

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of RALPH LEO, Deceased.

KEITH J. O'LEARY, Personal Representative of
the Estate of RALPH LEO, Deceased,

Petitioner-Appellant,

v

GORDON A. SNAVELY, and Estate of J. BRUCE
DONALDSON,

Respondents-Appellees.

KEITH J. O'LEARY,

Petitioner-Appellee,

v

GORDON A. SNAVELY and GORDON A
SNAVELY, P.C.,

Defendants,

and

PATRICIA F. DONALDSON, Independent
Personal Representative of the Estate of J. BRUCE
DONALDSON and DONALDSON
ASSOCIATES, P.C.,

Defendants-Appellants.

UNPUBLISHED
February 19, 2002

No. 217752
Oakland Probate Court
LC No. 95-245450-SE

No. 223098
Oakland Circuit Court
LC No. 99-013706-NM

KEITH J. O'LEARY,

Petitioner-Appellee,

v

GORDON A. SNAVELY and GORDON A.
SNAVELY, P.C.,

Defendants-Appellants,

and

PATRICIA F. DONALDSON, Independent
Personal Representative of the Estate of J. BRUCE
DONALDSON, and DONALDSON
ASSOCIATES, P.C.,

Defendants.

In re Estate of RALPH LEO, Deceased.

KEITH J. O'LEARY, Personal Representative of
the Estate of RALPH LEO, Deceased,

Petitioner-Appellant,

v

COMERICA BANK, Personal Representative of
JOHN R. LEO, Deceased, GORDON A.
SNAVELY, Estate of J. BRUCE DONALDSON,
and PAUL E. DUFAULT,

Respondents-Appellees.

Before: Wilder, P.J., and Hood and Collins, JJ.

PER CURIAM.

No. 223099
Oakland Circuit Court
LC No. 99-013706-NM

Nos. 228595; 229065
Oakland Probate Court
LC No. 95-245450-SE

In Docket No. 217752, petitioner Keith J. O'Leary ("O'Leary"), personal representative of the Estate of Ralph Leo, deceased ("the estate") appeals by leave granted the January 14, 1999, opinion and order denying O'Leary's motion for relief from judgment. In Docket No. 223098, defendants Gordon A. Snavelly and Gordon A. Snavelly, P.C. (collectively, "Snavelly"), and in Docket No. 223099, defendants Patricia F. Donaldson, independent personal representative of the Estate of J. Bruce Donaldson, and Donaldson Associates, P.C. (collectively, "Donaldson"), appeal by leave granted the September 2, 1999, order denying, in large part, their motions for summary disposition. In Docket No. 228595, O'Leary appeals by leave granted the June 13, 2000, order dismissing O'Leary's motion to vacate a partnership settlement. In Docket No. 229065, O'Leary appeals by leave granted the June 27, 2000, order granting respondent Paul E. Dufault's motion for summary disposition pursuant to MCR 2.116(C)(7) on O'Leary's motion to set aside the order approving Dufault's estate account. We affirm the probate court orders in Docket Nos. 217752, 228595, and 229065, and reverse the circuit court order in Docket Nos. 223098 and 223099.

All of these consolidated cases arise out of the same factual circumstances. In September 1995, Ralph Leo died of natural causes. He was unmarried. O'Leary, who lived in Missouri and who claimed to be Ralph's biological child, as well as Ralph's siblings, claimed an interest in Ralph's estate. O'Leary traveled to Michigan, paid Gordon A. Snavelly a retainer, and entered into an hourly fee agreement with Snavelly and J. Bruce Donaldson, whom Snavelly engaged as co-counsel. Snavelly opened an estate in the probate court and Snavelly and Donaldson obtained an order allowing them to retrieve DNA evidence from Ralph's body at the funeral home. Subsequently, the parties entered into a series of contingent fee agreements. The first contingent fee agreement stated that O'Leary would pay Snavelly and Donaldson twenty percent of the first million dollars recovered from the estate and five percent of any amounts recovered over one million.

On September 21, 1995, the probate court appointed Oakland County Public Administrator Paul E. Dufault temporary personal representative of Ralph's estate. A dispute arose concerning the portion of the estate that involved Ralph's business partnership, known as Northern Construction Company, with his brother, John Leo. John's attorney, David Kull, sent a letter to Dufault proposing a buyout of Ralph's share of the partnership pursuant to an agreement from the 1950's. In February 1996, the probate court appointed Dufault as negotiator, "to seek to establish through negotiations between the respective parties, the value of certain partnership interests of the decedent's estate." The court further ordered that "[f]ailing such an agreement, [Dufault] is empowered to arbitrate such matter."

In May 1996, Snavelly and Donaldson entered into a second contingent fee agreement with O'Leary that provided, among other things, that Snavelly would become personal representative of the estate if O'Leary were declared the sole heir, Snavelly would be paid an hourly wage for his services as personal representative, and Snavelly and Donaldson would receive thirty percent of the value of all assets recovered in excess of John Leo's original buyout offer. Snavelly sent O'Leary a letter confirming that the second contingent fee agreement would be duplicated "in mirror form" between Snavelly, as personal representative of the estate, and Snavelly and Donaldson, as attorneys, once Snavelly was appointed personal representative.

Also in May 1996, the probate court entered an order declaring O'Leary the sole heir of the estate, after DNA testing revealed an extremely high probability that O'Leary was Ralph's

son, and the court appointed Snavelly personal representative of the estate. Subsequently, Snavelly, as personal representative, executed a third contingent fee agreement, this one between Snavelly, as personal representative, and Snavelly and Donaldson as attorneys for the estate. This third agreement mirrored the second contingent fee agreement. Snavelly and Donaldson filed a petition to authorize the retention of special counsel to advise the estate, negotiate on its behalf, and conduct litigation growing out of the partnership dispute, and to allow the personal representative to enter into the fee agreement between the estate and special counsel. O'Leary received the petition and fee agreement and signed a document stating that he consented to "entry of an order allowing the petition and relief prayed, including the authorization of the underlying fee agreement." The probate court entered an order on June 18, 1996, approving the retention of special counsel and the fee agreement.

In April 1997, Dufault filed a petition for court approval of a settlement of the partnership dispute. Dufault attached a negotiator's report with exhibits. Snavelly consented to the partnership settlement on behalf of the estate. Also in April 1977, Snavelly filed a petition to authorize payment under the third contingent fee agreement. On April 28, 1997, the court entered an order approving the partnership agreement and adopting the negotiator's report. The court also entered an order authorizing payment under the third contingent fee agreement to Snavelly and Donaldson as special counsel of the estate.

In December 1997, O'Leary filed a petition in which he asked the court to (1) order limited supervision of the estate; (2) remove Snavelly as personal representative, (3) appoint a successor personal representative, and (4) impose a surcharge and compel disgorgement of fees by Snavelly and Donaldson. O'Leary claimed that excessive fees had been paid to Snavelly and Donaldson, that Snavelly failed to disclose conflicts of interest and administrative problems with the estate and had failed to pay the Michigan Estate Tax, and that the partnership settlement was inadequate or improper. The probate court entered an order on January 5, 1998, removing Snavelly and appointing O'Leary as successor personal representative. The order provides that "the fact of Gordon A. Snavelly's removal by the court as independent personal representative shall be without prejudice to his right to assert defenses in this matter. There has been no finding of wrongdoing." The order did not dispose of O'Leary's request for surcharge and disgorgement of fees.

Docket No. 217752

In April 1998, O'Leary filed a motion seeking partial summary disposition with regard to contingent fee agreements pursuant to MCR 2.116(C)(10), and to set aside the June 18, 1996, order authorizing retention of special counsel and approving the third contingent fee agreement, and the April 28, 1997 order approving payment to counsel under the fee agreement (collectively, the "special counsel orders"), pursuant to MCR 2.612(C). O'Leary claimed that Donaldson and Snavelly were guilty of fraud on him and the court. He asserted that Snavelly and Donaldson obtained orders from the court without full disclosure to the court of the multiple contingent fee agreements, that they failed to disclose the conflict of interest that arose because of the multiple contingent fee agreements, and that they failed to disclose the impact of the fee agreements on the valuation of the estate. O'Leary further alleged that the fees charged by Snavelly and Donaldson were unreasonable and clearly excessive, and that their payments to themselves from the estate were improperly made.

After conducting an evidentiary hearing on the fraud on the court allegations, the probate court denied plaintiff's motion for relief from judgment. The court held that the motion was untimely and that O'Leary failed to demonstrate the existence of extraordinary circumstances justifying relief. The court also held that to grant relief would detrimentally affect the rights of Donaldson's estate.¹

In Docket No. 217752, O'Leary first argues that the probate court erred in finding that his allegations of fraud by Snively and Donaldson were controlled by MCR 2.612(C)(1)(c) and thus were time-barred under the one-year limit of MCR 2.612(C)(2). This Court reviews de novo a lower court's interpretation and application of a court rule. *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000).

MCR 2.612(1) provides, in pertinent part, as follows:

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

* * *

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

* * *

(f) Any other reason justifying relief from the operation of the judgment.

As the probate court noted in its January 14, 1999 opinion, O'Leary argued that he was entitled to relief under MCR 2.612(C)(1)(f), not MCR 2.612(C)(1)(c). It was in the process of evaluating O'Leary's motion under the three-prong test articulated in *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1998),² that the probate court concluded under the first

¹ J. Bruce Donaldson died on November 19, 1998, and his estate was substituted as a party.

² In *McNeil*, this Court noted that MCR 2.612(C)(1)(f) was formerly GCR 1963, 528.3(6) and held that

[t]hree requirements must be fulfilled before relief may be granted under subsection (6): (1) The reason for setting aside the judgment must not fall under subrules (1) through (5) [(a) through (e) under MCR 2.612(C)(1)(f)]; (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside; and (3) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice. [*Id.* at 497, citing *Lark v The Detroit Edison Co*, 99 Mich App 280, 284; 297 NW2d 653 (1980).]

prong of that test that O’Leary’s motion could have been brought under MCR 2.612(C)(1)(c), which would require that it be filed within the one-year requirement of MCR 2.612(C)(2):

The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken.

We conclude that to the extent that the probate court found that O’Leary’s claim falls within MCR 2.612(C)(1)(c), it erred. The grounds for relief stated in MCR 2.612(C)(1)(c) are “[f]raud, (intrinsic or extrinsic), misrepresentation, or other misconduct *of an adverse party*.” (Emphasis added.) Although this dispute has turned into one in which O’Leary and his former attorneys are adverse parties, at the time of the alleged fraudulent conduct, those attorneys were not adverse to O’Leary. While the court rule does not define what constitutes an “adverse party,” in *Coates v Drake*, 131 Mich App 687, 691; 346 NW2d 858 (1984), this Court indicated that where misconduct by the plaintiff’s own attorney was alleged, former GCR 1963, 528.3(3) (now MCR 2.612(C)(1)(c)) would not apply to a motion for relief from judgment, but the motion could be brought under former GCR 1963, 528.3(6) (now MCR 2.612(C)(1)(f)). See also *McKinney v Boyle*, 404 F2d 632, 634 (CA 9, 1968).

Thus, to the extent that the probate court found that the first prong of the *McNeil* test was not met because O’Leary’s reason for setting aside the judgment falls under subrule (C)(1)(c), and that under subrule (C)(2), plaintiff’s motion was time-barred, it erred. However, as discussed below, the probate court did not abuse its discretion in determining that extraordinary circumstances mandating the setting aside of the judgment did not exist. Accordingly, the court’s error with regard to subrule (C)(1)(c) was harmless.

O’Leary next argues that the probate court erred in concluding that there were no extraordinary circumstances mandating the setting aside of the challenged orders to achieve justice and thus denying him relief under MCR 2.612(C)(1)(f). O’Leary contends that relief is required because testimony and evidence presented at the evidentiary hearing show that Snavelly and Donaldson committed fraud on both him and the probate court. A trial court’s decision to grant relief under MCR 2.612(C)(1)(f) is discretionary and will not be disturbed absent an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

A fraud is perpetrated upon a court when some material fact is concealed from that court or when some material misrepresentation is made to that court. *Banner v Banner*, 45 Mich App 148, 154; 206 NW2d 234 (1973). Not every concealment or misrepresentation of fact that might be called fraudulent will justify setting aside a judgment. *Baum v Baum*, 20 Mich App 68, 72; 173 NW2d 744 (1969). The concealment or misrepresentation must be material to the determination reflected by the judgment. *Id.* Thus, if the determination of the court would not have been different had the facts in question been truthfully represented, the judgment should not be set aside. *Id.*; see also *Parlove v Klein*, 37 Mich App 537, 545; 195 NW2d 3 (1972).

Here, the probate court conducted an evidentiary hearing limited only to O’Leary’s allegations of fraud on the court by Snavelly and Donaldson. The court concluded after at least four full days of testimony and over seventy exhibits submitted by O’Leary, including all four retainer/fee agreements, that it could discern no extraordinary circumstances requiring relief

from judgment. We have thoroughly reviewed the record and find no abuse of discretion. Further, the judge who presided over the evidentiary hearing was the same judge who presided over the estate proceedings from their inception and upon whom the fraud allegedly was perpetrated. That judge would be in the best position to determine, after four days of testimony, whether she was in possession of all material information when she signed the orders in question, whether anyone wrongfully withheld information from her to obtain a result in their favor, or whether she would have ruled differently if she had the information allegedly withheld from her at the time she signed the orders. See *Baum, supra*; *Parlove, supra*.

In light of our resolution of the above issue, we need not address O’Leary’s remaining issues in Docket No. 217752.

We affirm the probate court’s January 14, 1999, order denying O’Leary’s motion for relief from judgment.

Docket Nos. 223098 and 223089

In March 1999, O’Leary, individually, filed a complaint in Oakland Circuit Court against Donaldson and Snavelly. O’Leary alleged legal malpractice, unjust enrichment, breach of fiduciary duty, silent fraud, and interference with expected inheritance. Defendants moved for summary disposition under MCR 2.116(C)(4), (5), (6), (7), (8), and (10). In a September 2, 1999, opinion and order the circuit court denied, for the most part, defendants’ motions. The court granted summary disposition under MCR 2.116(C)(8) only on the negligent interference with inheritance claim and the “other matters” of fraud not specifically pleaded.

In Docket Nos. 223098 and 223089, defendants Snavelly and Donaldson argue that the circuit court erred in denying their motion for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction). Whether a trial court has subject-matter jurisdiction over a claim is a question of law that this Court reviews de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). In this case, whether the circuit court has jurisdiction of plaintiff’s claims is a question of statutory interpretation. Statutory interpretation also is a question of law that is considered de novo on appeal. *Oakland Co Bd of Rd Comm’rs v Michigan Property & Casualty Guaranty Ass’n*, 456 Mich 590, 610; 575 NW2d 751 (1998). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1997). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Our Legislature is presumed to have intended the meaning it plainly expressed. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).

While circuit courts are courts of general jurisdiction, MCL 600.605; *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998), the probate court is a court of limited jurisdiction, deriving all of its power from statutes. *Id.* at 611. At the time the circuit court

considered plaintiff's motion, § 21 of the Revised Probate Code (RPC), MCL 700.1 *et seq.*,³ provided for the jurisdiction of the probate court as follows:

The court has exclusive legal and equitable jurisdiction of all of the following:

(a) Matters relating to the settlement of the estate of a deceased person, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including but not limited to, the following proceedings:

(i) The internal affairs of the estate.

(ii) Estate administration, settlement, and distribution.

(iii) Declaration of rights involving estates, devisees, heirs, and fiduciaries.

(iv) The construction of a will.

(v) The determination of heirs.

(b) Proceedings concerning the validity, internal affairs, and settlement of trusts, the administration of trusts, and the declaration of rights involving trusts, trustees, and beneficiaries of trusts, including, but not limited to, the following proceedings to:

(i) Appoint or remove a trustee.

(ii) Review the fees of a trustee.

(iii) Require, hear, and settle interim or final accounts.

(iv) Ascertain beneficiaries.

(v) Determine any question arising in the administration or distribution of any trust, including questions of construction of wills and trusts; instruct trustees, and determine relative thereto the existence or nonexistence of an immunity, power, privilege, duty, or right.

(vi) Release registration of a trust.

³ The Revised Probate Code was repealed by 1998 PA 386, effective April 1, 2000. MCL 700.21 can now be found at MCL 700.1302 in the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*

(vii) Determine an action or proceeding involving settlement of an inter vivos trust as provided in Act No. 185 of the Public Acts of 1966, being sections 555.81 to 555.84 of the Michigan Compiled Laws.

(c) Proceedings concerning guardianships, conservatorships, and protective proceedings.

(d) Proceedings to review and settle the accounts of a fiduciary as defined in section 5, and to order, upon request of an interested person, instructions or directions to a fiduciary, concerning an estate within the court's jurisdiction. [MCL 700.21.]

Relying on *Manning, supra*, defendants contend that under the plain language of MCL 700.21(a), the probate court had exclusive jurisdiction of O'Leary's claims because they all relate to the settlement of the estate, specifically, the administration and distribution of the estate, and that any damage claimed by O'Leary would be damage to the estate, not to O'Leary individually. In *Manning*, the plaintiffs appealed a circuit court order dismissing their claims against the trustee of a trust and his attorney for malpractice, negligent and intentional infliction of emotional distress, unjust enrichment, tortious interference, and breach of contract. *Id.* at 610. The plaintiffs argued that the circuit court erred in finding that the probate court had exclusive jurisdiction of plaintiffs' emotional distress and malpractice claims simply because the cause of action arose out of the administration of a trust. *Id.* This Court disagreed, noting that under § 21 of the Revised Probate Code (RPC), MCL 700.1 *et seq.*, the probate court had exclusive jurisdiction over proceedings concerning the administration of and other matters pertaining to trusts. *Id.* at 611-612.

In determining that it would retain jurisdiction of O'Leary's malpractice action, the circuit court in this case distinguished *Manning* on the basis that it involved a trust rather than matters relating to the settlement of the estate of a deceased person. The court also cited *York v Isabella Bank & Trust*, 146 Mich App 1; 379 NW2d 448 (1985) in support of its decision, noting that O'Leary was suing for injuries running to him individually.

In *York*, the plaintiff filed a complaint in the circuit court against the defendant bank, the personal representative of her deceased husband's estate, and the person who had been appointed by the bank to act as fiduciary, claiming breach of fiduciary duty, negligence, and intentional infliction of emotional distress. The circuit court found that the probate court had exclusive jurisdiction over the plaintiff's claims and granted defendants' motion for accelerated judgment. *Id.* at 3. This Court held that the probate court had exclusive jurisdiction of the breach of fiduciary duty and negligence claims, explaining as follows:

Plaintiff's first cause of action alleges that defendants owed her a fiduciary duty and that the duty was breached. However, the factual allegations in support of this claim all pertain to injuries which would run to the estate. In other words, poor estate administration, a failure to investigate and/or recover missing assets, and the undervaluation or improper advertising of estate property constitute injuries which directly affect the estate and are integral to the settlement of the estate. Accordingly, we believe that the probate court had exclusive jurisdiction

and that accelerated judgment was properly granted with respect to the breach of fiduciary duty claim.

Similarly, we believe that the negligence cause of action was within the exclusive jurisdiction of the probate court. The sale and recovery of estate assets are clearly matters which relate to the settlement of the estate. [*Id.* at 4-5.]

This Court further found, however, that the circuit court would have jurisdiction of the intentional infliction of emotional distress claim because the injury alleged in that claim would run directly to the plaintiff and not to the estate, and that the claim “was not a ‘matter directly relating to the settlement of the estate.’” *Id.* at 6. This Court noted that “[i]n order to prevail on this claim, plaintiff need not prove, for example, that the estate was deprived of assets or that estate assets were undersold.” *Id.*

The *Manning* court distinguished *York*, noting that *York* was decided before certain amendments to MCL 700.21. *Manning, supra* at 615, n 4. At the time *York* was decided, MCL 700.21 provided, with regard to estates, as follows:

The court has exclusive jurisdiction of all of the following:

(a) Matters relating to the settlement of the estate of a deceased person, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled without the state leaving an estate within the county to be administered.

The 1989 amendment to the RPC, 1989 PA 69, specified in greater detail the jurisdiction of the probate court with regard to estates. The amended statute specifically provided that the probate court had jurisdiction of “[t]he internal affairs of the estate” as well as “[e]state administration, settlement, and distribution.” MCL 700.21(a)(i) and (ii).

Given the breadth of the *Manning* holding and the change in language in the RPC since *York*, we conclude that the circuit court erred in retaining jurisdiction of O’Leary’s claims. Just as malpractice and other tort claims against a trustee of a trust fall within the exclusive jurisdiction of the probate court because such claims involve the administration or distribution of a trust, under MCL 700.21(a)(i) and (ii), O’Leary’s claims against the attorneys and personal representative of the estate, who were instrumental in the administration and distribution of the estate, fall within the exclusive jurisdiction of the probate court. This conclusion is also supported by *York*. As noted above, in finding that the plaintiff’s claim for intentional infliction of emotional distress was not within the exclusive jurisdiction of the probate court, the *York* Court observed that the plaintiff need not show damage to the estate in order to prevail on her intentional infliction of emotional distress claim. *York, supra* at 6. Here, in order to prevail on his claims in the circuit court action, O’Leary would necessarily have to show damage to the estate.

We conclude, therefore, that because the probate court had exclusive jurisdiction of O’Leary’s claims, the circuit court erred in failing to grant defendants summary disposition under MCR 2.116(C)(4). In light of this determination, we need not address whether the circuit

court erred in failing to grant summary disposition under the remaining subsections of MCR 2.116(C) argued by defendants.

We reverse the circuit court's September 2, 1999, order, and remand for entry of an order granting summary disposition to defendants. We do not retain jurisdiction.

Docket No. 228595

On October 12, 1999, O'Leary moved to vacate the April 28, 1997, partnership settlement, alleging that he had newly discovered evidence of collusion, conflict of interest, misrepresentation, and nondisclosure by Snavelly, Donaldson, Dufault, and John Leo. O'Leary alleged that Dufault's appointment as negotiator/arbitrator of the partnership dispute was the result of collusion among Dufault, Snavelly, and Donaldson; that Dufault's service as negotiator/arbitrator of a dispute concerning an estate that he had represented as temporary personal representative constituted a conflict of interest; and that Snavelly, Donaldson, and Dufault manipulated the partnership dispute negotiations so that John Leo received a windfall in the eventual settlement and so that payment of federal taxes on the partnership properties could be deferred to ensure payment of their respective fees, which O'Leary claimed were excessive. O'Leary contended that through Kull's acquiescence to the "scheme" developed by Snavelly, Donaldson, and Dufault, John was a partner to any wrongdoing. In an order dated June 13, 2000, the probate court dismissed O'Leary's motion to vacate the settlement agreement.

In Docket No. 228595, O'Leary argues that the probate court erred in denying him relief under MCR 2.612(C)(2) without conducting an evidentiary hearing. Again, this court reviews a trial court's decision on a motion for postjudgment relief for an abuse of discretion. *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 354; 554 NW2d 43 (1996).

Petitioner brought his motion to vacate the partnership settlement under MCR 2.612(C)(3), which provides as follows:

This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceedings; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

However, in *Kiefer v Kiefer*, 212 Mich App 176, 182; 536 NW2d 873 (1995), this Court held that the one-year time limit provided for in MCR 2.612(C)(2) applies to a motion for relief from judgment where fraud on the court is alleged (MCR 2.612(C)(1)(c)) and that under MCR 2.612(C)(3), the one-year time limit does not apply only where the plaintiff brings an *independent action* that claims that there was a fraud on the court. Here, O'Leary did not bring an independent action; thus, because his claim was not brought within the one-year time limit, his request for relief would be barred under MCR 2.612(C)(2).

It appears from the probate court's opinion that the court tacitly acknowledged that O'Leary could not properly seek relief from the partnership settlement under subrule (C)(3) unless he filed an independent action, but went on to address the motion as if it had been brought under subrule (C)(1)(f) and determined that there were no circumstances warranting setting aside the partnership settlement. We find no abuse of discretion in that regard. In making its ruling

the probate court observed that on two other occasions the probate court, albeit a different judge, ruled on O'Leary's substantive claim that the partnership settlement and distribution of properties was unfair and should be set aside. In 1998, O'Leary sought relief from the partnership settlement on the grounds that it was obtained by fraud or entered into based on mistake. In an order dated June 10, 1998, the court denied O'Leary's requested relief and subsequently denied his motion for reconsideration. O'Leary failed to properly appeal the June 10, 1998 order.

After reviewing the lower court record, we conclude that O'Leary has failed to show that the alleged newly discovered evidence would affect the validity of the partnership settlement. Accordingly, the probate court did not abuse its discretion in denying O'Leary's motion for postjudgment relief without holding an evidentiary hearing. *Hadfield, supra*. Again, where alleged fraud would not have affected the court's decision, an evidentiary hearing is not necessary. *Parlove, supra; Baum, supra*.

We affirm the probate court's June 13, 2000 order.

Docket No. 229065

On April 2, 1999, O'Leary moved in probate court to set aside the February 5, 1997, order approving the estate account signed by Dufault, alleging that there had been a fraud on the court by a fiduciary. O'Leary alleged that the "amended inventory and final account" dated February 4, 1997, that Dufault presented to the probate court on February 5, 1997, was identical to the document dated June 6, 1996, that was previously submitted, and that Dufault simply changed the date but did not disclose the date change because it would have alerted O'Leary to the fact that the Michigan estate tax had not been paid. O'Leary also alleged that Dufault's legal assistant, Janice Thornton, maintained both Dufault's and Snavelly's records for the estate, and that Thornton's knowledge of the Michigan estate tax date was imputed to Snavelly and Dufault. O'Leary further claimed that in the account filed with the court, Dufault used overstated federal estate tax values to set the probate values for the estate's properties and that these overstated values were used by Snavelly and Donaldson to determine their contingent fee for their work in the partnership dispute.

Dufault moved for summary disposition pursuant to MCR 2.116(C)(7) on the ground that O'Leary's motion was time-barred. In its June 27, 2000, opinion and order, the probate court agreed that since O'Leary's claim could have been brought based on fraud, misrepresentation, or other misconduct of an adverse party, it was barred by the one-year rule of MCR 2.612(C)(2). The court also noted that O'Leary failed to properly appeal the February 5, 1997, probate order, that he failed to demonstrate harm through Dufault's actions regarding the changed date on the final account, and that O'Leary's claim that he was not provided with notice of the unpaid estate tax was a matter relating to the pending malpractice action. The probate court granted Dufault's motion for summary disposition and dismissed O'Leary's petition to set aside the order approving Dufault's final account of the estate.

In Docket No. 229065, O'Leary first argues that the probate court erred in finding that Dufault was an adverse party for purposes of MCR 2.612(C)(1)(c), and that because his motion could have been brought under that rule, the motion, which was not brought within the one-year limit, was time-barred under MCR 2.612(C)(2). We agree. Dufault, like Snavelly and Donaldson

in Docket No. 217752 above, was not an adverse party for purposes of MCR 2.612(C)(1)(c). Although Dufault was not O'Leary's attorney, as temporary personal representative to the estate, he owed fiduciary duties to the estate under MCL 700.501 (now MCL 700.1212). Accordingly, the probate court erred in finding that Dufault was an adverse party for purposes of MCR 2.612(C)(1)(c). However, because, as discussed below, the probate court properly denied O'Leary's motion under MCR 2.612(C)(1)(f), that error was harmless.

O'Leary next argues that relief should have been granted under MCR 2.612(C)(3) because Dufault committed fraud on the court. The probate court did not address whether O'Leary's motion could be considered under MCR 2.612(C)(3), but only discussed its propriety under MCR 2.612(C)(1)(f). In any event, as discussed under Docket No. 228595 above, pursuant to the rule established in *Kiefer*, the court could not properly have considered O'Leary's motion for relief from judgment under MCR 2.612(C)(3) because he did not file an independent action.

Finally, O'Leary contends that the probate court erred in dismissing, without conducting an evidentiary hearing, O'Leary's motion for relief under MCR 2.612(C)(1)(f) from the order allowing Dufault's final account. Again, however, after reviewing the lower court record and the allegedly newly discovered evidence of collusion among Snaveley, Donaldson, and Dufault, we conclude that O'Leary has failed to show that an evidentiary hearing is necessary. Some of the evidence that O'Leary claims shows collusion was available to O'Leary long before the probate court ruled on O'Leary's motion for relief from the order allowing the account, some of it was before the court when the court ruled on O'Leary's motion, and O'Leary has failed to show that the remaining evidence affects the validity of the final account. Again, where alleged fraud would not have affected the court's decision, an evidentiary hearing is not necessary. *Parlove, supra; Baum, supra*. We conclude, therefore, that the trial court did not abuse its discretion in denying O'Leary relief from judgment.

We affirm the probate court's June 27, 2000 order.

In sum, we affirm the probate court orders in Docket Nos. 217752, 228595, and 229065, and reverse the circuit court orders in Docket Nos. 223098 and 223099. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Harold Hood

Collins, J. did not participate.