STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOSEPHINE M. ROOSEN, a Protected Individual.

DENISE M. HUDSON, Conservator,

Petitioner-Appellee,

v

HENRY G. WURSTER,

Respondent-Appellant,

and

ALABAMA SPORTS HALL OF FAME,

Respondent-Appellee,

and

FRED SPADEMAN, Conservator for KAREN WURSTER, a Legally Incapacitated Person, LORI SPADEMAN, and JEFFREY WURSTER,

Appellees.

UNPUBLISHED
July 9, 2009

No. 282979
Wayne Probate Court
LC No. 1996-560104-CA

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Respondent Henry Wurster appeals as of right from a probate court order proposing settlement of claims relating to the estate of his mother, Josephine M. Roosen, a protected individual. The order requires respondent-appellee Alabama Sports Hall of Fame to return the value of a charitable gift annuity that Henry had purchased with Roosen's funds while formerly serving as Roosen's conservator and guardian, and also directs that Henry forego all claims against Roosen's conservatorship estate or for a share of Roosen's separate decedent's estate. For the reasons set forth in this opinion, we affirm in part and remand for further proceedings.

The probate court shall decide this matter on remand within 91 days of the issuance of this opinion.

I. Underlying Facts and Procedural History

Respondent Henry Wurster is Roosen's only surviving child. Roosen's other son, John Wurster, predeceased her in 1997. Appellees Karen Wurster,[1] Lori Spademan, and Jeffrey Wurster, are John's surviving children.

In approximately 1994, Roosen purchased three annuities from Hartford Life Insurance ("Hartford Life"), which had a value of more than $300,000. A conservatorship was later established for Roosen in 1996. Henry was originally named as beneficiary of the Hartford Life annuities, but several beneficiary changes were made between 1996 and 2000. In 1999, Henry and attorney Michael Parsons were appointed as successor co-conservators and successor co-guardians for Roosen. On January 7, 2000, Henry submitted a change of beneficiary request to Hartford Life. The request was signed by Roosen as annuitant, and Henry as a witness, and requested that Henry be named as beneficiary of the annuities. The request made no reference to Parsons as co-conservator.

On February 15, 2000, Parsons filed a petition for instruction in the probate court. He requested that the court issue suitable instructions with respect to the beneficiary designations for the Hartford Life annuities, and permit him to withdraw "in all capacities" from the conservatorship. Henry asserted that Roosen had re-designated him as beneficiary of her own free will, in accordance with her original intent. Henry requested that the court enter an order approving the most recent beneficiary change for the Hartford Life annuities.

In an order dated April 6, 2000, the probate court ordered an independent medical evaluation for Roosen to determine her mental capacity. Marlena Geha, Ph.D., a gerentologist, conducted the examination on June 8, 2000. Dr. Geha concluded that Roosen clearly wanted Henry to have all of her assets upon her death, but also concluded that she lacked the mental capacity to direct Henry to change any financial documents. Dr. Geha's report states:

> It is also clear . . . that the actions taken by Henry Wurster on or about January 7, 2000, changing Hartford accounts making himself the only beneficiary, were in keeping with his mother's repeated wishes. It is clear equally that Ms. Roosen could not have directed this transaction, as she does not know where her assets are held or the extent of her assets.

At a hearing on October 17, 2000, Parsons stated that he had no concerns about Henry serving as sole guardian and conservator. Parsons did not discuss the change of beneficiary for the Hartford annuities. Counsel for John's children stated that the children had no objections to Henry's appointment as guardian and conservator because John had indicated before he died that Henry should continue to take care of their mother. He too did not comment on Roosen's mental capacity, or the beneficiary change to the Hartford Life annuities. The probate court granted

[1] Karen Wurster is represented by her conservator, Fred Spademan.

Parsons's motion to withdraw and appointed Henry as sole successor guardian and conservator. The court also issued letters of authority requiring Henry to post bond in the amount of $400,000, based on the value of Roosen's estate. The lower court record does not contain any order relating to the beneficiary designation of the Hartford Life annuities.

On May 1, 2001, Henry used $300,000 of Roosen's assets from the Hartford Life annuities to purchase a gift annuity agreement from the Alabama Sports Hall of Fame. Under the terms of that agreement, Henry, acting as Roosen's conservator, made an irrevocable transfer of $300,000 as a charitable gift to the Alabama Sports Hall of Fame. In consideration of this transfer, the Alabama Sports Hall of Fame agreed to pay Roosen an annual annuity of $24,000, payable in monthly installments of $2,000, for the duration of her life, and afterward to Henry for the duration of his life.

On December 6, 2001, Henry petitioned the probate court to reduce his bond from $400,000 to $100,000, commensurate with the $300,000 purchase of the Alabama Sports Hall of Fame annuity. The court denied Henry's petition, commenting that Henry's actions had raised questions whether the annuity purchase was a prudent investment and whether Henry should have obtained court approval to transfer $300,000 from Roosen's estate to the annuity.

Roosen died on September 10, 2002. The probate court was not timely notified of her death. On August 1, 2005, the probate court appointed Denise Dean Hudson as special fiduciary for Roosen's conservatorship estate. On November 1, 2005, the court accepted Hudson's final account of the conservatorship estate, and ordered Hudson to "open a deceased estate to proceed on the surcharge if the son is uncooperative." The court later granted Hudson's petition to remove Henry as conservator and to appoint herself as successor conservator. The court also granted Hudson's emergency petition to freeze the $300,000 that had been transferred to the Alabama Sports Hall of Fame and all other assets derived from that investment, and to enjoin Wachovia Securities from making further distributions to Henry under the gift annuity agreement. Hudson was also appointed personal representative of Roosen's decedent's estate.

Hudson subsequently petitioned the probate court to require the Alabama Sports Hall of Fame to return the remaining funds for the gift annuity to Roosen's estate. Hudson also filed a petition requesting that the estate's assets be distributed according to the intestacy provisions of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., so that Henry would receive a one-half share, and John's heirs would receive the remaining one-half share. She also requested that the probate court determine that Henry had already received his one-half share because he failed to account for the approximate $200,000 balance of the estate. In response, Henry argued that he properly acted within his authority as conservator when he purchased the Alabama Sports Hall of Fame annuity. Henry also denied that Roosen died intestate and claimed that she had executed a will naming him the sole beneficiary of her estate.

In orders issued on October 16 and 17, 2007, the probate court granted Hudson's petition for the return of estate assets, and ordered the Alabama Sports Hall of Fame to remit to Roosen's estate all funds under its control pertaining to the gift annuity agreement, for distribution to the heirs of John Wurster after payment of administrative costs and expenses. The court's order also provided that Henry "shall forego any and all claims" against the estate of Josephine Roosen, a protected individual, and "shall forego any and all claims for a share of the Estate of Josephine Roosen, Decedent." The court later denied Henry's motion for reconsideration.

II. Probate Court's Authority

On appeal, Henry argues that the probate court lacked jurisdiction in a conservatorship action to distribute the assets of Roosen's estate, and that the court improperly failed to recognize the distinct legal duties of a conservator and personal representative.

This issue presents a challenge to the probate court's subject-matter jurisdiction, which we review de novo as a question of law. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). To the extent that this issue requires the construction or application of a statute, it presents a question of law, which we also review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The probate court has exclusive jurisdiction over both decedent's estates and conservatorships. MCL 600.841(1)(a) provides that the probate court has jurisdiction and power "[a]s conferred upon it under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102." MCL 700.1302 provides, in pertinent part, that the probate court "has exclusive legal and equitable jurisdiction" of all of the following:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (*i*) The internal affairs of the estate.
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> (*ii*) Estate administration, settlement, and distribution.
>
> (*iii*) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
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> * * *
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> (c) Except as otherwise provided in section 1021 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1021, a proceeding that concerns a guardianship, conservatorship, or protective proceeding.

In this case, petitioner Hudson was appointed as both successor conservator of Roosen's conservatorship estate and personal representative of Roosen's decedent's estate. The court had subject-matter jurisdiction over both proceedings. Consequently, there was no jurisdictional impediment.

Henry also argues that the probate court erred when it permitted Hudson, acting as conservator, to bring petitions to recover assets for Roosen's estates and distribute the assets according to the law of intestacy. Henry's argument is based on the premise that Hudson and the probate court improperly ignored distinctions between a conservatorship estate and a decedent's estate when the court granted Hudson's petition for return of assets to the estate and for distribution to the appropriate heirs at law. Although Henry acknowledges that Hudson had been appointed personal representative of Roosen's decedent's estate, he implies that Hudson was

improperly acting as a conservator when performing a role that properly belongs to the personal representative.

MCL 700.5426(4) allows a conservator of a protected person's estate to petition the court to exercise the powers and duties of a personal representative if the protected person dies while subject to the conservatorship. The statute provides:

> If a protected individual dies, the conservator shall deliver to the court for safekeeping a will of the deceased protected individual that has come into the conservator's possession, shall inform the personal representative or a beneficiary named in the will of the delivery, and shall retain the estate for delivery to a duly appointed personal representative of the decedent or another person entitled to the delivery. If within 42 days after the protected individual's death another person is not appointed personal representative and an application or petition for appointment is not before the court, the conservator may petition to exercise a personal representative's powers and duties in order to be able to proceed to administer and distribute the decedent's estate. Upon petition for an order granting a personal representative's powers to a conservator, after notice to a person nominated as personal representative by a will of which the petitioner is aware and after notice as described in section 1401, the court may grant the petition upon determining that there is no objection and may endorse the letters of the conservator to note that the formerly protected individual is deceased and that the conservator has all of the powers and duties of a personal representative. An order made and entered under this section has the effect of an order for a personal representative's appointment as provided in section 3307 and parts 6 to 10 of article III. *However, after administration, the estate in the conservator's name may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative*. [Emphasis added.]

This statute clearly establishes that the same individual may act as both conservator and personal representative. Furthermore, the last sentence establishes that the person acting as conservator may dispense with the formality of transferring the conservatorship assets to themselves as personal representative before distributing the assets to the decedent's heirs. Although this statute does not directly address the situation here, it militates against Henry's suggestion that the probate court must strictly differentiate between a fiduciary's dual roles as conservator and personal representative when the fiduciary properly occupies both positions.

In *In re Conservatorship of Halbeck*, 201 Mich App 387, 396; 506 NW2d 574 (1993), this Court held that the probate court had jurisdiction to resolve a claim for payment of services rendered to the protected person's estate during her lifetime, although the petition was not brought until after the protected person's death. Although we agree that *In re Conservatorship of Halbeck* is factually distinguishable from the situation at hand, it recognizes, contrary to Henry's position on appeal, that all proceedings related to a person's conservatorship estate need not occur solely in the administration of the person's decedent's estate.

More significantly, Hudson had authority to recover the charitable gift annuity proceeds in each of her dual capacities as conservator and personal representative. As conservator, Hudson had the authority to collect, hold, or retain estate property, until judging the disposition

of the property should be made. MCL 700.5423(2)(a). As personal representative, Hudson had the authority to receive property that rightfully belonged to the estate and to distribute the estate. MCL 700.3715(a) and (b). Here, Hudson served as both personal representative and conservator, and her petition sought to accomplish a duty relevant to both roles. Whether acting as personal representative or conservator in either of the two proceedings, she was the same individual, before the same probate court, in an action affecting the same interested parties.

Finally, a careful reading of the probate court's order reveals that the court did not distribute the estate. The order provides:

> 3. The funds received from the Alabama Sports Hall of Fame *shall ultimately be distributed* solely to the heirs of John Wurster, deceased son of Josephine Roosen, through the Estate of Josephine Roosen, Decedent, after the payment of administrative costs and expenses.
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> 4. Henry G. Wurster, shall forego any and all claims against the Estate of Josephine Roosen, Protected Individual (Wayne County Probate Court File No. 1996-560104-CA); further, Henry G. Wurster *shall forego* any and all claims for a share of the Estate of Josephine Roosen, Decedent. (Wayne County File No. 2006-702214-DE) [Emphasis added.]

These provisions do not effect a present disposition of Roosen's decedent's estate. Rather, they declare how events related to the conservatorship will bear upon future events in the decedent's estate proceeding.[2]

Henry's reliance on *In re Valentino Estate*, 128 Mich App 87; 339 NW2d 698 (1983), is misplaced because in this case there is no conflict between the interests of the conservatorship and the interests of the decedent's estate, and the same individual was lawfully serving as both conservator and personal representative.

For all of these reasons, we reject this claim of error.

III. Roosen's Testamentary Capacity

Henry next argues that the probate court erred in rejecting Roosen's will on the ground that Henry was collaterally estopped from asserting that Roosen had the proper testamentary capacity to execute it.

The application of collateral estoppel, a legal doctrine, is reviewed de novo. *Estes v Titus*, 481 Mich 573, 579; 751 NW2d 493 (2008). Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily

[2] One of the difficulties posed by not consolidating these matters is that the ultimate disposition of the estate is contingent on the trial court's ruling on the matter of the legality of the purported will of the decedent.

determined in the prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

Appellees contend that the issue of Roosen's testamentary capacity was actually litigated when the probate court previously denied Henry's petition to recognize the change of beneficiary for the Hartford Life annuities as valid, and also denied his petition to reduce his bond from $400,000 to $100,000. Appellees argue that both of these decisions were implicitly based on the court's finding that Roosen lacked testamentary capacity on January 7, 2000, the date that she executed both the will and beneficiary change for the annuities. Accordingly, they contend that Henry is collaterally estopped from relitigating the question of Roosen's testamentary capacity.

However, there is no indication in the record that the probate court ever directly resolved the validity of the change of beneficiaries, or more specifically, decided the issue of Roosen's testamentary capacity. The probate court did not address the validity of the beneficiary change at the court hearing and counsel for John's children did not raise the issue. Further, there is no order in the lower court record reflecting that this issue was decided. Rather, the court permitted Parsons to withdraw and it appointed Henry as sole successor conservator and guardian. Although Hudson argued below that the probate court had previously ruled on the question of Roosen's mental capacity, we find no support in the record for this assertion. Indeed, it would seem, at a minimum, unusual for the probate court to appoint Henry as Roosen's sole conservator if it believed that he had exploited Roosen's lack of capacity to make a self-serving change of beneficiary on the Hartford Life annuities. However, because there is no indication in the record that the issue of Roosen's testamentary capacity was previously decided, the probate court erred in finding that Henry was collaterally estopped from arguing that Roosen possessed the requisite testamentary capacity to execute her will.

Accordingly, we remand for further proceedings regarding the validity of Roosen's will and her testamentary capacity to execute it.

IV. The Nature of the Recovered Alabama Sports Hall of Fame Annuity

Finally, Henry argues that the funds recovered from the Alabama Sports Hall of Fame annuity are "encumbered" by the Hartford Life annuities, which are non-probate assets of which he is the beneficiary. We find no merit to this issue. The probate court ordered the Alabama Sports Hall of Fame to return the funds to Roosen's estate, to be distributed as estate assets.

Furthermore, MCL 700.5426(1) provides:

> If the estate is more than sufficient to provide for the purposes implicit in the distributions authorized by section 5425, a conservator for the protected individual, other than a minor, has the power to make a gift to charity or another object, as the protected individual might have been expected to make, in amounts that do not exceed an annual total of 20% of the estate income.

Here, Henry made a charitable gift in the amount of $300,000 from an estate whose principal was valued at $440,543. Although the lower court record does not disclose the annual income of Roosen's estate, it is apparent that a transfer of approximately 68 percent of the principal exceeds the permissible amount. Furthermore, there is no evidence that Roosen "might have been

expected to make" a charitable gift in the amount of $300,000 to the Alabama Sports Hall of Fame. Indeed, Henry's counsel conceded below that the charitable gift was not permissible. Therefore, the probate court did not err in nullifying this transfer and ordering the Alabama Sports Hall of Fame to return the remaining principal to the estate.

Henry also argues that the Alabama Sports Hall of Fame annuity was "encumbered" by the Hartford Life annuities. He fails to explain why or how the Hartford Life annuities may be considered "revived" by the nullification of the Alabama Sports Hall of Fame annuity. The probate court properly determined that the funds from the Alabama Sports Hall of Fame annuity were a cash asset of Roosen's estate.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia D. Stephens