STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of Vlado Nestorovski, Deceased.

BORA PETROVSKI,

Petitioner-Appellee,

v

VASKO NESTOROVSKI,

Respondent-Appellant.

FOR PUBLICATION
March 31, 2009

No. 271704
Oakland Probate Court
LC No. 2004-292348-DE

Advance Sheets Version

Before: Saad, C.J., and Borrello and Gleicher, J.J.

SAAD, C.J. (*dissenting*).

I. Introduction

The precise issue litigated in *In re Meredith Estate*, 275 Mich 278; 266 NW 351 (1936) is the arbitrability of testamentary capacity; the Michigan Supreme Court in *Meredith* concluded that testamentary capacity is not arbitrable. In all material respects, an identical issue is presented to the Court, because we are asked to decide whether the parties' agreement to arbitrate Vlado Nestorovski's testamentary capacity is enforceable. Because we are bound by the principle of stare decisis embodied both in our jurisprudential history and in specific holdings from our highest court, *Meredith*'s holding must control. Until our Supreme Court modifies its own precedent, the rule in this jurisdiction is that testamentary capacity is not arbitrable. Therefore, I respectfully dissent from the majority's departure from *Meredith*'s holding.

II. Nature of the Case

The underlying issue before the trial court was the testamentary capacity of the testator, Vlado Nestorovski. The key issue on appeal is whether testamentary capacity is subject to binding arbitration or is within the exclusive jurisdiction of the probate court. Because our Supreme Court ruled in *Meredith* that testamentary capacity is not arbitrable, the issue upon which the majority and I disagree is whether our Court, as an intermediate appellate court, may overrule *Meredith* on the basis of our belief that the Michigan Supreme Court would overrule *Meredith* if faced with the question today.

Because *Meredith* is binding on all inferior courts, including this Court, I respectfully disagree with the majority that we have the authority to rule contrary to *Meredith* simply because we believe that the Supreme Court would overturn its precedent in light of legislative, court rule, and decisional law developments.

Though I agree that the Michigan Supreme Court would overrule *Meredith* if faced with this precise issue today, the law that governs our authority as an inferior court precludes this Court from taking this action. Indeed, it is quite clear that Michigan Supreme Court precedent that is binding on this Court does not permit an inferior court, appellate or trial, to overrule Supreme Court precedent; rather, such precedent places the prerogative of overruling Supreme Court decisions with the Supreme Court.

Accordingly, because *Meredith* is "good law" until our Supreme Court rules that it is not, we are bound by Supreme Court precedent that clearly and unequivocally mandates that we follow its precedents and leave the business of overruling Supreme Court decisions to the Supreme Court.

III. Factual Relationship to *Meredith*

The majority paradoxically contends that *Meredith* is both a fact-specific holding unintended for extension and a "critical pronounce[ment] [of] the arbitrability of *any* probate dispute . . . ." *Ante* at 6 (emphasis added). It is, in fact, neither. The issue before the court in *Meredith* was narrow, and so too was its holding. Indeed, *Meredith* addressed the discrete issue whether testamentary capacity is arbitrable and it clearly and narrowly held that it is not. Because the arbitrability of testamentary capacity is precisely the issue before the Court today, our decision must be constrained by the Michigan Supreme Court's ruling in *Meredith*.

IV. Analysis

Michigan Supreme Court precedent precludes our Court from overruling decisions of the Michigan Supreme Court. In *People v Mitchell*, 428 Mich 364; 408 NW2d 798 (1987), our Supreme Court admonished this Court for failing to adhere to its earlier holding that an unsigned search warrant lacked validity. The Court made clear that the impropriety lies not in reaching the incorrect conclusion, but in overruling the Supreme Court:

> Although the Court of Appeals panel in this case *correctly anticipated our holding*, we disapprove of the manner in which the panel indicated its disagreement . . . . An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts. [*Id*. at 369 (emphasis added).]

Similarly, I believe that the majority "correctly anticipates" the Supreme Court's ruling, but incorrectly oversteps its authority in doing so.

Recently, our Supreme Court reaffirmed its holding in *Mitchell* and reiterated the importance of vertical stare decisis. In *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), overruled on other grounds in *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007), the Michigan Supreme Court reversed this Court's holding that the necessity to abide by the

Supreme Court's ruling in *Roberts v I X L Glass Corp*, 259 Mich 644; 244 NW 188 (1932), was obviated by post-decision amendment of the statute to which *Roberts* related.[1] Unequivocally asserting exclusive authority to overrule its decisions, the Michigan Supreme Court again held that "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and *until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority*." *Boyd, supra* at 523 (emphasis added), citing *Edwards v Clinton Valley Ctr*, 138 Mich App 312; 360 NW2d 606 (1984); *McMillan v Michigan State Hwy Comm*, 130 Mich App 630; 344 NW2d 26 (1983), rev'd in part on other grounds 426 Mich 46 (1986); *Ratliff v Gen Motors Corp*, 127 Mich App 410; 339 NW2d 196 (1983); *Schwartz v City of Flint (After Remand)*, 120 Mich App 449; 329 NW2d 26 (1982), rev'd on other grounds 426 Mich 295 (1986). Our Supreme Court in *Boyd* further noted:

> While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, *that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. Because this Court has never overruled* Roberts, *it remains valid precedent*. [*Boyd, supra* at 523 (citations omitted; emphasis added).]

The United States Supreme Court has issued the same mandate to inferior federal courts. Though not binding on our state's jurisprudence, the United States Supreme Court has ruled that only it, and not intermediate appellate courts, may overrule United States Supreme Court precedent. This decision underscores the important foundational nature of vertical stare decisis. In *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477; 109 S Ct 1917; 104 L Ed 2d 526 (1989), the Court analyzed an issue similar to the one before us. While the Court in *Rodriguez, id.* at 480, ultimately agreed with the United States Court of Appeals for the Fifth Circuit that the well-known case of *Wilko v Swan*, 346 US 427; 74 S Ct 182; 98 L Ed 168 (1953) (restricting the arbitrability of certain securities matters) should be overruled because the "judicial hostility to arbitration" present at *Wilko*'s issuance "has been steadily eroded over the years," the Supreme Court determined that it was nonetheless improper for the Court of Appeals to ignore the precedent:

> We do not suggest that the Court of Appeals on its own authority should have taken the step in renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. [*Rodriguez, supra* at 484.]

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[1] In support of the proposition that post-decision amendments of statutes on which higher court decisions are predicated can warrant departure from the doctrine of stare decisis, the majority cites *People v Pfaffle*, 246 Mich App 282, 303-304; 632 NW2d 162 (2001), and *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002). For reasons clearly set forth in this dissent, the Court in *Pfaffle* cited no authority to support such a theory. In *Lamp*, the Court, like the majority here, cited cases in support of its holding. However, each of those cases discusses the circumstances under which it is proper for the Michigan Supreme Court, not an intermediate appellate court, to overrule *its own* precedent.

Finally, while the degree of adherence to principles of stare decisis varies among our sister states, the great majority of state courts clearly hold that lower courts lack the authority to ignore what they perceive as outmoded precedent.[2] The reasons underlying the judiciary's commitment to stare decisis are readily apparent and are absolutely essential to our jurisprudence. Clearly, predictability and the rule of law would be undermined if lower courts could simply contravene established precedent, even for what appear to be good reasons. As explained in a recent law review article:

> Serious rule of law costs would follow if lower courts were free to ignore precedent established by a higher court of appeal. At the same time, the appellate process itself substantially mitigates the costs of adhering to an erroneous precedent, because it can always be addressed by the court of last resort. Thus, maintaining vertical stare decisis imposes few costs in terms of popular sovereignty and provides maximal rule of law benefits. [Lash, *Originalism, popular sovereignty, and reverse stare decisis*, 93 Va L R 1437, 1454 (2007).]

Moreover, to ignore the rule of stare decisis would inevitably grant to all lower courts, including trial courts, the authority to circumvent higher court rulings under the guise of anticipating that the higher court will change its position. This is a very dangerous, slippery slope. For these reasons, our Supreme Court and the United States Supreme Court have held that, even when a lower court correctly anticipates an overruling decision by the higher court, the inferior court must nonetheless leave the business of overturning Supreme Court precedent to the Supreme Court. Simply stated, "we cannot render decisions based on speculation regarding what the current membership of the Supreme Court may decide." *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 353 NW2d ___ (2009).

V. Conclusion

Mitchell and *Boyd* prohibit intermediate appellate courts from overturning higher court precedent. These holdings and principles apply, of course, with equal force to trial courts' obligation to conform to established precedent. *Mitchell* and *Boyd* clearly prohibit intermediate appellate courts from overruling Supreme Court precedent, even when the intermediate appellate court, as here, correctly anticipates that the Supreme Court would overrule its earlier ruling. *Mitchell, supra* at 369; *Boyd, supra* at 523. Therefore, the majority is without power or authority to overrule *Meredith*. Though the majority strains to justify its holding by tracing the "evolution" of the probate code and our courts' increasing approval of arbitration, it cites no legal authority that has changed the *Meredith* holding that testamentary capacity is not arbitrable. As much as the majority would like to distinguish or dilute the unequivocal holding of *Meredith* because it disagrees with its current viability, such attempts are unavailing. As our Supreme

[2] See, e.g., *State v Fornof*, 218 Ariz 74, 76; 179 P3d 954 (Ariz App, 2008); *State v Benton*, 168 Ga App 665, 667; 310 SE2d 243 (1983); *State ex rel Martinez v City of Las Vegas*, 135 N M 375, 381-382; 89 P3d 47 (2004); *Cannon v Miller*, 313 NC 324; 327 SE2d 888 (1985); *Fisher v Westmont Hospitality*, 935 SW2d 222, 224 (Tex App, 1996); *Roadcap v Commonwealth*, 50 Va App 732, 742-743; 653 SE2d 620 (2007).

Court made clear in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the Supreme Court may revisit its *own* decisions from time to time, yet it is equally clear, and dispositive here, that only the Supreme Court may do so. *Id*. And it hardly advances proper jurisprudence for our Court to overrule Supreme Court precedent while claiming not to do so. I believe it is imprudent for this Court to arrogate to itself powers it does not have.

For these reasons, I respectfully dissent from the majority's opinion and I would reverse the probate court's order that affirmed the arbitration award.

/s/ Henry William Saad