STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CHARLES O. MAST, deceased.

TRI-COUNTY GUARDIANSHIP SERVICES PLC CONSERVATOR,

Petitioner-Appellee,

v

CHARLOTTE SUE MAST,

Respondent-Appellant.

UNPUBLISHED
April 6, 2010

No. 281500
Eaton Circuit Court
LC No. 07-041282-CZ

In re Estate of CHARLES O. MAST, deceased.

CHARLOTTE SUE MAST,

Petitioner-Appellant,

v

THOMAS M. ANDERSON, personal representative of the estate of CHARLES O. MAST, deceased,

Respondent-Appellee.

No. 285412
Eaton Circuit Court
LC No. 07-045019-DA

In re Estate of CHARLES O. MAST, deceased.

CHARLOTTE SUE MAST,

Petitioner-Appellant,

v

No. 288334
Eaton Circuit Court

TRI-COUNTY GUARDIANSHIP SERVICES PLC CONSERVATOR, LC No. 05-39487-CA

Respondent-Appellee.

Before: SAAD, C.J., and WHITBECK and ZAHRA, JJ.

PER CURIAM.

In Docket No. 281500, defendant Charlotte Mast (Charlotte) appeals as of right a judgment for plaintiff Tri-County Guardianship Services PLC Conservator (Tri-County). The judgment imposed a constructive trust over real property that Tri-County's ward, Charles Mast, had deeded to his daughter, Charlotte, and transferred that property to Tri-County. In Docket No. 285412, Charlotte appeals as of right an order denying Charlotte's motion to appoint a general personal representative of her choosing, instead retaining acting special personal representative Thomas M. Anderson as general personal representative. In Docket No. 288334, Charlotte appeals as of right an order allowing the second and final accounting of the estate and an award of fiduciary fees to Tri-County. We affirm, with the exception that in Docket No. 288334, we reverse in part the trial court's decision to award Tri-County attorney fees incurred in filing the petition for probate.

I. BASIC FACTS AND PROCEEDINGS

Decedent Charles O. Mast and his late wife, Lucille, were farmers and had four children, one of which is Charlotte. Charles and Lucille owned the farm that comprised four parcels of contiguous real property in Eaton County ("the farm"). Charlotte lived on the farm her entire life and worked full time on the farm since 1980. Charlotte later built a house on the farm. In 1987, Charles and Lucille executed quitclaim deeds on all four parcels of property adding Charlotte as a joint owner with rights of survivorship. Lucille died in 1995. Charlotte continued to live and work on the farm with Charles. In 2002, Charles quitclaimed his remaining interest in all four parcels to Charlotte. Charles and Charlotte continued to live (though in separate houses) and work on the farm until July 2005.

After Lucille died, the Department of Human Resources began receiving referrals alleging that Charles had been abused and neglected. In a 1998 referral, Maureen Zapolski, an adult protective service worker, went to Charles' house found "many many baby chicks inside the home running around and you know what baby chicks do all over the place." Zapolski testified there was substantial chicken waste inside the house. She testified that house was "not very clean," and that Charles was "very, very untidy, dirty, had clothes that had food on them." Charlotte was present at Zapolski's first visit.

Zapolski returned to Charles' residence in June 2000 and found him with a black eye. Charles claimed that he fell. In January 2004, Zapolski received another referral for abuse after Charles had a sustained a broken hip. Charles said he fell down the stairs. Charles was released from a nursing home, but in July 2005, he was admitted to the hospital with several injuries. Charles had multiple injuries, including contusions and fractures. He had also suffered skin tears and part of his ear had been torn off. On the basis of Charles' injuries, the Eaton County

Sheriff's Department began an investigation into whether Charlotte caused Charles' injuries. Zapolski also evaluated Charles at the hospital and opined that, given his injuries, she found it very hard to believe they resulted from an accident and petitioned the lower court to appoint a guardian ad litem. The lower court appointed a guardian ad litem the same day.

The GAL wrote a report recommending that a guardian and conservator be appointed for Charles. On August 16, 2005, the lower court appointed Tri County as Charles' guardian and conservator. Kathleen M. Gaydos, an attorney and principal of Tri-County, was made a permanent conservator and guardian on November 22, 2005. Gaydos began to investigate whether Charles could sustain himself. Gaydos described Charles as "an absolute mess and due to his age and frailness and his dementia, he needed long-term care." Gaydos testified that Charles' personal care would cost $6,000 a month. Gaydos found that Charles received $166 annually from the Brown Corporation and around $800 a month for social security. Gaydos concluded that Charles could not sustain himself and that he owed $75,000 to Dimondale Nursing Center, which would soon evict him.

Gaydos also found that Charles was ineligible for Medicaid. As noted, Charles transferred all his property to Charlotte. Charlotte, acting as power of attorney for Charles, filed an Application for Medicaid but failed to mention the 2002 transfer of property. Further, because Charles had transferred property within three years of applying for Medicaid, Charles was denied Medicaid. Indeed, Charles was divested from receiving Medicaid until 2012, (or 9.58 years from the date of the transfers) based upon the value of the property transferred. An eligibility specialist for the Department of Human Resources, verified that Charles received a divestment penalty until 2012, regardless whether he owned the property jointly.

On January 4, 2007, Tri-County filed a complaint against Charlotte seeking recovery of the property that Charles had quitclaimed to Charlotte. The complaint alleged a violation of the Uniform Fraudulent Conveyance Act, MCL 566.11 *et seq*.; a claim of fraudulent inducement; and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Tri-County alleged that Charlotte promised Charles that she would take care of him for the rest of his life in exchange for the property. Tri-County also alleged that Charlotte's physical abuse of Charles violated the above acts. In February, Tri-County filed an amended complaint, adding a count alleging that Charlotte had violated a fiduciary duty to Charles and requested a constructive trust over the farm.

At trial, several witnesses familiar with the condition of Charles' home and Charlotte's treatment of Charles testified. In general, the testimony indicated that after Lucille died the condition of Charles' home became deplorable. Witnesses testified that Charles' house was filthy, cluttered, infested with chickens (and chicken excrement) and mice, lacked proper food, and did not contain an operable toilet but only a bucket. Witnesses also presented testimony to establish that Charlotte abused Charles. One witness testified to seeing Charlotte hit Charles with a broom causing him to fall. She also saw Charlotte hit Charles in the back of the knees causing him to fall off a ladder. Another witness testified that she saw Charlotte, "hitting [Charles] on the back of his head like a boxer." She also testified that Charlotte admitted to causing Charles injury by improperly removing a catheter and "accidentally" biting off a piece of Charles' ear and then gluing it back on. Another witness testified that "[m]ost every time we went there [Charles had] either a new black eye or bruises on the top of his head or on his cheeks." Witnesses testified that Charles pleaded to be taken away, but then changed his mind

after allegedly being threatened by Charlotte. Witnesses testified to hearing Charlotte threaten to injure Charles and destroy his property if he left home. There was also evidence presented that Charlotte installed a pad lock on the outside of Charles' home. Several witnesses testified that Charles appeared fearful when Charlotte was near.

Charlotte testified as an adverse witness at trial. She maintained that she always wanted her parents to stay on the farm and that she would keep a roof over their heads, regardless of deeds. Charlotte denied that she entered into an agreement to receive the deeds and maintained that she had a moral obligation to care for her parents. She admitted that she has some joint accounts with Charles. She also admitted that that she shared the farm's profits with Charles. However, Charlotte had $150,000 in her own account while Charles only had about $2,000. She maintained that Charles reinvested his money back into the farm.

Charlotte denied abusing Charles and testified that in 2000 Charles began to fall on average once a month. She testified that in 2002 Charles began showing signs of confusion and loss of eyesight. She testified that Charles quit farming in late 2002, but performed easier tasks. Charlotte testified that in 2003 Charles began to often lose his balance and fell on average twice a day. Charlotte pleaded the Fifth Amendment when allegations of abuse were raised. She testified that Charles "was taking care of himself, basically," until around July 12, 2005. In regard to her care of Charles, she maintained she would do the best she could. She admitted that her filing Charles' Medicaid application was "stupid."

In later testimony, Charlotte maintained that she did not know that Charles and Lucille had executed a deed in 1987 until after it was executed. Charlotte admitted to being present at the execution of the 2002 deed. She maintained that there was no discussion in regard to her caring for Charles the rest of his life. She admitted that Charles would keep chickens in the house if it were cold. She testified that, except while under repair, the toilet in the home functioned properly. She denied confining Charles in the house. She testified that Charles lived by himself and cleaned and cooked for himself.

Tri-County moved under MCR 2.118 to add a complaint for breach of contract to conform to the evidence presented at trial. Charlotte's counsel objected, arguing there were not sufficient evidence presented to maintain a contract action. The trial court granted Tri-County's motion, noting that Charlotte's counsel had previously indicated that the action should have been pleaded as a breach of contract action. The trial court, however, dismissed Tri-County's claim of fraudulent inducement. The trial court concluded that there was no evidence that Charles was induced to sign the deeds through duress or physical abuse.

Charlotte also presented witnesses at trial that generally testified that while Charles' house was dirty, they did not witness Charlotte abuse Charles. One witness testified that Charles never appeared afraid of Charlotte. She testified that she was with Charles in the hospital and "he looked up and he said that if anything happened to him he wanted Charlotte to get everything." She testified that Charles' home had running water and the toilet worked. On the other hand, one of Charlotte's witnesses testified that she had witnessed the 2002 deeds, and when asked, "[w]as there—was there a promise indicating that if—if I execute these deeds Charlotte is going to take care of me the rest of my life," she answered, "yes." She also testified that Charles "always said Charlotte would be having the farm, Charlotte was the one that always done all the work and took care of him."

The trial court allowed the parties to present written closing arguments. The trial court issued a written opinion on July 6, 2007. The trial court found that Tri-County proved that an oral contract existed. The trial court relied on testimony from Janet Jordon that, in 2002, "Charlotte Mast made a promise to take care of her father for the rest of his life if he signed the deeds." The trial court also found Janet's testimony corroborated by other evidence, particularly the testimony of Debbie Mast, Warren Mast, and Kelley Miller. The trial court also accepted Tri-County's contention that Charlotte had made the promise on March 5, 1987. The trial court found that the promise made in 2002 was a confirmation of a promise made on March 5, 1987. The trial court also found that an implied term of the oral contract was that Charlotte agreed to take good and proper care of Charles. The trial court concluded that Charlotte breached this term of the contract by neglecting and, at times, physically abusing Charles.

In regard to the remedy for the breach of contract, Tri-County requested the trial court impose a constructive trust over the property deeded to Charlotte. The trial court agreed and found that Charlotte took advantage of Charles' advanced age and feeble health. The trial court also found Charlotte took advantage of Charles' fear of nursing homes and limited his social contact with family members. The trial court found that Charlotte verbally and mentally abused Charles. The trial court determined that Charlotte was holding the property as a constructive trustee and ordered her to transfer it to Tri-County.

Charles died on November 10, 2007. On November 13, 2007, Tri-County filed a petition to probate. Tri-County attached a document, purportedly as Charles' will, reflecting a police officer's notes of an interview with Charles in which he suggested that Charlotte abused him. On November 14, 2007, Charlotte filed a petition for probate attaching a June 19, 1991 will, purportedly executed by Charles, and a holographic codicil purportedly executed by Charles, dated February 19, 2002. Both purported wills petitioned for probate by Charlotte essentially devise the entire estate to her. Charlotte also sought to be nominated personal representative pursuant to the June 19, 1991 will.

Charlotte filed a motion for summary disposition, seeking to strike the petition for probate filed by Tri-County. A hearing was held on April 8, 2008, and the court granted Charlotte's motion, finding that the police officer's notes were not a will. Charlotte also moved for summary disposition to probate the will she had filed. The court granted her motion and probated the June 19, 1991 will. Thereafter, counsel for Charlotte requested that William L. Ferrigan be appointed personal representative. After hearing objections, the court decided to retain the current special personal representative, Anderson, finding that "any change of that nature inevitably ends up costing the Estate more money because the new person would have to get up to speed and spend I think a fair amount of time reviewing these files." The trial court then changed Anderson's status from special personal representative to general personal representative.

II. DOCKET NO. 281500

Charlotte argues that the trial court erred in finding that an oral contract existed, that a constructive trust is improper, and that any conveyance of the farm violated the statute of frauds.

A. STANDARD OF REVIEW

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, when reviewing a trial court's ruling on matters of equity, this Court reviews the trial court's conclusions de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding of fact is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Carrier Creek Drain Drainage Dist v Land One*, LLC, 269 Mich App 324, 329; 712 NW2d 168 (2005).

B. ANALYSIS

We conclude that the trial court erred in finding that an oral contract existed but nonetheless did not err in setting aside the deeds.

The essential elements of a valid contract are: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). To form a valid contract, there must be a meeting of the minds on all the material facts. *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990). "'A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.'" *Id.*, quoting *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988). "Meeting of the minds" is a figure of speech for mutual assent. *Goldman v Century Ins Co*, 354 Mich 528, 534; 93 NW2d 240 (1958). See also, e.g., *Stark v Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975).

Here, the trial court relied heavily on testimony from Janet Jordan to establish that Charlotte offered to take care of Charles in exchange for the farm. The trial court specifically cited Janet's testimony that "Charlotte Mast made a promise to take care of her father for the rest of his life if he signed the deeds." Ostensibly, this finding arose from Janet's agreement with the question, "Was there—was there a promise indicating that if—if I execute these deeds Charlotte is going to take care of me for the rest of my life?" She also agreed that "it [was] said in the room that I will sign these deeds if you promise to take care of me for the rest of my life." She later agreed that she "thought that this deed that you witnessed in 2002 was a renewal of a prior deed."

We conclude that Janet's testimony that the 2002 deeds were executed to renew the promises made by the 1987 deeds is insufficient to support the trial court's conclusion that there existed an oral agreement between Charles, Lucille, and Charlotte. Cleary, Janet's testimony was unfounded lay opinion and should not have been relied on to conclude that there was an offer and acceptance in 1987. There exists no objective evidence of any express words or actions used by Charlotte, Charles, or Lucille in 1987 to establish an express oral agreement. See *Stanton*, 186 Mich App at 256. Thus, there is no evidence to support an oral contract.

Nonetheless, we conclude that case law supports the trial court's conclusion to set aside the deeds. In several Michigan Supreme Court cases, albeit older cases, the Court has consistently held, under circumstances not as egregious as the instant case, that "[w]here the parent is forced to leave the premises because of ill-treatment, the court has the power to set aside the conveyance to the child." Michigan Civil Jurisprudence, § 95, Conveyance to child in consideration of support of parent—ill treatment of parent, citing *Lewandowski v Nadolny*, 214 Mich 350; 183 NW 85 (1921); *Lockwood v Lockwood*, 124 Mich 627, 629-630; 83 NW 613 (1900). Indeed, "[c]onveyances of property by aged and infirm people in consideration of promised support and maintenance are peculiar in their character and incidents, and with them the courts deal on principles not ordinarily applicable to ordinary conveyances." 26 Williston on Contracts § 68.8 (4th), citing *Lewandowski*, 214 Mich 350. Under very limited circumstances, Michigan case law provides that principles of contract law do not prevent courts from setting aside deeds.

For instance, in *Lockwood*, 124 Mich at 628-629, the plaintiff, an older woman, sought to set aside a deed to 50 acres of farmland that she conveyed to her only son. The son lived with the plaintiff and worked on the farm. He also gave a portion of the farm proceeds to the plaintiff. After the plaintiff executed the deed, her son and his wife began to treat the plaintiff poorly. The plaintiff alleged that her son had promised her "that he would maintain and support her for the remainder of her life" and that she was induced to deed him the only land she owned. *Id*. at 628. The Court stated:

> The testimony is conflicting, but there are some things about which there can be no dispute. The complainant for some reason was induced to make to her son and his children a deed of all the property she had in the world, except a little personal property, without any writing being given her in return providing for her maintenance and support. In the deed which was made, there was simply reserved to her a life estate in the farm. The son did not bind himself by any written agreement to pay the taxes or insurance, or to keep the premises in repair, or to maintain and support his mother. It is also beyond reasonable doubt that his home is made so unpleasant for his mother that it would be cruelty to compel her to live therein, and we also think it appears by a preponderance of the evidence that complainant was sent away from his home. The proofs disclose that the complainant had confidence in her son, and relied upon him implicitly. It was his duty to see that her interests were guarded, and that his promises made to her were carried out. Instead of doing so, he has obtained from her, for himself and children, all the property she has; and at the age of 80 years she is without property, and without the home which was promised her. [*Id*. at 629.]

The Court set the deed aside. *Id*. at 629-630.

Similarly, in *Lewandowski*, 214 Mich at 351-352, the plaintiff, an older woman, filed suit to set aside a deed in which she conveyed her house to her daughter and the daughter's husband. They all lived together, and the daughter's husband provided for the family. The daughter, however, died, and her husband became the administrator of her estate. The husband sued the plaintiff to collect rent. In response, the plaintiff filed a suit claiming that her daughter "importuned her to make the deed" and "agreed that she would care for her mother as long as she

lived." *Id*. at 352. The deed said nothing of this promise. The trial court set aside the deed, finding "there was no intent to pass title." *Id*.

The Supreme Court agreed with the trial court but "from a slightly different angle." *Lewandowski*, 214 Mich at 352-353. The Court found the direct testimony meager but the surrounding circumstances convincing. The Court noted that the daughter continued to care for the plaintiff. The Court then elaborated that:

> where a child sustains confidential relations with the parent . . . , and such parent strips himself or herself of all his or her property and means of support by a conveyance to the child, some duty devolves upon the grantee or those claiming under such grantee to show the validity of the transaction. As was said by this court, speaking through Mr. Justice STEERE in *Williams v Williams*, 198 Mich 1[, 164 NW 374 (1917)]:
>
> "That the presumptions are against transactions of this nature and they are critically scrutinized by the courts, putting the burden of proof upon those seeking to sustain them, requires no citation of authority. In view of plaintiff's age, their kinship, and the confidential relations shown to exist between them at the time, it was incumbent upon defendants to show that the agreement with their father was not to his disadvantage, was fair to him and of his own free will; that no advantage was taken by them of his age, mental condition, or confidence in them; that they have fulfilled the terms of their agreement, in letter and spirit, so far as permitted by him, and are ready and willing to continue so to do." [*Id*. at 353-354.]

The Court then analyzed the surrounding circumstances of the transaction. *Id.* at 354. The Court noted that the plaintiff, 70 years old, transferred all her property to a trusted family member. Further, the Court indicated that the plaintiff understood or at least expected that she be taken care of during her declining years. The Court noted the close confidential relationship between the plaintiff and her daughter. The court concluded that "the deed, we think, was given to secure support during the balance of [the] plaintiff's life; it was not a testamentary disposition of [the] plaintiff's property and would not have been given except to provide for and secure such support." *Id*. at 356. The Court ordered the deed set aside.

As a final example, in *Smith v Jackson*, 239 Mich 197, 198-200; 214 NW 92 (1927), the plaintiff filed suit to set aside a deed conveyed to her daughter and her daughter's husband. The parties had lived together, and the daughter disappeared. The husband divorced, remarried, and lived with his new wife in the plaintiff's home. The plaintiff alleged that "she was crippled and infirm at the time of executing the deed, and [the] defendants then promised to care for, maintain, and treat her kindly during her lifetime, and in consideration of their promises she executed the deed in controversy." *Id*. at 199. The plaintiff alleged that after executing the deed, the "defendants became unkind, abusive, left her home, and failed to support her." *Id*. The trial court denied her claim, finding "that she voluntarily made the deed with full knowledge of the situation as conditions then were[.]" *Id*. at 201.

The Supreme Court reversed. The Court found that the "[p]laintiff deeded to defendants in her old age and crippled condition all the realty she owned and everything she had except

perhaps a small amount of personal property for a nominal consideration of $1, without anything in writing given her in return." *Id*. at 203. The court also found that "[t]he deed only reserved to her a life estate, necessarily of scant money value at her time of life and then condition, only valuable to her as a place in which to live." *Id*. The Court noted,

> The thought is impelling that there must have been some further consideration. Whatever it might have been was oral. Neither in the deed nor proofs in the case is there any provision as to payment of taxes, insurance on the property, keeping the premises in repair and other essential matters in a transaction of that kind. [*Id*.]

The Court held that

> the testimony fairly shows that she was induced to give this deed in consideration of their promise to care for and support her in her old age; that after obtaining the deed she was unkindly treated by them, difficulties between themselves and plaintiff ending in their deserting the premises and breaching their contract. [*Id*.]

We find the facts of the instant case clearly amenable to the principles announced in the above cases. Here, Charles and Lucille were older and effectively conveyed all their real estate and means of support to their daughter Charlotte. Not only did the parties have a confidential relationship by virtue of their kinship, but the record establishes that they relied on each other to maintain the farm. Charles and Lucille conveyed their livelihood to Charlotte, without any writing providing for their maintenance and support. Meanwhile, Charlotte did not bind herself to any written agreement to keep the premises in repair or to maintain and support her parents. The record clearly shows that Charles and Lucille trusted Charlotte, and relied upon her implicitly. Meanwhile, Charlotte accepted real property valued at over $1 million, and the record clearly supports the trial court's findings that "she most certainly verbally and mentally abused him. She most certainly physically abused [Charles] and neglected him. She took advantage of the trust her father imposed in her as his daughter." Under these circumstances, the trial court did not err in setting aside the conveyances to Charlotte.

Charlotte also maintains that the trial court's remedy violates the statute of frauds. However, in none of the above cases did the statute of frauds prevent the trial court from setting aside the deeds. Further, the statute of frauds does not prevent courts acting prudently in equity from setting aside deeds. See *Ferd L Alpert Industries, Inc v Oakland Metal Stamping Co*, 379 Mich 272, 278-279; 150 NW2d 765 (1967). The trial court did not err in setting aside the deeds to the farm.

Charlotte argues that the remedy was inappropriate because she worked on the farm, constructed her own home on the farm, improved outbuildings and maintained Charles' home.

The record does not support Charlotte's claim. There is no evidence that Charlotte maintained Charles' home. Rather, the opposite is true and established in the record. Before Lucille died, Charles' house was "neat as a pin." After Lucille died, all the testimony presented indicates that the condition of Charles' home deteriorated until 2005, when Charles' injuries forced him from his home. As of that date the witnesses by and large agreed that Charles' home was not fit for human habitation. In regard to her investing in the farm, Charlotte testified at trial

that she and Charles split the earnings from the farm. She testified that she was a "saver" and kept all her money earned from the farm, well over $100,000. Then she testified that Charles was also a "saver," but that he reinvested in the farm, purchasing crops, etc. Charles had all of $2,000 in his checking account in 2005. We reject Charlotte's claim that her significant contributions to the farm render the relief ordered unfair. Further, the case law is clear on the remedy: "Where the parent is forced to leave the premises because of ill-treatment, the court has the power to set aside the conveyance to the child." Michigan Civil Jurisprudence, § 95, Conveyance to child in consideration of support of parent—ill treatment of parent, citing *Lewandowski*, 214 Mich 350; *Lockwood*, 124 Mich 627.

III. DOCKET NO. 285412

Charlotte's argues that the court was required to appoint Ferrigan personal representative.

A. STANDARD OF REVIEW

Statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. ANALYSIS

After Charles died, both Charlotte and Warren Mast filed petitions to be named personal representative to the estate. Because there was a will contest, the lower court appointed Anderson as a special personal representative pursuant to MCL 700.3614. Charlotte claims that the court erred in later appointing Anderson as general "personal representative" because the Estates and Protected Individuals Code, MCL 700.5201 *et seq*., provides for the following priority of personal representatives:

> For either formal or informal proceedings, subject to subsection (2), persons who are not disqualified have priority for appointment as personal representative in the following order:
>
> (a) The person with priority as determined by a probated will including a person nominated by a power conferred in a will.
>
> (b) The decedent's surviving spouse if the spouse is a devisee of the decedent.
>
> (c) Other devisees of the decedent.
>
> (d) The decedent's surviving spouse.
>
> (e) Other heirs of the decedent. [MCL 700.3203(1).]

Charlotte claims that she retained the right to nominate a personal representative. Initially, however, Charlotte neglects to address a threshold question whether a person disqualified under MCL 700.3203 would retain the right under the will to nominate a personal representative. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).

In any event, Charlotte is not given the right to nominate a personal representative under the will. Charles' will specifically states that "[i]n the event that [Charlotte] be unable or unwilling to perform the function and duties of personal representative, I then nominate and appoint [Warren]." Simply stated, if Charlotte is unable to serve as personal representative, Warren is nominated and appointed personal representative. Accordingly, under MCL 700.3203(1), Charlotte could only request that Warren be nominated and appointed personal representative, which she did not do.[1]

Further, the statute does not provide that Charlotte retains a right to nominate a personal representative. MCL 700.3203(3) states, "A person entitled to letters under subsection (1)(b) to (e) may nominate a qualified person to act as personal representative." Before disqualification, Charlotte was entitled to letters under the will under MCL 700.3203(1)(a), and, thus, was not within "subsection (1)(b) to (e)." Accordingly, Charlotte did not have the right to "nominate a qualified person to act as personal representative."

Moreover, Charlotte cannot show that harm resulted from the court's decision to appoint Anderson as general "personal representative." The lower court clearly intended to grant Anderson power commensurate with a general personal representative. MCL 700.3617 provides, in part, that: "A special personal representative appointed by order of the court in a formal proceeding has a general personal representative's power except as limited in the appointment and duties as prescribed in the order." The lower court's extension of Anderson's power to that of a general personal representative is permitted by statute, and we cannot identify any harm resulting from Anderson being referred to as the general "personal representative" instead of a "special personal representative."

IV. DOCKET NO. 288334

Charlotte challenges the trial court's approval of Tri-County's second and final account.

A. STANDARD OF REVIEW

Tri-County is correct that Charlotte failed to indicate whether the issue was preserved and the applicable standard of review. However, this Court reviews the decision to allow fiduciary fees for a personal representative for an abuse of discretion. *In re Baird Estate*, 137 Mich App 634, 637; 357 NW2d 912 (1984). A trial court has not abused its discretion if it selects a "reasonable" or "principled outcome" when more than one correct outcome is possible. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. ANALYSIS

"A personal representative is entitled to reasonable compensation for services performed." MCL 700.3719. However, a court may also order a refund of excessive

[1] The record reflects that the lower court disqualified Warren as personal representative, and neither Charlotte nor Warren objected to that decision.

compensation. MCL 700.3721. The person claiming the compensation has the burden to prove that the services performed were necessary and that the charges were reasonable. *In re Baird*, 137 Mich App at 637-638. A personal representative's fee can be unreasonable even if the personal representative expends considerable time and effort. See *Becht v Miller*, 279 Mich 629, 640; 273 NW 294 (1937).

Charlotte essentially argues that the trial court approved Gaydos' billing statement even though the statement billed for work performed by her employees. In the first hearing on the motion to close the account, Gaydos testified that "95% of what's on the sheets I myself did it. The other 5% I was more likely there or instructed someone to do it as I was there, present." The trial court, in its opinion, found that "charging any time to prepare time sheets for billings is inappropriate. A fiduciary may not charge the estate for overhead. The cost of doing these things is considered part of the overhead of being a fiduciary." The trial court also stated that "[t]he law requires a set hourly fee with a billing record that describes each service and who performed it. It is not appropriate to bill for secretary's work." The court ordered that "Ms. Gaydos is directed to amend her billing statement consistent with this Opinion and file it with the Court. If it comports with this Court's rulings, the Court will allow the Second Amended Final Accounting."

The trial court later approved Gaydos billing statement. Charlotte argues that all Gaydos did to amend the billings statements was delete the time taken to prepare time sheets for billings. She maintains that Gaydos admitted to delegating five percent of the work to other employees, yet there are no other employees listed on the billing statements.

We conclude the trial court did not abuse its discretion in approving the billing statements. Here, Charlotte fails to mention that the most significant contribution of Gaydos' employees was filling out the billing statements. Even though Gaydos filled out many of the timesheets, she testified that an employee often performed this task. However, Gaydos' amended billing statement deleted these fees, and thus effectively deleted much, if not all, of the employees' work she had previously included in the billing statement. Further, Gaydos testified that, in regard to time billed for employees, that "I was more likely there or instructed someone to do it as I was there, present." In other words, Gaydos billed time for instructing her employees and billed time while performing substantive work with employees. Accordingly, Charlotte has not established the trial court abused its discretion in approving the billing statement.

Charlotte also argues that the trial court abused its discretion in awarding Tri-County $100 an hour in fiduciary fees.

An attorney is entitled to receive reasonable compensation for necessary legal services he performs on behalf of the estate, in an amount approved by the court. MCL 700.5413. In general, the court has broad discretion in determining what amount constitutes reasonable compensation. *In re Thacker Estate*, 137 Mich App 253, 258; 358 NW2d 342 (1984). However, the court's discretion is limited in certain respects. In making its determination, the court should consider, among other factors, the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience necessary, and the results obtained. *In re Weaver Estate*, 119 Mich App 796, 799; 327 NW2d 366 (1982). The burden of proof on

these considerations rests on the party claiming a right to that compensation. *In re Thacker Estate*, 137 Mich App at 264.

Charlotte cites *In re Krueger Estate*, 176 Mich App 241, 250-251; 438 NW2d 898 (1989), for the proposition that a court abuses its discretion by increasing the fiduciary fee from that requested. In *Krueger*, however, the court "increased the attorney fees by sixty-six percent from what was requested and established by the record." *Id*. at 250. Given that the increase here is only $10 an hour, *Krueger* is clearly inapposite to the instant case.

Further, in *Krueger*, "there was no evidence submitted to the probate court justifying an increase . . . [and the] judge . . . apparently went outside the record in making his determination regarding the reasonableness of the fees." *Id*. at 250-251. Here, on the other hand, the trial court heard testimony from experts on both sides. Although the experts generally agreed that $90 an hour was fair, there was no indication that $100 an hour would not be fair. Moreover, Gaydos informed the court that she worked many hours over the course of this protracted case for which she did not bill. The court did not abuse its discretion in awarding Tri-County $100 an hour in attorney fees.

Charlotte claims for a variety of reasons that Tri-County's fiduciary fees are unreasonable. However, Charlotte's arguments are premised on her position that the litigation was unnecessary and that Tri-County should have simply requested that Charlotte, Charles' alleged abuser, provide funds to support Charles. However, Tri-County had no obligation to Charlotte but Tri-County did owe an obligation to protect Charles' welfare, regardless of his potential estate.

Charlotte first claims that Tri-County failed to properly investigate before filing suit against Charlotte. Charlotte cites no authority, but maintains that Tri-County "depleted [Charles'] estate by one-third (an estimated $350,000) in order to cover care costs less than $67,000." Before the suit, Charles was destitute, ineligible for Medicaid, and had no estate, as Charlotte owned the farm. There is no evidence on the record that Charles was eligible for Department of Veterans Affairs benefits. Tri-County successfully sued and secured treatment for Charles. There is no breach of fiduciary duty.

Charlotte next argues that Tri-County failed to disclose to the court that Charles continued to suffer injuries at as a result of falls while in the hospital. We agree with the trial court that "a Conservator simply has no duty to report injuries to the Court . . . ." Further, Charlotte argued at trial that Charles' injuries that resulted in his conservatorship were from falls. The trial court rejected this claim largely because Charles' injuries were so extensive.

Charlotte next argues that Tri-County breached a fiduciary duty by interfering with Charles' estate plan. Charlotte specifically argues that Tri-County sought to interfere with Charles' estate plan by first investigating whether Charles could revoke his will, and then by seeking to establish a trust. However, as the trial court noted, Gaydos merely investigated whether Charles' will could be revoked. Further, there were indications on the record that Charles intended to change his will. Gaydos testified that Charles expressed a desire to leave his property to family members other than Charlotte. Accordingly, Gaydos had the authority to seek to establish a trust, MCL 700.5407(2)(c)(iv), even though her attempt failed.

Charlotte next argues that trial counsel for Tri-County misrepresented to the court that the farm was only worth $600,000. She also argues that Gaydos knew the proper value and failed to disclose that value to the court. Charlotte claims that the court only approved a contingent fee because the farm was only worth $600,000. This argument has no merit. Tri-County admitted that it improperly valued the farm, explained that it was a mistake, and the court did not award trial counsel for Tri-County a contingent fee. Thus, Charlotte's claim is without merit.

Charlotte argues that Tri-County improperly filed a petition to probate because it lacked standing. Tri-county cedes the point, indicating in its appeal that "[w]hen competing petitions were filed, the application of [Tri-County] was withdrawn." Tri-County also ceded the point at oral argument. However, the billing statement does not clearly indicate the time spent on filing the petition for probate, and thus, we remand to determine the extent that Tri-County improperly billed for filing the petition.

Last, Charlotte argues that the fiduciary fees were unreasonable because they resulted in little benefit to Charles, who "was actively dying." Charlotte also claims that "[e]ven had [Tri-County] decided to keep [Charles] in the nursing home, as it did, he could not have been discharged for lack of payment unless the nursing home had another facility for him to be placed in." This argument inappropriately suggests that preservation of Charles' estate was more important than Charles' welfare. With the exception of the attorney fees incurred in filing the petition to probate, we conclude that fiduciary fees were not improper.

We affirm, with the exception that in Docket No. 288334, we reverse in part the trial court's decision to award Tri-County attorney fees incurred in filing the petition for probate. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra