CASE LAW UPDATE

By

Patricia Patterson Courie
Attorney at Law
43550 Elizabeth, Suite 100
Clinton Twp., MI 48036
(586) 307-3600

RECENT MICHIGAN COURT OF APPEALS DECISIONS:

A. WILLS AND TRUSTS – DRAFTING ATTORNEY AND HIS CHILDREN AS BENEFICIARY

In re Mardigian Estate, ____ Mich App ___; ___ NW2d ____ (2015) #319023

1. Case remanded to Charlevoix Probate Court by 2-1 decision of the Michigan Court of Appeals for further proceedings to allow attorney, who drafted will and trust of client where attorney and his sons were beneficiaries, to present evidence sufficient to overcome the presumption of undue influence.

2. Decedent executed a trust amendment in August, 2010, leaving bulk of estate to the drafting attorney and his sons. Attorney had been a long-time friend of the deceased. In June, 2011, Decedent signed new will prepared by the same attorney giving the same distribution to attorney and his sons. Decedent died in January, 2012. Attorney tried to file will with probate court and be named Personal Representative, but objections were filed by brother, nephews and nieces of deceased. After discovery, decedent's brother and nephews filed Petition for Partial Summary Disposition to void all gifts under both the trust and will to the attorney and his sons as gifts were against public policy, as evidenced by MRPC 1.8(c). Although the Charlevoix Probate Court initially denied the petition, it was verbally renewed at a subsequent hearing, and was granted.

3. MRCP 1.8(c) provides: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

4. The court of appeals relied on *In re Powers Estate*, 375 Mich 150, 156, 176, 179; 134 NW2d 148 (1965). *Powers* found that a will devising the bulk of an estate to the family of the drafting attorney was not necessarily invalid. Their decision indicated that there was a question of capacity to executed estate planning documents by testator and whether undue influence by the attorney resulted in the gift. Appellees relied on *Karabatian's Estate v Hnot*, 17 Mich App 541, 546-547; 170 NW2d 166 (1969), which held a similar will was void as against public policy. The court of appeals found that the *Karabatian* court erred for failure to follow *Powers* as binding precedent.

5. The court noted that MRPC 1.8(c) prohibits the conduct by the attorney at issue in this case. While the conduct was unethical, and may result in future discipline, it is not *clearly* conduct against public policy. Trust and wills are not contracts, as the primary goal of interpreting wills is to determine the intent testator. Since the gifts to the attorney and his sons are not, on their face, unlawful, they can only be invalidated as unlawful *if* they are against public policy. The court notes that had the testator gone to another attorney to draft the estate planning documents, and named the same attorney and his sons as devisees, there would be nothing illegal

about the gifts. Although the attorney violated rules of professional conduct, invalidating the devises in the will and trust would fail to honor the wishes of the deceased. The court admits that the devises to the drafting attorney and his sons should be viewed with suspicion, but should be challenged under the doctrine of undue influence. The court reviewed the requirements to prove undue influence. They note that appellant was the decedent's fiduciary, benefited from the transaction with decedent, and as the drafter of the documents, had the opportunity to influence the decisions of decedent. They conclude that it is presumed that appellant exerted undue influence in securing the gifts to himself and his sons, but should still have the opportunity to attempt to rebut the presumption of undue influence.

6. The Dissent by Judge Servitto notes that *Powers* was decided long before the MRPC or the Code of Professional Conduct, and that MRPC 1.8(c), which specifically prohibits the actions of the appellant attorney, should be the rule to follow. Violation of the rules of professional conduct violates public policy. Under the dissent, the ruling of the trial court would have been upheld, and the will and trust would have been voided as being against public policy.

B. JOINT TRUST/ABILITY TO REMOVE ASSETS – UNDUE INFLUENCE RETROACTIVITY

Bill and Dena Brown Trust v. Geri Garcia; In re Estate of Billie Max Brown, ___ Mich App ___; ___ NW2d ___ (2015) #322401

1. Consolidated cases involved an action to quiet title and a will contest. Court of Appeals unanimously affirmed the ruling in the Montmorency Probate Court granting summary disposition to Geri Garcia finding the surviving Settlor/Trustee was authorized to remove property from the trust after the death of his wife, and summary disposition to Geri Garcia with respect to the claim of undue influence.

2. Facts show that Bill Brown and Dena Brown created a joint trust on June 8, 2007, along with "pour-over wills". On June 11, 2008, Bill and Dena amended the trust and wills to change some of the beneficiaries, but did not alter the terms of the trust. On February 28, 2008, Bill and Dena acquired property in Montmorency County, which was conveyed directly to their joint trust. They moved into the home to be closer to Bill's former daughter-in-law, as Dena had cancer and the daughter-in-law was caregiver. Dena died on August 10, 2008.

   Geri Garcia was born in April, 1983, in California and was immediately placed for adoption. In October, 2009, Geri was contacted by her birth mother, who informed Geri that her natural father was John Brown, the brother of Bill Brown. Geri contact John Brown, who rejected her claim of paternity and refused to provide a genetic sample for testing. In the meantime, birth mother contacted Bill Brown and provided a telephone number for Geri Garcia. He called Geri, and in August, 2010, Geri Garcia wrote to Bill Brown about herself and her family.

They had regular contact by telephone and mail, and in June, 2011, Geri Garcia flew to Michigan to visit Bill Brown. In January, 2012, Bill Brown submitted a genetic sample for testing, which excluded Bill Brown as her father but concluded with the probability of 97.7% that they were related, and the "likelihood that the alleged relative is the biological relative of the tested child is 43 to 1." Although provided the above information, John Brown continued to deny he was the father and admonished Bill Brown not to give anybody his cell phone number.

Geri Garcia flew to Michigan for a second visit with Bill Brown in February, 2012. During this visit, Bill Brown and Geri Garcia went to PNC Bank where Bill added Geri as joint owner with rights of survivorship on his bank accounts. They also visited Bill Brown's attorney, who had been contacted previously by Bill Brown, with instructions to prepare various legal documents. At the time of the office visit, the documents were signed by Bill Brown, including a Durable Power of Attorney naming Geri Garcia as Attorney in Fact; Designation of Patient Advocate; a living will; and a new Last Will and Testament. The new Will disinherited Bill Brown's two children and their issue, devised all the residue of his estate to Geri Garcia, and appointed Geri Garcia as his Personal Representative. Bill also signed a Lady Bird Deed transferring the house in Montmorency County from the Trust to himself as an individual, and to Geri Garcia should he not otherwise dispose of the property prior to his death.

Geri Garcia and various members of her family continued to visit Bill Brown on at least four occasions during 2012. Bill Brown passed away on January 16, 2013. Mark Brown, the son of John Brown, became Successor Trustee of the Bill and Dena Brown Trust.

Mark Brown filed an action in circuit court on February 1, 2013, to quiet title to the property in Montmorency County, claiming that the "Lady Bird" deed was null and void as it contradicted terms of the Bill and Dena Brown Trust. Garcia responded and denied that the deed was contrary to the terms of the trust. Mark Brown later developed a theory of undue influence on the part of Garcia.

On March 8, 2013, Garcia filed a petition in probate court for formal appointment as Personal Representative of the Estate of Bill Brown and for determination of heirs. Mark Brown contested probate. The two cases were consolidated with the consent of both parties and the Circuit Judge assigned to both cases.

In June, 2013, competing motions for summary disposition were filed. After hearing both motions in July, 2013, the trial court took the motions under advisement. On August 8, 2013, an opinion and order was entered by the trial court granting in part Garcia's motion and denying Mark Brown's motion. The court concluded that the terms of the Bill and Dena Brown Trust authorized Bill Brown, as the surviving settlor/trustee, to execute the "Lady Bird" deed. Although Article II of the trust prohibited the surviving settlor from revoking or amending the trust, Article VII provided that "during Settlor's lifetime, however,

Settlor may direct Trustee with respect to any matter concerning the ... distribution ... of trust assets." Additionally, Section 7.10 allowed Bill Brown, as trustee, to "deal in real property ... without regard to the duration of such interest."

The claim of undue influence continued, and after further discovery, Garcia moved for summary disposition. On May 8, 2014, the trial court issued an opinion and order granting the motion. The court relied on the testimony of the bank employee who assisted Bill Brown in adding Garcia as joint owner on his accounts, and the testimony of Brown's attorney, who drafted and witnessed the various documents requested by Bill Brown in February, 2012. The trial court ruled that "all of the testimony supports the conclusion that Bill Brown was acting of his own volition and not subject to any undue influence [and that plaintiff] has presented no evidence to the contrary." The trial court rejected the Successor Trustee's claim of a presumption of undue influence because "the evidence has not demonstrated a confidential or fiduciary relationship between Geri Garcia and Bill Brown."

3. The decision discusses at length the terms of the trust and the ability of the Settlor/Trustee to engage in self-dealing. The Court of Appeals found that the trial court correctly ruled that conveying the property by way of the "Lady Bird" deed did not alter, amend or revoke the trust. The conveyance merely removed an asset from the trust. The court found authorization in the trust for the trustee to deal in real property or any interest therein, as trustee deems appropriate and without regard to the duration of the interest, and to execute and deliver an instrument that accomplishes of facilitates the exercise of a power vested in trustee.

Additional language from the trust authorized the trustee to utilize trust assets, even to the exhaustion of the trust, to maintain settlors' customary standard of living. While the court found that this language did not specifically authorize the quitclaim deed, it demonstrated that the trust was drafted for the settlors' benefit during their lifetime, with no guarantee that assets would remain for distribution to other beneficiaries after the death of the second spouse. The court followed *In re Leix Estate*, 289 Mich App 574, 590-591; 797 NW2d 673 (2010) in concluding that mutual wills that provide for property to pass to certain heirs after the death of the surviving spouse does not restrict the survivor's ability to dispose of property during the survivor's lifetime, rejecting "appellant's invitation to recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills." *In re Leix Estate*, 289 Mich App at 590.

The decision does not use the doctrine of ademption by extinction, which is statutorily limited to wills, but the theory is the same with regard to trusts. A specific devise under either a will or trust, where the asset is no longer owned by

the settlor at time of death, has "adeemed". The beneficiary of that specific gift is simply out of luck.

4. The Court of Appeals further affirmed the trial court's ruling dismissing the claim of undue influence as plaintiff failed to produce evidence that either the "Lady Bird" deed or the last will and testament were the product of influence by Geri Garcia sufficient to overcome the free will of Bill Brown. No evidence was produced of a confidential or fiduciary relationship to support a presumption of undue influence.

   The decision recites the test for undue influence as found in *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976) "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." "Proof of motive, opportunity, or even of the ability to control the grantor are not sufficient to establish undue influence in the absence of affirmative proof that it was exercised." *Id.; In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003)."

   Plaintiff attempted to establish a confidential or fiduciary relationship between Bill Brown and Geri Garcia by referring to a general evidentiary principal that subsequent acts may be circumstantial evidence of earlier events. In other words, the fact that Bill Brown signed documents such as a Durable Power of Attorney should be sufficient to raise a question of fact regarding undue influence as to the execution of contemporaneous or prior documents. Plaintiff's argument is based on a premise that "creation of a fiduciary relationship retroactively extends a presumption of undue influence to acts that took place before the fiduciary relationship was created." The court stated that this bootstrap argument that a presumption of undue influence should be applied to documents created before the fiduciary or confidential relationship existed has no support.

   The court noted that even if there was a retroactive presumption of undue influence, it could be rebutted by the introduction of contrary evidence. "The ultimate burden of proof regarding undue influence remains with the party who alleges that it occurred." *Kar,* 399 Mich at 539. In this case, the evidence supplied through the testimony of the bank employee and Bill Brown's attorney was sufficient to show that Bill Brown actions were the result of his own volition and free will.

5. Of practical significance is the court's interpretation of MRE 701: "Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand),* 216 Mich App 452, 459; 549 NW2d 878 (1996). Both the attorney and the bank employee offered their opinions during their depositions that Bill Brown was acting of his own volition when executing documents, and they saw nothing to indicate otherwise. Although plaintiff argued that the trial court erred by granting summary

disposition based on witness testimony, the court of appeals found plaintiff's assertion to be without merit.

C. EXEMPT PROPERTY ALLOWANCE – ADULT, NON-DEPENDENT CHILD – DISINHERITANCE OF VESTED RIGHT

In re Estate of Shelby Jean Jajuga, ___ Mich App ___; ___ NW2d ___ (2015) #322522

1. Unanimous Court of Appeals decision upholding a decision in the Clare County Probate Court that an adult, non-dependent child of deceased has a right to receive the statutory exempt property allowance despite a provision in her mother's will that she was to inherit nothing from her estate.

2. Petitioner, Susan P. Veith, was the sole surviving child of decedent, Shelby Jean Jajuga. The last will and testament of the deceased drafted in January, 2002, left the entire estate in three equal shares to various beneficiaries that did not include Susan Veith. Specific language in the will indicated that the decedent's children were to inherit nothing from her estate. Additional language indicated that the exclusion of her children was "not because of any lack of love and affection I hold toward them but because they have either received compensation in advance of my death or because I do not believe it would be in their best interest that they inherit."

   Petitioner objected to allowance of the final account of the Personal Representative of her mother's estate "on the basis that the Personal Representative has refused to pay Petitioner the exempt property allowance as required by MCL 700.2404." Petitioner selected a 2000 Buick 4-door valued at $4,500.00, a John Deere tractor valued at $2,500.00 and $7,000.00 in cash, or, in the alternative, $14,000.00 in cash. The Personal Representative stated that Petitioner was not entitled to the exempt property allowance because she was specifically disinherited under the will.

   The trial court concluded that testator could not preclude a child from taking exempt property through a disinheriting clause, finding that MCL 700.2404 created an entitlement. Although the Estates and Protected Individuals Code (EPIC) does not define "entitled", plain dictionary meaning denotes a legal right. The court further found that MCL 700.2404 includes the phrase "in addition to", meaning it supplements amounts otherwise payable to a spouse or child, and did not establish a condition precedent that a child must be eligible to receive a distribution from the estate to be eligible for the exempt property allowance.

2. The case outlines at length the standards of statutory construction, citing the principles under *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013). Specific rules of construction to be applied when interpreting EPIC are found at MCL 700.1201.

MCL 700.2404 grants an entitlement to receive household furnishings, automobiles, furnishings, appliances, and personal effects from the estate up to $10,000.00 (subject to adjustment under MCL 700.1210). The entitlement is given to the surviving spouse, and if there is no surviving spouse, the decedent's children are entitled jointly to the same value. Subsection (2) indicates that the rights to exempt property, and assets needed to make up a deficiency of exempt property, "have priority over all claims against the estate," except for administration costs and expenses, reasonable funeral and burial expenses, Homestead allowance and Family allowance. Subsection (3) indicates that the rights under this section are *in addition to* a benefit or share passing to the surviving spouse or children by the decedent's will, *unless otherwise provided*, by intestate succession, or by elective share.

The decision of the Court of Appeals makes clear that there is no question that decedent intended that the petitioner receive nothing from her estate. The court indicates, however, that effectuating decedent's intent should not be the sole focus in construing MCL 700.2404, as EPIC clearly provides that the power to leave property by will is subject to the exempt property provisions of MCL 700.2404.

3. The decision goes into great detail regarding the meaning of "entitled" under MCL 700.2404(1) and (2). Although respondent asserted that the meaning of "entitled" gives a right of priority, and not an absolute right to exempt property, the court found that interpretation to be inconsistent with the language of the statute. The court referred to the Reporter's Comments to EPIC in support of their decision. Of significance to the court was the comment that, like the homestead allowance, the exempt property allowance does not need to be elected. The surviving spouse, or children if there is no spouse, is entitled to the allowance, and the personal representative has an obligation to pay it.

4. Next, the Court of Appeals addresses the language in MCL 700.2404(3), which states as follows:

> "(3) The rights under this section are in addition to a benefit or share passing to the surviving spouse or children by the decedent's will, *unless otherwise provided*, by intestate succession, or by elective share. The $10,000.00 amount expressed in this section shall be adjusted as provided in section 1210."

Respondent argued that in order to qualify for the exempt property allowance an adult child must first be entitled to receive a share of the estate. The court disagreed with this analysis. They indicated that the probate court found that a child's ability to claim exempt property is separate and independent from anything they are otherwise to receive under the will.

Respondent then argued that the phrase "unless otherwise provided" allowed a testator to exclude a child from receiving exempt property. The court determined that a general disinheritance clause in a will is insufficient to exclude petitioner's statutory right to the exempt property allowance.

5. Respondent finally contended that the rights of a surviving spouse should be distinguished from the rights of adult, non-dependent children. They referenced MCL 700.2205, which allows a spouse to waive, in whole or in part, any right to receive a share under an intestate estate, homestead allowance, family allowance, exempt property allowance, or dower, before or after marriage, by written contract. Thus, respondent argued, the surviving spouse has a right that is "vested" while the rights of surviving adult children are not. The implication is that a surviving spouse's right to the statutory allowances cannot be waived without consent of the spouse. An adult, non-dependent child does not have the same vested right as their consent is not required for their right to be modified or eliminated by will.

   The court agreed that there is a significant legal difference between a surviving spouse and an adult child, but disagreed that the child's interest in exempt property allowance is not a vested right. The court found that if the Legislature had intended for children to have a lesser right than the surviving spouse they could have included that language in the statute. The role of the court is to interpret statutes, not to add language that is not present.

6. Note: The former statute under the RPC limited the statutory allowances to the surviving spouse and minor children. EPIC, on the other hand, expanded the exempt property allowance to include all children without regard to either minority or disability. The Reporter's Comment following MCL 700.2402 indicates that the inclusion of all children is not based on economic necessity, but on simple fairness.

NOTEWORTHY UNPUBLISHED DECISIONS

A. IN TERRORUM CLAUSE

In re Gerald A. Mahoney Trust & Nancy W. Mahoney Trust.
Kim Jones, Appellant, v Keith Mahoney and Nancy W. Mahoney as Co-Trustees of the Nancy W. Mahoney Trust, Appellees. No. 320074 (August 20, 2015)

1. This is a 2-1 decision from the Court of Appeals affirming in part, reversing in part, and remanding to the Charlevoix Probate Court for further proceedings.

2. The case involves complicated claims of breach of fiduciary duty, application of an In Terrorum Clause, lack of capacity and undue influence. Kim Jones lost on all counts at the trial level, including the triggering of the In Terrorum Clause, by which Kim's interest in both parents' trusts was eliminated.

3. On appeal, the court upheld the dismissal of the claim of breach of fiduciary duty and lack of capacity. Kim Jones' claim that she had probable cause to bring an action of undue influence by her brother over her mother was reversed. The court did not reverse the finding that there was no undue influence, however, but ruled that the probable cause issue was significant to the application of the In Terrorum Clause.

   The court noted that it previously held that "[p]robable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." *In re Stan Estate*, 301 Mich App 435, 445; 839 NW2d 498 (2013). The trial court determined that there was insufficient evidence of undue influence to establish the level of probable cause necessary to escape the In Terrorum Clause. Two of the three court of appeals judges found otherwise, although the evidence was not enough to overcome the rebuttal evidence. As a result, Kim Jones still lost her claim that her mother was unduly influenced in her contested decisions, but the case was remanded to reinstitute Jones' shares in the two trusts.

B. JOINT BANK ACCOUNTS – STATUTORY PRESUMPTION OF SURVIVORSHIP

In re Estate of Dolores C. Soltys, SC: 148740; November 26, 2014, and COA: 311143, February 24, 2015

1. On January 7, 2014, the court of appeals affirmed the ruling of the St. Clair Probate Court that plaintiffs sufficiently rebutted the statutory presumption that the decedent intended the survivor of the joint bank account to keep the balance as of date of death. On application for leave to appeal, the Michigan Supreme Court vacated the court of appeals decision and remanded the case to the court of appeals for application of the proper standard.

2. Apparently the court of appeals stated that "the statutory presumption ... can be rebutted by competent evidence." The Michigan Supreme Court noted that the statutory presumption needs to be rebutted by **reasonably clear and persuasive** proof of a contrary intention.

3. Decedent had three children, Kathleen, Marlene and Dennis. In about 1992 the parents added Kathleen to their bank accounts. Father died in 2004, and Dolores died in 2007. In 2006 and 2007, Dolores also signed quitclaim deeds to Kathleen and Marlene, only, with rights of survivorship. After Dolores' death, Kathleen claimed the balance in the accounts as her personal property, and added her husband to the accounts.

4. On remand, the court of appeals applied the proper standard, and again sustained the St. Clair Probate Court's ruling that the presumption of survivorship had been

overcome. The decision lists seven findings of fact from the trial court's opinion in support of their decision. Those facts included testimony from Marlene and Dennis that their parents told them all of the children would be treated equally; Kathleen was added to the account at a time when there was no disharmony in the family; the decedent made statements that she "trusted" Kathleen; Kathleen told Marlene there would be an equitable distribution of their mother's estate; Kathleen lacked credibility as she made statements to Marlene that she "might" get half the real estate even though Kathleen was a witness to the deed prepared by her mother; there was testimony Kathleen did not spend any of the money "because it was Dolores' money"; and Kathleen made statements indicating she was unsure whether she was meant to keep all of the money in the account.

5. As practitioners, we frequently find clients have added one or more children to bank accounts. This should be discussed in detail, including the facts enumerated in this case. Intent to create a joint account with rights of survivorship is viewed as of the date of the creation of the account, and statements by the original owner after that date generally are not considered admissible evidence. *In re Cullmann Estate*, 169 Mich App 778, 788-789; 426 NW2d 811 (1988). Here, the trial court relied on more than statements by Dolores. The totality of the evidence seemed to be overwhelming, particularly as Kathleen's credibility was questioned regarding her statements to Marlene regarding the real estate.

   A case law summary prepared by Alan A. May suggests that clients who intend their joint accounts be accounts of convenience memorialize that intention to rebut the presumption of survivorship. He suggests that the client, perhaps, write a letter to all interested parties. While the letter might be added to rebuttal evidence, it seems to contradict the ruling in *Cullman* that the intent regarding joint accounts is viewed as of the date the accounts are established. Letters after the fact may or may not be admissible.

C. WRONGFUL DEATH – CHILD OF DECEASED SPOUSE
In re Estate of Cliffman, No. 321174, June 9, 2015

1. John Gordon Cliffman died from injuries received in a motor vehicle accident on October 2, 2012. John Cliffman died intestate. His wife, Betty Carter, died in 1996. He had no natural children. Appellants are Betty Carter's sons, and appellees are John Cliffman's sisters.

2. Issues involving referral fees to the probate attorney are interesting, but will not be reviewed here.

3. The significant issue for probate practitioners is interpretation of MCL 600.2922(3)(b) regarding the class of persons eligible to request a distribution from wrongful death proceeds for their loss of society and companionship. There are three classes of survivors eligible for distribution under MCL 600.2922(3).

The first class includes the relatives of the deceased according to the degree of relationship. The second class is "[t]he children of the deceased's spouse." The third class are devisees under the will or trust of the deceased, except where the relationship violated Michigan law.

4. Appellants are the children of Betty Carter, who predeceased Cliffman by a number of years. As a result, the trial court ruled that Cliffman did not have a spouse at the time of his death, and thus there are no children of the deceased's spouse.

5. Practice note: Some counsel have successfully argued equitable adoption of the stepchildren. May depend on the age of the children when the marriage occurred, were the children living with and supported by the deceased, etc.