# STATE OF MICHIGAN

# COURT OF APPEALS

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In re Estate of LAWRENCE PAUL DOSS,
Deceased.

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JUDITH YOUNG DOSS,

Petitioner-Appellant,

v

LAWRY NICOLE DOSS,

Respondent-Appellee.

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UNPUBLISHED
February 19, 2009

No. 277982
Wayne Probate Court
LC No. 2001-642445-DE

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Petitioner, Judith Doss, appeals as of right the trial court order granting respondent's motion for summary disposition and denying petitioner's cross-motion for summary disposition in this dispute over ownership of corporate membership units. We affirm.

Decedent, Lawrence P. Doss, died intestate on October 28, 2001. He was survived by his wife, petitioner, and two daughters (respondent being one of them) from prior marriages. Between 1994 and 1999, decedent purchased 9 "membership units" in Atwater Entertainment Associates, LLC ("Atwater"), a company formed in 1995 by the decedent and two other individuals for the express purpose of pursuing the licensing, ownership, and operation of casinos. It is undisputed that prior to his death, Doss transferred 2 of the units to petitioner. The dispute in this matter concerns the proper title to and distribution of the remaining 7 membership units.

While petitioner was the personal representative of decedent's estate, the Court ordered the transfer of the Atwater units from decedent's name to the estate. Some time later, respondent petitioned the court to remove petitioner as the personal representative of the estate, for an accounting, surcharge, and the return of estate assets, alleging that the estate had received $2.8 million for the redemption of the units at issue and that petitioner had spent and/or transferred some of the redemption monies for her personal use. Petitioner thereafter moved for a determination of property rights in the Atwater units and the parties filed cross-motions for summary disposition, with petitioner contending that the Atwater shares were not a part of the estate and respondent asserting the opposite. Petitioner specifically argued that two of the seven

units were assigned to her and the decedent as joint tenants and that decedent sold her an additional two units. Petitioner also asserted that those four units, as well as the other three units, were purchased with funds from her sole property or the marital home, thus making them her separate property. The trial court disagreed, determining that decedent repeatedly attempted to transfer the same two units to petitioner and was not successful until shortly before his death, when two units (those not at issue) became petitioner's property. The trial court held that there was no question of material fact that the seven remaining Atwater units were the property of the estate, and thus granted respondent's motion for summary disposition. Petitioner now appeals that decision.

Rulings on motions for summary disposition are reviewed de novo on appeal. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

On appeal, petitioner contends that the trial court erred in determining that decedent attempted to transfer the same two membership units to petitioner on several occasions, but only successfully transferred the two units not at issue. With respect to the transfer of ownership of shares to petitioner, the trial court stated:

> It is clear from the facts of this case that between September 1998 and January 2000 the Decedent made several attempts to complete a transaction to transfer at least two units of ownership to the Petitioner, as his wife. For instance, on September 29, 1998, the evidence shows that through an Assignment from Herb Strather and his Trust to Lawrence and Judith Doss, as husband and wife, the Decedent attempted to convey two units of ownership to his wife. This transfer was ineffective because, at the time, the Michigan Limited Liability Corporation Act, MCL 450.4504, did not authorize a membership interest in an LLC could be held jointly, as husband and wife, with full rights of survivorship as entireties property. . . The Decedent also attempted to transfer two of these units on October 1, 1998, by executing a Bill of Sale from himself to his spouse. This document was also ineffective because according to the AEA Operating Agreement, member approval was necessary for such a transfer. . . The Decedent finally successfully transferred two units of ownership to the Petitioner, after the Gaming License was granted, by submitting his Assignment of Membership interest in Atwater Entertainment Associates, LLC on January 10, 2000. . .

While the trial court may have found that decedent only intended to transfer the two units not at issue and the prior transfers were merely unsuccessful attempts to transfer these units, it also found that the transfers prior to 2001 failed. We find that the trial court correctly determined that the prior attempted transfers failed. We further find that whether decedent intended to transfer more than the two units that were successfully transferred is immaterial, given the express requirements of the Atwater Entertainment Associates operating agreement concerning the transfer of membership units.

As pointed out by petitioner, in September 1998 Atwater member Herbert Strather transferred two membership units to decedent and petitioner. The Atwater Entertainment Associates operating agreement, however, provides that the transfer of any membership unit requires the approval of a majority of the Members of Atwater. Exceptions are set forth at 13.3, which allows the transfer of units without consent if the transfer is made as a result of the death or permanent disability of a Member, or the transfer was made in connection with the entry of a divorce decree for or against a Member. Further exceptions are provided for at 13.5 of the agreement:

> Permitted Transfers. Notwithstanding anything to the contrary contained herein, but subject to the provisions of Section 13.6 below, Members shall be permitted to transfer Units without the consent of the other Members in the following events:
>
> A. Transfer to another Member;
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> B. Transfers to a corporation, partnership, limited liability company, trust or other entity, the ownership or beneficiaries, of which are comprised wholly of and limited to the transferee(s) and /or their legal/beneficial owners;
>
> C. Transfers to a trust (or similar vehicle) for the benefit of the family of the transferor;
>
> D. Transfers to beneficiaries or devisees upon the death of the transferor;
>
> E. Transfers as the result of the death or permanent disability of a Member;
>
> F. Transfers in connection with the entry of a divorce decree for or against a Member; and
>
> G. Transfers to the beneficial owners of entities which are Members.

None of these exceptions appears to have been present with respect to the two jointly assigned units and petitioner does not support any argument for application of an exception. It is undisputed that at the time of Atwater's inception and at the time two shares were jointly assigned, petitioner was not a Member. Absent an exception in the operating agreement, then, approval must have been obtained from the Atwater Members to effectuate the transfer of two units to petitioner. There is no evidence that such approval was obtained. As a result, the trial court was correct in determining that the attempted transfer of two units of Atwater membership to petitioner and decedent jointly in September 1998 was ineffective and provided petitioner with no right of ownership of the shares.[1]

[1] While the trial court determined that the transfer was ineffective because "MCL 450.4504 did not authorize a membership interest in an LLC could be held jointly," we will not reverse a trial court's order where it reaches the right result for the wrong reason. *Ford Credit Canada Leasing, Ltd, v DePaul,* 247 Mich App 723, 730; 637 NW2d 831 (2001).

Petitioner also claims, alternatively, that the two jointly assigned units were held by petitioner and decedent as tenants by the entireties such that the two units became her sole property upon decedent's death. It is true that a "husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety." MCL 557.71. Petitioner is also correct that a membership interest is personal property. MCL 450.4504. Petitioner then, however, makes the leap that because the interest was the personal property of decedent, it was *necessarily* held by both her and decedent as tenants by the entirety. Petitioner has not, however, provided any support for such a position; instead she has only provided authority (and only a cursory analysis) suggesting that personal property *could* be held as tenants by the entirety. We will not elaborate a party's arguments or search for authority either to sustain or reject his position. See, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, even if membership units in a corporation may be held as tenants by the entireties, the Atwater operating agreement specifically provides that transfers of ownership units to non-members requires the approval of all of the other members except under very specific circumstances—circumstances which were not present with respect to the September 1998 joint assignment of the two units.

In October 1998, decedent executed a bill of sale purporting to transfer two units to petitioner. According to petitioner, the two units could be assigned to her without Member approval under the exceptions in the Atwater operating agreement allowing for transfers of membership units "to beneficiaries or devisees upon the death of the transferor" and "transfers as the result of the death or permanent disability of a Member." However, the units petitioner references are those purportedly transferred to her through the October 1998 bill of sale. Obviously, this transfer did not take place due to or because of decedent's death, he having lived for several years after signing the bill of sale. Petitioner apparently encourages us to find the bill of sale not effective as of the date of signing, but effective only as of the date of decedent's death. She has, however, provided no rationale for construing the bill of sale in such a manner. The bill of sale itself contains no language suggesting an intention other than to have immediate effect. The transfer not falling within any exception in the Atwater operating agreement, Member approval was required for transfers of the units unless, among other things, the transfer was to another Member. Petitioner having not become a Member until (by her own estimation) 2002 when two units were successfully transferred to her, Member approval was necessary for the 1998 bill of sale. There is no assertion that approval was sought or obtained. As such the transfer is, according to the AEA Operating Agreement void ab initio and of no effect. The trial court did not err in finding that the October 1998 bill of sale failed to effectively transfer two membership units to petitioner.

Petitioner next argues that the trial court erred in determining that petitioner had no legal lien on the seven units at issue when mortgages on and sales proceeds from her properties were used to directly purchase the Atwater units in decedent's name. We disagree.

In support of her position that the seven units were estate assets and petitioner always recognized the units as such, respondent submitted, among other things, estate inventories, accounts, and tax returns. The inventories, signed by petitioner as personal representative of the estate, listed membership units as an estate asset, as did the estate accountings and tax returns. Correspondences from Atwater, addressed to petitioner, also establish that the seven units were estate assets. For example, a November 7, 2001 letter from Atwater, signed by Vivian

Carpenter, and addressed to petitioner states that Carpenter is enclosing a copy of petitioner's transfer documents as approved by the Michigan Gaming Control Board [of the 2 units not at issue]. According to the letter, "the remaining seven units are left in the Estate of Lawrence Doss." Atwater's corporate documents, including an April 27, 2005 "Rights Certificate" issued by Atwater and listing the estate of Lawrence P. Doss as the owner of seven units, also reflect that decedent, and then his estate, was the owner of the seven units.

Documents filed with the court throughout the dispute in this matter also indicate that the units were estate assets. On April 13, 2004 Petitioner signed a sworn "petition to authorize transfer of assets to estate" stating that the estate is the presumptive owner of seven units of membership in Atwater, and that the entities holding title to the asset would not transfer title to the estate without a court order. From this document, it appears that petitioner acknowledged the seven membership units as belonging to the decedent, and expressed an intent to transfer title of the units to the estate—not to her personally. An order authorizing the transfer of assets was entered August 30, 2004. The order provides that those entities holding title to the 7 membership units, "which originally belonged to Lawrence Paul Doss, shall forthwith transfer title to Judith Young-Doss, Personal Representative of the Estate of Lawrence Paul Doss, Deceased." The order, recognizing decedent as the owner of the units, was entered without objection.

Petitioner contends that the trial court could not properly rely upon the cited documents in granting respondent's motion for summary disposition, and is correct that an inventory made by an administrator is not conclusive as to the assets of the estate or their value. See, e.g., *Peckham v Hoag*, 57 Mich 289, 291; 23 NW 818 (1885). However, it having been established that only two units of membership were, in fact, actually transferred to petitioner, there is no reason articulated by petitioner why these documents cannot be viewed as evidence on the issue of whether she always believed the remaining seven units to be hers and always acted in conformity with that belief. These documents are not alleged to be inadmissible and petitioner's subjective belief that they are irrelevant is not controlling. It appears, too, that some of the documents petitioner now deems irrelevant were attached as exhibits to her summary disposition pleadings, and those documents that she signed and submitted in court proceedings are properly considered by the court.

Respondent having come forward with admissible evidence to support her position, it is incumbent upon petitioner to, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). Petitioner produced several documents for the trial court's review, including: her affidavit, a timeline purportedly establishing that decedent's Atwater units were financed through mortgages and sales proceeds from her properties, deeds concerning certain real properties, and amended inventories of decedent's estate indicating that she claimed a lien on the Atwater units. We agree with the trial court that the evidence submitted by petitioner was insufficient to create a triable issue as to whether the seven membership units were estate property.

The trial court discounted petitioner's affidavit, finding that it contradicted the prior statements petitioner had submitted in the sworn estate inventories, accountings, and tax returns. Despite petitioner's contention that the affidavit was merely explanatory, we find no error in the trial court's conclusion. A party or witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony or prior conduct. *Casey v Auto-Owners Ins Co,* 273 Mich App 388, 396; 729 NW2d 277 (2006); *Bergen v Baker,* 264 Mich App 376, 389;

691 NW2d 770 (2004); *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000). Here, petitioner's affidavit that she always believed the remaining seven units to be her personal property and always acted in conformity therewith could be construed as contradicting her prior conduct in listing the units as an estate asset on estate inventories and tax returns, seeking to have the units transferred from decedent to the estate, rather then claiming them as a personal asset, and failing to object to court documents indicating that the units belonged to decedent.

Likewise plaintiff's self-serving affidavit concerning the monies used to acquire the units and the remaining evidence she relies on, primarily a timeline and its supporting documents, serve as no concrete evidence that the mortgages and property sales were used to finance the purchase of Atwater units. The timeline shows, for example, (and supporting documents confirm) that decedent purchased .1 units in 1994 (no specific date) for $2500 and .4 units on July 29, 1994 for $10,000. Petitioner's time line shows a mortgage on her home in the amount of $45,000 taken out on October 7, 1994—after the first partial unit was purchased and for an amount far more than the purchase price. The line also shows that decedent purchased 2 units on May 31, 1995 for the price of $5.00. The timeline shows a mortgage on her separate property for $157,000 taken out on June 19, 1995—again, after the 2 units were purchased and for an amount hugely exceeding the units' purchase price. The timeline next shows a mortgage taken out on the marital home on January 31, 1996 for $300,000 and the purchase of .1 unit by decedent on November 21, 1996 for the price of $2500.00. Again, the disparity in price of units and amount of mortgage, along with the time gap, does not sufficiently establish that the mortgage monies were used to finance the purchase of Atwater units. The next event shown on the timeline is the sale of petitioner's sole property for the price of $72,000, followed on November 10, 1997 of the purchase of 2.4 units for $6. At this point, decedent has purchased 5 units in Atwater for a total purchase price of $15,011. Mortgages and sales proceeds petitioner claims were used to finance the purchase of these units totaled $574,500.00. There is no documentation to show that any of the sale/mortgage proceeds were paid directly to Atwater, (i.e. a check written from mortgage company to Atwater) and no bank records were produced to link the payments. Petitioner's attorney, when questioned in the presence of petitioner whether a paper trail corroborating the time line and further demonstrating how the money petitioner received from the mortgages and sales was used could be produced, admitted he could not produce any such evidence. As such, petitioner's claim that the sale and mortgages or her personal properties financed the purchases of the units appears to be speculative at best and is insufficient to create a genuine issue of material fact concerning whether petitioner has a legal claim to the seven units.

Petitioner also claims as error the trial court's holding that the estate would not be unjustly enriched were it to retain title to the units. Unjust enrichment is the "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Because we previously determined that the units properly belonged to the estate, the estate received no benefit from petitioner. Unjust enrichment is thus inapplicable.

Because of our prior determinations that decedent did not transfer any of the seven units to petitioner and that the evidence petitioner provided to support her position that the mortgage and sale proceeds from her personal properties financed the purchase of and were intended to be

secured by the disputed units was speculative, we need not address petitioner's remaining issues on appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood