STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of Bonita V. Harrington, Deceased.

HUGH KEGERREIS, Personal Representative of the Estate of Bonita V. Harrington, Deceased,

Plaintiff-Appellee,

v

LOIS M. SMIT,

Defendant-Appellant.

UNPUBLISHED
May 9, 2000

No. 216708
Kent Probate Court
LC No. 96-162471-DL

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and awarding attorney fees. Plaintiff filed a claim against defendant seeking recovery of $140,000 that he alleged defendant wrongfully misappropriated from decedent. We affirm the grant of summary disposition, but vacate the award of attorney fees and remand for further proceedings.

We review de novo a trial court decision granting summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* at 119-120. Whether plaintiff is entitled to an award of attorney fees is a legal question and we review questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

The first issue to be decided is whether the trial court erred by concluding that the creation of the joint bank accounts exceeded the scope of defendant's authority under the power of attorney. In the instant matter, the parties do not dispute that defendant used her power of attorney to change Bonita Harrington's existing individual bank accounts and certificates of deposit into joint accounts with defendant (valued at $140,000), and that she withdrew all funds from these accounts after Harrington died.

First, defendant contends that the trial court improperly concluded that paragraph 2.n. of the power of attorney prohibited defendant's creation of the joint accounts because no "gift" took place.[1] In support of this argument, defendant cites our Supreme Court's decision holding that the donor's creation of a joint bank account with right of survivorship is not "a common-law gift inter vivos because the donor retains an element of control and the power of revocation." *Jacques v Jacques*, 352 Mich 127, 134; 89 NW2d 451 (1958), citing *Rasey v Currey's Estate*, 265 Mich 597; 251 NW 784 (1933) and *In re Renz' Estate*, 338 Mich 347; 61 NW2d 148 (1953). The *Rasey* Court elaborated that the creation of the joint account did not "strip" the donor of "all ownership and dominion," as is necessary for a gift. *Rasey, supra* at 601-602. Thus, our Supreme Court placed particular emphasis on the donor's ability to revoke a joint bank account or withdraw all of the money from it in concluding that creation of a joint bank account is not a gift.

We would note that in the cases relied on by defendant, the decedents created the joint bank accounts. *Jacques, supra* at 128; *Rasey, supra* at 599; *Renz' Estate, supra* at 349. By way of contrast, in this case the decedent, Harrington, created *individual* bank accounts that *defendant* subsequently changed into *joint* accounts. Defendant's use of the power of attorney to make the individual accounts into joint accounts placed her in the unique position of being both the donor (as the person giving another – herself – an interest in) and the donee (as a person receiving an interest in) these accounts.

Moreover, the trial court found that decedent was "too frail and sickly to conduct her own banking and business matters." In fact, defendant testified that it was decedent's physical infirmities which prompted decedent to grant defendant the power of attorney.[2] The trial court concluded that decedent lacked the ability to even monitor her banking affairs, much less revoke the joint accounts or withdraw the proceeds, and considered it unlikely that decedent even knew about the creation of the joint accounts. It was not necessary, in order to provide for decedent's care and well-being, to change the accounts to joint accounts since defendant's power of attorney provided her with the authority to obtain money from decedent's bank accounts to pay any bills incurred in the course of providing for decedent's care. Thus, it appears on its face that defendant's act of creating the joint accounts was a benefit only to her.

In determining that the creation of a joint bank account was not a gift, our Supreme Court said, "The cardinal fact in this case is that decedent did undoubtedly knowingly create and maintain until his death a bank account made joint with right of survivorship." *Jacques, supra* at 136. Thus, to the extent that *Jacques* protects the donor's creation of joint bank accounts from being considered a gift, we agree with the trial court's decision to distinguish the instant matter. The facts indicate that decedent lacked both the practical and actual ability to challenge defendant's creation of the joint accounts

because of her health and lack of knowledge. Unlike *Jacques* and *Rasey*, defendant's act of creating the joint bank accounts had the effect of stripping decedent of "all ownership and dominion" because defendant effectively exercised complete control over the accounts. Therefore, we conclude that the trial court did not err in holding that defendant lacked authority under paragraph 2.n. to create the joint accounts.

Alternatively, we note that defendant testified several times that decedent instructed her to make the accounts joint as a "gift"[3] to defendant. As we have noted, paragraph 2.n. of the power of attorney empowered defendant to make gifts on behalf of Harrington "provided, however, that the amount transferred to any recipient during any calendar year should not exceed the amount required to qualify for a full applicable annual federal gift tax exclusion." Under 26 USC 2503(b)(1), the applicable annual federal gift tax exclusion was $10,000. If the trial court found defendant to be credible in this regard, it would have been required to conclude that, based on defendant's own testimony, paragraph 2.n. prohibited defendant's actions because the "gift" of the joint accounts was well in excess of $10,000. Thus, even under defendant's alternate version of the facts, the trial court correctly concluded that defendant lacked authority to create the accounts under paragraph 2.n.

Defendant also challenges the trial court's reliance on paragraph 2.o. to support its conclusion that defendant lacked authority to create the joint accounts.[4] As stated therein, the purpose of paragraph 2.o. is to place restrictions on defendant's powers under the instrument. While subparagraph 3 of paragraph 2.o. is very broad, subparagraphs 1 and 2 prohibit defendant from making changes that would affect the disposition of Harrington's assets on her death. A joint bank account with right of survivorship controls the disposition of any assets remaining therein at death just as surely as a will, codicil, will substitute, or beneficiary designation in a life insurance policy does. In fact, creation of joint bank accounts with right of survivorship is a form of will substitute. Indeed, joint tenancy with right of survivorship is commonly referred to as a "poor man's will." *Shubert v Schellie*, 143 Mich App 215, 219; 371 NW2d 914 (1985). The trial court's conclusion that defendant's creation of the joint bank accounts violated paragraph 2.o. of the power of attorney was correct because it violated both the specific prohibition against creation of a will substitute in subparagraph 1 and the more general prohibition in subparagraph 3 against causing Harrington's assets to be taxable to defendant after Harrington's death, including taxation of the income therefrom.

We further note that the trial court placed particular emphasis on defendant's "fiduciary duty" to decedent. The revised probate code, MCL 700.561(1); MSA 27.5561(1), states that a "fiduciary in his personal capacity shall not personally derive any profit from the purchase, sale, or transfer of any property of the estate." Defendant argues that the cited section of the probate code does not list, and therefore does not govern, a durable power of attorney. Contrary to defendant's argument, this Court has held that the grant of a general power of attorney forms a fiduciary relationship between the grantor and grantee. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1984). This Court has further held that a "fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of his agency." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), citing *Production Finishing Corp v Shields*, 158 Mich App 479, 486-487; 405 NW2d 171 (1987).

Any owner of a joint account may withdraw the entire account. *Treasury Dep't v Comerica Bank*, 201 Mich App 318, 325; 506 NW2d 283 (1993), citing *In re Wright Estate*, 430 Mich 463, 469, n 7; 424 NW2d 268 (1988) and *Sasanas v Manufacturers Nat'l Bank of Detroit*, 130 Mich App 812, 819; 345 NW2d 621 (1983). Thus, whether defined as a gift or as a transfer of title, defendant's creation of the joint accounts gave her the immediate right to withdraw any or all of the amounts contained therein. Creation of the joint accounts violated defendant's fiduciary duty to not derive a profit from the transfer of any estate property — regardless of whether the transfer took place at creation or upon the death of decedent. Paragraph 1 of the power of attorney states that defendant was "authorized to act for me under this Power of Attorney and shall exercise all powers in my best interests and for my welfare." As already noted, given defendant's power of attorney, the creation of the joint accounts was unnecessary to enable her to provide for Harrington's care. Accordingly, we conclude that whether based on the power of attorney's implicit prohibition or on statutory law, the trial court did not err by concluding that defendant was precluded by her fiduciary duty under the power of attorney from creating the joint accounts.

Next, defendant contends that the trial court erred by granting plaintiff's motion for summary disposition because there was an unresolved material issue of fact regarding whether it was decedent's intent to create the joint accounts. Defendant contends that decedent directed her to open the joint accounts as gifts. Paragraph 2 of the power of attorney authorized defendant to "perform any act and exercise any power with regard to my property and affairs that I could do personally, including exercising all of the specific powers set forth below." Defendant relies on the statutory presumption in MCL 487.703; MSA 23.303[5] to argue that the creation of the joint accounts was prima facie evidence of the depositors' intent to vest title to the proceeds of the accounts in each of them, and that plaintiff was then required to present reasonably clear and persuasive proof to the contrary in order to overcome the presumption. *In re Cullman Estate*, 169 Mich App 778, 786; 426 NW2d 811 (1988).

However, the statutory presumption is only effective "in the absence of fraud or undue influence." MCL 487.703; MSA 23.303; *Cullman Estate*, *supra* at 786. As discussed above, defendant had a fiduciary relationship with the decedent. "Once such a relationship is established and the fiduciary or an interest which he represents benefits therefrom, the law recognizes a presumption that he in whom trust was reposed exercised his influence unduly." *In re Wood Estate*, 374 Mich 278, 285; 132 NW2d 35 (1965), overruled on other grounds by *Widmayer v Leonard*, 422 Mich 280, 288-289; 373 NW2d 538 (1985). As this Court stated in *Habersack v Rabaut*, 93 Mich App 300, 305; 287 NW2d 213 (1979), the statutory presumption may be

> countered by another presumption which arose out of the instant factual situation. Where parties are involved in a confidential or fiduciary relationship and trust and confidence is reposed by one in the integrity and fidelity of another, and where the latter receives benefits as a result of such relationship, there arises a presumption that such benefits were procured by the exercise of undue influence. . . .
>
> Due to this latter presumption, the burden devolved upon the defendant to show, by a preponderance of the evidence, that undue influence was not operative. . . . In satisfying this burden, the defendant is benefited by a permissible inference that the

> joint bank account was intended to pass to the survivor. This permissible inference remains as a vestige of the rebutted statutory presumption. [Citations omitted.]

Thus, the statutory presumption in this case was rebutted by defendant's fiduciary relationship with Harrington, which itself gave rise to the rebuttable presumption of undue influence. In *Habersack, supra* at 306, this Court found that the presumption of undue influence was rebutted by evidence that the deceased had intended to disinherit her son, that the deceased was mentally alert when she opened the joint account, that the defendant had provided friendship and professional advice to the deceased, and that the defendant neither sought nor was paid for his professional services. Similarly, in *Conant Estate, supra* at 500, this Court found that the presumption of undue influence was rebutted by evidence that the decedent did not get along well with her children and did not intend to leave them much of her estate, that the decedent established the joint interest in her bank accounts while she was mentally alert, that the defendant provided both service and friendship to the decedent, and that the defendant never asked for reimbursement of the services she provided.

In this case, as observed above, it was *defendant* and not the *decedent* who established the joint bank accounts. Moreover, she did so at a time when it was at the least extremely difficult for Harrington to personally oversee her affairs.[6] Defendant clearly benefited from the creation of the joint accounts, and the benefit she derived was contrary to her fiduciary responsibilities. Further, there was testimony that Harrington was paid for services she rendered. In addition, as stated above, the power of attorney expressly prohibited defendant from making any gifts in excess of $10,000. As a result, even if decedent had directed defendant to create a joint tenancy in the accounts as gifts to defendant, the power of attorney did not empower defendant to carry out decedent's wishes. If decedent did not direct defendant to make the accounts joint, defendant was prohibited from doing so by paragraph 2.o. of the power of attorney. The result would be the same regardless of whether the decedent did or did not direct the creation of a joint tenancy in the accounts. We therefore conclude that the trial court correctly concluded that no material issue of genuine fact existed regarding Harrington's intent.

Finally, defendant argues that the trial court erred by awarding plaintiff $9,818.75 in attorney fees without providing any supporting authority. In his motion for summary disposition, plaintiff generally requested attorney fees and costs without citing a statute or court rule. The trial court concluded the summary disposition hearing by stating that attorney fees "are properly requested and should be granted as well." However, the trial court did not cite any statutory or court rule authority in support of this decision during the hearing, in its opinion, or in the addendum to its opinion.

We have held that, if authorized by statute or court rule, a trial court may award attorney fees as taxable costs. *Attorney General v Piller*, 204 Mich App 228, 232; 514 NW2d 210 (1994) (citing MCL 600.2405; MSA 27A.2405). Conversely, in the absence of such authority, attorney fees are not generally permitted. *Piller, supra* at 232, citing *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986).

In fact, this Court has recently considered a similar issue. In *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 373-374; 581 NW2d 781 (1998), the trial court awarded attorney fees to the prevailing party without providing any authority for its action. This Court recognized that the

traditional “American rule” requires each side to bear its own litigation

expenses, absent a statute or court rule exception. *Id.* at 373, citing *Bennett v Weitz*, 220 Mich App 295, 302; 559 NW2d 354 (1996). This Court therefore vacated the award of attorney fees and remanded the case for reconsideration of whether the plaintiff was entitled to such fees.

In the instant matter, we find that the trial court awarded attorney fees without specifying the authority supporting its decision. Accordingly, we conclude that the award of attorney fees should be vacated and the case should be remanded to permit the trial court to determine whether plaintiff is entitled to attorney fees and, if so, to specify the basis for such a determination and for the amount of any fees awarded. *Salesin, supra* at 373-374.

We affirm the trial court's order granting summary disposition, but vacate the trial court's award of attorney fees to plaintiff and remand for an explanation of the basis for granting plaintiff's motion for attorney fees. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] Paragraph 2.n. of the "General Durable Power of Attorney" executed by Harrington provided defendant with the power:

> To make gifts on my behalf to my children, including my agent, to my children's spouses and to my grandchildren; provided, however, that the amount transferred to any recipient during any calendar year shall not exceed the amount required to qualify for a full[y] applicable annual federal gift tax exclusion.

[2] Defendant testified that decedent walked with a walker, used "Ambucab" to get to her doctor's appointments, and used "Metrocab" to get to other destinations. Because her legs were swollen, it was difficult for the decedent to walk and she was essentially homebound. Defendant also testified that decedent did not accompany defendant when defendant conducted banking on decedent's behalf in either 1995 or 1996.

[3] This claim, of course, conflicts with her assertion that the creation of the joint accounts was not a gift. However, it is, as defendant maintains, possible for a decedent to intend a gift, but to provide the gift in the form of a joint account with right of survivorship in order to escape both gift tax limitations and inheritance tax limitations. The problem in this case is that such a "gift," as the trial court recognized, would run afoul of the restrictions contained in the power of attorney, and would also violate defendant's fiduciary duty. We further note that paragraph 2.n. restricts defendant's power to make gifts. Defendant was only authorized to make gifts to decedent's "children, including my agent," decedent's children's spouses, and her grandchildren. However, defendant testified that decedent had no children; thus, presumably there were no children's spouses or grandchildren. Moreover, defendant was a cousin, not a child. Thus, under the terms of the power of attorney, defendant could not make a gift to herself because she was not one of the decedent's children *and* because the transfer of the entire amount of the decedent's bank accounts (approximately $140,000) exceeded the applicable annual federal gift tax exclusion.

[4] Paragraph 2.o. restricted defendant's power as follows:

> Regardless of the above statements, my agent (1) cannot execute a will, a codicil, or any will substitute on my behalf; (2) cannot change the beneficiary on any life insurance policy that I own; and, (3) may not exercise any powers that would cause assets of mine to be considered taxable to my agent or to my agent's estate for purposes of any income, estate, or inheritance tax.

[5] MCL 487.703; MSA 28.303 provides in relevant part:

> The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

[6] The record establishes, and the trial court found, that the joint accounts were created three months prior to Harrington's death and that Harrington was, at the time, "an 87 year old woman living in her own home who had given the Power of Attorney to [defendant] for the very reason that she was too frail and sickly to conduct her own banking and business matters."