STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of RAY ASA SLOCUM, Deceased.

TIMOTHY HARRINGTON,

Petitioner-Appellee,

v

ALLISON ANDRAS,

Respondent-Appellant.

UNPUBLISHED
July 13, 2001

No. 216317
Oakland Probate Court
LC No. 97-257962-CZ

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Respondent appeals by right from an order of the probate court granting petitioner's motion for summary disposition and denying respondent's motion to stay. We reverse and remand.

Respondent and petitioner are two of the decedent's four grandchildren. In January 1995, the decedent was involved in an automobile accident, suffering severe brain damage that left him unable to manage his own affairs. In March 1995, respondent was appointed guardian and conservator of the decedent's estate. Apparently, respondent then converted and consolidated approximately nineteen certificates of deposit (CDs) held at two different banks, causing them to be reissued in the name of the conservatorship. Prior to this action, the CDs varied in title, with one or more of the decedent's four grandchildren also named on each CD. Petitioner was named on all nineteen CDs. Some but not all of the CDs contained the notation that they were payable to "either or survivor." Respondent testified at trial that she converted the CDs in order to "marshal all the assets" of the estate so that they could be used to take care of the decedent.

The decedent died on July 9, 1996. Pursuant to the decedent's last will and testament, petitioner was named independent personal representative (IPR) of the estate. Petitioner cashed in the conservator CDs and transferred them into an account in his name, as personal representative of the estate. After filing her final accounting of the conservatorship, respondent and her sister, Vickie Harrington, successfully petitioned the probate court to remove petitioner as IPR. While respondent was named temporary IPR, she never assumed those duties apparently

because she failed to post a required $100,000 bond. In February 1997, the probate court converted the independent estate proceeding into a supervised proceeding, appointing Neil Wallace personal representative.

Petitioner alleges that it was during preparation of the final accounting that he discovered that all of the original nineteen CDs had been reissued in the name of the conservatorship. The conversion of the CDs is significant because pursuant to the decedent's will, the residue of the decedent's estate was to be distributed in equal shares to the four grandchildren.[1] This means that petitioner would receive a substantially lesser sum under the will than he would have before the CDs were converted. Petitioner filed a multi-count suit alleging, essentially, that respondent had improperly converted the CDs.

On the second day of trial, the court granted summary disposition to petitioner. The court indicated that it had sua sponte reconsidered its denial of petitioner's October 2, 1996 motion after reading *In re Clancy*, 169 Mich App 232, 237; 425 NW2d 772 (1988) in chambers. We disagree with respondent that the court did not have the authority to sua sponte reconsider its earlier denial of petitioner's motion for summary disposition. In addition to the authority to sua sponte consider summary disposition against a party, a trial court has broad discretion to correct any legal errors it believes it has made before final judgment. However, the court must afford the party against whom summary disposition is granted "unequivocal notice of the court's intention and a fair chance to prepare a response." *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 90; 492 NW2d 460 (1992)(Corrigan, J., concurring). While the case relied on by the court when granting summary disposition had been raised in briefs and oral arguments on the October 2 motion, there is nothing in the record to show that respondent was afforded effective notice of, or a fair opportunity to respond to, the court's motion for reconsideration. It simply appears to have been brought up in the midst of an approximately thirty minute break in the presentation of petitioner's case-in-chief. There was no notice before the break that the court would be considering the matter in chambers. While the record shows that Wallace had argued against the motion in chambers, we do not believe the thirty minute time frame provided a sufficient opportunity to prepare a response. *Id.* at 89.

In any event, we believe that the trial court's legal conclusions offered in support of its grant of summary disposition were erroneous. When granting summary disposition, the trial court cited the following paragraph from *Clancy*:

> Up until the time of Mrs. Clancy's death, there is no question that her interest as joint tenant in the certificates of deposit was in the conservator as trustee pursuant to various provisions of the Revised Probate Code. During her lifetime, any of her debts potentially could be satisfied by liquidating the certificates of deposit. However, upon her death, the remaining joint tenants, as survivors, were entitled to the proceeds. The surviving joint tenants also took the certificates of deposit free from the debts of their cotenant, Jean Clancy. [*Clancy*, *supra* at 237.]

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[1] The decedent was preceded in death by both his wife and daughter.

We believe the trial court erred in concluding that summary disposition in petitioner's favor is supported by the preceding passage. Unlike the case at hand, the single $10,000 CD at issue in *In re Clancy* had not been converted or liquidated prior to the decedent's death. The conservator in that earlier case had wanted to liquidate the CD after the decedent's death in order to pay $3,110 in outstanding guardian/conservator and attorney's fees. *Id.* at 234. The *In re Clancy* Court concluded that the lower court had "erred in determining that title to the disputed [CD] . . . vested in the conservator until the estate was closed." *Id.* at 237. Rather, the Court concluded that absent any evidence "to rebut that statutory presumption that the depositor intended to create a joint tenancy," *id.* at 236-237, the plaintiffs, as joint tenants, "were entitled to the proceeds." *Id.* at 237.

The specific question that is before this court is whether a guardian/conservator of an adjudicated incompetent has the authority to alter the *nature* of CDs held jointly by the incompetent and others. We believe that while a guardian/conservator can liquidate such CDs in order to meet the necessities of the incompetent, the guardian/conservator cannot exercise generally and broadly the incompetent's discretionary power to intentionally or unintentionally alter the nature of the accounts. The guardian/conservator's good intentions are not dispositive.

During his lifetime, decedent could have liquidated any and all of the CDs at issue in order to satisfy his debts. *In re Clancy, supra* at 237. Also, respondent could have cashed in any CDs on which she was named. In the case at hand, however, respondent testified that she did not have to cash in any CD to pay the decedent's living expenses because other sources of income adequately met these needs. Rather, respondent contends that the accounts were changed so as to marshal the funds in case they were later needed.

While respondent could have accessed the funds as necessary to meet decedent's expenses, she did not have the authority to change the nature of the accounts, and thereby change decedent's expressed intention to set up the joint accounts in the manner chosen. *First Federal Savings & Loan Ass'n v Savallish*, 364 Mich 168, 175-178; 110 NW2d 724 (1961); *Drozinski v Straub*, 383 So2d 301, 304 (Fla App 1980)("In the absence of a statute providing otherwise, the rule is that the guardian of an incompetent cannot withdraw funds in an account held joint by the ward and another except for the ward's necessities, since withdrawal under other circumstances would be the exercise of a personal right of the ward." [footnote omitted]). Respondent was not decedent's alter ego. *Savallish, supra* at 176 ("'Certain it is that the committee does not by reason of his appointment become the *alter ego* of the incompetent . . . .'");[2] *In re Meyer Estate*, 744 SW2d 844, 848 (1988)(citing *Savallisch* for the general rule that "a guardian is not an alter ego of his ward and has no authority to exercise the ward's discretionary power with respect to the ward's property"). A guardian/conservator has "no power to substitute her intent, even if innocent and well meaning, for that of the ward." *Meyer, supra* at 848. Accord *Savallisch, supra* at 175-178.

We are now faced with the issue of how the CDs should be distributed. As our Supreme Court noted in *In re Wright Estate*, 430 Mich 463, 467; 424 NW2d 268 (1988), "Under MCL

[2] Quoting *In re Rasmussen's Estate*, 147 Misc 564, 566; 264 NYS 231 (1933).

487.703 . . . , a presumption of ownership is created when a person opens a bank account and names a joint owner with rights of survivorship." MCL 487.703 provides, in pertinent part:

> The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

We do not believe the abbreviated trial afforded respondent a fair chance to rebut the statutory presumption that the decedent intended to create a joint tenancy with right of survivorship in the nineteen CDs. Accordingly, the case is remanded for further factual development.

We also conclude that the trial court did not err in not enforcing the alleged settlement agreement. As the court correctly noted, "no enforceable settlement agreement was signed by the parties and no final meeting of the minds occurred." No settlement agreement was made in open court. While the correspondence in the record evidences ongoing negotiations intended to reach a settlement, it also clearly shows that the parties never arrived at a mutual assent to be bound by definite and agreed upon terms.

Additionally, we reject respondent's assertion that the decedent and subsequently his estate were the rightful owners of the CDs because they never relinquished possession of the certificates. Given that those named on CDs often do not reside in the same household, it is also often impossible for several people to have possession of the CD at the same time. Therefore, possession by one named on the CD is possession for the benefit of all. See *Drenckpohl v Barker*, 253 Ill App 3d 203, 209; 625 NE2d 651 (1993). A decedent's intent to have certain monies pass to those designated as joint tenants on a CD cannot be undermined simply because one or more of those joint tenants does not have physical possession of the instrument.

Further, we find no merit in respondent's assertion that the statutory presumption raised by MCL 487.703 applies only to those CDs bearing the "either or survivor" notation. If the terms and conditions of the CD accounts clearly provide for rights of survivorship, the requirements of MCL 487.703 are satisfied. See *Richard v Richard*, 58 Mich App 660, 663; 228 NW2d 512 (1975).

Finally, we address one issue that affects further proceedings on remand. We agree with respondent that the trial court erred in admitting petitioner's exhibit no. 33, a document reportedly from Citizens Bank setting forth terms and conditions for some of the involved CDs. Trial testimony by the witness relied on by petitioner to support introduction of the document shows that the witness was neither the custodian of the document nor qualified to establish the effective date of the document. MRE 803(6). Our conclusion, however, does not preclude the admission of this document if a sufficient foundation can be laid in the trial on remand.

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

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen