

STATE OF MICHIGAN
COURT OF APPEALS

In re THOMAS J. HOGAN TRUST.

JAMES E. HOGAN, MARY ANN HOGAN-
WILSON, and THERESA CHARBONNEAU, Co-
Trustees for THOMAS J. HOGAN, TRUST,

UNPUBLISHED
May 27, 2004

Petitioners-Appellants,

v

JULIANA HOGAN,

No. 247989
Macomb County Probate Court
LC No. 00-166589-TV

Respondent-Appellee.

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Petitioners appeal as of right the probate court's decision granting in part and denying in part petitioners' motion for accounting. We affirm in part, reverse in part, and remand.

This case arises from a trust agreement executed by Thomas J. Hogan (Hogan). Petitioners, the children of Hogan's first marriage, learned that their father had suffered a severe and debilitating stroke in January 2000. They subsequently became concerned that respondent, Hogan's current wife, would seek to divest them of their residual interest in the trust. On August 28, 2000, petitioners filed a petition to remove Hogan as trustee.

The parties settled that litigation, and a stipulated order modifying the trust and installing petitioners as co-successor trustees was entered by the probate court on June 27, 2001. As part of that order, respondent was to have access to a new, separate trust account created for the care and maintenance of Hogan. Additionally, respondent was made guardian of Hogan, whom the parties stipulated was incapacitated. The agreement further specified that respondent was not a trustee.

Petitioners became concerned that the \$25,000 per month being deposited into the account was not in fact being used for Hogan's care and maintenance, and they filed the instant action for accounting. The probate court granted an accounting with respect to another trust asset under respondent's control but denied the accounting with respect to the monthly care and

maintenance account, reasoning that petitioners could have negotiated for an accounting in the settlement leading to the June 27, 2001, order.

Petitioners first contend that respondent, as a fiduciary of Hogan, is also a fiduciary of the \$25,000 a month care and maintenance account, and, therefore, has a duty to account. The probate court did not specifically address the issue whether respondent is a fiduciary of Hogan. However, no one disputes the fiduciary nature of the relationship between respondent and Hogan. A fiduciary relationship is one “where a relation of confidence exists between the parties.” *In Re Wood Estate*, 374 Mich 278, 282-283; 132 NW2d 35 (1965). Respondent has complete control of the \$25,000 checking account used for Hogan’s care and maintenance.

Moreover, a guardian owes its ward a fiduciary duty. See *Shenk v Alex*, 245 Mich 167, 170; 222 NW 197 (1928). And MCL 700.1104(e) defines a fiduciary in part as “a personal representative, *guardian*, conservator, trustee, plenary or partial guardian appointed as provided in chapter 6 of the mental health code, 1974 PA 258, MCL 330.1600 to 330.1644, and successor fiduciary.” MCL 700.1104(e) (emphasis added). Respondent was appointed as Hogan’s guardian and, therefore, respondent is a fiduciary of Hogan.

Petitioners argue that the probate court abused its discretion by failing to recognize respondent’s duty to account. We agree. A probate court’s substantive decisions are reviewed for an abuse of discretion. *In re Rice Estate*, 138 Mich App 261, 270; 360 NW2d 587 (1984); *In re Hatjioannou Estate*, 101 Mich App 370, 374; 300 NW2d 569 (1980). An abuse of discretion has occurred when a result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *In re Estate of Weber*, 257 Mich App 558, 560; 669 NW2d 288 (2003). A trial court abuses its discretion when it misapplies or misunderstands the law. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

“A guardian is a trustee of the estate of his ward, bound by law to manage and conserve it in a manner most advantageous to the inheritance, and held, as a rule, to a rigid accountability in the execution of the trust, and liable for loss occasioned by improper or unlawful expenditure of the funds of his ward.” *Reynolds v Garber-Buick Co*, 183 Mich 157, 166-167; 149 NW 985 (1914). To the extent that respondent controls Hogan’s assets, she is a trustee of that estate.

Additionally, MCL 700.1308(1) and (2) provide as follows:

(1) A fiduciary is liable for a loss to an estate that arises from embezzlement by the fiduciary; for a loss through commingling estate money with the fiduciary’s money; for negligence in the handling of an estate; for wanton and willful mishandling of an estate; for loss through self-dealing; for failure to account for an estate; for failure to terminate the estate when it is ready for termination; and for misfeasance, malfeasance, nonfeasance, or other breach of duty.

(2) In response to an interested person’s petition or on its own motion, the court may at any time order a fiduciary of an estate under its jurisdiction to file an

accounting. After due hearing on the accounting, the court shall enter an order that agrees with the law and the facts of the case. [MCL 700.1308(1) and (2).]

MCL 1105(c) provides that an “interested person”

includes, but is not limited to, an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual . . .

Petitioners, as Hogan’s children and beneficiaries, are interested persons in the trust. Because the \$25,000 monthly deposit for Hogan’s care comes from the trust corpus, petitioners are “interested persons” who may petition the probate court for an accounting under MCL 700.1308(2). The probate court’s failure to consider petitioners’ right under MCL 700.1308(2) was a mistake of law and an abuse of discretion.

Last, petitioners argue that equity mandates a constructive trust. This argument is presented for the first time on appeal and is unpreserved. *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 32; 614 NW2d 634 (2000). Though this Court may review equitable issues not addressed by the lower court, *Kratzke v Independent Order of Oddfellows*, 442 Mich 136, 142; 500 NW2d 115 (1993), we find no compelling reason to do so here. There was no showing of impropriety on respondent’s part that would necessitate the imposition of a constructive trust. Moreover, the right to assert a constructive trust lies with Hogan, not petitioners.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Kathleen Jansen

/s/ Michael J. Talbot