Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

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DT: March 25, 2011

RE: Evelyn Jean Buchinger Revocable Living Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

All right baseball fans spring training has started and it's time to look to see what records will be broken this year. Let's look at homeruns.

There are three active players in the top 20 lifetime homerun list. Alex Rodriquez is ranked sixth. He has 613 homeruns. Fifth is the retired Ken Griffey with 630 and fourth is Willie Mays with 660. Alex, absent injury, will pass Ken. Willie is another story. Although Alex led the league in 2007 with 54 homeruns, the last three years he has hit 35, 30 and 30. In 2008 he was on the disabled list for 20 days, 2009 for 41 days and 2010 for 15 days. His at bats were 510, 444 and 522, respectively through those years. His games played were 138, 124 and 127. Therefore, 30 to 35 is reasonable; 47 is quite problematic.

Jim Thome just keeps on ticking and he ranks eighth with 589 behind steroid Sammy Sosa at 609. Jim is 40 years old and will be 41 in August. Jim was a designated hitter last year and played 108 games. He was not injured. I peg him at 610 – one more than Sammy; then retirement.

Manny Ramirez is 14th at 555. He needs nine (9) to pass Reggie Jackson, 13 to pass Harmon Killebrew, 15 to pass Rafael Palmeiro and 23 to pass another juicer, Mark McGuire. He's 38 years of age and played 90 games last year, plus eight (8) games in the minors. He hit nine (9) homeruns. He was picked up in free agency by Tampa. My prediction, Manny passes no one.

No one will break the 500 barrier or the 400 barrier this year.

In the next issue we'll take a look at lifetime batting averages. Clue, Miguel Cabrera needs 531 bats to reach 5,000; then be considered in the ranking for lifetime averages. He has been above that since 2004.

REVIEW OF CASE:

Reference Files: Transferors' Intent
Reformation
Parole Evidence Rule

Decedent conveyed Black Acre to Trust No. 1. Attorney drew Trust No. 2. Attorney prepared Deed from Appellant to the Decedent as joint tenants, intending Brown Acre but describing Black Acre. The Deeds were recorded. Post mortem, the error was discovered. Attorney drew a second Deed, noting Scrivener error. It was signed and recorded.[1] The Trust sued for reformation and the Probate Court granted same upon Scrivener's testimony and the second Deed was reformed.

The Court of Appeals affirmed the Probate Court; allowing the Scrivener's testimony, contravening the parole evidence rule, saying that this was allowed to prove mutual mistake and reformation. The reviewer agrees but believes that the statement contradicts previous rulings by the Court of Appeals, which includes one panel member. Also, where was the mutual mistake except between transferor and Scrivener? Transferee didn't even know there was a transfer. That fact was cited by both the Lower and Higher Courts as probative.

The race notice statute was not applicable as Appellant was not a bona fide purchaser for value.

If I have my facts right, there was a much simpler solution. If Settlor had deeded Black Acre to Trust No. 1, the erroneous Deed requires no reformation as Settlor lost power to re-convey Black Acre. A simple Deed from Trust No. 1 to Trust No. 2 would settle the matter as Deed No. 2 had no efficacy as being outside the chain of title.

The reader is alerted to the April 1, 2010 Trust Code relative to reformation.

AAM/jv/doc 683965v2
Attachment

[1] The Court of Appeals does not say who signed it. Reviewer assumes the trustee of the first Trust signed it.

STATE OF MICHIGAN

COURT OF APPEALS

IN RE EVELYN JEAN BUCHINGER
REVOCABLE LIVING TRUST.

EVELYN JEAN BUCHINGER REVOCABLE LIVING TRUST, by its Trustee, LORI J. ZIMMER,

Appellee,

v

THOMAS R. BUCHINGER,

Appellant.

UNPUBLISHED
February 15, 2011

No. 295544
Tuscola Probate Court
LC No. 09-033145-TR

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Appellant Thomas R. Buchinger ("appellant") appeals as of right the probate court's order to reform a deed based on the court's prior determination that the disputed deed was the result of a mutual mistake and that the subject property was a trust asset. We affirm.

This dispute involves the determination of the rightful ownership of a parcel of residential property located on Clear Lake in Atlanta, Michigan. Prior to 2001, the Clear Lake property belonged to Evelyn Buchinger (Mrs. Buchinger), who also owned two vacant lots in a platted subdivision known as Canada Creek Ranch. Mrs. Buchinger had three children: appellant; Carol Finner; and appellee Lori Zimmer. In 2001, appellee assisted Mrs. Buchinger in preparing estate planning documents, including a trust and two deeds purporting to transfer Mrs. Buchinger's real property to the trust. Neither deed was recorded at that time.

In early December 2002, the first trust was replaced with one drafted by attorney Andy Richards. Richards met with Mrs. Buchinger and the parties to discuss the terms of the second trust and to execute the necessary documents. It is undisputed that Mrs. Buchinger indicated her intention that the Clear Lake property be transferred to the trust. It is also undisputed Mrs. Buchinger intended to transfer the Canada Creek Ranch property to appellant. However, the deed prepared by Richards purporting to transfer property from Mrs. Buchinger individually to herself and appellant as joint tenants with rights of survivorship contained the legal description

corresponding to the Clear Lake property. This deed (the "disputed deed") was recorded on December 26, 2002. Mrs. Buchinger died on December 31, 2002. After her death, the discrepancy in the deed was discovered.

When appellee notified attorney Richards of the problem with the deed, Richards prepared another deed. In this second deed, he indicated that a scrivener's error had occurred, and he corrected the legal description to indicate that the deed conveyed the Canada Creek Ranch lots. This corrected deed was recorded with the Register of Deeds on January 31, 2003. On that same day, the deed that had been drafted by appellee and executed by Mrs. Buchinger on December 5, 2001, which purported to transfer the Clear Lake property from Mrs. Buchinger to the first trust, was also recorded.

Appellee executed a transfer of ownership affidavit indicating that the Clear Lake property had been transferred to the trust, and appellant executed a transfer of ownership affidavit indicating that the Canada Creek Ranch lots had been transferred to him. For several years after Mrs. Buchinger's death, all three children treated the Clear Lake property as if it belonged to the trust. The siblings split the expenses associated with the property, including taxes and utilities.

In 2006, appellant moved into the Clear Lake property on a full-time basis. The siblings continued to share the expenses of the property until appellant lost his job, at which point appellee covered his share of the expenses. In 2008, appellant made a written offer to purchase the Clear Lake property from his sisters. In researching the state equalized value of the Clear Lake property, appellant learned of the existence of the disputed deed, as well as the subsequent, corrected deed. Thereafter, appellant took the position that he was the rightful owner of the Clear Lake property.

Appellee filed this suit for supervision, instruction, and reformation of the disputed deed. The probate court held an evidentiary hearing limited to whether the disputed deed should be reformed. After the hearing, which included detailed testimony from the parties and Richards, the probate court concluded that a mutual mistake had been made in drafting and executing the disputed deed. The court found as a matter of law that the Clear Lake property was an asset of the trust and that an order reflecting same should be entered that would stand in lieu of any other deed of conveyance.

Appellant first argues that appellee lacked standing to institute and pursue this matter. We disagree.

The determination whether a person has standing is a question of law an appellate court reviews de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). Standing pertains to the right of a party to invoke the power of the court to adjudicate a claimed injury in fact. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). To have standing, a party must have "a legal or equitable right, title, or interest in the subject matter of the controversy." *MOSES, Inc v Southeastern Michigan Council of Gov'ts*, 270 Mich App 401, 414; 716 NW2d 278 (2006) (internal quotation omitted); see generally *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, ___ NW2d ___ (2010).

The central issue to be resolved in this matter was the determination of the ownership of the subject property—namely whether the property was a trust asset or had been properly transferred to appellant. As trustee, appellee clearly has an interest in the subject matter of the controversy. Accordingly, the trial court did not err in finding that appellee has standing.

Next, we address appellant's claim that the probate court improperly considered parol evidence in making its determination in this case.

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Generally, parol evidence is not admissible to vary the terms of an unambiguous deed. *Universal Underwriters Inc Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001) (interpretation of an unambiguous document is limited to the actual words used). However, for purposes of reformation, parol evidence can be used to determine whether a mutual mistake existed and to establish the true intentions of the parties. *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942).

Resolution of the parties' dispute required a determination whether a mutual mistake existed related to the deed transferring the subject property to appellant. To make this determination, it was necessary for the probate court to consider evidence beyond the four corners of the document. Thus, the court did not abuse its discretion in allowing parol evidence to be introduced.

Appellant argues the probate clearly erred in its factual determinations that Mrs. Buchinger intended to transfer the disputed property to the trust, rather than to appellant, and that the disputed deed was never delivered or accepted. We disagree.

First, we address appellant's claim that the trial court clearly erred in determining that Mrs. Buchinger intended to convey the disputed property to the trust. This position is directly contrary to appellant's own testimony at the hearing below where he conceded that his mother had expressed her intent at the December 2002 meeting to transfer the property to the trust and that she never relayed a different intent between the time of the meeting and the time of her death. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Thus, this portion of appellant's argument must fail.

We are also not persuaded by appellant's argument that the probate court clearly erred in finding that the deed was not delivered or accepted. A deed becomes effective when delivery occurs, not when the deed is executed or recorded. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). Delivery is required to show that the grantor intended to convey the property described in the deed. *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). Acceptance is necessary for a deed to be valid, as there can be no delivery without acceptance. *Gibson v Dymon*, 281 Mich 137, 140-141; 274 NW 739 (1937). Delivery may be presumed from recording of a deed during a grantor's lifetime. MCL 600.2110; *Finstrom v Baldwin*, 356 Mich 552, 556; 96 NW2d 798 (1959). However, a deed can be set aside when the presumption of delivery is overcome. *Creller v Baer*, 354 Mich 408, 412; 93 NW2d 259 (1958). In addition,

the subsequent conduct of the parties may be taken into consideration in determining whether there was intention to pass title. See *Tighe v Davis*, 283 Mich 244, 249-250; 278 NW 60 (1938).

The evidence presented below established that appellant was not provided a copy of the deed after it was executed. More telling is the fact that appellant treated the Clear Lake property as a trust asset for several years following Mrs. Buchinger's death. In fact, appellant first learned of the deed's existence at the same time he learned of the scrivener's error deed that was subsequently recorded. In light of this evidence, the trial court did not clearly err in finding that acceptance, and therefore delivery, had not occurred.

Appellant also argues that the trial court improperly considered the fact that he had paid no consideration for the disputed deed. We disagree.

Appellant argued below that he was the rightful owner of the Clear Lake property based on the race-notice statute. The race-notice statute, MCL 565.29, protects the property interests of a bona fide purchaser who first records their interest in land. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). A bona fide purchaser is a party who acquires a property interest for valuable consideration and in good faith, without notice of a third party's claimed interest in the property. 1 Cameron, Michigan Real Property Law (3rd ed), § 11.20, pp 395-396). At the hearing, appellant conceded that he had paid no consideration for the disputed deed. Thus, appellant was not entitled to the protection afforded by MCL 565.29. It was proper for the trial court to consider and note this fact in making its ultimate determination.

When a written instrument fails to express the intentions of the parties because of a mistake, the equitable remedy of reformation may be ordered by the court. *Scott*, 301 Mich at 237. A mutual mistake of fact "means an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). Here, the trial court correctly determined that Mrs. Buchinger did not intend to transfer the Clear Lake property to appellant and that he had no expectation of receiving the property. Accordingly, the disputed deed purporting to transfer the Clear Lake property to Mrs. Buchinger and appellant as joint tenants with rights of survivorship was the result of a mutual mistake. As a result, the probate court properly found as a matter of law that the property was a trust asset and entered an order reflecting same.

Finally, appellant's brief includes discussion of unclean hands, adverse possession, and disappointed beneficiaries. None of these claims have merit. The evidence at trial established that appellee never believed that Mrs. Buchinger had intended to convey the property to appellant and, rather than trying to interfere with a proper transfer of ownership to appellant, appellee was instead acting to correct what was believed to be a typographical error. Thus, appellee did not act with unclean hands by doing something inequitable or in bad faith relative to the Clear Lake property. *Richards*, 272 Mich App at 537. Next, the dispute related to the Clear Lake property arose in 2008, which is nowhere near the required 15-year period for adverse possession. *Beach v Lima Twp*, 283 Mich App 504, 524; 770 NW2d 386 (2009), lv granted 485 Mich 1036 (2010). Lastly, this case does not involve a disputed will, so the disappointed beneficiary argument is without merit. See *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 421-422; 655 NW2d 614 (2002). As noted previously, the probate court properly

allowed parol evidence to determine whether there was a mutual mistake in drafting and executing the deed.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder