



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 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations 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.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, click on the link below.
<http://www.kempklein.com/probate-summaries.php>

DT: August 9, 2012

RE: In re Estate of Johnson
Julia L. Johnson v Ronda A. Wickham
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

HOMERUN HITTERS MOVING UP IN THE STANDINGS

Albert Pujols finally caught fire and is hitting a respectable amount of homeruns. All during the year Albert Pujols has been battling Chipper Jones to become leader in lifetime homeruns hit by active players. It was only a matter time until Albert took over as Chipper is 40 years of age. Albert now has 469 homeruns and Chipper 464. Albert ranks 31st in the all time homerun hitter list and Chipper ranks 33rd. Albert has passed Dave Winfield and now trails Carlos Delgado by four homeruns. I think that Albert will probably pass Delgado, Willie Stargell and Stan Musial to move into 28th place.

In re Estate of Johnson
Julia L. Johnson v Ronda A. Wickham
STATE OF MICHIGAN COURT OF APPEALS
–continued–

Pujols' average is one homerun in every 17 hits at bat, and for those who have been following this statistical summary he has improved from 24 at bats and is headed into real homerun territory.

Adam Dunn is on a tear and he now has 396 homeruns and will certainly pass 400 this year. This will move him into 50th place.

Miguel Cabrera has now moved over 300 homeruns; with 303.

Prince Fielder now has 248.

Don't look for much more from Alex Rodriguez who has 644 as he is out with a broken wrist and probably will not pass Willie Mays this year, who ranks fourth with 660 homeruns

REVIEW OF CASE:

Reference Files: Constructive Trust
Inter vivos Promises
Probate Court Jurisdiction

This is a fact based case which I believe is decided correctly, but lacks some depth in discussion.

Decedent went through a contentious divorce and child custody litigation. He died. Decedent, post divorce, changed his employment insurance to his new wife. The ex-wife sued, asking that a constructive trust be placed on the proceeds as decedent "agreed that it was for his children", and suffered undue influence and breached a fiduciary duty.

A C (10) Motion was brought, and the Lower Court did not find facts sufficient to overcome facts raised by Defendant on the C (10) Motion.

It is first worthy of note that the Probate Court took jurisdiction over a claim relative to insurance benefits.

The undue influence and breach of fiduciary duty were abandoned on appeal.

The Court of Appeals sustained the Opinion of the Lower Court. The Court of Appeals' Decision lacks definition in two regards:

- First, the Court of Appeals failed to point out that constructive trust is a remedy and not a cause of action;
- Second, that the actual cause of action, which would have obtained the constructive trust if valid, would have been breach of contract.

AAM:jv:719083
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JOHNSON.

JULIA L. JOHNSON, Personal Representative of
the Estate of DEAN ALAN JOHNSON,

UNPUBLISHED
July 19, 2012

Plaintiff-Appellant,

v

RONDA A. WICKHAM,

No. 304420
Lapeer Probate Court
LC No. 10-036286-CZ

Defendant-Appellee.

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the probate court's order dismissing her complaint with prejudice. Because the probate court properly granted summary disposition for defendant on plaintiff's constructive trust claim on the basis that plaintiff failed to establish a justiciable question of fact, we affirm.

The decedent, Dean Alan Johnson, was killed in a motorcycle accident on July 10, 2010. Plaintiff, Johnson's ex-wife, serves as the personal representative of his estate and conservator for their three children. The controversy in this case concerns the disposition of Johnson's employer-provided death benefits, which primarily include life insurance proceeds and accident insurance proceeds, which were disbursed to defendant, Johnson's sister. Shortly after plaintiff and Johnson's divorce, Johnson changed the beneficiary of his death benefits from plaintiff to defendant. The divorce proceedings were contentious and involved plaintiff's claim that Johnson had sexually assaulted her daughter from a previous relationship. Plaintiff's allegation resulted in criminal charges being brought against Johnson as well as a petition to terminate his parental rights. A jury acquitted Johnson of all of the charges, and he ultimately retained his parental rights to his children. The same judge who presided over the instant case also presided over Johnson's criminal trial as well as the divorce and abuse and neglect proceedings.

After Johnson's death, all of his employment-provided death benefits, roughly \$600,000, were distributed to defendant. Thereafter, plaintiff filed a complaint seeking to impose a constructive trust on the funds. Plaintiff alleged that Johnson had intended that defendant use the

funds to support his three children. Plaintiff also alleged that defendant breached a fiduciary duty owed to Johnson by exercising undue influence over him at the time that he named defendant as the beneficiary of his death benefits. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's constructive trust and breach of fiduciary duty/undue influence claims. The probate court granted the motion, stating that it was convinced that Johnson trusted defendant and did not want plaintiff in any way involved with his money and assets. The court reasoned that statements that Johnson had made to plaintiff while they were married and vague statements that he made to friends were not enough to set aside his intent that defendant be the beneficiary of his death benefits, as evidenced when Johnson wrote defendant's name on the beneficiary form. The court also determined that Johnson was a competent, intelligent man and did not make his beneficiary designation based on undue influence. Subsequently, the court dismissed plaintiff's remaining conversion claim with prejudice.

We review de novo a lower court's decision granting a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). In reviewing a ruling made under MCR 2.116(C)(10), "a court tests the factual support by reviewing the documentary evidence submitted by the parties." *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We must consider the substantively admissible evidence and all reasonable inferences drawn from that evidence in the light most favorable to the nonmoving party. *Id.* at 567-568; *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "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 120.

Plaintiff argues that the probate court erred by granting summary disposition for defendant on plaintiff's constructive trust claim.¹ A constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest[.]" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958). The party seeking to impose a constructive trust must show that the property was "obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property[.]" *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 188; 504 NW2d 635 (1993) (quotation marks and citations omitted). Notably, however, "it is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld." *Kent*, 352 Mich at 657.

¹ Plaintiff does not challenge the probate court's decision granting summary disposition for defendant on her breach of fiduciary duty/undue influence claim. In fact, plaintiff appears to have abandoned her argument with respect to that claim by admitting that defendant "was the proper recipient of the proceeds because she was the last named beneficiary[.]" Moreover, in arguing that the pivotal question concerns Johnson's intent in naming defendant as the beneficiary, plaintiff does not assert that defendant exerted undue influence over Johnson in an effort to be designated the beneficiary of his death benefits.

Plaintiff argues that although Johnson's death benefits were properly paid to defendant because she was the last-named beneficiary, it was unfair and inequitable for defendant to retain the benefits for herself because the evidence showed that Johnson intended the funds to be used for his children. Plaintiff's argument lacks merit. Johnson named defendant as the sole beneficiary of his death benefits, without restriction, and did not indicate an intent that defendant hold the funds in trust for the benefit of his children. In addition, Johnson could have named his children as beneficiaries if he desired, but he did not do so. Plaintiff's claim regarding Johnson's intent was based in part on conversations that she had with him while they were married concerning life insurance and what would happen to the children if he died prematurely. Plaintiff admits that she did not have any discussion with Johnson regarding his death benefits after they divorced. Plaintiff's general, pre-divorce conversations regarding his desire to financially provide for his children if he died prematurely do not establish that Johnson intended for defendant to use his employer-provided death benefits for his children.

Plaintiff also relies on the testimony of Robert Brewer, Johnson's close friend, that Johnson had told him that his children would be better off financially if he died. Brewer also testified, however, that he could not recall whether Johnson made that statement before or after his divorce and Brewer did not know the source of funds that would have purportedly made his children better off financially. Brewer assumed that Johnson was referring to Social Security benefits. Moreover, Brewer testified that he did not know whether Johnson intended for his children to receive his death benefits. Thus, Brewer's testimony sheds little light on Johnson's intent with respect to the benefits.

Plaintiff further relies on the affidavit and deposition testimony of Bethany Shippey and the affidavit of Rebecca McClaren, both former girlfriends of Johnson. Shippey's and McClaren's statements, however, constitute inadmissible hearsay. In her affidavit, Shippey claimed that Johnson had told her that his children "would be set for life if anything" happened to him and that his "employer-provided 'benefit plan' was set up to take care of his children." At her deposition, Shippey admitted that Johnson had never used the term "employer provided benefit plan" and had instead referred to his life insurance policy. Similarly, McClaren averred that Johnson had told her that his children "would be financially stable if he died[.]" and that Johnson named defendant "as the beneficiary of his life insurance proceeds because he trusted that she would hold and use that money for their benefit."

"'Hearsay' is a statement, other than the one made by the declarant . . . offered in evidence to prove the truth of the matter asserted." MRE 801(c). "MRE 803(3) excepts from the rule against hearsay '[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), *but not including a statement of memory or belief to prove the fact remembered or believed . . .*'" *UAW v Dorsey*, 273 Mich App 26, 36; 730 NW2d 17 (2006) (emphasis added).

Here, Johnson's statements made to Shippey and McClaren were statements of belief not included within the MRE 803(3) hearsay exception. The statements conveyed Johnson's belief that his children would be "set for life," that they would be financially stable, and that defendant would use the life insurance proceeds for their benefit. Further, "a statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then

existing physical condition within the meaning of the rule but, rather, ‘a statement of memory or belief’ that is explicitly excluded from the exception.” *People v Hackney*, 183 Mich App 516, 527 n 2; 455 NW2d 358 (1990). Thus, Johnson’s statement that his employer-provided benefit plan or life insurance policy had been set up to take care of his children was a statement of belief and, as such, it did not fall within the MRE 803(3) exception.

Plaintiff also asserts that the probate court erred by relying on its prior knowledge of Johnson gleaned from presiding over the previous court proceedings. We note that plaintiff’s counsel opened the door for the court’s reliance on its prior knowledge by stating that “[t]he Court knows Dean Johnson well. Knows, I think . . . Julia Johnson . . . Rhonda Wickham and the circumstances surrounding this . . . as well as I can . . . argue today.” See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) (“[E]rror requiring reversal may only be predicated on the trial court’s actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.”) In any event, even if the probate court erred by relying in part on its prior knowledge, reversal is not required. We further note that plaintiff presented no evidence consistent with a donative intent subsequent to the previous legal proceedings and before his death. Therefore, plaintiff failed to present admissible evidence establishing a justiciable question of fact regarding whether Johnson intended for defendant to use his death benefits to provide for his children. The probate court correctly determined that plaintiff failed to present evidence sufficient to overcome defendant’s motion based on MCR 2.116(C)(10). Accordingly, the court properly granted the motion.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra