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 2007-2021 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© 2022 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2021 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.

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DT: October 28, 2021

RE: ***In re Tansey Estate***

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.

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Alan, you cannot write about baseball all your life.
Mrs. Pollinger
12th Grade English Comp
Mumford High —1959

BASEBALL LORE:

FACING THE PENULTIMATE

How a pitcher approaches the 8th batter in the batting order when two men are out.

Why would I write on such an esoteric topic? Because it's damn important and will help you enjoy watching a game.

Facts – Fifty percent of the runners who get on base score.

- The 8th batter is usually the second worst hitter in the line up. This is true in both leagues but even more in the National League where the pitcher bats.
- It's best to have the worst batter leading off an inning so that the number one batter starts the inning, presumably, with one out.

So the pitcher faces #8 and two are out. He wants to get him out so that the #9 batter starts the next inning. That pitcher will bear down more than usual. He will throw his best stuff. Usually a pitcher doesn't throw his best stuff until he's gone through the batting order twice. This situation is an exception.

The pitcher will stay away from the center of the plate unless he has a great fast ball. He will work the corners, but not sharply to avoid a base on balls. He will not throw inside to avoid hitting the batter. (some #8's will occasionally step into a pitch and take it on the shoulder).

All the above can vary under certain circumstances.

1. Are there runners on 2nd and 3rd ? If it's a close game, the pitcher may work the corners a little sharper and take the chance of a base on balls. Setting up a play at any base with the pitcher coming to the plate.
2. It's the top of the 9th with a lead. The pitcher is more likely to treat #8 and #9 alike.
3. The manager pulls #9 for a pinch hitter who is a much better hitter than the #8 he replaces.

Keep your eyes open and enjoy the game.

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 Tansey Estate*

- Dismissal before Discovery
- Discretion to Allow Discovery

Respondents were named co-fiduciaries in a Will of decedent, as well as beneficiaries. Petitioner, brother, was specifically excluded.

This Opinion makes no sense, unless at the time of the matter, the Will had not yet been admitted.

Petitioner sought a petition for administration intestate, saying upon information and belief decedent lacked competency at the time of the execution of the Will. He sought an adjournment to conduct discovery. Had the Will been proffered for Probate, I assume the proper forum for the instant hearing would be to object to admission of the Will or to set aside its admission.

The Court denied adjournment to conduct discovery and summarried out Petitioner.

The Court of Appeals said granting adjournment is discretionary and was not an abuse. Information and belief of incompetency is not sufficient to afford a special administration. Further, under the cases cited, you can grant summary before discovery.

The Court of Appeals reviewed the evidence known and said that showed the dismissal was not an abuse of discretion.

Query, could the entire matter be reheard if the Will were proffered for Probate and objections filed?

Why was the Will not offered for Probate?

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF DOROTHY L. TANSEY.

WILLIAM H. WELCH,

Appellant,

v

DOROTHY ANNE WELCH and JOHN H. WELCH,

Appellees.

UNPUBLISHED
September 23, 2021

No. 355160
Jackson Probate Court
LC No. 20-000648-DE

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Petitioner William H. Welch appeals the probate court's September 29, 2020 order, which dismissed his petition for probate and for appointment of a special personal representative. We affirm.

I. BACKGROUND

Dorothy L. Tansey (decedent) had three children: petitioner and respondents Dorothy Anne Welch and John H. Welch. At some point, decedent went to her attorney Howard Patch and instructed him to draft a will for her. Patch did so after discussing the matter with decedent, and decedent executed the will in March 2012. Patch and Pamela Maynard, who was Patch's legal assistant, were present when decedent executed the will. Decedent nominated respondents as co-personal representatives, bequeathed her entire estate to respondents, and indicated that she "intentionally" made "no provision" for petitioner. Decedent died on November 6, 2019.

On August 17, 2020, petitioner filed a petition for probate and requested that the probate court appoint him as "[a] special personal representative" of decedent's estate. Petitioner acknowledged that decedent had executed a will before her death. However, petitioner alleged

that, "on information and belief[,] decedent lacked the capacity to make a will and was under undue influence at the time." The petition also alleged as follows:

> After decedent's death, [respondents] avoided sharing information. When contacted by Petitioner's attorneys, they obtained an attorney. Requests were made to that attorney who only shared limited information. This lack of transparency has further raised Petitioner's suspicion that assets were improperly manipulated and legal documents executed by decedent at a time when she could not legally do so. A special representative is necessary to allow Petitioner to investigate and to obtain necessary information to determine if further proceedings are necessary.

Respondents opposed the petition, arguing that petitioner was aware that decedent had appointed respondents as co-personal representatives and that all of decedent's assets had already been distributed to the proper beneficiaries. Respondents also argued that petitioner had failed to produce "evidence or even a legitimate factual allegation to support that a special personal representative [was] appropriate[.]" Respondents presented affidavits executed by Patch and Maynard to support that decedent "had the requisite mental capacity to dispose of her assets."

At the hearing on the petition, petitioner's counsel did not present any evidence. Instead, petitioner requested a continuance to allow for discovery. Petitioner also requested that the probate court enter a scheduling order and hold a contested evidentiary hearing on the issue of decedent's testamentary capacity after the close of discovery. The probate court denied petitioner's requests, denied the relief sought in the petition, and dismissed the matter. This appeal followed.

II. DISCUSSION

Petitioner argues that the probate court abused its discretion by failing to permit discovery, by failing to grant a continuance, and by failing to hold an evidentiary hearing before dismissing the petition. We disagree.

A. STANDARDS OF REVIEW

"Interpretation of a court rule is a question of law that this Court reviews de novo." *Olin by Curtis v Mercy Health Hackley Campus*, 328 Mich App 337, 344; 937 NW2d 705 (2019). This Court also reviews de novo a trial court's decision to grant summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

"This Court reviews for an abuse of discretion [a] trial court's decision whether to adjourn or continue a proceeding," *Johnson v Johnson*, 329 Mich App 110, 118; 940 NW2d 807 (2019), whether to grant or deny discovery, *Chastain v Gen Motors Corp*, 254 Mich App 576, 593; 657 NW2d 804 (2002), whether to appoint a personal representative, *In re Kramek Estate*, 268 Mich App 565, 575; 710 NW2d 753 (2005), and whether to hold an evidentiary hearing, *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). "[A]n abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 216; 818 NW2d 478 (2012). "A court necessarily abuses its discretion when it makes an error of law." *In re Guardianship of Gordon*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 354646); slip op at 2.

B. ANALYSIS

1. DENIAL OF PETITIONER'S REQUEST TO CONTINUE THE PROCEEDING PENDING DISCOVERY

The probate court did not abuse its discretion by refusing to grant a continuance. A motion to adjourn must be based on good cause. MCR 2.503(B)(1). If a party seeks an adjournment due to the unavailability of a witness or evidence, the party must make the motion "as soon as possible after ascertaining the facts." MCR 2.503(C)(1). Such a motion may be granted "only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2).

Petitioner scheduled a hearing on the petition. At the hearing, petitioner's counsel expressed a need for discovery regarding decedent's longstanding mental health issues, explaining that there had been a lack of transparency on the part of respondents and that petitioner had tried to obtain information from them before the petition was filed. Although it would have been proper for petitioner to engage in discovery after the petition was filed, the record contains no evidence that petitioner made any effort to obtain discovery. See MCR 5.131(A) and (B)(1); MCR 2.301(A)(1). Specifically, there is no evidence that petitioner sought subpoenas for decedent's medical records, attempted to depose respondents, timely obtained affidavits, or otherwise sought information to support the petition. Indeed, petitioner did not even prepare and present his own affidavit to the probate court. This shows a lack of diligence by petitioner and demonstrates that petitioner failed to request a continuance "as soon as possible after ascertaining the facts."

Likewise, petitioner failed to demonstrate good cause to continue the proceeding. As discussed in more detail below, petitioner did not demonstrate any likelihood that he would uncover support for his petition. Instead, he merely speculated that unspecified evidence might substantiate his claims. Discovery based on mere conjecture is not appropriate. *Davis v Detroit*, 269 Mich App 376, 380; 711 NW2d 462 (2006). We therefore conclude that the probate court's refusal to continue the proceedings did not fall outside the range of reasonable and principled outcomes.

2. DISMISSAL OF THE PETITION WITHOUT PERMITTING DISCOVERY

The probate court did not err by granting summary disposition in favor of respondents and did not abuse its discretion by refusing to permit discovery.

Petitioner petitioned the probate court to appoint a special personal representative "to investigate and obtain necessary information to determine if further proceedings are necessary." Although petitioner did not cite authority for his request, MCL 700.3614(b) provides for the appointment of a special personal representative in the following circumstance:

> By the court on its own motion or in a formal proceeding by court order on the petition of an interested person if in either case, after notice and hearing, the court finds that the appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances in which a general personal representative cannot or should not act. If it appears to the court that an emergency exists, the court may order the appointment without notice.

Furthermore, under MCL 700.1309(a), the probate court, "[u]pon reliable information received from an interested person," may "[a]ppoint a special fiduciary to perform specified duties."

In support of his petition, petitioner asserted that "on information and belief decedent lacked the capacity to make a will and was under undue influence at the time" she executed the will. These matters were arguably pertinent to securing the proper administration of decedent's estate, and the petition was contested by respondents.

Contested proceedings in probate court are governed by MCR 2.401. MCR 5.141. MCR 2.401(B)(1) provides that the court "may" hold an early scheduling conference. At such a conference, "the court shall establish times for events . . . the court deems appropriate," including the time for completion of discovery and the exchange of witness lists. MCR 2.401(B)(2)(a). The use of the term "may" denotes permissiveness and is indicative of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). Therefore, the probate court had the discretion to hold an early pretrial scheduling conference and issue a scheduling order, but it was not required to do so. If the court has not issued a scheduling order under MCR 2.401, it shall (1) schedule a pretrial conference, (2) set the case for alternative dispute resolution, (3) set the case for trial, or (4) enter any other appropriate order to ready the case for trial. MCR 2.501(A).

In this case, petitioner scheduled a hearing on the petition. After petitioner failed to present any proofs to support his petition and instead requested discovery and that the matter be continued, the probate court dismissed the petition. It is not entirely clear what authority the probate court relied on when doing so. However, respondents appeared to request—and the probate court appeared to grant—dismissal based on a lack of evidentiary support. Specifically, the probate court held as follows:

> I just think that there's not sufficient information even alleged in the Petition. It says, "On information and belief Decedent lacked the capacity to make a will." And Mr. Patch points out differently. And as an Officer of the Court, I can—I can rely on him.

Under MCR 2.116(I)(1), "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Thus, "[u]nder this rule, a trial court has authority to grant summary disposition sua sponte, as long as one of the two conditions in the rule is satisfied." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted).

On appeal, petitioner argues that the probate court's ruling was improper because the probate court did not permit the parties to engage in discovery and relied solely on Patch's affidavit when making its ruling. "Generally, . . . summary disposition is premature if granted before discovery on a disputed issue is complete." *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006) (quotation marks and citation omitted). Despite Michigan's discovery rules being broadly construed, *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003), the support of open and extensive discovery is not intended to promote "fishing

expedition[s]," *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996). Summary disposition is "appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Oliver*, 269 Mich App at 567 (quotation marks and citation omitted).

In this case, the disputed issue was whether decedent possessed testamentary capacity at the time that the will was executed.[1] The right to contest a will is statutory and the burden is on the will contestant to establish that the will is void for lack of testamentary capacity. MCL 700.3407(1)(c). A testator's capacity to execute a will is presumed. *In re Mardigian Estate*, 312 Mich App 553, 565; 879 NW2d 313 (2015). "Whether a decedent had the requisite 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." *Id.* at 565-565 (quotation marks omitted). Just because a testator lacked capacity immediately before or after the execution of a will does not mean the testator lacked capacity at the time she executed the will. *Fish v Stilson*, 352 Mich 437, 440-441; 90 NW2d 509 (1958). To have testamentary capacity, a testator must "be able to comprehend the nature and extent of [her] property, to recall the natural objects of [her] bounty, and to determine and understand the disposition of property which [s]he desires to make." *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001) (quotation marks and citation omitted). Stated differently, a testator must know what property she owns, who her family is, and how the will disposes of the property in order to demonstrate her testamentary capacity. Proof of old age, mental weakness, or forgetfulness are insufficient to establish a lack of testamentary capacity. *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953). Neither a "lack of wisdom in the disposition of the property nor the fairness of the provisions of the will [should] influence the court in a determination of mental competency." *Id.* "A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected thereby." *In re Ferguson's Estate*, 239 Mich 616, 627; 215 NW 51 (1927).

In arguing that decedent lacked testamentary capacity to execute the will, petitioner argues that decedent had suffered from mental illness "for decades," that she was institutionalized at times, and that she was appointed a guardian ad litem in October 2014.[2] However, the appropriate test is whether *at the time she signed the 2012 will*, decedent was "able to comprehend the nature

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[1] On appeal, petitioner does not argue in a meaningful manner that the probate court erred by dismissing his claim that respondents exerted undue influence on decedent at any relevant time. Indeed, petitioner fails to present any relevant authority concerning undue influence, thereby rendering the argument abandoned. See *In re Spears*, 309 Mich App 658, 674; 872 NW2d 852 (2015). Nonetheless, to the extent that we have considered the argument, we conclude that the record would not support such a claim. See *In re Estate of Karmey*, 468 Mich 68, 73-76; 658 NW2d 796 (2003) (outlining the elements of undue influence). Additionally, given the affidavits of Patch and Maynard and the lack of support provided by petitioner on appeal, we fail to see how discovery on the issue would have uncovered any material evidence.

[2] While these affidavits were not before the probate court and are presented by petitioner for the first time on appeal, we have considered the affidavits in order to evaluate whether discovery would have uncovered evidence to support that decedent lacked testamentary capacity.

and extent of [her] property, to recall the natural objects of [her] bounty, and to determine and understand the disposition of property which [s]he desire[d] to make." See *Persinger*, 248 Mich App at 504. Petitioner presents no evidence concerning decedent's mental state at the moment she signed the will and does not purport to explain how he could have obtained evidence to support his position if discovery had been permitted.

Importantly, Patch and Maynard were present when the will was executed. Patch, an experienced estate planning attorney who had represented decedent for "approximately 13 years," averred that he had prepared decedent's will "according to her specific instructions[.]" According to Patch, decedent "was not accompanied by any other person when she came to the office to discuss and execute her Will." In relevant part, Patch further averred as follows:

> I believe, without question, that [decedent] had the ability to understand that she was providing for the disposition of her property after death, she knew the nature and extent of her property, and she knew the natural objects of her bounty. She understood the nature and effect of her act in signing the Will.

Patch also noted that he confirmed that decedent had reviewed the will, that decedent understood the will, and that the will was "prepared in accordance with [decedent's] wishes and intentions[.]" Patch recalled that decedent "did not want [petitioner] to receive any portion of her estate and intentionally made no provision for him in her Will." Patch averred that he had discussed this with decedent and confirmed that she had understood that she was disinheriting petitioner. Patch denied that he had "ever [spoken] with any of [decedent's] children regarding her estate plan until after [decedent] died." Maynard's affidavit is consistent with Patch's affidavit. Additionally, the last page of the will provided as follows:

> We certify under penalty for perjury under the law of the State of Michigan that (1) we, the witnesses, sign our names to this Will on this 8th day of March, 2012; (2) the individual signing this document executes it as a voluntary act for the purposes expressed in this Will; (3) each of us, in the individual's presence, signs this Will as a witness to the individual's signing; and (4) to the best of our knowledge, the individual is 18 years of age or older, of sound mind, and under no constraint or undue influence.

Patch and Maynard's signatures followed this paragraph, and the undisputed evidence established that only Patch and Maynard were in the room with decedent when she executed the will. Consequently, given that there is no indication that petitioner would be able to present evidence that decedent lacked testamentary capacity at the time she signed the will, summary disposition was not premature.[3]

[3] To the extent that petitioner argues that he was deprived of due process, this argument is without merit. Before the hearing on the petition was held, respondents objected to the petition and presented evidence to support denial of the relief sought in the petition. Nonetheless, petitioner did not attempt to obtain discovery before the hearing and did not seek to adjourn the hearing until

In sum, because the undisputed evidence established that decedent had testamentary capacity to execute the will and because there is no indication that discovery would have uncovered material evidence concerning this issue, the probate court did not err by granting summary disposition and did not abuse its discretion by declining to hold an evidentiary hearing. Furthermore, given the facts of this case, we cannot conclude that the probate court abused its discretion by denying petitioner's request for discovery. See *In re Hammond Estate*, 215 Mich App at 386; *Davis*, 269 Mich App at 380.

The probate court also did not abuse its discretion by denying petitioner's request for appointment of a special personal representative. Indeed, petitioner sought appointment of a personal representative solely so that the issue of decedent's testamentary capacity could be investigated. Because a genuine issue of material fact did not exist concerning decedent's testamentary capacity, it was not necessary to appoint a special personal representative.

Affirmed.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher

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the day of the hearing. After the probate court provided the parties with an opportunity to present oral argument, the probate court found that it was proper to dismiss the petition. In doing so, the probate court relied on the arguments contained in respondents' objection to the petition. Although petitioner could have filed a motion for reconsideration before the probate court, petitioner elected not to do so and instead filed the instant appeal. See *Al-Maliki*, 286 Mich App at 486 (holding that "any error by a court in granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless . . ., if the party is permitted to fully brief and present the argument in a motion for reconsideration"). Thus, we conclude that petitioner was provided with notice and a meaningful opportunity to be heard. See *id*. at 485.