

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ELMA ZYLA, Deceased.

PETER S. GRAPP, as Personal Representative of
the Estate of ELMA ZYLA, Deceased,

Plaintiff-Appellant,

v

LAURIE HILL-PTASHNIK and CYNTHIA
BERTOLINI, as Personal Representatives of the
Estate of CLARENCE HILL, Deceased,

Defendants/Third-Party-Plaintiffs-
Appellees,

and

DOUGLAS S. TOUMA, TOUMA WATSON
WHALING COURY & COSTELLO PC, f/k/a
TOUMA WATSON NICHOLSON WHALING
FLETCHER & DEGROW,

Third-Party-Defendants.

PETER S. GRAPP, as Personal Representative of
the Estate of ELMA ZYLA, Deceased,

Plaintiff-Appellant,

v

LAURIE HILL-PTASHNIK and CYNTHIA
BERTOLINI, as Personal Representatives of the
Estate of CLARENCE HILL, Deceased,

Defendants/Third-Party-Plaintiffs-
Appellees,

UNPUBLISHED
May 14, 2009

No. 281355
Oakland Probate Court
LC No. 2000-272816-DA

No. 281356
Oakland Probate Court
LC No. 2006-305456-CZ

and

DOUGLAS S. TOUMA, TOUMA WATSON
WHALING COURY & COSTELLO PC, formerly
known as, TOUMA WATSON NICHOLSON
WHALING FLETCHER & DEGROW,

Third-Party-Defendants-Appellees.

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

M. J. KELLY, J. (*dissenting*),

In this estate dispute, plaintiff Peter S. Grapp, as the personal representative of the Estate of Elma Zyla, appeals as of right the probate court's order of September 28, 2007, granting summary disposition in favor of defendants Laurie Hill-Ptashnik and Cynthia Bertolini, as the personal representatives of the Estate of Clarence Hill.¹ The primary issues on appeal are whether the probate court properly determined that the Zyla Estate's claims against the Hill Estate were untimely under MCL 700.3957 and MCL 700.3803 and whether the probate court erred when it determined that the joint will of Frank and Elma Zyla was ambiguous and, for that reason, declined to construe it. I would conclude that neither MCL 700.3957 nor MCL 700.3803 bars the Zyla Estate's claims against the Hill Estate. I would also conclude that the probate court erred when it declined to construe Frank and Elma Zyla's joint will and codicil; the joint will and codicil are unambiguous and clearly provide that the residue of the estate of the survivor of Frank and Elma should be held in trust for Peter Grapp, Paul Grapp and Gary Grapp. Therefore, the probate court should have granted partial summary disposition on this issue in favor of the Zyla Estate. For these reasons, I would reverse the probate court's decision and vacate its September 28, 2007 order in its entirety and remand for entry of partial summary disposition in favor of the Zyla Estate on the proper construction of Frank and Elma Zyla's joint will and codicil and for further proceedings consistent with this opinion. Therefore, I must respectfully dissent.

I. Basic Facts and Procedural History

A. Frank and Elma Zyla's Joint Will and Codicil

This dispute has its origins in the administration of the Zyla Estate. In 1965, Frank and Elma Zyla executed a joint will. At the time, Elma did not have any children, but Frank had a

¹ This Court assigned Docket Number 281356 to the third-party complaint filed by the Hill Estate. However, the parties did not raise any issues concerning the third-party complaint on appeal.

daughter, Jean Frances Grapp, by a previous relationship. Jean Grapp had three sons: Peter, Paul and Gary Grapp.

Under the provisions of the 1965 will, all the assets of the first spouse to die would pass to the surviving spouse. After the death of both Frank and Elma, the will provided for several specific bequests: \$2,000 to Frank's sister Mary Zaremba, \$1,000 to Elma's sister Juliette Sehl, \$2,000 to Elma's brother Clarence Hill, \$1,000 to Elma's brother Mathew Hill, and \$2,000 each to Frank's nieces Julie Zyla and Emily Zyla. If any of these specific beneficiaries were to predecease the survivor of Frank or Elma, the bequest to that person would lapse and become part of the residue of the estate.

The 1965 will specified that the residue was to go to "ANTHONY ARKER if he be living at the time of the death of the survivor of us, and if not, then to RICHARD SURDACKI, IN TRUST, NEVERTHELESS, for the uses and purposes herein stated and no other" The will then made elaborate provision for the administration of the testamentary trust. These provisions included a modest sum for the benefit of Frank's granddaughter, Theresa Grapp, who was hospitalized at the time. However, the bulk of the residue was to be held in trust for Peter, Paul and Gary Grapp. The corpus of the trust was to be distributed to the beneficiaries after they reached specific ages with the remainder being distributed once the beneficiaries reached age forty.

Frank and Elma also nominated Arker to be the executor of the will with Surdacki as an alternate executor.²

In 1978, Frank and Elma executed a codicil to the 1965 joint will. In the codicil, Frank and Elma changed the specific bequests. Among the changes, Frank and Elma increased the bequest to Elma's brother, Clarence Hill, from \$2000 to \$10,000. In addition, because Theresa Grapp had since died, Frank and Elma instructed that the references to Theresa should be deleted. Frank and Elma also modified the paragraph dealing with the residue of the estate by replacing the reference to Anthony Arker, who apparently had died, with Clarence Hill and replacing the reference to Richard Surdacki with Edward Sloan. Finally, Frank and Elma instructed that the executor should now be Clarence Hill and the alternate executor should be Edward Sloan.

Frank died in 1986.

In May 1996, Elma and her brother Clarence met with an attorney, Douglas Touma. Touma summarized the meeting in a letter written to Elma, but sent "c/o Clarence Hill."³ In the letter Touma indicated that Elma had expressed a desire to leave all her property to Clarence and that she was making certain properties joint with him. Touma noted that Frank and Elma had a joint will, which had become fixed as of Frank's death. But he stated that it was his belief that, under the terms of the residuary clause in the joint will, all of Elma's property would pass to

² According to the Zyla Estate, Arker and Surdacki were two of Frank's business acquaintances.

³ The letter was apparently misdated May 12, 1986.

Clarence if he survived her. For this reason, Touma stated that “as long as Clarence were to honor the specific bequests in Paragraph III-A, if he survives you I do not see any difference between the property being joint or passing to him by way of the joint and mutual will.”

B. Clarence Hill’s Administration of the Zyla Estate

Elma died in September 1999. In March 2000, Elma’s brother Clarence petitioned the probate court for the commencement of supervised probate of Elma’s estate. According to the petition, Touma represented Clarence. In the petition, Clarence listed all Elma’s heirs-at-law, devisees, and other interested persons. This list did not include Peter, Paul and Gary Grapp. It is undisputed that Clarence never provided the Grapp brothers with notice of the probate proceedings and did not notify them that they were named in the joint will. However, Clarence’s daughter, Laurie Hill-Ptashnik, was listed as an interested party and Clarence sent her a copy of the petition, joint will and codicil.

In June 2000, the probate court held a hearing on the petition and admitted the joint will and codicil to probate and appointed Clarence to be Elma’s personal representative. In November 2000, Clarence filed an inventory for the Zyla Estate. The inventory listed real property in Clair County worth \$95,044.00 and real property in Charlevoix County worth \$144,400 and a financial account worth \$287,623.75. The estate’s total value was \$527,067.75.

In April 2002, Clarence filed his first annual accounting. The accounting listed disbursements of \$23,000 for the specific bequests. The accounting included proof of the disbursements in the form of cancelled checks. The checks were drawn on an account labeled “Estate of Elma Zyla” with “Clarence E. Hill” and “Laurie J. Ptashnik” listed as co-owners. Laurie Ptashnik signed the checks. Also in April 2002, the probate court issued amended letters of authority to Clarence. The amended letters provided that Clarence could not sell any real property without an order of the court. Clarence also filed an accounting in April 2002. According to the accounting, Clarence advanced \$53,899 to the Zyla Estate, which was the exact amount of the total disbursements to that date. Hence, as of April 2002, the estate still had the real property and investment account with a total value of \$527,067.75.

In May 2003, the probate court suspended Clarence’s authority as personal representative of the Zyla Estate because Clarence failed to file an annual accounting and notice of continued administration. In June 2003, the probate court administratively closed the Zyla Estate. In the order closing the estate, the probate court noted that Clarence had not filed the notice of continued administration, a petition for settlement, or a sworn statement of closing, and failed to cure these deficiencies after notice from the probate court. The order also terminated Clarence’s authority as personal representative.

C. The Current Proceedings

In May 2005, Clarence died. The probate court appointed Clarence’s daughters, Laurie Hill-Ptashnik and Cynthia Bertolini, to be the personal representatives of the Hill Estate. In July 2005, Ptashnik and Bertolini published a notice to creditors of the Hill Estate in the Oakland County Legal News. It is undisputed that Ptashnik and Bertolini did not send a copy of the notice to the Grapp brothers.

According to the Zyla Estate's complaint, the Grapp brothers did not learn that they had been named in Frank and Elma's joint will and codicil until about March 2006.⁴ On June 6, 2006, Peter Grapp, who acted as the nominated personal representative of the Zyla Estate, filed a claim with the Hill Estate. Peter stated that the claim was premised on Clarence's failure to distribute the residue of the Zyla Estate "per the governing instrument while acting as Personal Representative." The Hill Estate disallowed the claim on June 9, 2006.

On June 6, 2006, Peter Grapp also petitioned the probate court to reopen the Zyla Estate. In the petition, Peter alleged that Clarence failed to distribute the Zyla Estate according to the requirements of the joint will and codicil and that he failed to provide notice to the Grapp brothers as interested parties. For that reason, Peter asked the probate court to reopen the estate and appoint him as the successor personal representative in order to pursue the Zyla Estate's claims against the Hill Estate. Ptashnik and Bertolini objected to the petition to reopen the Zyla Estate. But the probate court granted the petition after it learned that the Grapp brothers had not been given proper notice of the Zyla Estate's proceedings. The probate court entered an order reopening the Zyla Estate on July 25, 2006. The order also appointed Peter Grapp and Ptashnik to be the successor representatives, but gave Peter the sole authority to pursue the Zyla Estate's claims against the Hill Estate.

On July 31, 2006, Peter Grapp, as the personal representative of the Zyla Estate, sued the Hill Estate. The Zyla Estate alleged that Clarence Hill breached his fiduciary duties by failing to distribute the Zyla Estate's residue to the Grapp brothers. The complaint sought recovery under theories of surcharge and conversion.

In September 2006, the Zyla Estate moved for partial summary disposition under MCR 2.116(C)(10). The Zyla Estate asked the probate court to grant partial summary disposition as to the proper construction of the will. Specifically, the Zyla Estate argued that the joint will and codicil were not ambiguous and clearly provided that the residue of the Zyla Estate should go to the Grapp brothers.

In September 2006, Ptashnik and Bertolini caused the Hill Estate to sue Touma and his firm. In its third-party complaint, the Hill Estate alleged that Touma committed malpractice when he failed to properly and accurately advise Clarence about his obligations as the personal representative of the Zyla Estate. The Hill Estate also alleged that Touma failed to properly advise Clarence about the proper distribution of the Zyla Estate's assets. As a result of this malpractice, the Hill Estate alleged that it suffered the damages occasioned by the present litigation.

In October 2006, the Hill Estate responded to the Zyla Estate's motion for summary disposition and cross-moved for summary disposition under MCR 2.116(I)(2) and MCR 2.116(C)(7). In its brief in support of its motion, the Hill Estate argued that Frank and Elma's

⁴ It is not entirely clear from the record how the Grapp brothers first became aware that they might have been entitled to the residue of the Zyla Estate. However, at a February 27, 2007 hearing, Peter's counsel indicated that the brothers had received a copy of the joint will and codicil, "which was the whole genesis for this matter."

joint will and codicil unambiguously provided that Clarence should take the residue if he survived both Frank and Elma. In addition, the Hill Estate argued that the Zyla Estate's claims against Clarence were barred under MCL 700.3957 and MCL 700.3803.

In December 2006, the Zyla Estate moved to amend its complaint to state various claims of fraud. In the amended complaint, the Hill Estate alleged that Paul Grapp contacted Touma during Clarence's administration of the Zyla Estate and asked whether he or his brothers were entitled to any distributions from the Zyla Estate. According to the allegations in the amended complaint, Touma was the agent for the Hill Estate and, while acting in this capacity, fraudulently advised Paul that he and his brothers did not appear in the joint will or codicil. The Zyla Estate alleged that the Hill Estate was liable for the damages arising from this fraudulent statement. The Zyla Estate also moved for permission to join the relief sought by the Hill Estate in its third-party complaint against Touma and his firm.

On September 28, 2007, the probate court issued its opinion and order concerning the parties' motions for summary disposition. The probate court determined that the disputed portion of Frank and Elma's joint will and codicil was ambiguous and, for that reason, denied the parties' motions for summary disposition based on the interpretation of the joint will and codicil. Nevertheless, the probate court also concluded that MCL 700.3957 and MCL 700.3803 barred the Zyla Estate's claims against the Hill Estate. For that reason, it granted summary disposition in favor of the Hill Estate under MCR 2.116(C)(7). The probate court also concluded that the Zyla Estate's motion to amend should be denied because the new claims would also be barred by the relevant periods of limitation. Finally, the probate court concluded that the Zyla Estate's motion for permission to join in the relief sought by the Hill Estate in its third-party complaint was moot.

This appeal followed.

II. Summary Disposition Under MCR 2.116(C)(7)

A. Standards of Review

This Court reviews de novo a probate court's decision to grant summary disposition under MCR 2.116(C)(7). *State Farm Fire & Casualty Co v Corby Energy Services, Inc.*, 271 Mich App 480, 482; 722 NW2d 906 (2006). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by a statute of limitations. A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, which, if submitted, the Court must consider. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). Where the facts are not disputed, whether a cause of action is barred by the applicable statute of limitations is a question of law that this Court reviews de novo. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386; 738 NW2d 664 (2007). This Court also reviews de novo the proper interpretation of a statute of limitations. *Id.*

B. MCL 700.3957

I will first address whether the probate court erred when it determined that the Zyla Estate's claims against the Hill Estate were barred under MCL 700.3957. On appeal, the Zyla Estate argues that, because the Grapp brothers did not receive notice of the original petition to

initiate the probate of Elma's estate, application of MCL 700.3947 to bar the Zyla Estate's efforts to recover assets on behalf of the Grapp brothers would violate due process. However, before addressing whether deficient notice precludes application of MCL 700.3957 as a bar to the claims in this case, it is necessary to first determine whether MCL 700.3957 applies to the facts of this case.

Generally, under the Estates and Protected Individuals Code (EPIC), see MCL 700.1101 *et seq.*, a person who receives property from an estate as a distributee is liable to return the property or its face value if the property was improperly distributed and may also be liable for certain creditor claims. See MCL 700.3911 and MCL 700.3955. However, under MCL 700.3957, the Legislature provided distributees with protection from creditor claims and from heirs, or devisees seeking to recover improperly distributed property:

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling a personal representative's accounts, or otherwise barred, a claimant's claim to recover from a distributee who is liable to pay the claim and the right of an heir or devisee, or a successor personal representative acting in their behalf, to recover property improperly distributed or its value from a distributee are forever barred at the later of 3 years after the decedent's death or 1 year after the time of the property's distribution.

In the present case, Peter sued the Hill Estate on behalf of the Zyla Estate on the grounds that Clarence improperly distributed the residue of the Zyla Estate to himself. Thus, on the surface, MCL 700.3957 appears to apply. However, in order for the period of limitations provided under MCL 700.3957 to apply, the property at issue must have been "distributed" to Clarence—that is, Clarence must be a distributee—and Peter's claim must have been made more than 3 years after Elma's death or more than 1 year after Clarence made the distribution, which ever is later.

Under EPIC, a distributee is a "person that receives a decedent's property from the decedent's personal representative other than as a creditor or purchaser." MCL 700.1103(p). Further, MCL 700.1106(n) defines personal representative to mean an "executor, administrator, successor personal representative, [or] special personal representative" or "any other person who performs substantially the same function under the law governing that person's status." Thus, in order to be a distributee within the meaning of MCL 700.3957, a person lawfully acting as a personal representative must distribute the decedent's property to the distributee—that is, the person making the distribution must actually be authorized to make the distribution at issue on the estate's behalf. A person who receives a decedent's property from someone who is not authorized to transfer the decedent's property would not be entitled to assert MCL 700.3957 as a bar to an attempt to recover the property by an heir or devisee.

In this case, Clarence was clearly the authorized personal representative of the Zyla Estate during its prior administration. However, there is no evidence in the lower court record that Clarence, while acting as the duly authorized personal representative, formally transferred the assets at issue to himself. For this reason, it is impossible to determine whether the Zyla Estate's claims were filed within 1 year of the distribution. Moreover, even if Clarence did eventually distribute the Zyla Estate's assets to himself, there is record evidence that suggests that Clarence may have lacked the authority to make all or a portion of the distributions.

According to the accounting Clarence filed in April 2002, the Zyla Estate still owned assets with a value exceeding \$527,000. Roughly half of these assets were in the form of real property. Yet, when the probate court reissued Clarence's letters of authority in April 2002, it specifically limited Clarence's ability to sell real property. Likewise, by May 2003 the probate court had suspended Clarence's authority to act as the Zyla Estate's personal representative and by June 2003, the probate court terminated his authority. If Clarence exceeded the scope of his authority when he transferred the assets at issue, or no longer had any authority to transfer the assets by reason of the suspension and eventual termination of his authority, he would not be a distributee within the meaning of MCL 700.3957 and, therefore, would not be entitled to the protection of that statute. Consequently, on this record, the probate court's grant of summary disposition on the basis that the Zyla Estate's claims were barred under MCL 700.3957 was—at the very least—premature. See *Moll v Abbot Laboratories*, 444 Mich 1, 26-28; 506 NW2d 816 (1993) (discussing when a court may properly grant summary disposition based on the applicable period of limitations), abrogated not in relevant part by *Trentadue*, 479 Mich at 393. Nevertheless, because the Hill Estate might be entitled to the protection afforded by MCL 700.3957 as a bar to part or all the claims asserted on behalf of the Grapp brothers, I shall examine whether deficient notice of a probate proceeding renders MCL 700.3957 inapplicable as a bar to the claims of the persons whose notice was deficient.

In order to initiate a formal probate proceeding under EPIC, such as the one at issue, the petitioner must give the notice required by MCL 700.1401 to every interested person. MCL 700.1403(c). Interested persons include the beneficiaries of a testamentary trust. MCL 700.1105(c) (defining interested persons). Although notice by publication might be appropriate for interested persons whose whereabouts are unknown, see MCL 700.1401(1)(c), normally, notice must be given to an interested person by mail or delivery. MCL 700.1401(1)(a) and (b). The purpose behind the heightened notice requirements is to ensue that interested persons, whose rights might be adversely affected by the probate of the decedent's estate, are fully informed of the proceedings and have a reasonable opportunity to be heard. And for over 120 years, Michigan law has recognized that proper notice is essential to ensuring the integrity and fairness of probate proceedings. See *Lloyd v Wayne Circuit Judge*, 56 Mich 236; 23 NW 28 (1885); *Rice v Hosking*, 105 Mich 303, 307; 63 NW 311 (1895) (recognizing that a person who was not provided with notice of a probate proceeding may have the proceedings declared void); see also How Stat § 5801 (requiring personal service of notice on persons interested in the probate of a will).

In *Lloyd*, our Supreme Court examined the constitutionality of a statute that permitted a testator to submit his or her own will to the probate court while still living and with only limited provisions for notice to persons who might be affected by the will. *Lloyd*, 56 Mich at 237, citing 1883 PA 25. The testator had presented a will to the probate court in which he disinherited his wife and one son. *Lloyd*, 56 Mich at 237. After the probate court disallowed the will, the testator appealed to the circuit court. *Id.* But the circuit court also refused to allow the will. *Id.* The circuit court concluded that the proceedings were unconstitutional because the statute did not provide for notice to the testator's wife and an opportunity for her to be heard. *Id.*

On appeal to our Supreme Court, the testator argued that the lack of notice provided by the statute was not fatal because, if his wife were dissatisfied with the terms of the will, she still

had the right to take a share of his property as though no will were made. *Id.* at 238. Justice Cooley, writing for three of the four justices, disagreed that this saved the statute:

But this seems to be a very insufficient reason for failing to give the wife an opportunity for a hearing. A wife's interests in her husband's estate are not likely to be purely selfish and personal; the two co-operate in accumulating it, generally with an object in view that eventually it shall benefit children or others to whom they are mutually attached; and if the husband, while mentally incompetent, or in the hands and under the influence of scheming and mercenary persons, is making disposition of it, no person is so justly entitled as the wife to make a showing of the facts to defeat it. [*Id.*]

Justice Cooley also noted that the right to property was not the only right at stake—the wife also had statutory rights that her husband might take away through his will. *Id.* at 238-239. For that reason, the wife “should have opportunity to be heard.” *Id.* at 239.

The difficulty, then, is that the Act of 1883 makes no sufficient provision whereby, in the case of a married man, it can be carried into effect consistently with the preservation of rights which were before given, and which must be supposed to have been intended should remain. It therefore makes no sufficient provision for its own enforcement without conflict with other statutes not meant to be repealed, and is inoperative for that reason. [*Id.*]

Thus, Michigan courts have long held that the provision of adequate notice is an essential component of probate proceedings. Similarly, the United States Supreme Court has determined that the provision of notice in a probate proceeding may implicate a person's right to due process of law. See *Tulsa Professional Collection Services v Pope*, 485 US 478; 108 S Ct 1340; 99 L Ed 2d 565 (1988).

In *Tulsa Professional Collection Services*, the Court examined whether the notice provisions of Oklahoma's Probate Code met the requirements of the Due Process Clause. *Id.* at 479. Specifically, the Court had to determine whether Oklahoma's nonclaim statute, which required a creditor to file a claim with the decedent's estate within 2 months of notice or be forever barred, could be applied to bar the claim of a decedent's creditor where the only notice provided to the creditor was through publication in a local paper. *Id.* at 481-484.

The Court began its analysis by reiterating the importance of notice in the preservation of property rights against state action:

[S]tate action affecting property must generally be accompanied by notification of that action: “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [*Id.* at 484, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).]

Although the Due Process Clause is not implicated in situations involving the private use of state-sanctioned remedies or procedures, the Court nevertheless recognized that “when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.” *Tulsa Professional Collection Services*, 485 US at 485-486. Hence, the question before the Court turned on whether Oklahoma’s “involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.” *Id.* at 486. The Court concluded that the state’s involvement was substantial enough to implicate due process:

The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. . . . It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment. [*Id.* at 487.]

Because the nonclaim statute involved state action, the Court determined that those creditors who were known or reasonably ascertainable would be entitled to actual notice. *Id.* at 490-491.

As noted above, MCL 700.3957 serves to protect distributees from the claims of creditors, heirs, and devisees. To that end, the statute bars claims made “at the later of 3 years after the decedent’s death or 1 year after the time of the property’s distribution.” Although MCL 700.3957 includes an absolute time provision based on the decedent’s death, because MCL 700.3957 protects distributees, there must necessarily still be a distribution in order for the statute to apply; the property must be part of a decedent’s estate and must be distributed by the decedent’s lawful personal representative. MCL 700.3957; MCL 700.1103(p); MCL 700.1106(n). Likewise, the fixed period of limitations is in actuality the minimum period within which a claim may be filed; that is, if the personal representative makes a distribution shortly after the decedent’s death, such that the 1-year period would expire earlier than three years after the decedent’s death, the three-year period would apply. Because there is no limit on the time within which a personal representative must make distributions, the 1-year limit triggered by the distribution will in many cases constitute the applicable period. Thus, the application of MCL 700.3957 depends on the opening of probate proceeding, the appointment of a personal representative, and the distribution of estate assets by the personal representative. And, because the state’s involvement with these actions is substantial, application of MCL 700.3957 implicates due process. For that reason, MCL 700.3957 cannot serve as a bar to the claims of known or reasonably ascertainable creditors, heirs or devisees unless those creditors, heirs or devisees were given actual notice of the probate proceedings underlying the distribution.⁵

⁵ Although there is evidence that at least one of the Grapp brothers was aware of Elma’s death, there is no evidence that any of the Grapp brothers were aware of the fact that they were named in the joint will. Because the Grapp brothers were not Elma’s heirs-at-law and had no notice that they might be entitled to a portion of her estate, I reject the Hill Estate’s contention that the Grapp brothers had actual knowledge of the facts which formed the basis of the notice involved

(continued...)

This understanding of MCL 700.3957 is entirely consistent with the requirements of EPIC, which, unlike the statute at issue in *Lloyd*, clearly makes provision for the notification of interested persons and provides those persons an opportunity to be heard. Indeed, in order to initiate the probate of an estate, the petitioner must provide notice that is consistent with the requirements of due process. See MCL 700.1401(1) and MCL 700.1403(c). Furthermore, MCL 700.3106 provides that proper notice under MCL 700.1401 underlies the efficacy of the probate court's orders: "an interested person may be bound by court order with respect to property . . . by notice in conformity with section 1401." And, even if fewer than all interested persons are given notice, an order "is binding on all who are given notice of the proceeding" *Id.* Thus, under EPIC, persons who have not been given the notice required under MCL 700.1401 are not bound by orders with respect to property. And those interested persons who were not given proper notice may later seek to void the probate proceedings. See *Rice*, 105 Mich at 307. Finally, EPIC also provides for the correction of certain proceedings that would otherwise be defective for lack of notice. See MCL 700.3952(3). After reading the applicable provisions of EPIC as a whole and in light of the requirements of due process, I would conclude that a distributee may only raise MCL 700.3957 as a bar to claims made by creditors, heirs and devisees that were given the notice required under MCL 700.1401.

In the present case, it is undisputed that the Grapp brothers were entitled to notice of the probate of the Zyla Estate under MCL 700.1401 and that they did not receive that notice. Therefore, even to the extent that Clarence was a distributee within the meaning of MCL 700.3957, because the Grapp brothers did not receive the notice required under MCL 700.1401, the Hill Estate could not properly raise MCL 700.3957 as a bar to the Zyla Estate's claims on the Grapp brothers' behalf. Consequently, the probate court erred to the extent that it determined that the Zyla Estate's claims were untimely under MCL 700.3957.

C. MCL 700.3803

The Zyla Estate also contends that the probate court erred when it determined that the Zyla Estate's claims were barred under MCL 700.3803. Although the Zyla Estate argues that MCL 700.3803 is inapplicable to the claims at issue on a variety of grounds, I shall first examine whether the Zyla Estate's claims were timely under a plain reading of the statute.

In the present case, the Zyla Estate has raised claims against the Hill Estate based on Clarence's actions while serving as the personal representative of the Zyla Estate. Hence, these claims arose before Clarence's death.⁶ In relevant part, MCL 700.3803(1) provides that,

a claim against a decedent's estate that arose before the decedent's death . . . ,
whether due or to become due, absolute or contingent, liquidated or unliquidated,
or based on contract, tort, or another legal basis, . . . is barred against the estate,

(...continued)

in Elma's probate proceedings.

⁶ Because the claims are against the Hill Estate, the period of limitations provided under MCL 700.3803 must be measured by reference to the notice provided by the Hill Estate. Hence, to the extent that the probate court determined that the present claims were barred under MCL 700.3803(1)(c) because more than three years have elapsed since Elma Zyla died, it erred.

the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801 or 7504, within 4 months after the date of the publication of notice to creditors

* * *

(c) If the notice requirements of section 3801 or 7504 have not been met, within 3 years after the decedent's death.

Thus, if the Hill Estate met the notice requirements of MCL 700.3801,⁷ the Zyla Estate, acting on behalf of the Grapp brothers, would have had to file its claims against the Hill Estate within 4 months of the published notice to creditors. On the other hand, if the Hill Estate failed to comply with the notice requirements of MCL 700.3801, the Zyla Estate would have had three years from the date of Clarence's death to file its claims.

Under MCL 700.3801(1), the personal representative of an estate must publish notice to the estate's creditors "to present their claims within 4 months after the date of the notice's publication or be forever barred." In addition, the personal representative is required to send a copy of the notice or similar notice "to each estate creditor whom the personal representative knows at the time of publication" MCL 700.3801(1).

The Hill Estate published the notice to creditors required under MCL 700.3801(1) in July 2005. The Hill Estate did not, however, send the Grapp brothers the notice required for creditors known to the personal representative. Peter Grapp, acting as the nominated personal representative of the Zyla Estate, filed a claim on behalf of the Zyla Estate in June 2006. Thus, if the Grapp brothers were not known creditors of the Hill estate, the published notice was adequate and the Zyla Estate's claims on behalf of the Grapp brothers would be untimely under MCL 700.3803(1)(a). However, if the Grapp brothers were known creditors of the Hill Estate, then the Hill Estate was required to send actual notice to the Grapp brothers under MCL 700.3801(1) and (2), which it did not do. Therefore, the Zyla Estate's claims on behalf of the Grapp brothers would be timely under MCL 700.3803(1)(c).

The personal representative of an estate "knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor's existence is reasonably ascertainable by the personal representative based on an investigation of the decedent's available records for the 2 years immediately preceding death and mail following death." MCL 700.3801(1). In this case, I conclude that the personal representatives of the Hill Estate had either actual notice that the Grapp brothers were creditors of the Hill Estate or that the Grapp brothers' status as creditors of the Hill Estate was reasonably ascertainable.

⁷ Although MCL 700.3803 refers to both MCL 700.3801 and MCL 700.7504, only MCL 700.3801 is applicable to the facts of this case.

MCL 700.3803 applies to a wide range of creditors' claims: it applies to claims that are "due or to become due, absolute or contingent, liquidated or unliquidated" and to claims "based on contract, tort, or another legal basis." Hence, the claims against an estate may include claims that are in various stages of development and that have various levels of documentation. Indeed, the creditors of an estate may even include persons who are not aware of their status as creditors, but whose claims will nevertheless be barred under MCL 700.3803. Because the notice provisions of MCL 700.3801 are designed to protect the interests of the creditors listed under MCL 700.3803, these statutes must be read together. See *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953).

A personal representative must send a copy of the creditors' notice to creditors that he or she "knows"—which includes creditors about whom the personal representative has "actual notice." MCL 700.3801(1). The statutory provisions do not define what constitutes "actual notice." In context, the word "actual" means "existing now; present; current" and "notice" means "information, warning, or announcement of something impending." *Random House Webster's College Dictionary* (1997). Hence, "actual notice" means current or present information or warning that creditor has a claim. Further, within MCL 700.3801(1), the term "actual notice" is used in contradistinction from notice that is "reasonably ascertainable" through an investigation. Thus, "actual notice" must be understood as something more than the notice that would come only after an investigation. Although "actual notice" clearly encompasses formal notice by a creditor, given the broad range of creditors and claims encompassed under MCL 700.3803(1), actual notice is also clearly not limited to situations where the personal representative has been formally made aware of a claim against the decedent. Rather, in addition to formal notice by the creditor, I would conclude that "actual notice" includes knowledge of facts that would lead a reasonable personal representative to conclude that a particular person or entity was likely a creditor of the estate—as distinct from those persons or entities whose claims are merely conjectural.⁸ See *Tulsa Professional Collection Services*, 485 US at 490. Indeed, to construe "actual notice" as not encompassing notice from facts known to the personal representative would elevate form over substance; under such an interpretation, a personal representative who knew about the existence of a creditor but who nevertheless did not receive formal notice and did not find documentation of the debt could deliberately—and without violating the statute—choose not to notify the creditor and thereby deprive the creditor of the opportunity to assert his or her claim.⁹

In this case, Clarence's daughter, Laurie Ptashnik, is one of the personal representatives of his estate. And there is record evidence that Ptashnik assisted her father during his administration of the Zyla Estate. Ptashnik's name appeared as a joint owner on the Zyla

⁸ Thus, where the personal representative has actual knowledge that the decedent may have caused another's injury—such as in an automobile accident—the fact that the injured party has not formally asserted a claim for damages would not relieve the personal representative of the duty to send the injured party a notice to creditors. This is because the personal representative's knowledge about the accident constitutes "actual notice" that the other party is a creditor.

⁹ Because I reject such an interpretation, I need not determine whether that construction would be consistent with the requirements of due process. See *Tulsa*, 485 US at 490-491.

Estate's account and she signed the checks for the specific bequests under Elma's joint will and codicil. In addition, Ptashnik received formal notice of the Zyla Estate's prior administration, which included a copy of the joint will and codicil. The undisputed evidence of Ptashnik's involvement in the prior administration of the Zyla Estate and her status as an interested party supports the conclusion that Ptashnik was aware of the fact that Clarence never gave notice to the Grapp brothers or otherwise afforded them an opportunity to dispute his interpretation of the joint will and codicil. The evidence also supports the conclusion that she knew that Clarence did not file records with the probate court evidencing a formal transfer of the Zyla Estate's remaining assets to himself as a devisee and was aware of the limits that the probate court placed on Clarence's ability to sell the real property. Likewise, this evidence establishes that she knew about the probate court's decision to suspend and eventually terminate Clarence's authority to act as the personal representative for the Zyla Estate. Thus, the undisputed evidence shows that Ptashnik had knowledge of facts that would lead a reasonable personal representative to conclude that the Grapp brothers likely had claims against the Hill Estate based on Clarence's administration of the Zyla Estate. Therefore, under MCL 700.3801(1), the Hill Estate had to send a copy of the notice to creditors to the Grapp brothers. Because the Hill Estate did not send the required notice, the Zyla Estate's claims on behalf of the Grapp brothers were timely under MCL 700.3803(c).

In addition, even if Ptashnik did not have "actual notice" of the Grapp brothers' status as creditors, I would nevertheless conclude that their existence was "reasonably ascertainable by the personal representative based on an investigation of the decedent's available records for the 2 years immediately preceding death and mail following death." MCL 700.3801(1). MCL 700.3801(1) imposes a duty to investigate the decedent's records for the two years preceding the decedent's death. However, the imposition of the duty to investigate records for the two years preceding the decedent's death is a *minimum* duty—it does not preclude the personal representative from examining earlier records. And, where the investigation of the documents within the two-year period reveals information that would lead a reasonable personal representative to further investigate the available records, MCL 700.3801(1) does not absolve the personal representative of his or her duty to make that investigation. See *Tulsa Professional Collection Services*, 485 US at 490 (explaining that the Due Process Clause does not require impracticable and extended searches for creditors, but does require reasonably diligent efforts to ascertain the identities of creditors).

In this case, Clarence died less than two years after the probate court terminated his authority as the personal representative of the Zyla Estate. Hence, the Hill Estate's personal representatives clearly had a duty to investigate those final probate records. MCL 700.3801(1). These final records reveal that the termination of Clarence's authority was based on his failure to meet his filing obligations. Thus, the required investigation should have put the Hill Estate's personal representatives on notice that there was a clear potential for liability based on Clarence's administration of the Zyla Estate. In order to reasonably ascertain whether Clarence's administration exposed his estate to liability, the personal representatives had to investigate Clarence's handling of the Zyla Estate. *Tulsa Professional Collection Services*, 485 US at 490. And, based on the evidence already noted, a reasonable personal representative examining the records of Clarence's administration of the Zyla Estate would have recognized that the Grapp brothers were likely creditors.

The personal representatives of the Hill Estate did not send the Grapp brothers the notice required under MCL 700.3801(1). Hence, the Zyla Estate had three years from the date of Clarence's death to file its claim on behalf of the Grapp brothers. MCL 700.3803(1)(c). Because the Zyla Estate filed its claim within that time limit, the probate court erred when it concluded that the Zyla Estate's claims were barred as untimely under MCL 700.3803(1). Because of my resolution of this issue, I would decline to address the Zyla Estate's remaining arguments concerning the proper application of MCL 700.3803.

III. Interpretation of the Joint Will and Codicil

A. Standard of Review

The proper interpretation of a will is a question of law that this Court reviews de novo. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

B. Analysis

The Zyla Estate also argues that the probate court erred when it refused to construe Frank and Elma's joint will and codicil on the basis that the will and codicil were ambiguous. Specifically, the Zyla Estate argues that the will is not ambiguous and plainly provides that the residue of the estate of the survivor of Frank and Elma was to be held in trust for the Grapp brothers.

The sole objective in construing a will is to "ascertain and effectuate the intent of the testator as it appears from the language of the will." *Hund v Holmes*, 395 Mich 188, 196; 235 NW2d 331 (1975). Where a will is unambiguous, this Court may not construe it, but must enforce it as plainly written. *In re Reisman*, 266 Mich App at 527. A patent ambiguity exists if the uncertainty appears on the face of the will and arises from defective, obscure, or insensible language. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

In the present case, the parties dispute the meaning of paragraph III(B) of Frank and Elma's 1965 joint will, as amended by the 1978 codicil. This paragraph states:

All the rest, residue and remainder of the estate of the survivor of us, real, personal or mixed, and wheresoever situated we, or the survivor of us, give, devise and bequeath to CLARENCE E. HILL, if he be living at the time of the death of the survivor of us, and if not, then to EDWARD SLOAN, IN TRUST, NEVERTHELESS, for the uses and purposes herein stated and no other, that is to say:

Following this paragraph, the will makes elaborate provision for a testamentary trust whose beneficiaries are the Grapp brothers.

The paragraph at issue is not artfully composed and is susceptible to different interpretations. One plausible interpretation is that Frank and Elma intended to give the whole of their residue to Clarence, if he survived them, and then, if he did not, to Sloan as the trustee of a trust for the benefit of the Grapp brothers. However, it is equally plausible that they intended the limiting language, "IN TRUST, NEVERTHELESS" to modify both the language giving the

residue to Clarence and, in the alternative, giving it to Sloan. Under that interpretation, Clarence would be Frank and Elma's first choice to act as the trustee for the trust provided in the remainder of the will and Sloan would be an alternate trustee. Hence, when read in isolation, this paragraph appears to be patently ambiguous. However, as Justice Voelker once stated when discussing the proper interpretation of a deed, the mere possibility of semantic ambiguity does not render an ambiguity actionable:

We do not hold that there is no possibility of semantic ambiguity in the above-quoted provision. There is, and the unhappy fact is that the possibility of such ambiguity lurks in almost every written instrument devised by man; it is indeed one of the dilemmas of language; but to hold that this ambiguity is actionable and is thus sufficient to open the door to parol evidence to determine the intent of the parties would be in effect to dissolve the salutary rule that where possible the intent of the parties must be drawn from the 4 corners of the instrument. This we do not intend to do.

The issue in cases of this nature is not whether there is any possible ambiguity, but whether any ambiguity which arguably may exist is, on its face, so palpable and so grave that recourse must be had to explanation lying without the instrument. [*Flajole v Gallaher*, 354 Mich 606, 609; 93 NW2d 249 (1958).]

For the same reason, courts must construe wills in their entirety and without emphasizing the wording of any isolated paragraph to determine the testator's intent. See *Hudson v Lindsay*, 383 Mich 126, 130; 174 NW2d 822 (1970). When the paragraph at issue is read in the context of the whole joint will, as amended by the codicil, it is clear that Frank and Elma intended the residue to fund a trust for the benefit of the Grapp brothers and that Frank and Elma selected Clarence to be the initial trustee and selected Sloan as an alternate trustee.¹⁰ Because the apparent ambiguity can be resolved by reading the joint will as a whole, there is no need to resort to rules of construction. *Id.* And this Court may determine Frank and Elma's intent as a matter of law. *In re Reisman*, 266 Mich App at 526.

¹⁰ For this reason, it is not necessary to examine extrinsic evidence of the testators' intent—such as the letter from Touma dated May 12, 1986. See *Hudson*, 383 Mich at 130 (stating that courts must gather the testator's intent from the four corners of the instrument). Nevertheless, I note that this letter is not evidence that either Frank or Elma intended the residue to pass to Clarence at the time they executed the will or codicil. Touma wrote the letter long after Frank's death and did so ostensibly in response to inquiries by Elma and Clarence about passing more of Elma's estate to Clarence. Hence, this letter does indicate that, after she executed the joint will and codicil, Elma had some concerns about how her estate would pass. But there is no way to discern whether the concerns arose because she originally intended to pass the residue to Clarence if he survived her, but now worried that the language of the joint will and codicil did not effect that intent, or whether she had a change of heart about the disposition of her estate after executing the joint will and codicil. However, the letter *is* evidence that both Elma and Clarence were aware that the joint will and codicil might pass the residue to the Grapp brothers. In any event, I conclude that the language of the joint will, as amended by the codicil, is ultimately unambiguous and constitutes the best indicator of Frank and Elma's intent.

The joint will is divided into six sections preceded by a preamble. The first section directs that Frank and Elma's debts and funeral expenses should be paid as soon as possible. The second section provides that the survivor of Frank or Elma is to receive all the property of the other. The third section addresses the distribution of the residue after the deaths of both Frank and Elma. This section is divided into two parts.

The first part of the third section provides for specific bequests to persons who are related to either Frank or Elma. As amended by the codicil, the bequests include gifts to Elma's brother Clarence, and to her sister, to Frank's nieces, Elma's great-nephews, to Elma's niece, Frank's nephews, and even a bequest to Frank's sister-in-law. Conspicuously omitted from the specific bequests to family members is any mention of Frank's grandchildren—Peter, Paul, and Gary Grapp. The second part of the third section addresses the distribution of the residue of the estate and contains the disputed language noted above.

The structure of section three strongly suggests that Frank and Elma intended the residue to pass in trust to either Clarence or Sloan for the benefit of the Grapp brothers. As already noted, the first part of section three makes provision for specific bequests to members of Frank and Elma's families. Yet none of the bequests include Frank's grandchildren. However, when the second part of section three is understood to provide that the residue should benefit the Grapp brothers through a trust, the failure to mention the Grapp brothers in the first part of section three makes eminent sense. In addition, the disputed language is arranged as a single sentence punctuated by a colon, which introduces the will's testamentary trust provisions. This suggests that Frank and Elma intended the trust provisions to apply to the residue whether given to Clarence or Sloan. This result is also suggested by the fact that Frank and Elma chose to emphasize the terms "IN TRUST, NEVERTHELESS," but did not emphasize any other language save the names of persons mentioned in the will. Finally, it is noteworthy that the trust provisions in the will account for more than three pages of the five page will.

However, the most compelling evidence of Frank and Elma's intent is found in the language of the provisions dealing with the trust for the Grapp brothers.¹¹ In these provisions, Frank and Elma repeatedly refer to the "Trustee or Alternate Trustee." These specific references to a trustee and alternate trustee indicate that they had already named both a trustee and an alternate trustee. Yet, Frank and Elma did not provide for the appointment of trustees in any part of the will other than the second part of section three. Consequently, these references must be to Clarence, as the trustee, and to Sloan, as the alternate trustee. This understanding is further supported by the fact that Frank and Elma selected Clarence to be the executor of their will with Sloan as the alternate executor—that is, Frank and Elma clearly associated Clarence and Sloan as persons who could be entrusted with carrying out their will and felt that, as between the two, Clarence was their first choice.

When their joint will and codicil are read as an integrated whole, it is plain that Frank and Elma intended to give the residue of their estate to Clarence in trust for the benefit of the Grapp

¹¹ I also find it noteworthy that Frank and Elma refer to the Grapp brothers as their "grandchildren" in the trust provisions.

brothers. Therefore, the probate court erred when it declined to construe the joint will and codicil in this way. The Zyla Estate was entitled to partial summary disposition in its favor on this issue. See MCR 2.116(C)(10).

IV. Leave to Amend

The Zyla Estate next argues that the probate court abused its discretion when it denied leave to amend its complaint to include various claims based on fraud. In denying leave to amend, the probate court primarily relied on its belief that the claims would be untimely under MCL 700.3957 and MCL 700.3803. However, as noted above, neither statute barred the Zyla Estate's claims. Given the resolution of the issues involving these statutes, I would decline to address whether the probate court abused its discretion. The probate court should have the opportunity to revisit its decision under the guidance provided by this opinion.

V. Conclusion

The probate court erred when it concluded that MCL 700.3957 and MCL 700.3803 barred the Zyla Estate's claims against the Hill Estate. The probate court also erred when it declined to construe Frank and Elma Zyla's joint will and codicil. Because the joint will and codicil, when read as a whole, are unambiguous and plainly provide that the residue of the estate of the survivor of Frank and Elma should be held in trust for Peter, Paul and Gary Grapp, the probate court should have granted partial summary disposition on this issue in favor of the Zyla Estate. For these reasons, I would reverse the probate court's decision, vacate its September 28, 2007 order in its entirety, and remand this case for entry of partial summary disposition in favor of the Zyla Estate on the proper construction of Frank and Elma Zyla's joint will and codicil and for further proceedings consistent with this opinion.

/s/ Michael J. Kelly