

# PROBATE LAW CASE SUMMARY

BY ALAN A. MAY



*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.*

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 2007-2020 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© 2021 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2020 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. Additionally, he has been designated a “Leading Lawyer” in Trust, Will & Estate Planning Law for the years 2013 to the present (a distinction granted to the top 1% of attorneys in Michigan). 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).

He is the published author of Article XII: A Political Thriller and Sons of Adam, an International Terror Mystery.

View previous Probate Law Case Summaries online at: <http://kkue.com/resources/probate-law-case-summaries/>.

---

**DT:** July 13, 2021

**RE:** *Schaaf v Forbes (On Remand)*, \_\_\_ Mich App \_\_\_ (2021) (Docket No. 343630)

STATE OF MICHIGAN COURT OF APPEALS

---

Kemp Klein Law Firm represents Elder Law of Michigan, a charitable organization and Trustee of the Elder Law of Michigan Pooled Account Trust. Through this relationship, our attorneys administer the Pooled Account Trust for Elder Law of Michigan on a long-term contract. If interested, please contact Cindy Fedewa at 248-528-1111 or [cindy.fedewa@kkue.com](mailto:cindy.fedewa@kkue.com).

**KEMP**KLEIN  
LAW FIRM

201 West Big Beaver Road, Suite 600, Troy, MI 48084 | Phone: 248.528.1111 | [kkue.com](http://kkue.com)

*Alan, you cannot write about baseball all your life.*

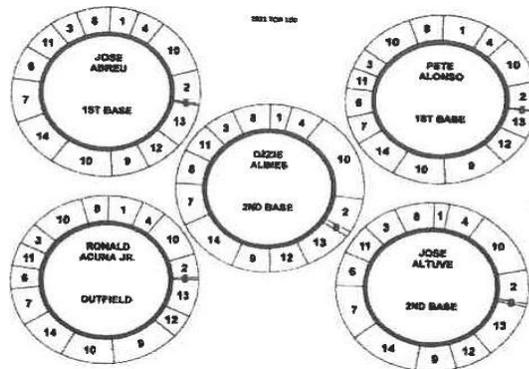
Mrs. Pollinger  
12th Grade English Comp  
Mumford High —1959

# BASEBALL STATS:

## *THE ALL-STAR GAME*

Its mid-year and the leagues battle it out with the nominated best from both leagues. This phenomenon started in 1933 and was known as the “Fan’s Game”. It was designed to give an emotional boost to the fans stuck in the doldrums of a depression.

For those who wanted to extend this experience for an entire year, Ethan Allen, a former ball player designed the best board game of all time, “All-Star Baseball.” Discs like the one pictured below were placed on a spinner and each number with mathematical precision based on actual date determined what the batter did.



The game’s only flaw was that it didn’t reflect a pitcher’s ability.

John Chase, Jr. recalls playing the role of announcer, striking a miniature bat against a table leg to reflect the bat striking the ball.

Earl Endelman recalls playing either by himself, spinning for both teams, or facing off against his friends.

I recall many hours with my friend, Allan Guritz, battling over which side of a line the “leaner” actually landed. We had volumes of score sheets and compiled records.

My grandson, Ryland Kaplan is nine, game board, phone and computer addicted. What would he do with this game? We started a game that Ryland entered with some doubt of appreciation. He enjoyed the experience and now has his own 1960 version.

Its my humble opinion that games like this keep the sport alive not vice versa.

**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:** *Schaaf v Forbes (On Remand)*, \_\_\_\_\_ Mich App \_\_\_\_\_ (2021) (Docket No. 343630)

- Jurisdiction Circuit v Probate
- Discovery - Timing
- Contribution
- Trust as Joint Tenant with Survivorship Rights

Without dwelling on facts, an action was brought in the Circuit Court to determine the validity of a title arrangement. Exclusive jurisdiction of the Probate Court was alleged and rejected. The Circuit Court determined it had jurisdiction, awarded equitable costs (not sanctions), accepted documentation on a contribution issue which was challenged as tardy and ruled that a trust cannot be a joint owner with the individual jointly with a right of survivorship.

The matter was heard by the Court of Appeals at a previous time where all the above was sustained. Appeal was taken to the Michigan Supreme Court which vacated the previous Opinion of the Court of Appeals directing the Court of Appeals in the instant matter to resolve the issue of subject matter jurisdiction of the Circuit Court.

In a published Opinion, this Court of Appeals opined inter alia:

### Jurisdiction

The Court of Appeals gives an excellent statutory analysis first pointing out that a decision without subject matter jurisdiction is void. It then sets out the relevant EPIC sections of exclusive verses concurrent jurisdiction. It then finds there is concurrent jurisdiction to determine a property right and partition. It points out RJA [MCL 600.2932(1)] that a party may bring an action in the Circuit Court to resolve competing title claims.

### Contribution

When one assumes the entire burden which benefits others equally effected, the Court may order to share the burden including attorney fees.

### Documenting

The lower Court has discretion to accept or reject discovery.

### Joint Tenancy

The majority creates a rule of “common sense” and declares that joint tenancy with rights of survivorship is based on “life” and “death”, and because a trust “terminates” and doesn’t die, a

## REVIEW OF CASE:

trust cannot own property with individuals jointly with rights of survivorship. The majority so ruled. The minority respectfully disagrees and believes that such an arrangement is possible.

I believe respectfully, the dissent is more enlightened.

The dissent says:

1. The common law allowed such an arrangement.
2. Cites law that extending the prohibition of corporations owning property jointly with right of survivorship to trusts is universally criticized and generally ignored in the United States.
3. Bogert looks to the document as to whether survivorship is allowed.
4. The Michigan Trust Code doesn't preclude such an arrangement and because the Trust Code limited trustees in other sections – even if a common law rule prevents the arrangement, the code supersedes it.

I would add to the dissent.

1. A trust could by its terms terminate prior to the life of the individual joint tenant. Therefore, if the arrangement is improper in some cases, it may not be improper in all cases, and if the Court must opine as it did, there should be limitation.
2. What the joint tenancy with right of survivorship actually is when the life expectancy of the living people is less than the date of trust termination is a reversionary interest if the real estate is not sold inter vivos. This is not an unreasonable arrangement.
3. Not only is there no prohibition against the instant arrangement in the Trust Code, there is no prohibition found in the ruling of real estate law.
4. The arrangement and its consequences are presumably known to the living beings Ab Inito.

If they agree, the Probate Section might file amicus if the Appellant takes the instant case to the Supreme Court.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

CINDY SCHAAF, COLLEEN M. FRYER, and  
GWEN MASON,

Plaintiffs/Counterdefendants-  
Appellees,

v

CHARLENE FORBES, also known as ANGIE  
FORBES,

Defendant/Counterplaintiff-  
Appellant.

---

FOR PUBLICATION  
July 1, 2021

No. 343630  
Antrim Circuit Court  
LC No. 2016-009008-CH

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

RIORDAN, J. (*concurring in part and dissenting in part*).

I concur with the majority that the circuit court had subject-matter jurisdiction over this case, that it did not abuse its discretion by considering more than 300 pages of documentation offered by plaintiffs, and that it did not err by requiring contribution to plaintiffs. However, I respectfully dissent from the majority’s conclusion that the circuit court did not err by ruling that a trust cannot hold title to real property as a joint tenant with rights of survivorship.<sup>1</sup>

“The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed.” *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). See also MCL 554.43 (“Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.”). It is true that the common

---

<sup>1</sup> Because I would conclude that the circuit court erred in this regard, I also disagree with the majority that the circuit court’s corresponding partition ruling should be affirmed as well.

law provided that neither corporations nor sovereigns may hold title as a joint tenant because “king and corporation can never die.” 2 Blackstone, Commentaries on the Laws of England, p \*184. That is, “because a corporation can survive indefinitely, which is contrary to the right of survival of a joint tenancy,” a corporation may not hold title as a joint tenant under the common-law rule. 6A Fletcher, Cyclopaedia of the Law of Corporations § 2816.

However, as the majority acknowledges, a trust could not exist in perpetuity under the common law. See *Scudder v Security Trust Co*, 238 Mich 318, 320; 213 NW 131 (1927). Thus, the basis for the common-law rule precluding a corporation from holding title as a joint tenant is inapplicable here. Indeed, the majority does not cite any authority providing that a trust may not hold title as a joint tenant under the common law. Rather, the majority offers “common sense” arguments to reach its conclusion. In my view, the common law and statutory framework provide to the contrary, and that is what we should follow to resolve the matter before us.

“A trust is a right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another.” *Fox v Greene*, 289 Mich 179, 183; 286 NW 203 (1939). “ ‘Trusts’ in the broadest sense of the definition, embrace, not only technical trusts, but also obligations arising from numerous fiduciary relationships, such as agents, partners, bailees, etc.” *Id.* (cleaned up). See also Restatement (Third) of Trusts § 2 (“A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . .”).

Our common law recognizes that a trustee may hold title as a joint tenant. See, e.g., *Norris v Hall*, 124 Mich 170, 176; 82 NW 832 (1900) (“The deed from Dyson to the five trustees expressly stated that they were to hold ‘as joint tenants, and not as tenants in common.’ ”); *Fox*, 289 Mich at 184 (“[P]roperty held by a trustee who is a joint tenant, or tenant in common with another, may be partitioned at the instance of the trustee, or of any person beneficially interested in the trust.”).<sup>2</sup> If a trustee may hold title as a joint tenant, it seemingly follows that the trust itself may be deemed as holding title as a joint tenant to the same extent. See *Ford v Wright*, 114 Mich 122, 124; 72 NW 197 (1897) (explaining that a trustee holds trust property). The conclusion that a trust may hold title as a joint tenant is consistent with the Restatement (Third) of Trusts § 40, which explains that “a trustee may hold in trust any interest in any type of property.” Comment *b* to that section further explains:

[L]egal or equitable present interests in real or personal property for life or for a term of years, and presently existing future interests, whether legal or equitable, whether reversionary interests, executory interests, or remainders (contingent, vested, or vested subject to being divested), may be held in trust.

---

<sup>2</sup> I acknowledge that *Norris* and *Fox* concerned properties in which the joint tenants were all trustees. Nonetheless, such cases illustrate that there was no blanket common-law prohibition against a trustee holding title as a joint tenant.

Accordingly, in my view, the common-law authorities cited above weigh in favor of a rule that a trust may hold title as a joint tenant, or at a minimum, fail to establish a contrary rule.

Alternatively, even if there was a common-law rule providing that a trust may not hold title as a joint tenant, I would conclude that such a rule has been superseded and replaced by statute. The Michigan Trust Code, which is set forth as Article VII of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, is a comprehensive scheme with dozens of provisions addressing virtually every aspect of trust law. “In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.” *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007) (quotation marks and citations omitted). Thus, for example, this Court has held that the Michigan Trust Code sets forth the exclusive grounds for removal of a trustee and that a trustee cannot be removed for additional grounds at common law. *In re Gerald L Pollack Trust*, 309 Mich App 125, 161-163; 867 NW2d 884 (2015).

Relevant to this case, there is no provision within the Michigan Trust Code that precludes a trust from holding title to real property in the same manner as a natural person. This absence is noteworthy because the Michigan Trust Code includes several provisions otherwise limiting trusts and trustees. See, e.g., MCL 700.7404 (“A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.”); MCL 700.7815(3)(b) (“A trustee may not exercise a power to make distributions pursuant to a discretionary trust provision in a manner to satisfy a legal obligation of support that the trustee personally owes another person.”). Further, the Michigan Trust Code includes several provisions conferring broad powers upon trusts and trustees to hold, manage, and distribute trust property. See, e.g., MCL 700.7816(1)(b)(ii) (“A trustee, without authorization by the court, may exercise all of the . . . [p]owers appropriate to achieve the proper investment, management, and distribution of the trust property.”); MCL 700.7817(g) (“[A] trustee has . . . [the power to] acquire property, including property in this or another state or country, in any manner for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, or change the character of trust property.”). In my view, the express conferral of such powers, coupled with the absence of any express limitation that would be controlling here, shows the Legislature’s intent to supersede and replace any common-law rule that may have existed to prohibit a trust from holding title as a joint tenant.

I respectfully disagree with the majority that “[c]ommon sense and relevant law establish that . . . a trust may not hold property as a joint tenant with rights of survivorship.” The common-law rule against a corporation holding title as a joint tenant—which the majority extends here to trusts—is, according to one court, “universally criticized and generally ignored in the United States.” *Bank of Delaware v Bancroft*, 269 A2d 254, 255 n 1 (Del Ch 1970).<sup>3</sup> Indeed, the rule

---

<sup>3</sup> In *Bancroft*, the Delaware Court of Chancery ruled that a trust company may hold title as a joint tenant with rights of survivorship because a Delaware statute conferring the powers of “a legally qualified individual” upon such companies superseded the common-law rule to the contrary.

was revoked in England in 1899 by the Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vic.C. 20. *Id.* As illustrated by this case itself, application of the rule results in a division of interests that, in all likelihood, was completely unforeseeable by both the grantor and the grantees at the time of the trust's creation. Even if such a peculiar outcome is compelled by the common law applicable to corporations and joint tenancies, our Legislature has sensibly abrogated that common law with respect to trusts in order to provide stability and certainty to trustees and those who engage with them.

Accordingly, I respectfully dissent from the majority's conclusion that a trust cannot hold title to real property as a joint tenant with rights of survivorship.

/s/ Michael J. Riordan

---

See also Bogert, *Trusts & Trustees* (2d ed) § 145 (“In the United States, where a trust company or bank is made co-trustee with an individual, it is usual to provide in the trust instrument for survivorship in the corporate trustee. If such a provision is not made, . . . the ancient law with regard to the inability of corporations to act as joint tenants is deemed to be still in force . . .”).