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.

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

DT: Date: February 2, 2022

RE: ***In re Timco 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.

KEMPKLEIN LAW FIRM

201 West Big Beaver Road, Suite 600, Troy, MI 48084 | Phone: 248.528.1111 | kkue.com

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

BASEBALL STATS:

Meaningful Stats

On base percentage is more meaningful than batting average.

What is O.B.P.? Simply put, it's the number of times a batter, (Notice I didn't say hitter), through his own efforts reaches at least first base.

Why is this more meaningful than batting average? Simply put, a batter can't score until he becomes a runner and the more times he becomes a runner, the more chance his team has to advance him to home plate.

How is O.B.P. determined? First, I must inform you that the average fan does not know the difference between a numerator and a denominator, let alone what to do with them. A & W Root Beer tried to compete against McDonald's quarter pound by offering a burger that weighed 1/3 of a pound at a lesser cost. Joe Public demurred believing the McDonald burger was bigger.

Hence, some basic math.

$$\text{Batting Average} = \frac{\text{Hits}}{\text{At Bats}} \qquad \frac{\text{Batting Average}}{\text{At bats / hits}}$$

O.B.P. Hits + Walks + Hit by Pitch = Numerator
At bats + Hit by Pitch + Walks + Sacrifice Flies = Denominator

You don't count getting on base through an error – that's not "by your own effort."

Therefore,

$$\frac{\text{One Base Percentage}}{\text{Denominator / Numerator}}$$

Conversely, looking at it from the pitcher's mound, the fewer hits and walks (whip) per inning the better the pitcher.

Alan, you cannot write about baseball all your life.

Mrs. Pollinger

12th Grade English Comp

Mumford High —1959

BASEBALL STATS:

Castrovince points out:

An O.B.P. over .390 is excellent
.370 is great
.340 is above average
.320 is average
.310 is below average
.300 is poor
.290 is awful

Got it, or are you still trying to figure out the Big Mac?

REVIEW OF CAS

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on Propriety of citing unpublished cases

RE *In re Timco Estate*

- Jaw Jaw Jaw is Better than War War War
- Out of Court Settlement of Estate
- Estoppel
- Statute of Limitation
- a) Breach of Fiduciary Duty
- b) Breach of Contract
- Failure to Distribute

After a funeral, all the presumptive heirs at law and beneficiaries under an alleged Will met and divided the estate and agreed to a distribution. [1] The nominated Personal Representative in the alleged Will "may" have gotten more than the agreement provided. This meeting took place in 2012. In 2020, Appellant filed a petition to admit the putative Will and claimed a breach of fiduciary duty.

The lower Court ruled that the estate had been properly settled by agreement and dismissed the matter.

The Court of Appeals affirmed, and inter alia said:

1. EPIC MCL 700.3914 allow out of Court settlements. [2]
2. Case law allows for same. *Foote v Foote*, 61 Mich 131 (1886).
3. Case law says these agreements are favored.
4. Fraud is an exception or an action which makes the agreement "otherwise invalid."
5. If you breached, you are estopped from arguing the point.
6. A personal representative is a fiduciary and has fiduciary duties.[3]
7. Even if breach of fiduciary duty existed, the allegation was beyond 3 years, and if based on contract, more than 6 years have passed.

Sanctions?

---

[1] This Court mentions a signed receipt, "of my share of the estate", it does not refer to a written agreement.
[2] EPIC says "in writing." In this case, either the receipt was the basis of the writing requirement or there was a failure to say there was a writing.
[3] But Appellee was not a fiduciary. Michigan does not utilize the doctrine of executor ex maleficio. Would it not be better to have said that under these circumstances constructive trust could be imposed as a remedy and the person would be a constructive trustee.

STATE OF MICHIGAN

COURT OF APPEALS

In re TIMCO ESTATE.

KYLE TIMCO,

Appellant,

and

ANDREW TIMCO, ERIC TIMCO, and BRENT TIMCO,

Other Parties,

v

RONALD MACKOOL,

Appellee.

UNPUBLISHED
January 13, 2022

No. 356338
Macomb Probate Court
LC No. 2020-235736-DE

Before: BOONSTRA, P.J., and CAVANAGH and RIORDAN, JJ.

PER CURIAM.

Appellant, Kyle Timco, appeals as of right the probate court's order denying his petition for formal probate and appointment of a personal representative. On appeal, appellant argues the probate court erred for a multitude of reasons. We find none of these reasons persuasive. Because the record shows the estate of decedent, Douglas Timco, was settled outside of probate, the probate court was correct to deny appellant's petition. We affirm.

This case arises from appellant's efforts to submit decedent's putative will to probate more than eight years after decedent's death. Decedent died in June of 2012, and left behind a will, under which appellant and Sandra J. Timco, decedent's ex-wife, were devisees. The will named appellee as personal representative.

Decedent's will never went through probate. According to appellee's counsel, there was no need to go through probate because appellee already had access to all of decedent's assets: all of decedent's assets were either owned jointly with appellee, or else made payable to appellee upon decedent's death. Appellee, appellant, and all other interested parties met privately just after decedent's death, and at this private meeting, appellee distributed decedent's assets. Appellant signed a receipt acknowledging appellee delivered appellant's share of decedent's estate to him.

More than eight years passed, when, in November of 2020, appellant moved in the probate court to admit decedent's will to probate. Appellant did not provide a copy of decedent's putative will with his petition. He claimed appellee would not provide him a copy. Still, appellant did not state what the contents of the will would be. Also, appellant failed to list Sandra and appellee as interested parties. At the same time, appellant failed to serve his petition and notice of hearing on appellee. Somehow, appellee discovered that appellant had filed a petition, and promptly filed an objection. In the objection, appellee alleged that decedent's estate had already been settled. Appellee attached a copy of decedent's putative will and a copy of the receipt signed by appellant.

The day of the probate court hearing, appellant submitted a lengthy affidavit with numerous allegations. On the whole, he alleged three things. First, he alleged appellee failed to distribute of all of decedent's assets in accordance with decedent's will. Second, and inconsistently with his petition, appellant alleged decedent's will was invalid. Third, appellant alleged appellee breached his fiduciary duties. The probate court denied appellant's petition, finding that decedent's estate had already been properly settled and that appellant failed to provide a basis for reopening decedent's estate. This appeal followed.

This Court reviews for clear error the findings of a probate court sitting without a jury. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "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." *Id*. "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). To the extent that this appeal requires interpretation of statutes or court rules, this Court's review is de novo. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007). Likewise, "[t]he question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009).

At the outset, we note all of appellant's arguments about the validity of decedent's will are unpreserved, and so we decline to consider them. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (noting that the failure to preserve an issue for appellate review generally precludes appellate consideration of that claim in a civil case). Generally, an issue is not properly preserved if it was not raised before, addressed, or decided by the trial court or administrative tribunal. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). The probate court did not decide appellant's arguments about decedent's will being invalid because of decedent's lack of testamentary capacity, fraud, or undue influence. While a party should not be penalized by the trial court's failure to address or decide an issue that was otherwise properly before it, see *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d

499 (1994), appellant's arguments were not properly before the probate court. Appellant filed a petition to admit decedent's will to formal probate; he was not challenging the validity of the will. Therefore, appellant's arguments about the validity of the will were outside of the scope of the proceedings below and were not properly before the probate court.

We turn now to the issues properly preserved for appeal. This case is governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. "The provisions in EPIC are to be construed liberally and applied to promote its purposes and policies, including '[t]o discover and make effective a decedent's intent in distribution of the decedent's property.' " *In re Attia Estate*, 317 Mich App 705, 709; 895 NW2d 564 (2016), quoting MCL 700.1201(b).

The gist of appellant's argument on appeal is that the probate court erred by dismissing his petition for formal probate and appointment of personal representative. Appellant's argument is unavailing.

Our Supreme Court has historically held that the estate of a deceased person may be settled between all those interested and competent to contract without intervention of the probate court—even when a decedent has left behind a will—so long as no creditors intervene. See, e.g., *In re Meredith's Estate*, 275 Mich 278, 290; 266 NW 351 (1936); *Powell v Pennock*, 181 Mich 588, 593; 148 NW 430 (1914); *Morse v Allen's Estate*, 99 Mich 303, 307; 58 NW 327 (1894) ("[W]here the rights of creditors do not intervene, the heirs may divide and distribute the personal property of an estate in such manner as they see fit."). In fact, our Supreme Court has held that these types of agreements are favored, so long as they are reasonable and entered into understandingly. *Detroit Trust Co v Neubauer*, 325 Mich 319, 334; 38 NW2d 371 (1949) ("It has been the policy of this State for many years to regard favorably the settlement of litigation in situations of the nature here involved."); *In re Lacroix's Estate*, 244 Mich 148, 157; 221 NW 165 (1928) ("Amicable settlements of disputes arising out of the provisions of testamentary dispositions of estates of deceased persons are recognized and justified by the law and are encouraged by the courts."); *Krause v Hoffman*, 239 Mich 348, 353; 214 NW 146 (1927); *Baas v Zinke*, 218 Mich 552, 554; 188 NW 512 (1922) ("Settlement of family difficulties or controversies arising out of the distribution of estates are favored, both at law and in equity, if at all reasonable and entered into understandingly."). And MCL 700.3914 explicitly allows such settlement agreements:

> (1) Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written agreement executed by all who are affected by its provisions. If there is, or may be, an interested person to the agreement who is a minor or incapacitated individual or if there is an inalienable estate or future contingent interest, after notice to the representative of the individual or interest as provided by supreme court rule, the court having jurisdiction of the matter may, if the agreement is made in good faith and appears just and reasonable for the individual or interest, direct the representative of the individual or interest to sign and enter into the agreement. The personal representative shall abide by the agreement's terms subject to the personal representative's obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the fiduciary office's

> responsibilities for the benefit of a successor of the decedent who is not a party. [MCL 700.3914(1).]

Settlement agreements such as these remain binding until rescinded for cause. *Stefanac v Cranbrook Ed Community*, 435 Mich 155, 163; 458 NW2d 56 (1990). This rule holds true in the context of estate settlement agreements. See *Foote v Foote*, 61 Mich 181, 190; 28 NW 90 (1886). The facts of *Foote* are similar to the facts here. In *Foote*, right after the decedent's funeral, the heirs of the decedent met privately and reached an agreement as to how decedent's estate would be distributed. *Id*. at 187-188. Our Supreme Court held that an heir who was party to the agreement was estopped from later repudiating it:

> When such arrangement and distribution have been made and executed, it will be binding, both in law and equity, as between the parties making it, whenever the rights of creditors do not intervene. And where there are no creditors, the heirs or legatees may divide up and distribute the personal property of the decedent without converting it into money, in such manner as they see fit; and when such division has been executed, even though it is not such as the decedent has made by his will, or such as the law would make when there is no will, it will be binding upon all the parties to the agreement.
>
> By the terms of the claimed settlement in this case all the estate was disposed of, and the heirs with whom [Elisha Foote] made the settlement were fully satisfied, and among whom was the heir who has been appointed administrator of [decedent's] estate. It is not claimed any fraud was practised [sic] upon either side in making the settlement, or any mistake made; all the parties to the agreement were familiar with the facts and circumstances under which it was made. If such settlement was made as claimed, we think it was upon a sufficient consideration, and all the parties present and participating therein, or assenting thereto, are bound thereby, and estopped from making any claim to said note, or to any of the proceeds thereof. [*Id*. at 190-191) (citations omitted)].

However, estate settlement agreements are not unassailable. Our Supreme Court has held that an estate settlement agreement may be set aside if the agreement was procured by fraud. *Baas*, 218 Mich at 554-555. "But fraud is not lightly to be presumed, and the burden is on those alleging it to prove it." *Id*. at 554.

The record shows appellee and appellant were parties to a settlement agreement concerning decedent's estate. Appellee and appellant agree they and other interested persons met privately in June of 2012, and at this meeting, appellee distributed decedent's assets. Indeed, appellant signed a receipt acknowledging he received a $10,964.80 distribution in accordance with decedent's will and acknowledging he would have to contact decedent's insurer to collect the $5,000 to which he was entitled. In the absence of fraud, this agreement was binding on appellant, thus barring him from seeking to admit decedent's will to probate.

Appellant offered no competent proof this settlement agreement was a product of fraud. The allegations in appellant's affidavit consisted of innuendo and speculation rather than facts of which he had personal knowledge. See *SSC Assoc Ltd Partnership v Gen Retirement Sys of City*

of Detroit, 192 Mich App 360, 363-364; 480 NW2d 275 (1991) (noting that affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence). Presumably in an effort to show the settlement agreement was fraudulent, appellant attested Sandra and appellee received "the majority of [decedent's] property." Even if this were circumstantial evidence of fraud, the record shows appellant's attestation is inaccurate. According to the spreadsheet provided with the will, Sandra received 16% of decedent's assets, appellant received 18%, and appellant's siblings split the rest. Plus, appellant offered nothing to show appellee usurped assets from decedent's estate for appellee's own use. In oblique terms, appellant speculated this was the case, but set forth no particular facts of which he had personal knowledge to support this claim.

Simply put, the record below shows decedent's estate was distributed in accordance with a settlement agreement entered into outside of probate. And appellant has offered nothing to show this agreement was the product of fraud, or that it was otherwise invalid. He is therefore estopped from repudiating it. See *Foote*, 61 Mich at 190-191. Accordingly, the probate court was correct to deny his petition for formal probate and appointment of personal representative.

To the extent that appellant argues appellee breached his fiduciary duties or breached the settlement agreement, these arguments are barred by the statutes of limitations.

A personal representative is considered a fiduciary under EPIC. MCL 700.1104(e). ("Fiduciary includes, but is not limited to, a personal representative, funeral representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary."). Under MCL 700.1214 of EPIC, fiduciaries are prohibited from engaging in self-dealing. *In re Cummin Estate*, 474 Mich 1117, 1117; 712 NW2d 447 (2006). Most relevant here, MCL 700.1214 states: "A fiduciary in the fiduciary's personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate's property." MCL 700.1214. Under MCL 700.1308, the probate court has authority to determine and remedy a fiduciary's breach of fiduciary duty. *In re Conservatorship of Murray*, ___ Mich App ___, ___ ; ___NW2d ___ (2021) (Docket No. 349068); slip op at 5.

Even if appellant had a claim for breach of fiduciary duty against appellee, appellant's claim would be barred by the statute of limitations. A party has three years from the date on which a claim for breach of fiduciary duty accrues to sue. *Prentis Family Foundation v Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005), citing MCL 600.5805(10). "A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach." *Id*. at 47 (quotation marks and citations omitted). "The 'knew or should have known' language indicates that when a claim accrues is subject to an objective standard." *Id*. at 48. "[A] plaintiff is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause." *Id*. (quotation marks and citations omitted).

Appellant should have been aware of a possible cause of action against appellee when appellee allegedly failed to deliver the property to which appellant believed he was entitled under decedent's will. Put otherwise, appellant should have been aware of a possible cause of action against appellee after the June 2012 settlement meeting. As a result, appellant's cause of action for breach of any fiduciary duty first accrued in June of 2012. Yet appellant filed his petition in

November of 2020, well in excess of the statute of limitations for a breach of fiduciary duty claim. Appellant was, therefore, barred from suing appellee for breach of fiduciary duty.

Even if appellant's argument is treated as a breach-of-contract claim, the same result is obtained. A breach-of-contract claim accrues on the date of the breach, and the statute of limitations is six years. *Seyburn*, 483 Mich at 355, citing MCL 600.5807(8). If appellee failed to deliver all of decedent's assets in accordance with the will, as appellant alleged, the date of breach was June of 2012. Consequently, appellant was required to sue for breach of contract by June 12, 2018. He failed to do so.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael J. Riordan