STATE OF MICHIGAN

COURT OF APPEALS

In re Tobias Estates.

CAROL TOBIAS, as personal representative of THE ESTATE OF RAYMOND TOBIAS and THE ESTATE OF ROGER TOBIAS,

Petitioner-Appellant,

v

GREGG B. DAVIS and DIANN L. DAVIS,

Respondents-Appellees.

UNPUBLISHED
May 10, 2012

No. 304852
Barry Probate Court
LC No. 11-025721-CZ

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Petitioner Carol Tobias, as personal representative of the Estates of Raymond Tobias and Roger Tobias, appeals as of right the trial court's order granting defendants Gregg and Diann Davis's motion for summary disposition. We affirm.

I. FACTS

This case arises from disputes between the parties involving two separate issues. The first challenges the validity of two deeds that Raymond Tobias executed before his death. The second issue involves the handling of certain bank account funds.

A. THE DEEDS

In 1943, Raymond Tobias and his then wife Dora purchased approximately 40 acres of land in Carlton Township, Barry County, Michigan. Dora Tobias died in May 1977. Raymond Tobias then married his second wife, Cleone Reigler Tobias. And in November 1978, Raymond and Cleone Tobias executed a quit-claim deed to Raymond's only son, Roger Tobias, regarding the 40-acre property. The language of the 1978 deed reserved a power of appointment, stating in pertinent part as follows:

> GRANTORS reserve and grant to RAYMOND H. TOBIAS the full use, benefit, control, possession and power to sell or otherwise deal with said premises

> for and during his lifetime, and RESERVE AND GRANT to CLEONE REIGLER TOBIAS, upon the death of RAYMOND H. TOBIAS, the full use, benefit, control, income and possession of said premises for and during her lifetime, provided she is married to RAYMOND H. TOBIAS at the time of his death.

In July 1982, Raymond and Cleone Tobias executed a quit-claim deed, transferring two acres of the 40-acre property to Raymond Tobias' granddaughter, Diann Davis (then known as Diann Tobias). Diann built a home on the two acres. Diann married Gregg Davis in 1995, and transferred ownership of the two acres to herself and Gregg Davis.

Cleone Tobias died in August 2002. In May 2007, Raymond Tobias executed a warranty deed, transferring another 23 acres of the original 40-acre property to the Davises. These 23 acres of land were adjoining to the Davises' two-acre property. And in January 2009, Raymond Tobias executed a quit-claim deed, transferring the remaining 15 acres of the original 40-acre property to the Davises. Raymond Tobias died intestate in December 2009.

B. THE BANK ACCOUNT

In 2008, Raymond and Roger Tobias had a joint bank account at the Thornapple Valley Credit Union. Roger Tobias claimed that he was informed that the account was about to escheat to the state of Michigan, presumably due to lack of activity on the account. As a result, Roger Tobias withdrew $26,644.53 from the account and transferred it to a separate account. Roger Tobias used those funds to open another account at United Bank.

In January 2009, Raymond Tobias then demanded that Roger Tobias return the funds that he had taken. Roger Tobias complied and delivered a check in the amount of $26,139.27 to Diann Davis. Those funds were then deposited into a joint account held by Raymond Tobias and Diann Davis at Hastings City Bank.

Roger Tobias died in May 2010.

C. PROCEDURAL HISTORY

In February 2011, Carol Tobias filed suit against her daughter and son-in-law, Diann and Gregg Davis. In the first count of the complaint, seeking to quiet title in the property, Carol Tobias claimed that after Cleone Tobias' death, the 40-acre property (less the two acres deeded to Diann Davis in 1982) was owned by Roger Tobias, subject to the life estate of Raymond Tobias. She alleged that the 2007 and 2009 deeds from Raymond Tobias to the Davises were ineffective because they did not refer to the power of appointment authorized by the 1978 deed. Carol Tobias asserted that, at most, the 2007 and 2009 deeds conveyed only Raymond Tobias' interest as a life tenant, and his life estate expired at the time of his death in December 2009. In the second count of the complaint, Carol Tobias alleged that the funds placed into the joint account between Raymond Tobias and Diann Davis were the property of the Estate of Roger Tobias.

In their answer, with regard to the first count of the complaint, the Davises asserted that the 1978 deed was intended to be what is known as a Lady Bird deed or intervivos power of appointment and that Roger Tobias was the default beneficiary in the event that Raymond Tobias

did not otherwise dispose of the property. According to the Davises, "this type of ownership is uniquely different from a simple 'life estate.'" The Davises further asserted that Cleone Tobias' death did not change the parties' interests; that is, Raymond Tobias retained his power of appointment and Roger Tobias remained the default beneficiary. The Davises contended that the 2007 and 2009 deeds were effective because the transfers did not require reference to the power of appointment. Therefore, according to the Davises, after Raymond Tobias fully conveyed the property via the 1982, 2007, and 2009 deeds, no real estate remained to pass to Roger Tobias. With regard to the second count of the complaint, the Davises admitted that they possessed the funds at issue, but asserted that Raymond Tobias gifted the funds to them.

The Davises moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that the 1978 deed, which contained the power of appointment, was a valid Lady Bird deed, intended to allow Raymond and Cleone Tobias flexibility in deciding how to dispose of the subject property. Roger Tobias was named in this deed only as the default beneficiary in the event that Raymond and Cleone Tobias did not exercise their power of appointment to dispose of the property before their deaths. Noting that Carol Tobias was not challenging the validity of the 1982 deed to Diann Davis even though that deed contained the same conveyance language as the 2007 and 2009 deeds, the Davises argued that if the 1982 deed was valid despite its failure to refer to the power of appointment, then the 2007 and 2009 deeds should not be considered invalid merely for failure to refer to the power of appointment. Citing § 4 of the Powers of Appointment Act,[1] the Davises further argued that, once created, the power of appointment does not need to be specifically referenced in order to transfer a valid fee interest.[2] The Davises also pointed out that their conduct and documentary evidence demonstrated that each of the three transfers were intended to be and, in fact were, valid fee interests. The Davises contended further that, in executing the contested deeds, Raymond Tobias' intent, as evidenced by witness affidavit and a video recording made at the time of execution of the 2009 deed, was to prevent Roger Tobias from acquiring the land after he took the funds from the bank account.

Turning to Carol Tobias' claim regarding the bank account funds, the Davises argued that Raymond Tobias intentionally placed the money in a joint account with Diann Davis to avoid further interference from Roger Tobias. In support of this contention, the Davises submitted a witness affidavit. Further, the Davises pointed out that, under Michigan law, when funds are held jointly in a bank account with rights of survivorship, it is presumed that the depositor intended those funds to pass by operation of law to the surviving joint tenant, here, Diann Davis. And although the presumption may be rebutted by reasonably clear and persuasive proof of a contrary intent, the Davises argued that Carol Tobias presented no such evidence.

Carol Tobias responded, explaining that, although she believed that the 1982 deed was as equally defective as the 2007 and 2009 deeds, she did not challenge the 1982 deed due to the Davises' long-held claim to that portion of the property. Glancing over the significance of § 4 of the Powers of Appointment Act, Carol Tobias contended that "the better practice is to refer to the

[1] MCL 556.111 *et seq*.

[2] MCL 556.114.

retained power in any future conveyance." And, because Raymond Tobias failed to follow this "better practice" in executing the 2007 and 2009 deeds, Carol Tobias argued that the deeds were ineffective and the property conveyed therein became the property of Roger Tobias upon Raymond Tobias' death. With regard to the bank account funds, Carol Tobias contended that questions of fact remained regarding Raymond Tobias' intent in creating the joint account with Diann Davis. That is, Carol Tobias asserted that the joint account was created merely as a convenience and that the money was intended for Raymond Tobias' care during his lifetime, with Diann Davis being only the fiduciary for disposition of those funds, not an intended claimant to those funds.

After a hearing on the motion, the trial court granted the Davises' motion on the basis of the reasons set forth in their brief in support of their motion for summary disposition.

Carol Tobias now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."[3]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[4] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[5] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[6] We review de novo the trial court's ruling on a motion for summary disposition.[7]

B. VALIDITY OF RAYMOND TOBIAS' EXERCISE OF HIS POWER OF APPOINTMENT

Carol Tobias argues that a deed that purports to convey title to property to a third person, without reference to previously retained power of appointment, is not effective to divest title in the original grantee. While we agree that the "better practice" would indeed be to include a

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[3] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[4] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[5] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[6] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[7] *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

specific reference to the power of appointment in later conveyances that purport to invoke that power, we conclude that under the circumstances here such reference was not required by law.

As the Davises argue and the trial court acknowledged, the 1978 deed in this case was what is known as a Lady Bird deed.

> A "Lady Bird" deed is a nickname for an enhanced life [e]state deed. It is named after Lady Bird Johnson, because allegedly President Johnson once used this type of deed to convey some land to Lady Bird. An enhanced life estate deed is a variation of a quitclaim deed that . . . enable[s] named persons to receive the home upon death, free of Medicaid claims and liens. . . . Generally, it works like a traditional Life Estate Deed . . . . It goes beyond a life estate deed, because not only does the life tenant get to live there for life, that former owner also reserves more than just a life estate. Also reserved are the rights to sell, commit waste, and almost everything else, except the transfer on death to the "remainderman."[8]

As the Davises point out, Michigan Land Title Standards 9.3, titled, Life Estate with Power to Convey Fee, confirms that, in Michigan, a donee may transfer a fee interest in the subject property: "The holder of a life estate, coupled with an absolute power to dispose of the fee estate by inter vivos conveyance, can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective." The Standard does not indicate whether specific reference to the power of appointment is required at the time it is invoked; however, that requirement has been clarified by Michigan caselaw and statute.

Under the common law, a donee's power of appointment was not properly exercised, without expressly referring to the power, "unless a contrary intention to exercise the power [could] be sufficiently proven."[9] But this case is not governed by common law. The governing statutory rule of law in this case comes from § 4 of the Powers of Appointment Act. That section provides, in pertinent part, as follows:

> Unless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power. . . .[10]

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[8] http://definitions.uslegal.com/l/lady-bird-deed/ (last accessed April 17, 2012).

[9] *Hund v Holmes*, 395 Mich 188, 193-194; 235 NW2d 331 (1975).

[10] MCL 556.114.

As § 4 indicates, the necessity of a reference to the power of appointment in later conveyances can be provided for within the creating instrument.[11] However, the creating instrument in this case—the 1978 deed—contains no provision requiring or waiving any such reference. Thus, we turn to the remainder of the governing statutory language.

Where the creating instrument does not contain a provision requiring or waiving reference to the power of appointment, a donee may nevertheless manifest an intent to exercise the power in a later instrument (1) "if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument," or (2) "if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power."[12]

In support of her position that the deeds were ineffective, Carol Tobias relies on the Michigan Supreme Court's decision in *Hund v Holmes*.[13] However, that reliance is misplaced. In that case, applying the latter of the two statutory methods to manifest intent to exercise the power, the Court determined that the "wording" in the residuary clause of the testatrix's will was not sufficient to manifest her intent to exercise an earlier granted power of appointment.[14] However, the Court in that case did not consider the former of the two statutory methods to manifest intent to exercise the power, which we conclude is in fact the relevant applicable language here.

Here, "even though the power [was] not recited or referred to in" the 2007 or 2009 deeds (or the 1982 deed), Raymond Tobias manifested an intent to exercise the 1978 power of appointment in those instruments because they "purport[ed] to transfer an interest in the appointive property that [Raymond Tobias] would have no power to transfer except by virtue of the power[.]" That is, absent inclusion of the power of appointment language in the 1978 deed, that deed would have been a simple quit-claim transfer of Raymond Tobias' complete fee interest in the property to Roger Tobias. In that event, Raymond Tobias would have no longer had any powers, rights, or ownership title to the property to transfer. However, the power of appointment language was included, and it was "by virtue of [that] power" that Raymond Tobias retained his right to "transfer an interest in the appointive property[.]" Therefore, the power was not required to be "recited or referred to" in the later deeds.

Accordingly, we conclude the trial court properly granted summary disposition to the Davises on this issue because even though the three intervivos conveyances did not contain

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[11] *Id.* ("Unless otherwise provided in the creating instrument . . . .").

[12] *Id.*

[13] *Hund*, 395 Mich at 188.

[14] *Id.* at 197-198.

specific reference to the 1978 power of appointment, by executing those conveyances, Raymond Tobias effectively transferred his fee interest to the Davises.

C. OWNERSHIP OF THE BANK ACCOUNT FUNDS

Carol Tobias argues that where monies are turned over to a person believed to be the attorney-in-fact for the decedent, those monies are assets of the estate of the decedent that are required to be returned to the personal representative of the estate. More specifically, Carol Tobias asserts that when Roger Tobias turned over the disputed funds to Diann Davis, she was acting as Raymond Tobias' attorney-in-fact and that she was only intended to be the fiduciary for disposition of those funds, not an intended claimant to those funds. According to Carol Tobias, the joint account was created merely as a convenience.

In making her argument, Carol Tobias concedes that she is lacking factual support for her claim, but she contends that summary disposition on this issue was premature. Summary disposition can be premature if it is granted before discovery on a disputed issue is complete.[15] However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a "fair chance of uncovering factual support" for the opposing party's position.[16] In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.[17] It is not sufficient for a party to promise to offer factual support for her claims at trial.[18] Conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[19]

Here, we conclude that summary disposition on this issue was not premature. Although the discovery period remained open, Carol Tobias failed to present any material independent evidence in support of her claim. Her speculation regarding the nature of the relationship

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[15] *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

[16] *Id*.

[17] *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994); see *Coblentz v Novi*, 475 Mich 558, 570; 719 NW2d 73 (2006) (concluding that the plaintiffs could not complain that summary disposition was premature because they did not offer the required MCR 2.116(H) affidavits with the probable testimony to support their contentions).

[18] *Maiden*, 461 Mich at 121; *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[19] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

between Raymond Tobias and Diann Davis was mere conjecture and speculation, and further discovery did not stand a fair chance of uncovering factual support for her position.

Michigan law is clear that upon the death of a person holding a bank account jointly with rights of survivorship, the account balance passes by operation of law to the surviving joint tenant.[20] Thus, when a deposit is made in the name of the depositor or any other person "in form to be paid to either or the survivor of them,"[21] it is prima facie evidence that the depositor intended to vest title to the deposit in the survivor.[22] Rebutting this presumption requires reasonably clear and persuasive proof that the depositor intended otherwise.[23]

As stated, Carol Tobias has failed to present any proof that Raymond Tobias intended anything other than to have the bank account balance pass to Diann Davis upon his death. To the contrary, the evidence that the Davises submitted confirmed that there was no genuine issue of material fact regarding Raymond Tobias' intent. In an affidavit, his home health service provider, Mitzi Carroll, attested that she was "well aware of the estranged relationship between Raymond and his son, Roger Tobias." According to Carroll, Raymond Tobias told her, "on several occasions that he gifted money to Diann Davis to both prevent Roger from absconding with said funds and to ensure Diann receive the funds."

Accordingly, we conclude the trial court properly granted summary disposition to the Davises on this issue because Carol Tobias failed to rebut the statutory presumption and the evidentiary support that when Raymond Tobias created the bank account jointly with Diann Davis, he intended that upon his death the title to those funds would vest in Diann Davis.

We affirm. The Davises, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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[20] MCL 487.703; *Jacques v Jacques*, 352 Mich 127, 135; 89 NW2d 451 (1958).

[21] MCL 487.703.

[22] *Jacques*, 352 Mich at 136.

[23] *Id.* at 136-137.