

STATE OF MICHIGAN
COURT OF APPEALS

VINYL TECH WINDOW SYSTEMS,

Plaintiff-Appellee,

UNPUBLISHED
November 1, 2011

V

No. 295778
Oakland Circuit Court
LC No. 2007-081906-CZ

VALLEY LAWN MAINTENANCE COMPANY,
PAMELA BLODGETT, and WILLIAM L.
BLODGETT,

Defendants-Appellants.

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff's motion for liquidation and delivery of individual retirement account (IRA) funds. We affirm.

Defendant, Pamela Blodgett, was hired as the comptroller of plaintiff in 1993, a job that required her to manage the company's finances and taxes. At defendant Pamela Blodgett's request, defendant Valley Lawn Maintenance Company (VLM), a company operated by her husband, defendant William L. Blodgett, was retained to provide lawn service for plaintiff. However, defendant Pamela Blodgett embezzled funds from plaintiff and deposited the monies in VLM's accounts.¹ In March 2007, plaintiff filed a multi-count complaint seeking to recoup the funds stolen from plaintiff. Additionally, the trial court ordered defendants to disclose their assets and enjoined them from transferring funds. The trial court granted plaintiff's motion for summary disposition and granted judgment in the amount of \$1,720,000 against defendants.

Plaintiff's attempts to recover the judgment were futile, and plaintiff alleged that defendants failed to provide post-judgment discovery and violated the terms of the preliminary injunction. Consequently, plaintiff sought to liquidate IRA funds held by the individual defendants. In response, defendants asserted that the IRA funds were exempt from collection. The trial court granted the motion to liquidate the accounts, holding:

¹ Defendant Pamela Blodgett was convicted of five counts of embezzlement, MCL 750.174.

There is no legal basis for protecting Defendants' multiple Individual Retirement Funds (hereafter referred to as IRAs). Plaintiff has established that these IRAs were created with partial proceeds of partial lump sum pension distributions elected upon Defendant William Blodgett's early retirement, and as such these funds are not protected from execution on this judgment which was entered for breach of fiduciary duties, fraud and embezzlement. IRAs are specifically excepted from ERISA's anti-alienation provision. *Selflube, Inc v JJMT*, 278 Mich App 298, 316 (2008); 29 USC § 1051[6]. Further, ERISA also preempted any Michigan law with regard to the IRAs. *Lampkins v Golden*, 28 Fed.APPx. 409 (6th Cir. 2002)[unpublished].

Lastly, this Court finds that any protection afforded the IRAs has been lost by Defendants Blodgetts' self dealing and disregard for this Court's orders. [Footnotes omitted].

In a footnote, the circuit court made the following factual findings:

Plaintiff has provided evidence that defendants cashed out an AT&T 401 account worth \$100,000 and transferred the bulk of those funds to a Florida trust. Additionally, over \$400,000 which Plaintiff states was located though [sic] Advance Capital Management, Inc. and was neither an AT&T SSP nor during the pertinent time period, a protected pension, had been placed through a Self Directed IRA Trust into several IRAs.

Defendants filed a claim of appeal from the trial court's opinion and order and requested a stay of the trial court's order. This Court temporarily entered a stay and ordered the trial court to make special findings regarding the nature of the retirement funds in question and to determine "whether those funds [were] exempt from collection on execution pursuant to MCL 600.6023(1)(k)."² In a written opinion and order, the trial court delineated the various transfers of monies from various IRA accounts made by the individual defendants. The trial court then ruled:

This court finds that these funds are not exempt from collection or execution under MCL 600.6023(1)(k) because the [individual defendants] engaged in willful acts of fraud and theft in the underlying civil and criminal actions; because the IRAs now at issue were created by William Blodgett's election of a lump sum pension pay out through his Self Directed IRA Trust upon his voluntary early retirement and such self-dealing is not protected by this statute; and because to the extent that the [individual defendants] would be protected by the provisions of MCL 600.6023(1)(k), that protection would be preempted by ERISA, 29 USC 1144(a).

² *Vinyl Tech Window Systems v Valley Lawn Maintenance Co*, unpublished order of the Court of Appeals, entered January 27, 2010 (Docket No. 295778).

Lastly, this court would note that these IRAs were created in violation of this court's orders.

Defendants appeal as of right. On appeal, defendants do not contest the entry and amount of the judgment entered following the dispositive motion decision, but rather asserts that the trial court erred by ordering the liquidation of IRA funds. We disagree.

Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute's plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76. The trial court's factual findings underlying its legal holdings are reviewed for clear error. MCR 2.613(C); *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *FACE Trading, Inc v Dep't of Consumer & Industry Servs*, 270 Mich App 653, 661; 717 NW2d 377 (2006). The burden of proving entitlement to an exemption rests with the party seeking the exemption. See *Davidson v Secretary of State*, 365 Mich 162, 164; 112 NW2d 106 (1961); *Michigan Tool Co v Employment Security Comm*, 346 Mich 673, 680; 78 NW2d 571 (1956). When a party fails to meet its burden of proof in demonstrating entitlement to an exemption, the exemption should be denied. *Covert Twp Assessor v State Tax Comm*, 407 Mich 561, 618; 287 NW2d 895 (1980) (opinion by MOODY, JR., J.); *Michigan Consol Gas Co v Austin Twp*, 373 Mich 123, 144; 128 NW2d 491 (1964).

To preserve an evidentiary issue for appellate review, a party must raise the issue in the lower court and the trial court must address it. MRE 103(a)(2); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368; 533 NW2d 373 (1995). Before evidence is admitted, the item must be authenticated; specifically, the trial court must find that the matter in question is what the proponent claims. *Haberkorn*, 210 Mich App at 366. When there is no offer of proof regarding the substance of excluded testimony, appellate review of the admissibility of the evidence is precluded. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 94; 697 NW2d 558 (2005). When a party fails to produce pertinent evidence within its control, there is a presumption that the evidence, if produced, would be contrary to the withholding party's position. *Devlin v Kaplanis*, 43 Mich App 519, 524-525; 204 NW2d 543 (1972).

MCL 600.6023 governs property exempt from levy and sale under execution, and provides in relevant part:

(1) The following property of the debtor and the debtor's dependents shall be exempt from levy and sale under any execution:

(k) An individual retirement account or individual retirement annuity as defined in section 408 [26 USC 408] or 408a of the internal revenue code of 1986

and the payments or distributions from such an account or annuity. . . . This exemption does not apply to an individual retirement account or individual retirement annuity to the extent that any of the following occur:

(iii) Contributions to the individual retirement account or premiums on the individual retirement annuity, including the earnings or benefits from those contributions or premiums, exceed, in the tax year made or paid, the deductible amount allowed under section 408 of the internal revenue code of 1986. This limitation on contributions does not apply to a rollover of a pension, profit-sharing, stock bonus plan or other plan that is qualified under section 401 of the internal revenue code of 1986, or an annuity contract under section 403(b) of the internal revenue code of 1986.

In addition to IRAs, MCL 600.6023 also contains a homestead exemption provision, MCL 600.6023(h), (j). However, case law provides that exemptions are unavailable where misappropriation occurs. In *Long v Earle*, 277 Mich 505, 511-512; 269 NW 577 (1936), the beneficiaries of a trust took issue with the actions of the trustee and whether he wrongfully embezzled and converted trust proceeds to his own use. The defendants asserted that the acquisition of real estate by the husband and wife was an exempt homestead. The Supreme Court rejected the defendants' argument, holding:

It is well settled both upon principle and authority that one who embezzles or otherwise misappropriates trust funds cannot get away with the embezzlement or misappropriation by investing the money embezzled or misappropriated, which belonged to the beneficiaries of a trust, in a homestead.

* * *

[I]t was never contemplated or intended by the Constitution and laws of this State that a homestead could be created and maintained with stolen or embezzled property, or with property wrongfully converted which rightfully belonged to the beneficiaries of a trust fund.

“If this were so, the statute exempting a homestead, instead of promoting the public welfare, would operate as an immoral and baneful influence, undermining and destroying the fundamental principles of the government.”

A homestead established from the proceeds of crime, or the misappropriation of the property of others, when the proceeds of such wrongful act upon the part of the trustee are directly traceable to the homestead, cannot be held exempt from the reach of the arm of a court of equity whose jurisdiction has been properly invoked by the beneficiaries of the trust fund which has been embezzled or fraudulently converted and so invested. [*Id.* at 519-520 (citation omitted).]

When an individual obtains property in fraudulent violation of his fiduciary duty, the defrauded person is given extensive remedies. See *Herpolsheimer v A B Herpolsheimer Realty Co*, 344 Mich 657, 666-667; 75 NW2d 333 (1956).

The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. ‘A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, . . . from his children and his children’s children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud’. [*Id.* at 666-667, quoting 3 Pomeroy, Equity Jurisprudence (5th ed), p 607.]

A review of the record in the present case reveals that defendants failed to meet their burden of proof by demonstrating entitlement to the exemption. *Davidson*, 365 Mich at 164; *Michigan Tool Co*, 346 Mich at 680. Because defendants failed to meet their burden of proof, the trial court properly denied the exemption. *Covert Twp Assessor*, 407 Mich at 618; *Michigan Consol Gas*, 373 Mich at 144. Plaintiff repeatedly scheduled a creditor’s examination, and defendants did not comply with the request or produce discovery. Consequently, the trial court was not presented with any record evidence to establish that the funds at issue were legitimate IRA funds as opposed to monies acquired through the fraudulent conduct or funds deliberately commingled to prevent the attempted execution. Plaintiff provided documentation that defendants deliberately prevented the discovery of assets and monies had been funneled to relatives. *Long*, 277 Mich at 519-520; *Devlin*, 43 Mich App at 524-525.

To obtain appellate relief, defendants make a blanket conclusion without citation to the lower court record that there was no evidence to support the trial court’s factual findings. However, defendants failed to present evidence to controvert the evidence offered by plaintiff. Accordingly, we cannot conclude that the trial court’s factual findings were clearly erroneous. *Detroit*, 481 Mich at 35. Defendants also fault the trial court for failing to conduct an evidentiary hearing and for failing to adjourn the hearing in light of counsel’s participation in a lengthy trial. However, a review of the record reveals that defendants failed to request an evidentiary hearing and did not file a motion to adjourn the hearing. Additionally, defendants did not file proposed findings of fact and conclusions of law in accordance with the trial court’s instruction. More importantly, defendants did not request the opportunity to make an offer of proof on the record regarding the evidence that would have been presented if an evidentiary hearing had been conducted. Because defendants failed to avail themselves of the opportunity to preserve the evidence for appellate review, we cannot conclude that the trial court erred. *Hashem*, 266 Mich App at 94. In light of defendants’ lack of participation in the post-judgment process, defendants failed to meet the burden of proof in establishing entitlement to the exemption, MCL 600.6023(1)(k). *Davidson*, 365 Mich at 164; *Michigan Tool Co*, 346 Mich at 680.³

³ Defendants’ statement of the issue presented does not raise the applicability of the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, and it is not an issue in this case. *Selflube, Inc v JJMT, Inc*, 278 Mich App 298, 316; 750 NW2d 245 (2008).

Affirmed.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood