STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of HENRY L. RUPERT

JOELYNN T. STOKES, Personal Representative, and RUTHA SHARPE RUPERT, a/k/a RUTHA SHARPE-RUPERT,

Appellees,

v

HENRY RUPERT, JR.,

Appellant.

UNPUBLISHED
August 25, 2011

No. 298605
Wayne Probate Court
LC No. 2006-710364-DE

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Henry Rupert, Jr. appeals a probate court judgment that awarded $52,364.03 to appellee Rutha Sharpe-Rupert. Rupert Jr. also appeals a separate order that awarded attorney fees of $1,700 to Sharpe-Rupert and attorney fees of $1,680 to Joellyn Stokes as the personal representative for the estate of Henry Rupert. We affirm.

Rupert Jr. claims the probate court erred by ruling that a number of cashier's checks owned by decedent were part of the decedent's estate. Rupert Jr. claims that, when decedent delivered the checks to him for safekeeping, decedent intended the checks to be an inter vivos gift or oral trust.

When the probate court sits without a jury, we review its findings of fact for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Questions of law, including issues of statutory interpretation, are reviewed de novo. *In re Rudell Estate*, 286 Mich App 391, 403; 780 NW2d 884 (2009). Further, to the extent that Rupert Jr. argues that the probate court unduly restricted the scope of the evidence, we review the court's decision to admit or exclude evidence for an abuse of discretion. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005).

A valid inter vivos gift requires that title pass to the donee. *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). Delivery must be unconditional. *Id.* The gift must be fully

consummated during the lifetime of the donor. *Id.* If the donor intends to reclaim or revoke the "gift" if the need arises, the requisite donative intent is lacking. *Id.* at 612.

Rupert Jr. testified that the decedent gave him the cashier's checks "to hold for him[.]" Rupert Jr. explained that he did not immediately deposit the checks because it remained his father's money. Rupert Jr.'s own testimony disproves his theory of an inter vivos gift because it established that delivery was conditional and title did not pass to the donee. Accordingly, the probate court did not err in finding that the evidence did not establish an inter vivos gift.

"[A] trust is created only if the settlor manifests an intention to create a trust, and it is essential that there be an explicit declaration of trust accompanied by a transfer of property to one for the benefit of another." *Osius*, 375 Mich at 613. "To establish a trust of personalty, parol evidence must be clear and satisfactory and find some support in the surrounding circumstances and conduct of the parties." *Id.* "[A] trust is created only if the settler manifests an intention to create a trust, and it is essential that there be an explicit declaration of trust accompanied by a transfer of property to one for the benefit of another." *Id.* According to Restatement Trusts, § 56, "[w]here no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with." See also *Osius*, 375 Mich at 614. Thus, "if the owner of property delivers it . . . to the intended trustee, but he manifests an intention that the conveyance shall not be effective until his death, the disposition is testamentary." Restatement Trusts, § 56, comment b.

Rupert Jr.'s testimony shows that the decedent did not create an oral trust. Rupert Jr. testified that the decedent gave him the checks to "hold for him," and expressed a desire to provide for his granddaughters in the event that something happened to him. The testimony was not "clear and satisfactory" evidence of a trust. *Osius*, 375 Mich at 613. There was no "explicit declaration of trust." *Id.* The decedent's directive concerning the use of the money was contingent on his death. Thus, the disposition that Rupert Jr. described is testamentary and needed to comply with statutes that govern the creation of wills. See MCL 700.2502. Accordingly, the probate court did not err in also rejecting Rupert Jr.'s claim of an oral trust.

To the extent that Rupert Jr. contends that the probate court unduly limited the presentation of evidence, the record shows that the court merely urged the parties to focus on the issues. This was not an abuse of discretion. *In re Kramek Estate*, 268 Mich App at 573.

Rupert Jr. claims that the probate court failed to address the distribution of the estate to Sharpe-Rupert as the surviving spouse. We hold that Rupert Jr. abandoned this issue by failing to pursue it below. Rupert Jr. initially raised the issue in his March 9, 2009, evidentiary hearing brief in support of his petition to set aside the default judgment, but when the parties explained to the court their agreement with respect to the petition, the parties did not mention any dispute about distribution. Later, in his brief concerning the March 10, 2010, evidentiary hearing, Rupert Jr. did not state that distribution was disputed. After the probate court announced its decision at that hearing, Rupert Jr. asked the court to allow the estate to remain open to determine a proper distribution of the estate's assets, which he maintained included the $55,000 judgment. The court declined to address the issue at that time and invited counsel to submit appropriate pleadings if distribution was contested. Rupert Jr. filed subsequent pleadings but

failed again to mention any dispute about distribution. On appeal, he faults the probate court for not addressing the issue, but the court's silence is attributable to Rupert Jr.'s failure to identify that matter as a disputed issue in his brief for the March 10, 2010 hearing and then his failure to accept the court's invitation to file additional pleadings to address that point. Any error in the court's failure to evaluate the effect of the judgment on the distribution was caused by Rupert Jr. Because an appellant cannot contribute to error by plan or design and then argue error on appeal, Rupert Jr. is not entitled to appellate relief with respect to this issue. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).

Rupert Jr. also challenges the probate court's award of attorney fees pursuant to the offer of judgment rule, MCR 2.405, but he has not presented a persuasive reason to overturn the probate court's award. "We review for clear error the findings of fact underlying an award of attorney fees." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296-297; 769 NW2d 234 (2009). "We review de novo underlying questions of law, and we also review de novo the interpretation and application of the offer of judgment rule." *Id*.

Rupert Jr. emphasizes that his position was not frivolous, but that consideration is immaterial to an award of attorney fees under MCR 2.405. He also asserts that the "requests for attorney fees should have been denied because the majority, if not all, of the attorney fees being requested were not causally related to Mr. Rupert's rejection of the offer of judgment." However, Rupert Jr. fails to mention that the probate court declined to award the majority of requested attorney fees. The court determined that the only fees recoverable were those incurred after the offer of judgment was made. Rupert Jr. does not offer any argument explaining why the limited fees that were awarded were not causally related to his rejection of the offer. Accordingly, we find no error.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher