STATE OF MICHIGAN

COURT OF APPEALS

In re HOWARD J. DEMING TRUST.

SUZANNE B. LAVERTY,

Petitioner-Appellant,

v

HOWARD J. DEMING and NBD BANK,

Respondents-Appellees.

UNPUBLISHED
February 4, 2000

No. 212638
Washtenaw Probate Court
LC Nos. 97-110930 ML
97-111424 CG

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Petitioner appeals as of right from the trial court's opinion and order awarding respondent summary disposition pursuant to MCR 2.116(C)(10), thereby dismissing petitioner's petitions for appointment of a guardian and conservator for respondent and seeking to set aside the 1997 amendments to the Howard J. Deming Trust Agreement. We reverse and remand.

I. Factual Background

This case involves a dispute between petitioner and respondent Deming regarding the Howard J. Deming Revocable Living Trust Agreement. Petitioner is respondent's only child and, prior to April 2, 1997, was named as the residuary beneficiary of the trust. Respondent was born on October 29, 1911, executed the trust in 1980, and amended it in 1982 and 1988 by amendments not here in dispute. Following the 1988 amendments, respondent and NBD Bank were co-trustees, while respondent's wife, petitioner, and NBD Bank were named as successor co-trustees. Respondent's wife died in 1995, leaving petitioner and NBD Bank as the successor co-trustees.

During the summer of 1996, respondent's family and the bank officer who was respondent's principal contact at NBD Bank noticed changes in respondent's behavior, ultimately causing petitioner and the bank officer to request that respondent's personal physician at that time, Dr. Alan Dengiz, an internist, and Dr. Barbara Day, a psychiatrist with experience in geriatric medicine, evaluate respondent's mental competence pursuant to § 1.6 of the trust agreement, which provides:

1.6 Incapacity of Grantor.

If, due to physical or mental incapacity as determined by a court having jurisdiction over such matters or as unanimously determined in writing by two medically licensed doctors, one of whom shall be the Grantor-Trustee's personal physician, if possible, the Grantor-Trustee is unable to carry out his responsibilities as Trustee hereunder including the custody and management of the Trust principal and income, then in such event the Successor Trustees named herein shall become Trustee without any additional action or permission of any kind from the Grantor-Trustee. The Successor Trustees shall then possess all the rights, duties and obligations to the same extent as the original Trustee possessed under the terms of this Trust and shall from time to time, distribute to or expend for the benefit of the Grantor and those dependent upon him the income and sufficient principal, which, together with funds known to the Successor Trustee to be available from other sources for such purposes, will in the sole discretion of the Successor Trustees and consistent with the value of the Trust maintain Grantor and those dependent upon him as nearly as possible in the mode of living to which he and they were accustomed prior to his becoming incapacitated. During the period of time that the Grantor-Trustee shall remain so incapacitated as evidenced either by court order or by the written opinion of two medically licensed physicians, as the case may be, the Trust Agreement shall be irrevocable and not amendable and the Grantor-Trustee shall, during this period, have no reserved power or rights under the Trust Agreement such as the right to direct investments or withdraw amounts of principal or income.

By letter of September 27, 1996, Drs. Dengiz and Day stated that respondent was not mentally competent to be independently handling his own financial affairs and recommended that his personal finance decisions be turned over to the bank. Upon receipt of this letter, petitioner and the bank assumed the role of co-trustees pursuant to § 1.6 of the trust agreement.

In March and April 1997, respondent's attorney obtained letters from two physicians attesting to respondent's capacity to carry out his responsibilities as trustee. Pursuant to amendments to the trust executed after receipt of these letters, respondent named himself as trustee, provided that a bank would be co-trustee if he chose, and selected a bank as successor trustee. These amendments explicitly made no provision for petitioner, thus effectively eliminating her as a beneficiary of the trust.

Petitioner refused to recognize the trust amendments as valid, petitioning the trial court to find that, because Drs. Dengiz and Day had previously declared respondent to be incompetent to handle his financial affairs, the trust agreement thereby became permanently irrevocable and incapable of amendment. The court rejected that argument, ruling that the trust agreement's language permitted respondent to regain capacity after a period of incapacity.

Petitioner then petitioned the court for appointment of a guardian for respondent as an allegedly legally incapacitated person, for appointment of a conservator for him, and to set aside the 1997 trust amendments. After respondent had been evaluated by medical personnel and discovery was

completed, the court granted respondent summary disposition pursuant to MCR 2.116(C)(10) regarding all petitions.

II. Guardianship

Petitioner first argues that the trial court erred by awarding summary disposition regarding her petition for appointment of a guardian because Dr. Dengiz' opinions created sufficient issues of material fact to entitle her to proceed to trial. We agree. A trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Id.* at 454-455 and n 2; *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). The party opposing the motion may not rest on the mere allegations or denials contained in the pleadings, but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto, supra* at 362, 371. A question of fact exists when reasonable minds could differ regarding the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Quinto, supra* at 363.

MCL 700.443(1); MSA 27.5443(1) provides:

> A person in his or her own behalf, or any person interested in the person's welfare, may petition for a finding of incapacity and appointment of a guardian. The petition shall contain specific facts about the person's condition and specific examples of the person's recent conduct that demonstrate the need for the appointment of a guardian.

MCL 700.444(1); MSA 27.5444(1) provides, in pertinent part:

> The court may appoint a guardian if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is a legally incapacitated person, and that the appointment is necessary as a means of providing continuing care and supervision of the person of the legally incapacitated person.

Finally, MCL 700.8(2); MSA 27.5008(2) defines a "legally incapacitated person" as

> a person . . . who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent that the person lacks sufficient understanding or capacity to make or communicate informed decisions concerning his or her person.

The sole ground alleged in the petition for appointment of a guardian is "mental deficiency."

The trial court noted that, although respondent's memory and attention were somewhat impaired, his orientation, comprehension and judgment were average. Having viewed respondent's lengthy videotaped deposition, the court concluded that respondent "offers a rationale for decisions he makes" and "is currently capable of making and communicating informed choices about his life." The court stated that "contrary to the general allegation in the petition, there is evidence [respondent] is making informed choices concerning medical care," and added that petitioner "cannot meet her burden of establishing [respondent] is a legally incapacitated person . . . ."

If petitioner is to survive respondent's motion for summary disposition regarding this issue, she must do so on the basis of evidence furnished by Dr. Dengiz. According to Dengiz' August 18, 1997, affidavit, he had known respondent since 1986 and was his physician from September 1993 until October 1996. In his May 14, 1998, affidavit, he states, "I evaluated [respondent] on November 21, 1997. Based on this evaluation, it is my opinion that [respondent] is suffering from dementia and that he has either Alzheimer's disease or a multi-infarct dementia that will progress." In ¶ 8 of this affidavit, Dengiz avers, "Based on my interactions with [respondent] through November 1996, my evaluation of [respondent] on November 21, 1997, and my evaluation of [respondent's] videotaped deposition testimony it is my professional opinion that [respondent] currently is not capable of handling his personal or financial affairs and that he is currently in need of a full guardian and conservator." These averments, if believed, would support petitioner's contention that summary disposition was improvidently granted because Dengiz' affidavits create a genuine issue of material fact regarding respondent's ability to make or communicate informed decisions concerning his person. While Dr. Dengiz' opinion does not settle the issue, it certainly creates a genuine issue of material fact. In short, the trial court erred by weighing the evidence and reaching a conclusion of fact. That conclusion is within the purview of the trier of fact following a trial. In light of the contested issues regarding respondent's capacity, summary disposition was not appropriate.

III. Conservatorship

Petitioner next claims that the trial court erred by awarding summary disposition for respondent pursuant to MCR 2.116(C)(10) regarding the petition for appointment of a conservator. We agree. The applicable statute, MCL 700.461(b); MSA 27.5461(b), provides:

> Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that the person is unable to manage his or her property and affairs effectively for reasons such as mental illness, mental incompetency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

The sole ground alleged in the petition for appointment of a conservator is respondent's alleged "mental incompetency." Petitioner contends that the trial court ignored Dr. Dengiz' affidavit and

deposition testimony to the effect that Dengiz believed that respondent was then not capable of handling his financial affairs and needed a conservator. We agree.

In addition to Dr. Dengiz' opinion, petitioner contends that the trial court overlooked substantial evidence supporting her petition. Petitioner points to such items as respondent's request to the trust for $20,000 for an alleged tax liability later found not to exist, the termination of a credit card for apparent failure to make timely payments on several occasions, and occasional late utility payments. While these items are certainly not dispositive, they do represent issues to be resolved by the trier of fact following trial. Accordingly, the trial court erred in granting summary disposition.

IV. Trust Amendments

Petitioner lastly maintains that the trial court erred by awarding respondent summary disposition pursuant to MCR 2.116(C)(10) regarding her petition to set aside the 1997 trust amendments. Respondent's attorney who handled these amendments testified that at the time that respondent initially executed trust amendments on January 20, 1997, she was not aware of petitioner's claim that the trust had become irrevocable, and that when she became aware of this claim she obtained determinations from two physicians that respondent was competent and then re-executed the trust amendments on April 2, 1997. She also testified that she found no evidence of undue influence, coercion, fraud or mistake in the execution of the amendments.

After citing this evidence, the trial court noted that petitioner "has not presented any evidence of any other physician who saw [respondent] during the time frame of April or March, 1997, and the court must assume there is none." Concluding that respondent "undoubtedly has testamentary capacity," the court added, "This new estate plan was dealt with during [respondent's] deposition: he provided a rationale for each bequest and understood the purpose of the trusts for his niece's children. . . . . There is no showing the trust amendments – for lifetime management and [testamentary] disposition – are not perfectly consonant with [respondent's] present wishes."

Again, petitioner points to Dr. Dengiz' evidence. Again, while Dr. Dengiz' opinion is not necessarily determinative of respondent's capacity when he amended the trust, it is for the trier of fact following trial to make such determination. After hearing all of the evidence, the trier of fact can determine whether to accept Dr. Dengiz' opinion and petitioner's position, or whether respondent was, in fact, competent at the time.

In sum, while respondent may ultimately prevail, it was premature for the trial court to make such a determination at the summary disposition stage. A genuine issue of material fact exists regarding respondent's capacity, both now and at the time of the trust amendments. Accordingly, the trial court should have allowed the matter to proceed to trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Petitioner may tax costs.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald