

STATE OF MICHIGAN
COURT OF APPEALS

FOUNDATION FOR MUSKEGON COMMUNITY
COLLEGE,

UNPUBLISHED
September 17, 1999

Plaintiff-Appellant,

v

WILLIAM A. RIGGS,

No. 211885
Newaygo Circuit Court
LC No. 97-017550 CZ

Defendant-Appellee.

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order of summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10), holding that plaintiff has a contingent future interest in defendant's estate, but, during his life, defendant has an unfettered right to dispose of his assets as he deems appropriate so long as the disposition is not inconsistent with defendant's mutual will with his former wife. We affirm.

I

This case arises from a controversy over plaintiff's rights under a joint and mutual will executed in 1992 by defendant and his former wife, Velva V. Riggs, who is now deceased. Apparently, after their divorce, defendant and Velva continued to reside together. The Riggses executed a mutual will, which provided in relevant part:

We devise to the survivor of us the balance of our estate, both real and personal, wherever situated, in which either of us may have an interest at the time of death.

After the death of both of us, we direct that all the estate which we, or either of us, shall own or be entitled to at the time of our death, or the death of the survivor of us, shall be paid over, delivered, transferred and conveyed to the Foundation for Muskegon Community College to be used for scholarships.

Following Velva's death in 1995, defendant filed a declaratory judgment action in Muskegon Circuit Court to determine the respective rights of the instant parties under the will and determine whether the will was revocable. The court held that Velva's and defendant's "verbal contract" to make a will was irrevocable, but that the will itself was not irrevocable. Plaintiff thereafter filed the instant action to enforce its alleged rights as a third-party beneficiary under the will and to impose a constructive trust on assets owned by Velva and defendant.

II

Plaintiff argues that the trial court erred in ruling that plaintiff possessed a mere contingent future interest in defendant's estate. This Court reviews the findings of fact made by a trial court under the clearly erroneous standard. MCR 2.613(C); *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 636; 583 NW2d 215 (1998); *Giordano v Markovitz*, 209 Mich App 676, 678-679; 531 NW2d 815 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). We review questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). The trial court did not err in ruling that plaintiff's claim on defendant's estate was a contingent future interest.

The parties agree that Velva and defendant had a contract to make a joint and mutual will and that the will was executed. The will itself contains no specific devise to defendant, instead generally bequeathing all Velva's estate to him, with a subsequent devise of defendant's estate to plaintiff upon defendant's death.

The trial court found that during his life, defendant has an unfettered right to dispose of his assets as he deems appropriate as long as any testamentary disposition is not inconsistent with Velva and defendant's mutual will. This holding is supported by case law. *In re Reilly Estate*, 156 Mich App 186, 189; 401 NW2d 269 (1986). Had Velva and defendant wished to include restrictions on the survivor's use of the estate assets, such a limitation was possible. *In re Mendelson Estate*, 391 Mich 706, 710-711; 220 NW2d 33 (1974); *Hawley v Grand Rapids Trust Co*, 267 Mich 232, 234-236; 255 NW 196 (1934). Without a specific devise or other limitation on the survivor's use of the assets, however, there are no restrictions on their use. *Getchell v Tinker*, 291 Mich 267, 268-270; 289 NW 156 (1939); *Keasey v Engles*, 259 Mich 178, 180-182; 242 NW 878 (1932); *In re Reilly Estate*, *supra* at 187, 189.

III

Plaintiff also argues that the trial court erred in dismissing its claim for anticipatory breach of contract. The trial court did not err in summarily disposing of this matter, because plaintiff could not establish an anticipatory breach of contract.

The role of the court in an action on a will is to ascertain and give effect to the intent of the testators as derived from the language of the will. *In re Woodworth Trust*, 196 Mich App 326, 327; 492 NW2d 818 (1992). Absent an ambiguity, the court is to glean the intent from the four corners of

the testamentary instrument. *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995). The expressed intent of the testators could not be more clear; the defendant was required to leave his entire estate to plaintiff at his death, but there were no limits on his use or disposal of that estate until his death.

As the beneficiary of the contract, plaintiff has the right to enforce the agreement. *Phelps v Pipher*, 320 Mich 663, 670; 31 NW2d 836 (1948); *Kozyra v Jackman*, 60 Mich App 7, 11, 13; 230 NW2d 284 (1975). However, since the contract does not limit defendant's use of the property, it is impossible for the contractual right to be breached unless defendant creates another will leaving the estate's assets to someone other than plaintiff. Plaintiff has not alleged that defendant has written another will or in any way impeded plaintiff's receipt of the estate other than to bring an earlier declaratory action to determine his rights under the document. That action ended in plaintiff's favor, with the court ruling that the agreement to devise all the survivor's estate to plaintiff was valid.

IV

Plaintiff next argues that the trial court erred in dismissing its claim for imposition of a constructive trust on the assets of the estate. We disagree.

A constructive trust arises by operation of law and may be imposed where a fiduciary breaches a duty of fidelity. *Cerling v Hedstrom*, 51 Mich App 338, 343-344; 214 NW2d 904 (1974); *Sloan v Silberstein*, 2 Mich App 660, 674, 677-678; 141 NW2d 332 (1966). A constructive trust may also be imposed where a joint and mutual will devised specific property to a third party that the survivor of the will attempts to divest. *Schondelmayer v Schondelmayer*, 320 Mich 565, 567-568, 575-576; 31 NW2d 721 (1948); *Glover v Glover*, 18 Mich App 323, 324; 171 NW2d 51 (1969). However, in this case, neither the will nor the contract to make a will created such a relationship between defendant William Riggs and plaintiff. See *In re Doncea Estate*, 72 Mich App 202, 207; 249 NW2d 356 (1976). In this case, plaintiff was left only the estate owned by defendant at his death. In such an instance, a constructive trust limiting defendant's use of the assets is not warranted.

V

Plaintiff also argues that the trial court erred in ruling that there was no genuine issue of material fact that defendant intended to deliberately subvert the joint and mutual will. The trial court did not err, because while plaintiff pointed to defendant's testimony dating from his previous declaratory action to determine his rights under the will, plaintiff could point to no acts by defendant that either subverted the will or imperiled its ability to take his estate at death.

VI

Finally, plaintiff argues that the trial court clearly erred when it found that Velva Riggs was the wife of William Riggs. While the trial court mistakenly referred to Velva as defendant's wife, the court did not make a finding of fact that Velva and defendant were married at the time of her death. In any event, the trial court's statement was not essential to its decision to grant defendant's motion; reversal

on this ground is not warranted. *In re Approximately Forty Acres in Tallmadge Twp*, 223 Mich App 454, 463; 566 NW2d 652 (1997). In addition, whether Velva was defendant's wife was irrelevant because a contract to make a joint will may be made by unmarried people. *In re Thwaites Estate*, 173 Mich App 697, 702-703; 434 NW2d 214 (1988).

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski