legal authority for the minor's care and maintenance; and 3) the minor is not residing with his or her parent when the petition is filed. In *Deschaine*, this Court held that "the permission referred to in the statute must be currently occurring—which would be shown by the child's actual presence in the care of another—when the guardianship issue arises." *Deschaine*, 256 Mich App at 670. Past permission is not relevant; what matters is whether the permission is ongoing at the time the petition for guardianship is filed. *Id*. at 671-673.[7]

With respect to the first requirement, although respondent contends that he "revoked" his permission for his children to reside with petitioners as of May 9, 2018, he also testified that he did not plan to actually move the children out of petitioners' home until August 1, 2018, and that he allowed the children to live with petitioners during the interim. Pertinent portions of his testimony are as follows:

> *Q*. And the children continued to live with your parents until July 27th of 2018?
>
> *A*. Yes.
>
> * * *
>
> *Q*. And could you just tell me again why you allowed the children to continue to live with your parents for a period of two to three months after you revoked your permission?

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[7] The petitioner in *Deschaine* was the maternal grandfather of the child at issue. He alleged that before her death, the minor child's mother, who had sole physical custody, had indicated that in the event of her death, she wanted the petitioner and the maternal grandmother to care for the child. *Deschaine*, 256 Mich App at 666-667. After the mother's death, the petitioner went to the mother's home and picked up the child, brought her to his home, and later filed a petition to become the child's guardian. The child's father objected. *Id*. at 667. This Court affirmed the trial court's denial of the petition for guardianship on the basis that the mother's prior, pre-death permission did not meet the requirements for appointment of a guardianship under MCL 700.5204(2)(b), which requires that the permission be currently occurring at the time the petition is filed. *Id*. at 670. This Court found it noteworthy that MCL 700.5204 "was preceded by MCL 700.424, which was repealed . . . [and which] formerly stated, 'The parent or parents *have permitted* the minor child to reside with another person. . . .' " *Id*. at 671-672.

A. It was to find a house that was suitable for all of my children to live in, and for a transition period for emotional –for my children.

* * *

Q. Okay, When did you establish your own residence?

A. That would have been June 29th when the house closed, of 2018.

Q. June 29?

A. Yes

Q. Okay. So why not move the children in with you on the 29th of June?

A. Because we still had about a month period of the transition for the girls, and we're still preparing the house and school for them.

* * *

A. We had to buy furniture and –furniture and clothing and whatnot for the girls' rooms.

Q. Okay. Did you choose an official move-out date for the children?

A. Yes, we did.

Q. What was that date?

A. It was August 1st.

In other words, despite a *plan* to move the children into his home, it is undisputed that respondent was still allowing the children to reside with petitioners as of July 27, 2018—the date the petition was filed—up until he took them to his home for good that evening. See *Deschaine*, 256 Mich App at 670 ("[T]he permission referred to in the statute must be currently occurring—which would be shown by the child's actual presence in the care of another—when the guardianship issue arises.") Contrary to respondent's and the trial court's focus, a plan to discontinue one's permission to reside at some point in the future is not the relevant inquiry. What is relevant is that on July 27, 2018, respondent was allowing the children to reside with another person, being petitioners. The children had bedrooms in petitioners' home, they had resided there continuously since 2007, and respondent was still allowing them to reside there as of July 27, 2018. Petitioners satisfied this first requirement.

With respect to the second requirement in MCL 700.5204(2)(b), it is undisputed that respondent did not provide petitioners with legal authority for the minors' care and maintenance, such as a power of attorney delegating parental authority to petitioners, even though the children had lived with petitioners, with respondent's permission, since 2007. Thus, petitioners satisfied this requirement.

Thus, the final question is whether petitioners established the third requirement that the minor children were "not residing" with respondent when the petitions were filed. As noted by petitioners, the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., which governs minor guardianship proceedings, does not provide a definition for "residing," nor of "residence." Applying the plain and ordinary meaning of that word, the record evidence indicates that they were not yet residing with respondent. Instead, the record shows that the children resided continuously with petitioners from January 2007 until 7:00 p.m. on July 27, 2018, hours after petitioners had filed their petition for guardianship. During this period, petitioners housed the children, cared for them, and made all of the child rearing decisions, even after respondent began to exercise some overnight visits at his place starting in May 2018. Regardless of respondent's intention to have the children reside with him in the future, or his characterization of the months after May 9, 2018 as a "transitional period," when the petitions were filed, the children were still residing with, and in the care of, petitioners. See *Deschaine*, 256 Mich App at 670. And by respondent's own admission, they were not expected to move in with him until August 1, 2018. Therefore, they were not "residing with [their] parent . . . when the petition[s] [were] filed." MCL 700.5204(2)(b).

We reject respondent's argument that a simple overnight at a grandparent's home opens up the door to a guardianship petition. The grandparent would have to prove that the parent is permitting the child to *reside* with him or her and that the child is *not residing* with the parent. In this case, all parties agree that the children had moved into petitioners' home as of 2007 and were continuing to live there, as allowed by respondent, for over 11 years as of the filing of the petitions. Like the grandparent in respondent's feared scenario, several overnight stays with respondent preceding his planned official move-in day for the children do not count as changing the children's residence. Had the petition been filed on or after July 28, 2018, however, the trial court's ruling would have been correct.

In light of the relevant undisputed facts, we conclude that the trial court erred in applying those facts to the legal requirements of MCL 700.5204(2)(b). We reverse the trial court's order and remand for further proceedings, at which time the trial court can gauge the children's best interests and make the discretionary decision as to whether a guardianship appointment for any of the children is appropriate. In light of our ruling on petitioners' first issue on appeal, we need not address their other arguments in support of reversal.

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

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Jane M. Beckering