

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of STEFAN FEHER, Deceased.

COMERICA BANK, Trustee of the STEFAN
FEHER Trust,

Plaintiff-Appellee,

v

DONNY HELENE KORDA,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 209960
Wayne Probate Court
LC No. 96-567757-SE

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant,¹ proceeding in propria persona, appeals as of right the probate court's order granting plaintiff's motion for partial summary disposition and request for discovery sanctions; granting the estate's motion for entry of default; and denying defendant's motions for extension of time, reimbursement of costs, to admit the entire deposition of the attorney that drafted the deceased's last will, and to submit signatures for inspection. We vacate the probate court's grant of partial summary disposition to Comerica and remand for a determination whether a genuine issue of fact remained on the question of the validity of the January 8, 1992 documents. The probate court's remaining determinations are not properly before us. MCR 5.801(D).

I

We first address Comerica's argument that this Court lacks jurisdiction over the discovery rulings made by the probate court in its February 6, 1998 order.²

¹ The COA docket sheet refers to the parties as plaintiff and defendant, rather than petitioner and respondent. We are checking with the Lansing Commissioner's office to see if these are proper designations.

² Korda's appellate brief, filed in propria persona, states in its section regarding jurisdiction of

“The appellate jurisdiction of the Court of Appeals is as established by law, MCR 7.203(A)(2), and several scattered statutes grant an appeal as of right to that court from various proceedings held in the probate court.” Martin, Dean & Webster, Michigan Court Rules Practice, MCR 5.801, Authors’ Comment, p 602. MCR 5.801(B) allows appeals by right to this Court from certain final orders entered in probate court actions. *In re Farris Estate*, 160 Mich App 14, 16; 408 NW2d 92 (1987). On the date Korda filed her claim of appeal with this Court, February 26, 1998, MCR 5.801³ provided in pertinent part:

(B) Orders Appealable to Court of Appeals. Orders appealable of right to the Court of Appeals are defined as and limited to the following:

* * *

(3) a final order affecting the rights or interests of an interested person in a decedent’s estate. . . or an inter vivos or testamentary trust. These are defined as and limited to orders resolving the following matters:

* * *

(c) interpreting or construing a testamentary instrument or inter vivos trust;

* * *

(C) Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court

(D) Interlocutory Orders. **An interlocutory order, such as an order regarding discovery**; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an

this Court that the probate court’s February 6, 1998 order “does not adjudicate all claims in view of the fact that the order specifically states hat the [sic] Comerica has not presented sufficient evidence which would overcome the presumption that the later will is VALID.”

In addition, Korda’s appellate brief argues that the Wayne County Probate Court lacked jurisdiction over any matter involving Feher, because Feher lived, did his business and banking, was hospitalized, and died, in Oakland County and that his only asset in Wayne County was his former home “which the Comerica Bank crowd sold.” Korda’s appellate brief further argues that although she entered a motion to have the case transferred to Oakland County “it was never entered to the court file nor was it ever answered or heard.”

The lower court record contains no indication that Korda asserted this jurisdictional challenge below, thus we do not address the substance of this issue. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 230; 532 NW2d 903 (1995).

³ The amendments to MCR 5.801 that took effect on April 1, 2000 are not pertinent to this appeal.

account, **may be appealed only to the circuit court and only by leave** of that court. The circuit court shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation. [Emphasis added.]

A

We glean from a lower court record in considerable disarray that the deceased, Stefan Feher, who was defendant's godfather, executed a trust and a number of wills. Feher executed a pour-over will and trust agreement on January 8, 1992, both drafted by his then-attorney, George Smrtka, leaving the residue of his estate to Comerica Bank, f/k/a Manufacturers National Bank, as trustee. The trust provided that two Romanian grandnephews would receive \$10,000 each, and that the balance of the trust property and estate be distributed to St. George Romanian Orthodox Cathedral. The trust provided that the grantor "has made no other provision in this trust for any other persons, be they relatives or not, including DONNY HELENE KORDA, for reasons known but to the Grantor." The trust was funded.

On January 30, 1992 Feher executed a final will, drafted by a new attorney, Douglas Lindsay, that revoked all prior wills and codicils but neither revoked nor addressed the trust agreement executed several weeks earlier. Feher's January 30, 1992 will left \$10,000 each to the same two Romanian grandnephews, and the residue of his estate to defendant Korda, including real property. Feher's January 30, 1992 will appointed Korda as personal representative and Manufacturers National Bank of Detroit as first successor personal representative.

Feher died on July 28, 1996. In September 1996, Eric Smith, the public administrator and former conservator of Feher, petitioned the court for commencement of probate proceedings and sought admission of the January 8, 1992 will. Korda objected and petitioned the court for commencement of proceedings, seeking to admit the January 30, 1992, will. Plaintiff Comerica objected to admission of the January 30, 1992 will on the ground that defendant Korda exercised undue influence over Feher. A number of motions followed.

B

The probate court's order of February 6, 1998 encompassed several rulings: 1) it dismissed with prejudice defendant's motions for extension of time, to request admission of the entire deposition of attorney Doug Lindsay, and for submission to the Michigan State Police for Signature Checks; 2) it granted the estate's motion for default judgment on its petition for reimbursement, ordering defendant to pay \$130,000 plus costs and fees; 3) it denied Comerica's motion for default judgment; 4) it granted Comerica's request for sanctions of \$3,000 against Korda; and 5) it granted Comerica's motion for partial summary disposition, based on its ruling that the January 30, 1992 will "did not revoke" the January 8, 1992 trust, and that "[t]he assets in the trust are to be distributed pursuant to Article Fourth of the Trust Agreement."

The ground for the court's rulings dismissing defendant's motions, granting the estate a default judgment, and granting Comerica sanctions, was defendant's failure to comply with discovery. Under MCR 5.801(D), a probate court's discovery rulings are considered interlocutory and appealable only to the circuit court on leave granted. There is no indication in the record that defendant sought leave to appeal these rulings to the circuit court, and this Court lacks jurisdiction to consider them.

However, the probate court's grant of Comerica's motion for partial summary disposition, which rested on its determination that the January 30, 1992 will⁴ did not revoke the January 8, 1992 trust agreement, constituted a "final order" appealable to this Court as of right. MCR 5.801(B)(3)(c). That ruling⁵ was founded on an assumption that the January 8, 1992 documents

⁴ Regarding the validity of the January 30, 1992 will, the probate court's February 6, 1998 opinion and order denied Comerica's motion for default judgment on its claim of undue influence, stating in pertinent part that Comerica

has not presented sufficient evidence which would overcome the presumption that the later will [of January 30, 1992] is valid. As such, even though Korda has failed to comply with the Court's discovery orders, a grant of entry of default judgment as requested by Comerica would not serve the interests of justice in this case. A determination needs to be made concerning the validity of the will. To grant the default judgment and deny the admission of the January 30, 1993 [sic 1992] will, may interfere with the testator's intent. The Court cannot allow Korda's failure to comply with the Court's orders to subvert the testator's intent. A determination of validity must be made on the merits. As such, the Court rules that a lesser sanction would better serve the interests of justice in this case

. . . Comerica's motion for sanctions in the amount of \$3,000 against Korda for her failure to comply with the Court's discovery orders is granted.

⁵ The probate court's opinion and order stated in pertinent part:

IV. COMERICA'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Finally, Comerica's Motion for Partial Summary Disposition claiming that the most recently filed will did not revoke a previously established trust is granted. Feher established a trust on January 8, 1992. The trust was funded on the same day and the assets contained in the trust consist of real estate located at 610 West Hildale, Detroit, many items of Feher's personal property, his insurance from Ford Motor Company, all his bank accounts and securities and any other assets owned by Feher. Article Fourth of the Trust Agreement provides a distribution scheme for the assets in the trust following Feher's death. Article Twelfth⁵ of the Trust Agreement gave Feher the power to modify, alter, amend or revoke the trust, change the beneficiaries and to withdraw any or all of the assets in trust if such amendment was in writing and delivered to the trustees during Feher's lifetime.

were valid, an assumption Korda challenged below by arguing that Smrtka obtained the January 8, 1992 documents fraudulently, that she (Korda) was present with Feher at Mr. Smrtka's office on that date and there was no one else there to witness the January 8, 1992 will, as it purports, that the signatures were forged, and that plaintiff failed to submit the original documents. Korda sought to support her position below by moving to have the signatures inspected,⁶ and by seeking to take Smrtka's deposition. Although the probate court stated that "this Court finds that the trust was validly established and funded and was never revoked during Feher's lifetime," it did not specifically address Korda's challenges to the validity of the January 8, 1992 documents, focusing only on the legal consequence of the January 30, 1992 will's failure to refer to the trust.⁷

There has been no evidence presented that any such amendment was ever made or delivered to the trustees prior to Feher's death. The will allegedly executed on January 30, 1992, which claims to revoke any previously drafted wills, makes no mention of the January 8, 1992, trust agreement. Further, even if the January 8, 1992 will made mention of the trust, it was not delivered to the trustees during Feher's lifetime and thus would not operate to revoke the trust. *Hackley Union National Bank v Farmer*, 252 Mich 674, 682; 234 NW 135 (1931) (Butzel, CJ, dissenting) (trustee owes duty to insist on strict compliance with the revocation requirements contained in a trust agreement); *Sabin-Schreiber v Sabin*, 128 Mich App 427, 433; 340 NW2d 114 (1983). See also 2 Restatement of Trusts, 2d, § 330, Comment j, p 139 (if a settlor reserves the power to revoke the trust during his lifetime, he cannot revoke the trust in his will). This Court finds that the trust was validly established and funded and was never revoked during Feher's lifetime. Therefore, Comerica's Motion for Partial Summary Disposition is granted pursuant to MCR 2.116(C)(8) and (C)(10). Further, the assets in the trust are to be distributed pursuant to Article Fourth of the Trust Agreement.

⁶ Recognizing that the probate court's discovery rulings are not within our jurisdiction, we do note that one of the probate court's order regarding discovery, dated September 17, 1997, provided that George Smrtka, the attorney that drafted the trust agreement, "shall submit to a deposition by Donny Korda on November 10, 1997 . . ." and that it would take Comerica's motion for partial summary disposition under advisement. Korda had earlier filed a motion to recuse the probate court judge, and on September 26, 1997, the judge entered an order denying the motion. However, by order entered on October 29, 1997, the probate court judge referred the matter to the State Court Administrator for appointment of another judge to determine whether the probate court judge's decision not to recuse himself should be set aside. The probate court's order of October 29, 1997 provided that no action be taken on any pending matters until an order was received regarding recusal. Judge Sapala eventually affirmed Judge Burton's decision not to recuse himself, but an order to that effect was not entered until March 4, 1998, i.e., after Korda filed the instant appeal.

Our understanding is that the probate court's order that Smrtka be deposed, and all other matters pending at that time, were stayed until after the instant appeal was filed. On the record before us, it appears that Korda was not able to depose Smrtka.

⁷ The court's legal conclusion in this regard is not challenged on appeal.

Under these circumstances, we vacate the probate court's grant of partial summary disposition to Comerica, which assumed the validity of the January 8, 1992 trust agreement and accompanying documents, and remand to the probate court for a determination whether a genuine issue of fact remained on the question of the validity of those documents. The probate court shall set an appropriate time frame in which plaintiff may take Smrtka's deposition. We do not retain jurisdiction.⁸

Grant of partial summary disposition vacated, and remanded for further proceedings consistent with this opinion.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White

⁸ Korda's remaining challenges are not properly before us.