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, 2020 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.

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: April 19, 2021
RE: ***In re Schmunk 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 – Uniform Numbers

Numbers, Numbers, Numbers. Much has been written about numbers in the game of baseball. One subject of numbers in baseball is the numbers worn on the back of uniforms.

There were sporadic efforts in the early days of the sport to help the fans know "Who's on First." They sputtered and never caught on.

In 1929, the Indians started the season with numbers on uniforms followed the next day by the Yankees. If you batted lead-off, you wore number 1, batting second number 2, etc. Hence, the Babe was number 3, and the Iron Horse number 4. The back up catcher was number 9 and pitchers 10 – 17. A few years later, the numbering system was changed to the number designation of your position; first base 3, second base 4, etc.

That system fell by the wayside and numbers became a matter of choice. The only deviations were when the whole league wore the number 42 in honor of Jackie Robinson and the last game at Tiger Stadium. In 1999, in the last game, the Tigers wore numbers of their past greats. Gabe Kapler didn't wear a number because he was honoring Ty Cobb who had never owned a number.

Look for future articles on this subject.

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 Schmunk Estate*

- Burden of Proof Suitable – Unsuitability
- Grounds Appointment – Removal – Best Interests
- Excluding Testamentary Nominee
- Necessity of Testimony

If this opinion is restricted to its facts, I approve of this ruling. If it is extended, I do not approve.

Decedent made a Will. He had one son who was sole beneficiary. He named a niece, Appellant-Personal Representative. He was divorced at the time of the execution of the testamentary document. Time passes. The property becomes encumbered. Twelve years later, decedent passes away. The son wants his mom, decedent's ex-spouse as Personal Representative. She won't charge a fee and has started working on re-financing the property. Nominated Personal Representative will charge and will sell one parcel to pay fees. No testimony taken, but no allegations contested. Lower Court acknowledges status requires nominee to be appointed "Unless unsuitable." Lower Court finds nominee unsuitable because of facts.

Inter alia the Court of Appeals says:

1. Suitability not defined by EPIC.
2. Adopts removal statutory language that Court may remove if in "best interest of estate." (I believe Court errs here. Legislature says something in one section but not another, can't impose standard where not set forth – expressio unius est exclusio alterius. Why not just say nominee unsuitable because of facts in this case e.g. passage of time, land burdened with lien).
3. He who alleges unsuitable has burden of proof – standard preponderance of evidence.
4. Appointment on removal reviewed for abuse of discretion.
5. No evidentiary hearing necessary if facts (apparently uncontested) presented by counsel are deemed sufficient to formulate a reasonable decision.

Lesson for the scrivener. Often one can speculate that a divorced spouse doesn't want the ex as fiduciary of his/her estate. In light of the ruling in this case, a testator should say, "I

don’t care if my nominee charges the entire estate as a fee, I don’t want my S.O.B. of an ex spouse anywhere near my property under any circumstances Your Honor.”

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF ROLLAND GEORGE SCHMUNK.

SUSANNE BROOKS, Personal Representative of the ESTATE OF ROLLAND GEORGE SCHMUNK,

Appellee,

v

JUDI JOHNSON,

Appellant.

UNPUBLISHED
March 25, 2021

No. 352405
Saginaw Probate Court
LC No. 19-139802-DE

Before: BECKERING, P.J., and SWARTZLE and RICK, JJ.

PER CURIAM.

Appellant, Judi Johnson, appeals as of right the probate court's order appointing Susanne Brooks as personal representative of the estate of Rolland George Schmunk. We affirm.

I. BASIC FACTS

In 2007, Rolland Schmunk executed a will that left the entirety of his estate to his son, Cody Schmunk, who was a minor at the time. The will designated Johnson to serve as the personal representative of the estate.[1] After Rolland's death in 2019, Cody filed a petition for formal administration seeking, in relevant part, an order admitting Rolland's will to probate and appointing his mother, Brooks, to serve as the personal representative of the estate.[2] After Rolland

[1] According to Rolland's will, if Cody dies before he turns 30 years of age (he is currently in his mid-twenties), his share remaining in the trust will go to Johnson. Johnson is Rolland's cousin.

[2] Brooks is also Rolland's ex-wife.

died, Brooks assisted Cody by paying expenses related to Rolland's house, as well as Rolland's funeral and burial expenses. Johnson objected to Cody's request that Brooks be appointed personal representative, citing her priority of appointment pursuant to Rolland's designation in his will.

At the hearing on Cody's petition, his counsel presented several arguments regarding Johnson's unsuitability to serve as personal representative and Brooks's suitability. Cody's counsel explained that Rolland's estate consisted solely of two pieces of real estate. Both parcels were residences and were encumbered by large loans that Rolland had taken out shortly before he died. Cody had lived on one of the properties with Rolland before his death, and Cody wished to continue living there. To do so, however, he would have to refinance the loans. Brooks had already begun negotiating the refinancing of the loans with the bank, and she was willing to serve as personal representative without compensation. By contrast, Johnson's appointment as personal representative would create administrative fees that almost certainly would require the sale of at least one of the estate's properties. Johnson's counsel argued that the probate court should honor Rolland's intent, as expressed in his will, and emphasized Johnson's priority of appointment under MCL 700.3203. However, Johnson's counsel admitted that Johnson's appointment would likely require the sale of at least one of the estate properties.

After hearing arguments from both sides, the probate court found Johnson unsuitable and Brooks suitable; and thus, it appointed Brooks as personal representative of Rolland's estate. In explaining its determination, the court noted that the estate consists only of two pieces of real estate, one of which Cody—Rolland's only child—wished to continue living in, and that Brooks had paid for Rolland's funeral and burial expenses.

II. ANALYSIS

Johnson first argues that the probate court violated MCL 700.3203 and improperly imposed a "suitability" requirement when appointing Brooks as personal representative. We disagree.

We review a probate court's appointment of a personal representative for an abuse of discretion. See *In re Bittner Conservatorship*, 312 Mich App 227, 235; 879 NW2d 269 (2015) ("[This Court] review[s] a probate court's appointment or removal of a fiduciary for an abuse of discretion."). "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 findings of fact for clear error. *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Vansach Estate*, 324 Mich App 371, 385; 922 NW2d 136 (2018) (quotation marks and citation omitted). Lastly, "we review de novo issues of statutory interpretation." *In re Attia Estate*, 317 Mich App 705, 709; 895 NW2d 564 (2016).

MCL 700.3203 governs the priority among persons seeking appointment as personal representative. *Tkachik v Mandeville*, 487 Mich 38, 42 n 1; 790 NW2d 260 (2010). MCL 700.3203(1) provides, in relevant part:

> (1) For either formal or informal proceedings, subject to subsection (2), *persons who are not disqualified* have priority for appointment as a general 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) (emphasis added).]

Under MCL 700.3203(1)(a), then, an individual designated as personal representative in a decedent's will has priority of appointment unless he or she is disqualified or subject to a specified exception.[3] MCL 700.3204 governs disqualification and states, "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).

Johnson is correct that she would generally have priority under MCL 700.3203(1)(a) because in 2007, Rolland designated her as personal representative in his will. She is incorrect, however, to the extent she argues that the probate court departed from the statute by considering her "suitability" for the appointment. Her argument ignores the statute's explicit statement that the priority order applies to "persons who are not disqualified . . . " MCL 700.3203(1), and that an individual may be disqualified from serving as personal representative if a probate court finds that individual is "unsuitable" in formal proceedings, MCL 700.3204(3). Thus, in the present case, MCL 700.3203(1) may be understood to indicate that a person named in a probated will as personal representative is first in priority for appointment to that position unless that person is disqualified by his or her unsuitability. Accordingly, the probate court did not introduce a suitability requirement into MCL 700.3203(1); suitability entered through the concept of disqualification.

Johnson also argues that the probate court erred by resting its decision on a concept, i.e., suitability, undefined by the statutes at issue. It is true that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., does not define suitability. See *In re Redd Guardianship*, 321 Mich App at 407 ("We must next construe the meaning of 'suitable,' as EPIC does not define the term . . . ."). However, if the Legislature has not defined a statutory term, courts give it its plain and ordinary meaning. See MCL 8.3a Suitability is the nominative form of the adjective "suitable." This Court has previously determined the plain and ordinary meaning of "suitable" as "fit and appropriate for [its] intended purpose," "adapted to a use or purpose," or "able/qualified." See *In re Redd Guardianship*, 321 Mich App at 407-408. Regarding what makes an individual other than "fit and appropriate" for appointment as a personal representative, this Court has held that any statutory basis sufficient to remove a personal representative is also sufficient to support an interested person's objection to the appointment of a personal representative. *In re Stan Estate*, 301 Mich App 435, 446-447; 839 NW2d 498 (2013). A personal representative may be removed if "removal is in the best interests of the estate . . . .' " MCL 700.3611(2)(a). Accordingly, an interested person may object to an individual's appointment as personal representative on the basis that the appointment is not in the best interest of the estate. *Id*. Thus, although there is no statutory

[3] Neither of the two exceptions enumerated in MCL 700.3203(2) apply here.

definition of suitable or suitability within EPIC, the probate court was not operating without guidance on what could render a personal representative unsuitable.

Johnson next argues that, even if the court's consideration of suitability was proper, the court abused its discretion by appointing Brooks as personal representative because Cody did not meet his burden of proof to demonstrate Johnson's unsuitability.[4] Again, we disagree.

MCL 700.3203(2) "provides that an interested person may object to the appointment of a personal representative in a formal proceeding." *In re Stan Estate*, 301 Mich App at 446. There is no dispute that as a devisee of Rolland's will, and as Rolland's only child, Cody is an interested person. See MCL 700.1105(c) (defining interested person for purposes of EPIC to include an heir, devisee, or child). Nor is it disputed that Cody challenged Johnson's appointment as personal representative in a formal proceeding. See MCL 700.1104(h) (defining a "formal proceeding" as a "proceeding[] conducted before a judge with notice to interested persons"). A person may be disqualified from serving as personal representative if the court, in a formal proceeding, finds that person to be "unsuitable." MCL 700.3204(3). The party challenging suitability has the burden to prove unsuitability by a preponderance of the evidence. See *In re Guardianship of Reid*, 321 Mich App at 411.

As already indicated, "[a]lthough Michigan law provides that an interested person may object to the appointment of a personal representative in a formal proceeding, MCL 700.3203(2), the Legislature has not specified the grounds that would support such an objection." *In re Stan Estate*, 301 Mich App at 446. Nevertheless, the Legislature has specified grounds for *removing* a personal representative in MCL 700.3611(2). *Id.* "These grounds include, among other things, that '[r]emoval is in the best interests of the estate . . . .' " *Id.*, quoting MCL 700.3611(2)(a). This Court has held that "any ground which would justify the removal of a personal representative under MCL 700.3611(2) is equally sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2)." *Id.* at 446-447. Thus, the question is whether Cody carried his burden to prove by a preponderance of the evidence that Johnson's appointment would not be in the best interests of the estate.

During the hearing on Cody's petition, Cody's counsel advanced several reasons why Johnson was unsuitable to serve as personal representative. Cody's counsel emphasized that the estate only consisted of two pieces of real estate, that Cody wanted to continue living in one of the properties, and that payment of a personal representative's administrative fees would almost certainly require the sale of at least one of the properties. Counsel noted that circumstances had changed significantly since Rolland had executed his will twelve years earlier: part of the property had fallen into disrepair, Rolland had taken out hundreds of thousands of dollars in loans near the end of his life, and those loans became due at his death. Cody's counsel observed that Brooks

[4] In her brief on appeal, Johnson claims that "appellee" did not meet "her" burden of proof regarding suitability. It is worth noting that Brooks, as personal representative, is the appellee in this case. However, it was Cody who objected to Johnson's appointment below. Cody therefore had the burden of proving Johnson's unsuitability.

would serve as personal representative without compensation and had already taken critical steps toward helping Cody preserve the property he had inherited from his father. Johnson's counsel admitted that Johnson's appointment as personal representative would likely require selling at least one of the two properties.[5]

Given the arguments presented at the hearing, we conclude that a preponderance of the evidence supports the trial court's conclusion that Johnson was unsuitable because her appointment would come at a price of losing at least one of the estate lands that Rolland had left for Cody. MCL 700.3611(2)(a); *In re Stan Estate*, 301 Mich App at 446-447. Specifically, the probate court indicated that appointing Johnson as personal representative would inherently result in Johnson committing waste because Johnson would have to sell one of the properties in order to pay her estate administration fees.[6] By contrast, Brooks would serve as personal representative without compensation, and thus, would be in a better position to preserve the property for her son, the estate recipient. And Cody wanted to continue to live on and keep the land. Under the presenting circumstances, the record does not leave us with a definite and firm conviction that the probate court made a mistake by finding Johnson unsuitable to serve as personal representative on the basis that appointing her would not be in the best interests of the estate. *In re Vansach Estate*, 324 Mich App at 385.

Likewise, we are not left with a definite and firm conviction that the probate court made a mistake in appointing Brooks as personal representative for Rolland's estate. *Id.* Because Brooks agreed to serve without compensation, her appointment as personal representative would not create administrative fees, would not require the sale of any of the estate's property, and, therefore, would not create unnecessary waste. Additionally, Brooks's relationship with Cody was such that she was motivated to maintain the estate's assets for her son's benefit.

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[5] To the extent Johnson argues on appeal that the probate court erred by not taking testimony during the hearing, we conclude that she effectively waived the issue. The lawyers for both parties discussed facts before the judge that appeared to be undisputed. At one point, Johnson's lawyer indicated that Cody's lawyer "is testifying," and he indicated "I'll put [Johnson] on the stand . . ." but it was pertaining to whether Cody and Johnson get along. The trial court responded, "I'll assume that your client's going to say everything's hunky dory, she gets along with him and I'll assume they're going to say they don't get along; is that right?" Johnson's counsel responded that his client would say that "there were conversations after [Rolland] died." But then he added, "And we can go into this but I don't think that's germane. What I think is germane is we have a will, he specified what he wanted to do and we are willing to move ahead if the Court desires." Both parties' lawyers provided factual information for the judge, and other than the issue about getting along, no other factual representation before the court has been called into question as inaccurate. Notably, Johnson has never walked back her counsel's representation that her service as personal representative would likely require that one of the estate's two parcels be sold to pay estate expenses.

[6] We note again that at the time Rolland executed his will, his land was not yet encumbered by mortgage debt, such that having to sell one of the properties to refinance mortgages and administer the estate was not a concern.

Because the probate court found Johnson unsuitable to serve as personal representative in a formal proceeding, Johnson did not have priority of appointment under MCL 700.3203(1), even though Rolland designated her as personal representative in his will. MCL 700.3203(1) (setting forth the priority order of appointment for "persons who are not disqualified . . ."); MCL 700.3204(3) (stating that an individual is not qualified to serve as personal representative if the court finds that individual unsuitable in a formal proceeding). Thus, the probate court did not abuse its discretion by appointing Brooks—whom the court found to be suitable—as personal representative rather than Johnson.

Affirmed.

/s/ Jane M. Beckering
/s/ Brock A. Swartzle
/s/ Michelle M. Rick