

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HANS FORNWALL, deceased.

UNPUBLISHED
December 20, 1996

KATHLEEN FORNWALL, Personal
Representative of the Estate of Hans Fornwall,

Appellee,

v

No. 184719
LC No. 28356

JERRIANNE HOLDER,

Appellant.

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Sixteen-year-old Christy Holder became pregnant by Hans Fornwall. Hans died in an automobile accident shortly before Christy gave birth. Paternity appears to have been uncertain, or at least unacknowledged, at the time of birth. The mother of Hans, appellee Kathleen Fornwall, filed a petition to commence probate proceedings and a publication notice, listing only herself and Hans' sister (her daughter) as heirs. Appellee was appointed personal representative of the decedent's estate in November 1993. However, even before this, appellee had entered into a contingency fee agreement with an attorney, who had pursued a wrongful death action on behalf of the decedent's estate. This wrongful death action had culminated in a settlement with a third-party liability insurer for the policy limit of \$100,000.

In May 1994, appellant Jerrienne Holder, the mother of Christy Holder and the limited guardian of Christy Holder's infant daughter, filed a petition to dismiss the probate proceedings because appellee Kathleen Fornwall had failed to disclose that Hans had left a child, that born to Christy Holder. Appellant requested that the appointment of appellee as personal representative of Hans' estate be declared null and void, that she be appointed personal representative, and that Christy's daughter be

*Circuit judge, sitting on the Court of Appeals by assignment.

declared the daughter and sole heir of the decedent. Appellant entered into a contingency fee agreement with respect to this action.

After a hearing, the probate court entered an order determining that Alicia Holder was the daughter and sole heir of the decedent and appointed appellant as successor personal representative of the estate. However, the court determined that there was no justification for voiding or dismissing the original petition or probate proceedings because there was no intentional or constructive fraud on the part of appellee in omitting Alicia as an heir on the probate petition because there was grounds for reasonable doubt whether the decedent was Alicia's father and because she commenced the probate proceedings in good faith. The court further determined that both the attorneys for the Fornwalls and the Holders were entitled to receive their one-third contingency fee as agreed. Finally, after deducting expenses and the one-third contingency fee for appellee's attorney, the probate court distributed eighty percent of the wrongful death proceeds to Alicia, and ten percent each to appellee and Heidi. Appellant now appeals as of right, and we affirm.

On appeal, appellant argues that the court clearly erred in finding that appellee did not know that the decedent potentially had a daughter by Christy Holder at the time she petitioned the probate court regarding his estate. Appellant further claims that because appellee knew of this daughter but omitted her name on the petition, she committed constructive fraud, which deprived the probate court of jurisdiction and required voiding appellees' appointment as personal representative.

This Court reviews a trial court's findings of fact under the clearly erroneous standard. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 99. Whether the original probate proceedings are voidable and whether the probate court had jurisdiction are questions of law. This Court reviews questions of law de novo. *Bruwer v Oaks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 183013, issued 8/23/96), slip opinion, p 2.

We find no clear error with respect to the probate court's finding that appellee committed no fraud. The question of whether appellee intended to deceive the probate court was essentially one of the appellee's credibility: while it was uncontested that appellee had reason to suspect that the decedent was the father of Christy's child, appellee testified that she asked the decedent, that he denied paternity, and that she believed him. The court chose to believe appellee. The court's conclusion that appellee acted in good faith is strengthened by the fact that she cooperatively submitted to testing to determine paternity. Moreover, evidence suggested that Christy had had a motive to fabricate the paternity of her child following the decedent's death, namely, social security benefits, meaning that appellee had had a legitimate basis for questioning Christy's assertion that the decedent fathered her child. Given the court's opportunity to assess the credibility of appellee as well as the other witnesses, we are not left with a definite and firm conviction that a mistake was made. *Hoffman, supra*, p 99.

We also believe that the court's finding that there was no constructive fraud on appellee's part was not clearly erroneous. Constructive fraud may exist where one makes a misrepresentation but lacks a purposeful design to defraud. *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176, 188; 362 NW2d 595 (1984). Prior to distribution of the wrongful death proceeds, appellee and her daughter (the decedent's sister) agreed to undergo blood testing to determine whether Christy's daughter was the decedent's child. Appellee stated that if Alicia, Christy's daughter, was the

decedent's daughter, she would not dispute Alicia receiving her share of the wrongful death settlement. Moreover, once Alicia was determined to be the decedent's daughter, appellee did not contest the court's distribution of eighty percent of the wrongful death proceeds to Alicia. Thus, the court did not clearly err in finding that there was no constructive fraud.

Appellant claims that the probate court lacked jurisdiction because appellee committed constructive fraud and that her appointment as personal representative should be voided because it prejudiced Alicia. Because we find no reason to overturn the court's ruling that no fraud or constructive fraud existed, there is no need for us to address this issue.

Moreover, appellant does not point to any authority to establish that appellee's appointment as personal representative should be voided; therefore, this Court need not address the issue. *In Re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). However, we note that, although Alicia was initially denied the opportunity to choose an attorney to represent the decedent's estate in the wrongful death suit because she was not recognized as a potential heir, appellant does not assert that appellee's attorney was inadequate or that the case was inappropriately handled or that the settlement obtained was inadequate. Once the probate court determined that Alicia was the decedent's daughter, appellant was appointed as successor personal representative of the estate and Alicia received eighty percent of the wrongful death proceeds. Thus, the court correctly determined that there was no justification for voiding or dismissing the original probate proceeding given that appellee "acted properly and obtained the maximum settlement obtainable for the estate." Accordingly, the probate court properly held that appellee commenced the probate proceedings in good faith and properly refused to void its appointment of appellee as personal representative of her son's estate. *Bruwer, supra*.

Appellant also argues that the probate court should have voided the contingency fee agreement that appellee entered into with her attorney, to represent the estate in the wrongful death matter and should have awarded only the value of his services in quantum meruit. First, recovery in quantum meruit under the facts of this case is clearly inappropriate. See *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329-330; 536 NW2d 886 (1995). Second, given that the probate court concluded that appellee acted in good faith throughout the proceedings below, we agree that there is no justification to disregard appellee's contract with her attorney, especially given that he quickly negotiated a settlement at the limit of the policy in issue.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power