STATE OF MICHIGAN

COURT OF APPEALS

In re RAYMOND A. AND SUZANNE ELAINE NOWAK REVOCABLE LIVING TRUST.

LORRAINE ANN READER,

Appellee,

v

DENNIS LAFAVE and JEAN LAFAVE, as Trustees of the RAYMOND A. AND SUZANNE ELAINE NOWAK REVOCABLE LIVING TRUST,

Appellants.

UNPUBLISHED
December 6, 2012

No. 298212
Kent Probate Court
LC No. 08-185901-TV

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Appellants appeal as of right the order denying their petition for reimbursement, contending that the probate court erred in finding that the presumption of gratuity precluded reimbursement. Specifically, appellants argue that (1) the probate court ignored three agreements that rebut the presumption of gratuity, (2) appellee admitted that appellants were entitled to reimbursement, and (3) two statutory provisions entitle them to reimbursement. We affirm.

"Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Although appellants raised the issue of reimbursement below, they did not raise the specific arguments regarding the agreement between the daughters or the provisions of the trust agreement, and the probate court did not address those arguments. The probate court also did not address appellants' arguments regarding the durable power of attorney, appellee's deposition, and the application of certain statutory provisions. Therefore, these arguments are unpreserved. See *id*.

> Although this Court need not review issues raised for the first time on appeal, this Court may overlook preservation requirements if the failure to

> consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. [*Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citations omitted).]

We may consider appellants' unpreserved arguments because consideration is necessary for a proper determination of the case and the issue involves, in part, a question of law and the facts necessary for its resolution have been presented. *Smith*, 269 Mich App at 427.

"We review a probate court's factual findings under the clearly-erroneous standard." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* (quotation marks and citation omitted). "We review de novo issues of statutory interpretation." *Id.* However, "[r]eview of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Appellants contend that they are entitled to reimbursement for caregiving services provided to Suzanne Nowak, appellant, Jean LaFave's, mother. The Michigan Supreme Court has stated:

> The courts regard with suspicion and disfavor claims brought against an estate for personal services rendered by relatives, especially where the latter are members of decedent's immediate family or household, as the presumption is that such services between persons occupying such relations are intended to be gratuitous, and hence claims against the estate of a decedent made by near relatives for personal services require stronger proof to establish them than ordinary claims by strangers. The rule applies when the family relationship actually existed between claimant and decedent, although there was neither consanguinity, affinity, nor adoption. [*In re Thompson's Estate*, 297 Mich 479, 482; 298 NW 103 (1941) (quotation marks and citation omitted).]

The Court further stated: "Where the services are rendered to one standing *in loco parentis*, there is no implied promise to pay for them, though such presumption may be overcome by the facts and circumstances of the case." *In re Thompson's Estate*, 297 Mich at 482 (quotation marks and citation omitted). "If the facts and circumstances attending the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous, and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable." *Id.* at 483 (quotation marks and citation omitted). The presumption of gratuity "is rebutted, an implied contract to pay arises and plaintiff is entitled to recover, if it be established that when the services were rendered plaintiff expected to receive and deceased expected to pay wages therefor." *In re Parks' Estate*, 326 Mich 169, 172-173; 39 NW2d 925 (1949).

This Court has also explained:

> A presumption of gratuity arises where the plaintiff is related by blood or marriage to the decedent and where the parties lived together as husband and wife although never married. Where a presumption of gratuity arises, the plaintiff may still recover for services rendered under the theory of contract implied in fact. A contract implied in fact arises "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." The issue is a question of fact to be resolved through the consideration of all the circumstances, including the type of services rendered, the duration of the services, the closeness of the relationship of the parties, and the express expectations of the parties. However, "when one renders personal services to another merely upon the expectation of a legacy promised without a contract obligation, the promisee takes his chances on receiving the legacy, and, if his expectations are disappointed, he can recover nothing." [*In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (1988) (citations omitted).]

Because appellants were Suzanne's daughter and son-in-law, the presumption of gratuity arises. See *In re Thompson's Estate*, 297 Mich at 482; *In re Lewis Estate*, 168 Mich App at 74. The presumption can be rebutted by proving that appellants expected to be paid and Suzanne expected to pay for the services. See *In re Parks' Estate*, 326 Mich at 172-173; *In re Thompson's Estate*, 297 Mich at 482-483; *In re Lewis Estate*, 168 Mich App at 75. Appellants provided no evidence below of a contract implied in fact. See *In re Lewis Estate*, 168 Mich App at 75. The probate court found that the presumption was not rebutted because there was no evidence that appellants expected compensation or that Suzanne expected to pay for the services. This finding was not clearly erroneous. See *In re Townsend Conservatorship*, 293 Mich App at 186.[1] There was evidence that appellants paid others during this time for caregiving, but did not seek reimbursement for themselves, indicating they had no expectation of compensation. There was also evidence others believed appellants were not seeking compensation.

On appeal appellants point to three additional agreements which they claim rebut the presumption of gratuity. Appellants assert that the three daughters entered into a contract in March and April 2002 under which they would share equally in the care and expenses of Suzanne and which appellee breached, but provide no evidence of this alleged contract or agreement. And, even if the contract existed, it would not rebut the presumption of gratuity because a contract between the daughters does not show that Suzanne expected to pay for caregiving services provided by appellants. See *In re Parks' Estate*, 326 Mich at 172-173; *In re Thompson's Estate*, 297 Mich at 482-483; *In re Lewis Estate*, 168 Mich App at 75. Similarly, appellee's statement that she believed appellants were entitled to compensation does not show that either appellant expected to be paid or that Suzanne expected to pay for services. See *In re Parks' Estate*, 326 Mich at 172-173; *In re Thompson's Estate*, 297 Mich at 482-483; *In re Lewis*

[1] Neither party has raised an issue about the standard of review, but given the lack of testimony before the trial court there is a legitimate question whether the clearly erroneous standard would apply. See *People v White*, 294 Mich App 622, 633; ___ NW2d ___ (2011) lv gtd 491 Mich 890 (2012). Because no party has raised the issue we will apply the clearly erroneous standard.

Estate, 168 Mich App at 75. Therefore, there was no plain error with regard to this argument. See *Rivette*, 278 Mich App at 328.

Appellants also cite two provisions of the trust agreement, though neither one entitles appellants to compensation for their services. Article VIII(A) involves compensation and reimbursement for the trustee. Even though Jean is the trustee, this section is not applicable to appellants' claim for caregiving expenses. Article XV(A) involves the availability of the beneficiary's interest to creditors and is also not applicable to this situation. Accordingly, there was no plain error with regard to this argument. See *Rivette*, 278 Mich App at 328.

Appellants also cite the durable power of attorney, which appoints Jean as guardian or conservator, without appointment by the probate court.[2] However, the durable power of attorney does not show any expectation of compensation for caregiving services by either appellants or Suzanne. Therefore, it does not rebut the presumption of gratuity. See *In re Parks' Estate*, 326 Mich at 172-173; *In re Thompson's Estate*, 297 Mich at 482-483; *In re Lewis Estate*, 168 Mich App at 75. There was no plain error with regard to this argument. See *Rivette*, 278 Mich App at 328.

Two statutory provisions are also relied upon by appellants, but they fail to argue how the provisions apply. "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Nonetheless, these provisions do not entitle appellants to reimbursement for caregiving expenses. The version of MCL 700.5315(1)[3] in effect at the time of the hearing provides:

> A guardian of an individual for whom a conservator also is appointed controls the ward's custody and care and is entitled to receive reasonable amounts for those services and for room and board furnished to the ward as agreed upon between the guardian and the conservator if the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to a third person or institution for the ward's care and maintenance.

Thus, the statute provides for reasonable compensation for a guardian where a conservator is also appointed, as agreed upon between the guardian and conservator. See MCL 700.5315(1). Under the Estates and Protected Individuals Code, conservator is defined as "a person appointed by a court to manage a protected individual's estate." MCL 700.1103(h). In this case, there was no conservator appointed by a court and, therefore, there could be no agreement between any guardian and conservator. MCL 700.5315(1). There was no plain error. See *Rivette*, 278 Mich App at 328.

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[2] Suzanne also signed a durable power of attorney in favor of Dennis.

[3] MCL 700.5315 was amended by 2012 PA 173, effective October 1, 2012.

MCL 700.5413 provides that "a visitor, guardian ad litem, attorney, physician, conservator, or special conservator appointed in a protective proceeding, is entitled to reasonable compensation from the estate." However, because Jean is not a conservator as defined by the statute, nor a special conservator, she is not entitled to compensation under this provision. *Id*.

Alternatively, appellee argues that appellants waived any claim by waiting eight years before requesting reimbursement. The probate court found that the late filing was suspicious, but did not find that the claim was waived.[4] "[A] cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court or tribunal." *Boardman v Dep't of State Police*, 243 Mich App 351, 358; 622 NW2d 97 (2000). Therefore, we may consider whether appellants' claim is waived.

In general, waiver is "the intentional or voluntary relinquishment of a known right." *Sherry v East Suburban Football League*, 292 Mich App 23, 33; 807 NW2d 859 (2011). Appellants waited eight years before making a claim for reimbursement. Two years of litigation had already passed. The petition came only after appellee's motion to remove appellants. As noted, there was evidence that appellants paid others during this time for caregiving, but did not seek reimbursement for themselves. There was also evidence others believed appellants were not seeking compensation. Appellants' course of conduct indicates that they waived their claim. See *In re Shailer Estate*, 172 Mich 600, 610-611; 138 NW 205 (1912); S*herry*, 292 Mich App at 33 (finding course of conduct showed the plaintiff's desire to exercise right to assert issues). On this basis we also affirm the probate court's order.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray

[4] The probate court did, however, find that part of the claim was barred by the statute of limitations. Appellants do not dispute this ruling.