STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of FREDA ROMAK, Deceased.

EDWARD ROMAK,

Petitioner-Appellee,

v

JOYCE MANGINO, PERSONAL REPRESENTATIVE OF THE ESTATE OF FREDA ROMAK,

Interested Party-Appellant.

UNPUBLISHED
January 16, 1998

No. 196539
Wayne Probate Court
LC No. 96-560211-SE

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Appellant/personal representative, Joyce Mangino, appeals as of right from the probate court's entry of an order reflecting the provisions of a May 7, 1996 settlement agreement between Mangino and petitioner, Edward Romak. We affirm.

Mangino alleges that, immediately prior to the commencement of a hearing set for May 7, 1996, she, petitioner and their attorneys met in an attempt to negotiate a settlement regarding the division of the estate of Freda Romak. Mangino asserts that, at the outset of negotiations, counsel for petitioner stated that petitioner was entitled to the first $60,000 of the estate. However, MCL 700.105; MSA 27.5105 states:

> The intestate share of the surviving spouse shall be 1 of the following:
>
> * * *
>
> (c) If there are surviving issue all of whom are issue of the surviving spouse also, the first $60,000.00 plus 1/2 of the balance of the intestate estate.

(d) If there are surviving issue, 1 or more of whom are not the issue of the surviving spouse, 1/2 of the intestate estate.

Mangino argues that, because §105 does not give the first $60,000 of the estate to the spouse where, as here, there is a surviving child that is not the child of the surviving spouse, there was either mutual mistake by the parties, or that petitioner's attorney misrepresented the provisions of the statute in an effort to fraudulently obtain an agreement beneficial to his client.

First, we note that under the provisions of MCL 700.191(1); MSA 27.5191(1), interested parties may agree amongst themselves to alter their interests. Thus, the parties were free to negotiate a settlement agreement outside of the confines of the probate code. Ordinarily, a contract between parties will not be reformed absent mutual mistake or a unilateral mistake induced by fraud. *Goodwin, Inc v Coe Pontiac, Inc*, 392 Mich 195, 218; 220 NW2d 664 (1974) (citing *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963)). Fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). In addition, there can be no fraud where a person has the means to determine that a representation is not true. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). We review the court's findings of fact in probate cases under a clearly erroneous standard. *In the Matter of Jones*, 137 Mich App 152, 160; 357 NW2d 840 (1984).

Here, Mangino failed to prove either mutual mistake or fraud. After Mangino's original claim of mutual mistake, petitioner informed the court that he was aware of the provisions of the law and never misrepresented that knowledge to Mangino. On appeal, Mangino appears to have abandoned her mutual mistake argument. She now argues that petitioner "failed to bring the error to Appellant's counsel's attention," and that petitioner "took advantage of Appellant's counsel's incorrect perception." She contends that "Appellee's admitted knowledge of the error of Appellant's counsel and failure to bring it to Appellant's attention constitutes fraud which coupled with Appellant's unilateral misunderstanding is sufficient grounds for reformation of the agreement." This argument is without merit.

First, petitioner's silence cannot constitute fraud unless he was under some duty to disclose Mangino's (or her attorney's) mistake. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). Mangino cites no authority, and we have found none, for the proposition that an attorney has an affirmative legal duty to correct an opposing counsel's errors or misunderstandings. As the trial court noted, an attorney who recognizes an opposing counsel's legal error is caught between a possible ethical or moral obligation to point out that mistake, and a duty to her own client, who may be better served by silence. We will not attempt to resolve that dilemma here. We simply recognize that an attorney has no *legal* duty to correct an opposing counsel's errors, and, therefore, that silence in the face of such errors cannot constitute fraud.[1]

Alternatively, we note that, regarding issues of law, an attorney always has the means to determine that a representation is not true. Here, if petitioner did assert that he was entitled to the first $60,000 of the estate, Mangino's counsel was perfectly capable of ascertaining whether or not that was true. Indeed, that was Mangino's counsel's job. Viewed this way, we are skeptical whether one party's assertion on a point of law can constitute fraud where the other party is represented by counsel.

See *Nieves, supra* at 464. Finally, we note that, even if Mangino could show a mutual mistake, she would not necessarily be entitled to reformation of the contract. See *Marshall v Marshall*, 135 Mich App 702, 710; 355 NW2d 661 (1984). If the mistake is with respect to an extrinsic fact, reformation is not allowed even though the fact is one which probably would have caused the parties to make a different contract. *Id.*

Mangino also contends that her attorney's mistake should not be held to damage her rights as the proper beneficiary to recover her rightful estate. We disagree. Mangino relies on *Moritz v Horsman*, 305 Mich 627, 634; 9 NW2d 868 (1943). However, *Moritz* dealt with a *mutual* mistake. Here, as discussed above, Mangino essentially admits that the mistake in this case was not mutual.[2] Thus, *Moritz* is distinguishable. It is quite clear that a unilateral mistake is insufficient to warrant a modification of a judgment, *Hilley v Hilley*, 140 Mich App 581, 585; 364 NW2d 750 (1985), and we will not allow a party to avoid an agreement simply because they later decide that they received bad advice from their attorney. In such a case, the party may file a suit for malpractice against their attorney, but they may not force the other party to renegotiate their agreement.

Finally, Mangino contends that the probate court erred by failing to grant rehearing on her objections to entry of the order reflecting the parties' agreement. However, Mangino does not cite any authority to support this claim of error. An appellant may not raise an issue on appeal and leave it to the Court to discover the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Thus, Mangino has failed to perfect the issue for appellate review. Even were this issue preserved, we find no error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

[1] We also point out, however, that any affirmative attempt to create or maintain such erroneous beliefs in opposing counsel might constitute fraud.

[2] Even if Mangino did not so admit, the trial court found that there was no mutual mistake, and this finding was not clearly erroneous.