STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of GLORIA I. FLURY, Deceased.

GERALD FLURY and ELIZABETH FLURY,

Petitioners-Appellees/Cross-Appellants,

v

MARVIN FLURY,

Respondent-Appellant/Cross Appellee.

FOR PUBLICATION
January 15, 2002
9:10 a.m.

No. 220977
Macomb Probate Court
LC No. 91-119885-IE

Updated Copy
March 29, 2002

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Alice Horton, personal representative of the estate of Marvin Flury[1] (respondent), appeals as of right from the jury's verdict finding that Marvin Flury assigned all of his rights in Gloria Flury's estate to petitioner Gerald Flury. Gerald and Elizabeth Flury (petitioners) cross appeal. We affirm.

This case is before this Court for a second time. The facts that preceded the first appeal are set forth in *In re Flury Estate*, 218 Mich App 211; 554 NW2d 39 (1996). A pertinent portion of those facts is reproduced below:

> Respondent [Marvin] is the father of petitioner Gerald Flury and the decedent, Gloria Flury, who died June 13, 1991, leaving a sizeable estate. Petitioners contend that Gloria had written a holographic will leaving everything to Gerald. When the will turned up missing, Gerald, an attorney, visited his

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[1] We note that respondent Marvin Flury is deceased. By order of the trial court on November 18, 1998, Marvin's estate was substituted in his place with Alice Horton, also known as Irene Horton, his friend, acting as the personal representative.

> elderly estranged father and obtained, among other documents, an executed assignment of his father's interest in Gloria's estate. Admission of the lost will was sought by petitioners and contested by respondent. A trial by jury was conducted . . . [and] Gerald, the proponent of the lost will, prevailed. The jury found that a holographic will existed, that it was validly written, and that Gerald was the sole heir. The jury also found that the assignment from respondent to Gerald was without consideration, but was not the result of undue influence and was not executed as a result of actual or constructive fraud. [*Id*. at 213.]

In the previous case, this Court reversed the decision of the probate court and remanded for a new trial. *Id*. at 220. In reaching this conclusion, this Court stated that the probate court had improperly admitted evidence concerning Marvin's poor relationship with his family and that this "likely tainted the jury's consideration of the assignment issue to [Marvin's] detriment." *Id*. The probate court was instructed to limit this evidence on remand. *Id*.

During the retrial, the probate court, following this Court's prior opinion, allowed very few details of the parties' familial relationships into evidence. The probate court also directed a verdict in favor of respondent with regard to the issue of the holographic will because petitioners failed to produce two witnesses to testify that a holographic will was executed by Gloria. Thereafter, the jury determined that Marvin's assignment of his estate interest to petitioner Gerald was valid.

Respondent first argues on appeal that the trial court erred in failing to instruct the jury that consideration is a necessary element for a valid assignment.[2] We disagree. Claims of instructional error are reviewed de novo on appeal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

> [W]e examine the jury instructions as a whole to determine whether there is error requiring reversal. . . . Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Id*. (citations omitted).]

Respondent relies on *Goodrich v Waller*, 314 Mich 456; 22 NW2d 862 (1946), for the proposition that consideration is required for an assignment to be valid. In *Goodrich* the Supreme Court declared that assignments of an inheritable interest in an estate require valid consideration. *Id*. at 470. In this regard, the Supreme Court stated:

[2] Respondent also raises the argument in her appellate brief that the trial court improperly refused to instruct the jury that there is a presumption of undue influence where there is a fiduciary relationship. However, this issue is waived on appeal because it was not raised in the statement of questions presented. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999); MCR 7.212(C)(5). Similarly, respondent's claim that the evidence supported a finding of fraud or undue influence is not properly before this Court. *Id.*

> Furthermore, there was no valid consideration for the assignments. No money was paid to plaintiffs, and the record is convincing that they executed the assignments as an accommodation to defendant in the belief that their interests in the Halstead estate were of little, if any, value. . . . While the settlement of family disputes should be encouraged, nevertheless, a valid consideration must be shown for an assignment of an inheritable interest in an estate. There was no consideration for the assignments in question from plaintiffs to defendant. [*Id.* at 469-470.]

While *Goodrich* appears to support respondent's argument in this case, respondent fails to note that the Legislature has since enacted MCL 700.216(7).[3] "[W]here 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." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). MCL 700.216 was part of the Revised Probate Code and it prescribed in detail the course of conduct to pursue when successors wished to alter the wishes of the deceased. Thus, we conclude that at the time this case was decided, MCL 700.216(7) was the controlling law.

MCL 700.216(7) provided:

> Subject to the rights of creditors and taxing authorities, competent successors and fiduciaries of minors or incapacitated persons 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.* The fiduciary shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. [Emphasis added.]

"Statutes should be interpreted consistently with their plain and unambiguous meanings." *Stozicki v Allied Paper Co, Inc*, 464 Mich 257, 263; 627 NW2d 293 (2001). The plain language of MCL 700.216(7) does not require that consideration be given when an agreement is made regarding the interests, shares, or amounts of an estate. It simply requires a signed writing. For example, in *In re Jobe Estate*, 165 Mich App 774, 775; 419 NW2d 65 (1988), a brother and sister entered into a written agreement concerning their shares of their mother's estate. Thereafter, one of the parties claimed that the agreement was procured through undue influence. *Id.* at 776. However, this Court explained that MCL 700.216(7) allowed for agreements to change the distribution of an estate between heirs. *In re Jobe Estate, supra* at 776-777. We note

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[3] MCL 700.216(7) was in effect at the time of trial in this case. It was subsequently repealed, effective April 1, 2000. MCL 700.3914 now addresses the issue of agreements between heirs and is similar in substance.

that there was no consideration paid in that case and that the validity of the assignment was upheld.

In the instant case, it is uncontested that a writing exists wherein Marvin gave his interests in the estate to petitioner Gerald. There is also evidence of Marvin's awareness of the approximate worth of Gloria's estate. Indeed, before being told the actual value of Gloria's estate, Marvin told his nephew that the estate must be worth around $250,000 because Gloria had Kmart stock and was "tight-fisted." Moreover, in concluding that the assignment was valid, the jury determined credibility issues in favor of petitioner Gerald and rejected arguments that the agreement was involuntary or that Marvin did not have necessary information disclosed to him. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). We find no error in the probate court's denial of respondent's request for an instruction on the issue of consideration and conclude that the assignment was valid.

Respondent further claims that the probate court abused its discretion by allowing petitioners to admit evidence that the Court of Appeals had previously prohibited and classified as prejudicial. As a result of this error, respondent opines that the probate court should have granted her motion for a mistrial. We disagree. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened. *Id*. at 635-636; *Wischmeyer v Schanz*, 449 Mich 469, 481; 536 NW2d 760 (1995).

Respondent argues that the following exchanges during the direct examination of petitioner Gerald require a mistrial:

> *Q*. Let me ask you something. On the date of Gloria's death, what was her relationship with Marvin Flury?
>
> *A*. I don't believe—
>
> *Mr. Wilson*: Your Honor—
>
> *The Witness*:—spoken in 25 years.
>
> * * *
>
> *Q*. And what, if anything, did you discuss with [Marvin Flury] at that point?
>
> *A*. I think I mentioned to him that he and Gloria had never gotten along.

However, respondent fails to explain or rationalize in her appellate brief how these questions and answers rise to the level of requiring a mistrial. Instead, respondent simply concludes that she was entitled to a mistrial. An appellant is not permitted to announce his

position and leave it to this Court to rationalize the basis for his claims. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000).

Nonetheless, we do not find that the questions and answers were unduly prejudicial. It was obvious from the testimony legitimately presented at trial that Marvin had no relationship with Gloria. In fact, Marvin testified that he had only read about Gloria's death in the paper, failed to attend her funeral, and stated that he never received anything from her and did not want anything. More importantly, in *In re Flury Estate*, *supra* at 217, this Court specifically expressed concern over the evidence "scrutinizing" Marvin's relationship with his ex-wives and other failed relationships with women. The questions and answers at issue in this case did not relate to the highly prejudicial evidence that was expressly condemned by this Court. However, even if the challenged questions and answers were improper, the errors were harmless. The jury heard information that was already apparent from the legitimate record. We further note that after respondent's motion for a mistrial, there were no more "impermissible" questions or answers.

In light of our disposition of this case, we decline to address the issues raised in petitioners' cross appeal.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey