STATE OF MICHIGAN

COURT OF APPEALS

In re Trust Agreement of William Pagonas.

MARY JAYE PAGONAS,

Petitioner-Appellant,

v

WILLIAM A. PAGONAS,

Respondant-Appellee.

UNPUBLISHED
July 27, 2010

No. 290864
Macomb Circuit Court
LC No. 2008-195708-TV

Before: Murray, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Petitioner, Mary Jaye Pagonas, appeals as of right an opinion and order granting respondent William A. Pagonas's motion for summary disposition in this action involving a petition for supervision of a trust. Because petitioner has not established a question of fact with regard to the settlement agreement and has not established that she had standing to bring a cause of action under the controlling 1999 trust, we affirm the probate court's grant of summary disposition in favor of respondent.

The decedent, William Pagonas, died on August 22, 2008 at age 79 survived by two sons, respondent William and Stephen, and one daughter, petitioner Mary Jaye. The decedent had executed the "Trust Agreement of William Pagonas" (the trust) on March 31, 1999. The trust named respondent William and Stephen as beneficiaries, each receiving 50% of the remaining trust property at the time of the decedent's death. With regard to petitioner Mary Jaye, the trust stated as follows: "I am not unmindful of my daughter, MARY JAYE PAGONAS, but I have deliberately made no provision herein for the benefit of her."

According to Gary A. Renard, M.D., as of March 14, 2007, the decedent had become terminally ill and "should have an appointed guardian to assist him in the management of his affairs. Mr. Pagonas also needs management of his physical needs." Apparently, the decedent suffered from congestive heart failure, diabetes mellitus, lowered oxygen saturation level, and advanced dementia. The decedent was hospitalized several times over the past few years for his medical conditions, spent time in a nursing home, and eventually returned to his home where he actually became more stable but was confined to a hospital bed in his living room.

Petitioner asserts that over time she and her father mended their relationship after she moved in with him and cared for him. A letter dated May 21, 2007, from attorney Christy M. Pudyk to petitioner, indicates that petitioner retained Pudyk for the purpose of representing her father and revising his estate plan. On June 22, 2007, the decedent executed a document entitled, "First Amendment to the Trust Agreement of William Pagonas, u/a/d March 31, 1999" (the amendment) prepared by Pudyk. The second paragraph of the amendment is as follows: "My relationship with my daughter Mary Jaye Pagonas has been repaired and as such I wish that she be deemed a beneficiary of my Estate." The amendment named all three children as beneficiaries, each receiving 1/3 of the remaining trust property at the time of the decedent's death.

As Power of Attorney for decedent, respondent William objected to the amendment and also began proceedings to evict petitioner from their father's home. In a letter dated July 3, 2007, from the decedent to Pudyk, the decedent stated as follows in part:

> Please stop all communication with any and all parties connected with my legal business and affairs as of July 3, 2007. My intension (sic) was never to retain you as my attorney. If I have done so, I am dismissing you at this time. You are not my legal representative. I already have legal representation in Neil P. Murphy. You do not, now or in the future, represent me in any way.

On July 5, 2007, respondent William sent a second letter to Pudyk informing her that since 1999 he had been "the court approved Health Care Advocate" as well as "Durable Financial Power of Attorney Agent" for his father. Also in the letter, respondent William denied Pudyk's request for a meeting, terminated her representation of the decedent in all respects, and demanded that she "immediately hand over any file whatsoever you have in your possession of my father's."

Also on July 5, 2007, the decedent executed a document entitled, "Affirmations to the William Pagonas Trust Agreement Dated March 31, 1999, William Pagonas Health Care Power of Attorney Dated March 31, 1999, [and] William Pagonas Power of Attorney Dated March 31, 1999" (affirmations). It stated as follows in part:

> I, WILLIAM PAGONAS, Grantor, on the 5th day of, July, 2007 sign these Affirmations to ALL OF MY TESTAMENTARY DOCUMENTS SIGNED BY ME AND DATED MARCH 31, 1999; INCLUDING THE WILLIAM PAGONAS TRUST AGREEMENT WHICH NAMES MY TWO SONS WILLIAM A. PAGONAS AND STEPHEN W. PAGONAS MY BENEFICIARIES; THE WILLIAM PAGONAS LAST WILL AND TESTAMENT name my son WILLIAM A. PAGONAS my Personal Representative, THE WILLIAM PAGONAS HEALTH CARE POWER OF ATTORNEY AND THE WILLIAM PAGONAS DURABLE POWER OF ATTORNEY, both naming my son WILLIAM A. PAGONAS as my agent. If these Testamentary Documents and Power of Attorney's conflict with any other testamentary provisions, these documents dated March 31, 1999 will be controlling.
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> In all provisions I ratify and confirm my Trust Agreement, Testamentary Documents, and Power of Attorney's dated March 31, 1999.

On August 1, 2007, the decedent submitted to an independent psychological evaluation by Lynn T. Pantano, Ph.D., a licensed psychologist, for the purpose of determining whether he needed a guardian or conservator, as well whether he had testamentary capacity to change his estate plan. As part of this evaluation, Dr. Pantano performed a clinical interview of the decedent, as well as collateral interviews with all three of his children and the attorney who referred the decedent for evaluation, Donald Stehl. Dr. Pantano submitted a lengthy report describing her interviews, observations, test results, conclusions, and recommendations. The Conclusions and Recommendations portions of the report are as follows:

> CONCLUSIONS:
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> Mr. Pagonas is a 78-year-old, widowed Caucasian male who was referred by Mr. Donald Strehl for an Independent Clinical Evaluation to assess his need for Guardianship and/or Conservatorship, as well as Testamentary Capacity. At this point in time, Mr. Pagonas shows impairment in repetition, orientation, reading, attention and concentration, long and short term memory, and abstraction. On the Dementia Rating Scale-II, Mr. Pagonas is Very Severely Impaired in his Memory and Severely Impaired in his Initiation and Perseveration. He cannot write a check, nor can he record it. He cannot use a telephone, shop, prepare food, do housekeeping, laundry travel, be responsible for medications or money. Currently, he requires assistance with eating and cannot dress or toilet himself. Mr. Pagonas has no insight into his limitations, his vulnerability, nor the risk that he presents himself. At this point, he meets criteria for Guardianship in that he presently lacks sufficient understanding or capacity to make responsible decisions regarding his person. Further, he is also a person who is unable to manage his property and affairs effectively, he has property which will be wasted unless proper management is provided, the funds are needed for his support, and protection is necessary to obtain and provide funds, and thus, he meets criteria for a Conservator.
>
> Paradoxically, Mr. Pagonas seems to understand the concept of signing or changing his Will or Trust. He has a fairly good idea as to what he has, although he does not have any idea as to its value. He knows his natural heirs, and he clearly stated that he currently does not wish to leave some things to his daughter. Mr. Pagonas denied undue influence, but it is clear that there have been repeated attempts by his daughter to have attorneys draft changes to his Will and Trust. It appears that Mr. Pagonas has been able to resist the pressure up until this time, although there may be documents that Mr. Pagonas has signed, under duress, but does not remember signing, that may be in the possession of a third party at this time. Currently, Mr. Pagonas states that he has no intention of changing his estate plan. Despite what may or may not have been signed between the beginning of 2007, and now, Mr. Pagonas does not seem to want to change from what was originally drafted in 1999.
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> Even though at first glance, Mr. Pagonas may appear to have superficially met the criteria for Testamentary Capacity, he actually does not. This is because of his current functioning level in the severe range of dementia, and his very severe impairment of memory, particularly short term memory. The standard of

> Testamentary Capacity generally used for simple Trusts includes the ability to conduct business affairs and be able to engage in contracts. At this point in time, although Mr. Pagonas might be able to understand some of the concepts, given his exceedingly impaired short term memory, he would not remember what he had done or signed, even shortly before, and thus, capacity is greatly diminished under these circumstances. Certainly any documents signed in the last few months would not be valid, given his level of dementia. As the physician's letter of 3-14-07, indicated that Mr. Pagonas was terminally ill at that time, the physician felt that he needed assistance then. While Mr. Pagonas continues to live, his condition has not improved appreciably, and he continues to be bed bound, requiring care 24/7. His current medical, as well as mental, condition are only likely to deteriorate as time goes on. As he is dependent upon caregivers, particularly his daughter, he will become even more vulnerable to undue influence to which he is undoubtedly being subjected at this time, although he denies, and/or resists it.
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> RECOMMENDATIONS:
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> Recommendations are at this point in time are to further explore the need for a Guardian or Conservator given the difficulties among the family members as to how best [to] care for Mr. Pagonas. Currently, he does not possess Testamentary Capacity and has not, at least, through the first of 2007. Thus, any documents that may have been signed from that point forward would not be valid.

As a result of disputes regarding the decedent's estate plan among the decedent's three children, all three of them entered into a Settlement Agreement dated August 15, 2008 (the settlement agreement). The settlement agreement acknowledged that it was the opinion of Dr. Renard that there were issues with regard to the decedent's ability to manage his affairs as of March 14, 2007, and as a result, the decedent was evaluated by Dr. Pantano. The settlement agreement states that the parties wished "to resolve all of their differences with respect to WILLIAM PAGONAS, his estate plan and the respective parties' claims or entitlements thereunder . . . ." The parties agreed that on execution of the settlement agreement, petitioner would be paid $25,000 as well as an additional amount of funds from the proceeds of the sale of certain stock. The parties also agreed that "the March 31, 1999 estate plan of WILLIAM PAGONAS shall control the distribution of the Estate of WILLIAM PAGONAS upon his death, the parties agreeing that the March 31, 1999 estate plan is the valid estate plan for WILLIAM PAGONAS, the parties further agreeing to waive any contest or challenge thereof." The parties all agreed that all three of them had the right to "reasonable visitation" with their father and that none of them would discuss or complain about the estate plan in front of their father. All parties were represented by counsel and the settlement agreement contained an express merger clause setting out that the agreement contained the "entire agreement among the parties . . . ."

The decedent passed away on August 22, 2008. On December 8, 2008, petitioner filed her "Petition for Supervision of Trust, Filing of Inventory and Accounting of Successor Trustee's Administration of Trust," in the probate court. Respondent filed his response on January 20, 2009, "maintaining that the petition is barred by a Settlement Agreement executed by Petitioner stipulating that the March 31, 1999 Trust Agreement excluding Petitioner controls, Petitioner waiving and releasing any claim to the contrary and as the alleged Amendment is invalid as a

result of a subsequent Affirmation executed by the Decedent or alternatively, as a result of lack of testamentary capacity." Respondent also asserted that as agreed in the settlement agreement, petitioner was paid $25,000 and subsequently paid additional funds in accord with the agreement and that petitioner had not tendered back any sum of money. Respondent sought dismissal of petitioner's petition pursuant to MCR 2.116(C)(5), (C)(7), and (C)(10).

In an affidavit dated January 31, 2009, petitioner averred that she signed the settlement agreement under severe duress exerted on her by her brothers because they threatened to evict her from her residence and did not allow her to see her dying father. She also stated that when she executed the settlement agreement, it was her understanding that, "the Amendment executed by [her] father which included [her] as a one-third beneficiary would be followed as part of his 'estate plan.'" Petitioner also stated that she was "coerced" to sign the settlement agreement against her will by her brothers.

The probate court entertained oral argument on the matter on February 18, 2009. At the conclusion of the arguments, the probate court held as follows:

> The settlement agreement is clear and unambiguous, there's no doubt she was represented by counsel, the Court believed that she fully understood the nature and effect, the conditions, the terms, she fully agreed to them, the Court would not accept that afterwards she decided she didn't agree to them and want to change those circumstances through her affidavit. There's been no indication that there was any duress at all. I also don't believe that she had standing to even bring the petition seeking the accounting and the inventory on the Trust. I think it was clear that the Trust drafted in 1999 was the only Trust that would control, that the amendments that she attempted to have prepared or have drafted afterwards are of no force and effect, that was addressed in the settlement agreement that she agreed to. She received the benefit of that settlement agreement by accepting the $25,000.00 as well as the subsequent payment, I believe, in the amount of $65,000.00. So, not only does she not have standing to bring the petition but there really are no material issues of fact, she resolved all aspects of her claim in that settlement agreement and that is the controlling document. Dr. Pantano's report was clear, he did not have the testamentary capacity to execute that amendment, the amendment was of no force and effect and, therefore, the 1999 Trust controls and she was not a beneficiary, did not as a result have the right to demand an accounting, or an inventory of the Trust. She accepted the $25,000.00, the $65,000.00 as a full settlement of her claims.
>
> The fact that she didn't get to visit her father as often as she would like I don't think invalidates the agreement, the terms of that agreement, and the motion for summary disposition is granted. The petition is dismissed.

The trial court memorialized its holding in an order granting summary dismissal on February 25, 2009 without stating specifically under which rule it granted summary disposition. It is from this order that petitioner now appeals as of right.

Petitioner contends that genuine issues of material fact exist concerning the alleged invalidity of the 2007 trust amendment as well as what constituted the decedent's estate plan

pursuant to the settlement agreement so as to preclude summary disposition pursuant to MCR 2.116(C)(10). It is respondent's position that the 2007 trust amendment is invalid because of the clear and unambiguous language of the settlement agreement and that the 1999 trust is in full force and effect. The probate court agreed with respondent stating that the settlement agreement was "clear and unambiguous" and was the "controlling document." Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *A & E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 643-644; 723 NW2d 223 (2006). In determining whether summary disposition is proper under MCR 2.116(C)(10), this Court must view the documentary evidence in the light most favorable to the nonmoving party. *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007).

The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). This Court reads the agreement as a whole and attempts to apply the plain language of the contract itself to enforce the parties' intent. *Id*. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Phillips v Homer*, 480 Mich 19, 24; 745 NW2d 754 (2008). If, however, the contractual language is ambiguous, it presents a question of fact to be decided by a jury. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007).

The settlement agreement states that "the parties wish to resolve their differences with respect to WILLIAM PAGONAS, his estate plan and the respective parties' claims or entitlements thereunder . . . ." Thus, "in consideration of the mutual covenants and promises" the parties agreed that: respondent as power of attorney would pay petitioner $25,000 from the proceeds of the sale of certain J.P. Morgan stock that petitioner had unilaterally liquidated as a settlement amount on execution of the agreement; respondent as power of attorney would cease eviction proceedings against petitioner in the district court and the parties would enter into a consent judgment; petitioner would receive the remaining proceeds from the sale of the J.P. Morgan stock that was held jointly with the decedent less a percentage allocation to cover expenses and tax consequences from the sale; that all parties would be entitled to reasonable visitation with their father; and finally, with regard to the estate plan, the parties agreed that, "the March 31, 1999 estate plan of WILLIAM PAGONAS shall control the distribution of the Estate of WILLIAM PAGONAS upon his death, the parties agreeing that the March 31, 1999 estate plan is the valid estate plan for WILLIAM PAGONAS, the parties further agreeing to waive any contest or challenge thereof."

After reviewing the settlement agreement, we agree with the probate court that the language is "clear and unambiguous" and conclude that is was the intent of the parties at the time of the execution of the settlement agreement that the terms of the 1999 trust were to control the distribution of the decedent's estate. The settlement is silent with regard to the 2007 amendment prepared at petitioner's direction. Contrary to petitioner's assertions on appeal, there is no indication whatsoever in the settlement that the 1999 trust as amended by the 2007 amendment controlled. Instead, the trust is patently clear that the 1999 trust, standing alone, was the valid estate plan and was to control the distribution of the estate. Because the settlement agreement language is unambiguous, petitioner has not established that a genuine issue of material fact

existed with regard to the 2007 trust amendment or the decedent's estate plan pursuant to the settlement agreement and the probate court properly granted summary disposition pursuant to MCR 2.116(C)(10).

Petitioner also argues that genuine issues of material fact exist concerning the enforceability of the alleged settlement agreement with regard to breach, duress, fraud, and the tender back rule, thus summary disposition pursuant to MCR 2.116(C)(7) was inappropriate. Respondent contends that petitioner's claim is barred by both the clear and unambiguous language of the settlement as well as her violation of the tender back rule. Summary disposition is proper under MCR 2.116(C)(7) if the undisputed facts establish that "[t]he claim is barred because of release." MCR 2.116(C)(7); see also *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). In determining whether summary disposition is proper under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

The parties agreed in the settlement agreement to "waive any contest or challenge" of the decedent's 1999 estate plan. This contractual waiver language is both unambiguous and broad, and therefore plainly operates as a release for purposes of MCR 2.116(C)(7). Thus, the release bars petitioner's claim and summary disposition was appropriate under MCR 2.116(C)(7). Additionally, petitioner's attempt to repudiate the release fails. Petitioner does not contest the fact that respondent performed under the contract and paid petitioner the $25,000 owed under the contract one week after the execution of the settlement. Petitioner does not contest the fact that she received another payment under the settlement agreement of approximately $65,000 from the liquidation of the J.P. Morgan account as agreed in the contract. "It is a well-settled principle of Michigan law that settlement agreements are binding until rescinded for cause. Further, tender of consideration received is a condition precedent to the right to repudiate a contract of settlement." *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 163; 458 NW2d 56 (1990). Thus, in order to repudiate her release, petitioner must first tender back the consideration given. Petitioner has not done so and as a result, her argument fails.

Also, the settlement agreement's last paragraph contains a merger clause as well as a statement that the contract resolves all outstanding issues among the parties. It states as follows:

> Complete Agreement. The parties further represent and acknowledge that this written Settlement Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof, all parties acknowledging that they have fully read and understood this Settlement Agreement and are entering into the same upon review and advice of their respective counsel, the parties further acknowledging that they are relying upon no promises, representations or inducements except as fully set forth in writing herein, the parties further recognizing that this Settlement Agreement constitutes the compromise of the parties to resolve all outstanding issues regarding WILLIAM PAGONAS and the parties' respective entitlements or inheritances, the actions and payments called for hereunder not constituting an admission of fault or liability by any party, but rather, represent the compromise agreement between the parties resolving

> disputed claims, the settlement if which the parties acknowledge and agree is in the best interest of their father, WILLIAM PAGONAS.

This paragraph states that the agreement represents the entire agreement among the parties and that petitioner was represented by counsel in the formation and execution of the settlement. Also, it indicates that all parties including petitioner entered into the settlement agreement "relying upon no promises, representations or inducements" except as set forth in the agreement.

While after the fact petitioner now claims that she entered into the contract under duress exerted by her brothers, there is no evidence of this in the record. In her affidavit petitioner claims that she felt pressured to sign the settlement for two main reasons, because she was concerned she would be homeless as a result respondent kicking her out of her home and because her brothers would not allow her to see her dying father. Again, other than petitioner's own self-serving affidavit, there is no evidence of this on the record. The record reveals that indeed there was a dispute regarding petitioner's residence at the decedent's home, but that was proceeding legally in the district court at the time and was resolved amicably by the settlement. Also, petitioner did get to visit with her father and was with him at the time of his death. And, petitioner does not contest the fact that she was represented by counsel when she executed the settlement agreement. Petitioner has not established that a question of fact remains with regard to duress or coercion and thus summary disposition pursuant to MCR 2.116(C)(7) was proper. *Lentz v Lentz*, 271 Mich App 465, 471-473; 721 NW2d 861 (2006). (Absent fraud, coercion. or duress, unambiguous contracts are not open to construction and must be enforced as written.)

Finally, petitioner argues that she had standing to file her petition because she was the daughter of the decedent and specifically named beneficiary of the 2007 trust amendment, therefore, summary disposition pursuant to MCR 2.116(C)(5) was inappropriate. "Summary disposition is properly granted pursuant to MCR 2.116(C)(5) if the party asserting the claim lacks the legal capacity to sue. In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 492; 776 NW2d 387 (2009) (internal quotations and citations omitted). The determination whether a party has standing is a question of law subject to de novo review. *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008).

In discussing standing, we address the right of a party to invoke the power of the court to adjudicate a claimed injury in fact. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006). Standing generally requires that the party, individually or in a representative capacity, has "some real interest in a cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992) (citation omitted). We have already concluded that the language of the settlement agreement is unambiguous and therefore the 1999 trust controls. There is no question that petitioner is not a beneficiary to the trust and therefore has no interest in the trust.

Accordingly, petitioner lacks standing to sue and summary disposition under MCR 2.116(C)(5) was proper.

Affirmed. As the prevailing party, respondent may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher