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 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).

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DT: September 15, 2010

RE: Estate of Carlton J. Leix
STATE OF MICHIGAN COURT OF APPEALS

TIGER REMEMBRANCES FROM JERRY STARR:

I can't remember a time when I was not interested in baseball. My family moved to a new neighborhood every other year. I found that the quickest way to meet new friends was to go wherever kids were playing ball and ask to be included. At age 13, I recruited a Detroit Parks and Recreation team from my school that lost only one game all season.

At age 14, thanks to my stepfather, I was invited to be an usher at Briggs Stadium for the summer. It required two long bus rides to get there, but I was game, even at night. There was no pay, only tips for showing people to their seats and wiping them clean. By the third inning, it was safe to move to an empty seat closer to the action and enjoy the game.

The Tigers were in the midst of a losing decade, including their first last place finish in 1952. In '54, they finished 69-86 (.441). Mediocrity would be their fate until 1961 when they won 101 games, still finishing eight games behind the Yankees.

The highlight of 1954 was the first full year of Al Kaline. In 1953, Kaline joined the Tigers near the end of the season, getting seven hits in 28 appearances. In 1954, he averaged .276. In 1955, he won the American League batting championship with a .340 average, including 27 homeruns. In 20 seasons he did enough to be selected for the Hall of Fame after retirement.

In 1954, I saw Ted Williams in a one day/night double header; he went eight for 9, including two homeruns and two doubles. His swing was beautiful to behold. Even the one out was a line drive. Williams was, arguably, the greatest hitter of all time. The Cleveland Indian's player manager, Lou Boudreau, devised what he called "the Williams' shift" aligning all but the third baseman and left fielder to the right of second base, conceding a bunt single.

On the other hand, Kaline was the complete player. Fast and graceful, he covered right field all the way out toward center and he rarely made a fielding error. He had one of the finest arms in baseball history. In 1954, while breaking in, I watched Kaline, in a throwing contest with a visiting player. He would run up to home plate and sling the ball out toward the deepest point of center field (440 feet). The ball would sail into space, reach a peak and then fall well beyond the outfield fence. Nobody ran on Kaline. I still remember the crowd's gasp when he hauled in a long fly at the wall in right field and then threw the ball on a line to catcher Matt Batts. Needless to say, the runner ventured out slightly before taking his coach's advice to retreat to third. That was Al Kaline, barely out of his teens.

Though an accomplished and well known professor of sociology and author of several respected treatises, Starr is, to me, best known as the sports Editor of the 1959 Mumford Mercury where he published under the title Starr Gazing. Although Jerry does not consider himself a grudge holder, he did reiterate to me recently that Walter Dropo was once rude to him.

REVIEW OF CASE:

Reference Files: Mutual Wills
Effect of Mutual Wills
Transfer by Survivors

Husband and wife made mutual Wills and entered into an agreement to keep their provisions in affect after the death of the first spouse. The wife died. Husband created non probate inter vivos transfers to granddaughter #1. Granddaughter #2 and child objected.

The Court of Appeals ruled in a Published Per Curiam, 13 page Opinion, that after the death of one party the agreement becomes irrevocable and a beneficiary may enforce it.

The Court cites *In re. VanConett Estate*, 262 Mich App 660 (2004) that since property held jointly with right of survivorship passes to a survivor at the moment of death by operation of law, it does not pass by Will. Hence, it is not property subject to a contract to make a Will. The parties to the contract could provide otherwise. *Schondelmayer v Schondelmayer*, 320 Mich 565.

The instant court notes the conflict between *Schondelmayer* and *VanConett* and limits the later to its facts.

The instant court reviewed the law of other jurisdiction finding the law unsettled in Michigan. Wisconsin for instance limited post mortem non testamentary transfers though the survivor left the terms of the Will in place. The Wisconsin Court said the distinction was a "mere play on words" stripping the flesh off the bones of the agreement. The prohibition against non-testamentary transfers was an implied limitation of the Mutual Will Agreement.

The Michigan Court of Appeals rejects "implied limitations" on surviving spouses. An unambiguous contract must be enforced according to its terms. (*Burkhhardt v Bailey*, 260 Mich App 636 (2004).) Michigan does not recognize "implied good faith." Thus, unless the mutual will contract prevents the surviving spouse from making, non-testamentary transfers. He/she may do so and it is not in breach, as long as the will remains as agreed upon as to the remaining assets of the survivor at death.

LESSONS AND UNANSWERED QUESTIONS:

(1) Succession planners make your contracts clear and unambiguous, evidencing intent. Do not rely on good faith.

(2) Scriveners were allowed to testify in the lower court, in the instant case.
Query – Is the Court of Appeals giving silent approbation to this extrinsic scrivener testimony?

This is a good decision which closes the door to what someone "might" have meant. Different humans can draw different "implications" leading to uncertainty which is anathematic to a succession planner – inconsistency is the hobgoblin of dairy states.

AAM:jv:#670670v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CARLTON J. LEIX.

CARLTON E. LEIX,

Petitioner-Appellant,

and

MELINDA TRIPLETT,

Petitioner,

v

MELADY A. PERRY and JEFFREY PERRY,

Respondents-Appellees.

FOR PUBLICATION
August 26, 2010
9:20 a.m.

No. 291406
Genesee Probate Court
LC No. 08-184704-CZ

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

This case concerns the disposition of assets formerly owned by Carlton J. Leix ("Carlton") and his wife, Viola Leix. After Viola's death, Carlton transferred the assets so that they were jointly owned with the Leixs' granddaughter, respondent Melady A. Perry. Petitioner-Appellant Carlton E. Leix, the son of Carlton and Viola, contended that the transfers violated his parents' agreement to execute mutual wills. Appellant appeals as of right the judgment granting summary disposition pursuant to MCR 2.116(I)(1) in favor of Melady and her husband, respondent Jeffrey Perry [hereafter referred to jointly as "respondents"], on the ground that the agreement to execute mutual wills did not restrict Carlton from making the transfers. We affirm.

I

Carlton and Viola had two children, appellant and Arletta Cady. Cady is the deceased mother of Melady and petitioner Melinda Triplett. On September 30, 1982, Carlton and Viola executed identical wills, a revocable trust agreement, and an agreement to execute mutual wills. The wills, trust, and agreement for mutual wills reflect an estate plan that called for establishing a trust for the benefit of Melady for life, with the remainder to the issue of Carlton and Viola. Viola died on December 11, 1983.

Carlton executed amendments to the trust in July 1988 and October 2000.[1] He also transferred title to assets that had been owned by Viola and him. For example, Carlton withdrew money from bank accounts and, in 2001 and 2002, purchased annuities that named Melady as beneficiary. He added Melady as a joint owner on a checking account in 1984, closed the account in 2006, and then opened a new checking account with Melady as joint owner. In 1994, he conveyed real estate to himself, Arletta, and Melady as joint tenants with rights of survivorship.

In 2006, Melady became Carlton's guardian and conservator. Carlton died in July 2008. At the time of Carlton's death, nearly all of the assets were titled jointly in his and Melady's name or named Melady as beneficiary. After Carlton's death, Melady received the money from the annuities and placed some of it in certificates of deposit in her name and in the name of her husband.

Appellant and Melinda Triplett brought this action in probate court requesting that the court impose a constructive trust on certain assets in the control of respondents. They alleged that Carlton transferred the assets in violation of his and Viola's 1982 agreement to execute mutual wills. They filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and in support thereof submitted the deposition transcripts of (1) Michael James, the attorney involved in drafting the original estate plan documents, (2) Robert Reid, the attorney who drafted an amendment to the trust, and (3) Melady. James could not recall the Leixs' intent when executing the original documents, and Reid was not involved with the original documents. Melady testified about the family's relationships and the accounts, but she had never discussed Carlton's estate plan with him.

Following a hearing on the motion, the trial court found the agreement to execute mutual wills to be valid and binding, that nothing in the agreement put any restrictions on what the surviving party could do with the parties' assets, and that Carlton's transfer of assets during his lifetime and his amendment of the trust did not constitute a breach of the agreement.[2] The court therefore granted summary disposition in favor of respondents.

II

Summary disposition pursuant to MCR 2.116(C)(I)(1) is appropriate if "the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact . . ." This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

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[1] Petitioner does not claim that the amendments to the trust breached the agreement to execute mutual wills.

[2] The trial court relied on *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004), in support of its ruling.

The parties do not dispute the trial court's determination that Carlton and Viola's agreement to execute mutual wills is valid and that they agreed not to revoke the wills that they executed. The agreement states, in pertinent part:

> The parties agree that on the death of the survivor, all of the property of which the survivor dies possessed is to be held in trust for the benefit of their granddaughter, Melady Cady, during her life. Upon the death of Melady Cady, the Trustee shall divide the balance of this Trust into equal shares so as to provide one (1) share for the issue of Melady Cady, one (1) share for Arletta Cady or her issue if she fails to survive said division, and one (1) share for Carlton Leix or his issue if he fails to survive said division.

The parties also do not dispute that after Viola's death, Carlton transferred money in various accounts so that Melady became a joint owner or beneficiary, and thereby upon Carlton's death she received the assets directly, rather than as a lifetime beneficiary of a trust. One of the effects of the transfers is to divest the trust of assets that the contingent trust beneficiaries may receive upon Melady's death.

The issue presented is whether an agreement to execute mutual wills limits a surviving spouse's ability to dispose of the assets that the parties held jointly as he or she chooses.

"An agreement to make mutual wills, or the execution of wills in pursuance of such an agreement, does not bind the testators to keep the property, covered thereby, for the intended beneficiaries under such wills, or prevent them from making such other disposition of it, either *inter vivos* or by will, as they may desire and mutually agree, while both or all still live." *Phelps v Piper,* 320 Mich 663, 670; 31 NW2d 836 (1948) (citation and quotation marks omitted). However, upon the death of one of the parties, the agreement (not the will) is irrevocable. *Id.* at 669. "Upon the death of one party to a contract to make mutual wills, the agreement underlying the will becomes irrevocable and right of action to enforce it is vested in the beneficiaries." *Schondelmayer v Schondelmayer,* 320 Mich 565, 572; 31 NW2d 721 (1948) (citation and quotation marks omitted). Thus, where the agreement to make mutual wills provides for the disposition of specific real property to a particular party, that party may obtain injunctive relief to prevent a surviving spouse from disposing of the specified property in a manner contrary to the agreement. *Id.*

As presented, the issue whether Carlton's transfer of assets breached his agreement with Viola involves two considerations: (1) whether assets that are held jointly by the contracting parties are subject to an agreement to make mutual wills, and (2) to what extent does an agreement to make mutual wills restrict the surviving spouse's ability to transfer assets.

A

Respondents contend that *In re VanConett Estate,* 262 Mich App 660, controls this case and establishes that "jointly held assets are not subject to an agreement to make mutual wills." In *In re VanConett Estate,* Herbert and Ila VanConett, a married couple, and Florence VanConett owned real property as joint tenants with full rights of survivorship. *Id.* at 667. After Florence's death, Herbert and Ila continued to hold the property as joint tenants with full rights of survivorship. *Id.* This Court determined that Herbert's and Ila's wills revealed a clear

expression of their intent to enter a contract to dispose of their property in the manner expressed in their wills, and that the surviving spouse's will would become irrevocable after the first spouse's death. *Id.* at 664-665. After Ila's death, Herbert transferred the real property to the defendants. After Herbert's death, his estate brought an action to recover the property. This Court held that his estate lacked standing to seek return of the real property to the estate because the property was not covered by the couple's contact to make a will:

> Property held as joint tenants with full rights of survivorship automatically passes to the surviving tenant(s) at a tenant's death. 1 Cameron, Michigan Real Property Law (2d ed), § 9.11, pp 306-307. *Because title passed instantly at Ila's death, it would not have been part of her estate and would not be covered by the couple's contract to make a will.* Therefore, the estate has no right to seek its return. This is true even though the VanConetts' wills purported to apply to "all our property, whether owned by us as joint tenants, as tenants in common or in severalty." Certainly, the VanConetts could not destroy the survivorship right through their wills because a will has no effect until the testator's death. The VanConetts' contract to make a will did not expressly indicate that the couple wished to terminate their joint tenancy and destroy the survivorship rights attached to it. No authority suggests that merely expressing a desire to end a joint tenancy carries out the task of terminating a joint tenancy with rights of survivorship. Therefore, we conclude that the VanConetts' wills did not terminate the survivorship rights of their joint tenancy. The property passed to Herbert immediately at Ila's death and the estate lacked standing to seek its return to the estate. [*In re VanConett Estate,* 262 Mich App at 667-668 (emphasis added).]

In other words, "the estate did not have standing to bring a cause of action concerning the real property because the real property passes outside the VanConett's wills." *Id.* at 662.

Respondents' contention that *In re VanConett Estate* indicates that, in every instance, an agreement to make mutual wills does not apply to property that the contracting parties own jointly at the time the first testator dies is incompatible with decisions of the Michigan Supreme Court.

For example, in *Schondelmayer*, 320 Mich 565, Charles and Cathrin Schondelmayer jointly held title to real property as tenants by the entirety. *Id.* at 568. The Court determined that they agreed to execute and did execute a joint mutual will. The will stated that the survivor would pay the funeral expenses and just debts and

> "thereafter become the sole owner of any and all property owned by either or both of them. The said survivor shall live as he or she has been accustomed, using so much of the income or principal as may be necessary for his or her comfort of convenience." [*Id.* at 571.]

The will then specified that each of the Schondelmayers' three sons was to receive a specific farm. *Id.* at 568, 571. Corna, the plaintiff, was to receive real estate that included the home farm and the balance of the estate after certain costs. After Charles's death, the relationship between Cathrin and the plaintiff deteriorated. Cathrin claimed that she had the right to dispose of the

property, including the home farm, by will, and also stated that she intended to sell it. *Id.* at 573. The plaintiff sought specific performance of his parents' agreement to make a joint mutual will and an injunction restraining Cathrin from disposing of the property in violation of the terms of the joint mutual will. The Court concluded that Charles and Cathrin had agreed that the will of the survivor would dispose of the estate in accordance with the terms of their joint mutual will, and the agreement became irrevocable upon Charles's death. *Id.* at 571-572, 575. The Court affirmed the trial court's grant of injunctive relief, concluding that the property that Charles and Cathrin held jointly at the time of Charles's death was subject to the parties' agreement to execute a mutual will. See also *Getchell v Tinker,* 291 Mich 267; 289 NW 156 (1939) (involving an agreement to devise specified real property that the contracting parties owned jointly).

Respondents' contention that the agreement to make mutual wills did not apply to the assets that were jointly held by Carlton and Viola, and which therefore passed to Carlton after Viola's death, is unpersuasive. It is difficult to reconcile the statement in *In re VanConett Estate,* 262 Mich App at 668, that property that passed instantly at the death of the contracting party would not be covered by the couple's contract to make a will, with the Supreme Court's holdings in the above cases. We therefore conclude that the holding in *In re VanConett Estate* should be limited to the particular circumstances in that case, where the contract to make a will was within the wills themselves.

B

In regard to whether an agreement to make mutual wills restricts the surviving spouse's ability to dispose of assets absent express limitations in the agreement, Michigan case law is not well developed. Appellant relies on *Schondelmayer,* 320 Mich at 565, *Getchell,* 291 Mich at 267, and *Carmichael v Carmichael,* 72 Mich 76; 40 NW 173 (1888). However, those cases involved agreements to convey specific property. Appellant does not claim that the agreement in this case contains language designating specific property or language prohibiting the surviving spouse from transferring assets. Rather, appellant asserts, "A corollary of the rule that the surviving co-maker of an agreement to make a mutual will is irrevocably bound by that agreement after the death of the other co-maker, is that the surviving co-maker cannot transfer assets in a manner that would defeat the agreement."[3]

[3] This Court's decision in *In re VanConett Estate,* 262 Mich App at 665, touched on that issue very briefly. Before the Court explained that the contract did not apply to the real estate at issue, the Court considered the plaintiffs' argument that Herbert received only a life estate and therefore had no right to dispose of the property. This Court stated, "Unlike in *Quarton* [*v Barton*, 249 Mich 474; 229 NW 465 (1930)], Herbert received a fee simple estate in the couple's property at Ila's death; hence, he was free to dispose of the property as he wished, and his beneficiaries were only entitled to the remainder." *In re VanConett Estate,* 262 Mich App at 665. Arguably, the statement supports the position that absent limiting language in the agreement, an agreement to make a will does not impose any limitations on a surviving spouse's right to dispose of property. However, because the Court ultimately concluded that the real estate was not covered by the agreement, the Court's statement that Herbert was free to dispose

(continued...)

The uncertainty in the law is reflected in an order that the Supreme Court issued when it initially granted leave to appeal in *In re VanConett Estate*. The order directed the parties to address

> whether the mere fact that Herbert and Ila VanConett entered into a mutual will imposes restrictions on the surviving spouse's power of disposal despite the absence of express contractual or testamentary limitations on the power of alienation, (3) the source and nature of such a restraint if it is contended that Herbert VanConett was so restrained from disposing of his estate, and (4) whether any secondary authority in wills and estates law (e.g. hornbooks and treatises), or practice in the field, supports the proposition that a mutual will imposes restrictions on the surviving spouse's power of disposal in the absence of express contractual language or testamentary limitations on the power of alienation. [*In re VanConett Estate*, 474 Mich 999; 708 NW2d 99 (2006), vacated and lv den 477 Mich 969 (2006).]

The directive to consult secondary authority suggests that the Court believed that the issue was unsettled in Michigan.

Courts in other jurisdictions have differing views concerning whether the surviving party to a contract to make a will is limited in the right to dispose of property after the death of the first party. See Anno: *Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life,* 85 ALR3d 8; 79 Am Jur 2d, Wills, §§ 687-688, pp 736-738; 97 CJS, Wills, § 2056, pp 659-661. Some jurisdictions allow the surviving spouse in that circumstance to use the property for support and ordinary expenditures, but not to give away considerable portions of it or make gifts that defeat the purpose of the agreement:

> Where an agreement as to mutual wills does not define the survivor's power over the property, but merely provides as to the disposition of the property at his or her death, the survivor may use not only the income, but reasonable portions of the principal, for his or her support and for ordinary expenditures, and he or she may change the form of the property by reinvestment, but must not give away considerable portions of it or do anything else with it that is inconsistent with the spirit of the obvious intent and purpose of the agreement. . . . [T]he surviving spouse cannot make a gift in the nature, or in lieu, of a testamentary disposition, or to defeat the purpose of the agreement. [97 CJS, Wills at 660-661.]

Conversely, in other jurisdictions:

> The courts do not assume that the parties to a joint and mutual will intended to restrict either party from disposing of property in good faith by

(...continued)

of the property as he wished (evidently without regard to any obligations from the agreement), is dictum.

> transfers effective during his or her lifetime, unless a plain intention to do this is expressed in the will or in the contract pursuant to which it was executed. Nothing short of plain and express words to that effect in a contract to execute wills with mutual and reciprocal provisions is sufficient to prevent one of the testators from disposing of his or her property in good faith during his or her lifetime, notwithstanding the death of the other testator. [72 Am Jur 2d, Wills at 738.]

The ALR annotation collects cases in § 17 that address the surviving spouse's authority to dispose of property where the agreement or will leave to designated beneficiaries property that the survivor may own at the time of the survivor's death, or contains similar provisions. The annotation states that such provisions "have been construed by some courts as indicating a desire on the part of the testators to give the survivor full authority to dispose of the property during the survivor's lifetime." 85 ALR3d at 51. The annotation collects cases taking a more limited view as well, including those "[h]olding that the survivor could dispose of the property only for such things as necessities or reasonable needs," and rejecting claims "that the survivor was given the full power of disposition by the provision in a joint or mutual will which left to the beneficiary, at the survivor's death, only that property which the survivor might own at his death, or the like." *Id.* at 52.

As quoted in *Murphy v Glenn,* 964 P2d 581, 586 (Colo App, 1998), another treatise states:

> A general covenant to devise, which does not refer to specific property, does not prevent the promisor from making conveyances during his lifetime. Such a covenant has been held not to prevent him from making gifts during his lifetime, if reasonable in amount and not made to evade performance. If the contract provides for devising or bequeathing all that the promisor owns at his death, he may convey his property during his lifetime if such conveyance is not in fraud of the rights of the promisee. A contract to devise all of the property of which the promisor should die possessed was held not to reserve to the promisor the right to convey any considerable part of the property gratuitously. [*Id.*, quoting 1 W Page, *Wills* § 10.23 (Bowe-Parker rev ed 1960).]

In *Murphy,* 964 P2d at 586, the court cited seven cases from other jurisdictions as supporting "the proposition that a party who is bound by a contract to make a will may make reasonable gifts during his or her lifetime and use the property for reasonable living expenses, but may not transfer the bulk of the estate in a way contrary to the terms of the agreement embodied in a mutual will."

In re Chayka's Estate, 47 Wis 2d 102; 176 NW2d 561 (1970), provides an example of a court invalidating inter vivos transfers of property to avoid commitments made in a mutual will on the basis that the transfers breached the covenant of good faith that accompanies every contract. A husband and wife executed a joint, mutual, and reciprocal will in which they bequeathed to each other all real and personal property and "after the decease of both of us, the whole of said real and personal property of whatever nature and wherever located that we may own at the time of decease of the survivor of use" to a specified beneficiary. After the husband died, the wife married the appellant. She conveyed parcels of real property to herself and the

appellant as joint tenants, gave the appellant bonds as a gift, and transferred funds into a joint account in her and the appellant's name. After her death, the probate court ordered the appellant to deliver the bonds and determined that the properties she placed in joint tenancy were part of the wife's estate. The Wisconsin Supreme Court rejected the appellant's contention that the transfers were valid, stating:

> Appellant contends that Evelyn Flanagan Chayka complied with her agreement with her first husband by leaving unrevoked the will giving all of the property she possessed at the time of her death to Robert W. Flanagan. This, as another court has well stated it to be, is "a mere play upon words." What she in fact has done has stripped nearly all of the flesh from the bones, leaving only a skeleton for testamentary disposition to Robert W. Flanagan. This is a compliance in form, not in substance, that breaches the covenant of good faith that accompanies every contract, by accomplishing exactly what the agreement of the parties sought to prevent.
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> * * *
>
> . . . The duty of good faith is an implied condition in every contract, including a contract to make a joint will, and the transfers here violate such good faith standard by leaving the will in effect but giving away the properties which the parties agreed were to be bequeathed at the death of both to a designated party. The contract to make a will, once partially executed and irrevocable, is not to be defeated or evaded by what has been termed "completely and deliberately denuding himself of his assets after entering into a bargain."[8]

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[8] "Should it be held that the promisor is always left free to defeat the effect of his promise by completely and deliberately denuding himself of his assets immediately after entering into the bargain, it would seem that the contracts could serve very little purpose other than that of being either gambling devices or instruments of fraud and would be unworthy of legal protection. * * * A party to such a contract should be made to understand clearly that the law does not permit a man to have his cake and eat it too." Sparks, Contracts to Make Wills, (1956), pages 51, 52. See also: 94 C.J.S. Wills s 119, p. 881, stating: "Agreements based on valuable consideration to make a particular disposition of property will not be allowed to be defeated by a conveyance to persons who are not bona fide purchasers, during the lifetime of the promisor."

[*In re Estate of Chayka,* 47 Wis 2d at 108.]

Similarly, in *In re Estate of Erickson,* 363 Ill App 3d 279; 841 NE2d 1104; 299 Ill Dec 372 (2006), the court invalidated transfers as being violative of the implied duty to act in good faith and contrary to the purpose of a joint and mutual will. The husband and wife executed a joint and mutual will in which each bequeathed to the survivor the entire estate "as the survivor's property absolutely," and after the survivor's death, to specified children in specified amounts.

Id. at 280. The husband died first. Five days before the wife's death, she conveyed three tracts of real property, each for $10, to two daughters and a grandson. A son filed a complaint to have the parcels returned to the estate. The defendants argued that the agreement gave the property to the survivor absolutely and she was free to dispose of it as she saw fit as long as she did not revoke the joint and mutual will. After noting that the contract underlying a joint and mutual will becomes irrevocable upon the death of the first testator, the Illinois Court of Appeals stated:

> Here, five days before her death, Lea attempted to circumvent both the terms of the joint and mutual will and her contractual obligations thereunder to dispose of her property by essentially giving it away. Lea's actions violate the spirit and purpose of the joint and mutual will, as well as the implied duty to act in good faith-a duty that is part of every contract. See *Bank One, Springfield v. Roscetti,* 309 Ill.App.3d 1048, 1059-60, 243 Ill.Dec. 452, 723 N.E.2d 755, 764 (1999) ("Good faith requires the party vested with contractual discretion to exercise it reasonably, and he may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties"). The term "absolutely" does not give Lea the power to upset the dispositive scheme.
>
> We agree with defendants that *Helms* [*v Darmstatter*, 34 Ill 2d 295; 215 NE2d 245 (1966)], *Rauch* [*v Rauch*, 112 Ill App 3d 198; 445 NE2d 77; 67 Ill Dec 785 (1983)], and other decisions (see, *e.g., Orso v. Lindsey,* 233 Ill.App.3d 881, 887, 174 Ill.Dec. 403, 598 N.E.2d 1035, 1039 (1992)) leave open the question to what extent the surviving spouse may use the property upon the death of the other testator: "It may well be that they intended that the survivor should have the absolute right to use the entire *corpus* for life, but only upon the condition that the property owned by the survivor upon his or her death would pass in accordance with the terms of the joint will." *Helms,* 34 Ill.2d at 301-02, 215 N.E.2d at 249. Interesting questions remain as to whether Lea could have sold some property to make a modest gift to a charity or to travel the world. We need not analyze those possibilities, and we need not decide whether Lea, after Charles's death, could have sold or given this property at a different time or under different circumstances. The undisputed facts establish Lea disposed of the property five days before her death. She received $10 for each parcel. No facts establish Lea could have had any intention other than to circumvent the dispositional scheme. These transfers are not permitted by the will. [*In re Estate of Erickson,* 363 Ill App 3d at 284.]

In contrast, the approach adopted in *Ohms v Church of the Nazarene, Weiser, Idaho, Inc,* 64 Idaho 262; 130 P2d 679 (1942), focuses on enforcing the terms of agreements to make wills as they are written. In that case, the husband and wife made mutual, reciprocal, and concurrent wills in which each bequeathed to the survivor all real and personal property owned at the time of his or her death, and in the event that the spouse predeceased the testator, to the husband's children and grandchildren. The husband and wife also executed a mutual contract in which they agreed that all property owned by the last one dying should go to the husband's children and grandchildren. After the husband died, the wife made other wills that conflicted with the agreement. After being advised that she could not will the challenged property to the church, she revoked the inconsistent wills and instead deeded the property to the church. After the wife's

death, her husband's children and grandchildren brought an action to set aside the deed on the basis that the transfer violated the purpose and intent of the couple's contract. The Idaho Supreme Court recognized that there were decisions supporting the view that the transfer was invalid as a subterfuge, but ultimately concluded, "It is better to give effect to the contract as made by the parties than attempt construction by implication or insertion by inference." *Id.* at 682. "If it was the intention of the parties that what each might receive upon the death of the other should be kept intact and passed on without diminution thereof to Otto Ohms' children, the contract should have so stated, which it did not." *Id.* In addition to noting the absence of limitation in the parties' agreement, the court referred to other facts that bolstered the reasonableness of validating the disposition (e.g., the support provided by the church, the wife's contribution to retention of the property, the husband's evident desire that the realty be in a different category than other property). However, the crux of the decision is the recognition that "[c]ourts should construe contracts according to the plain language used by the parties making them, and [] should not, in this or any other case, substitute what we may think the parties should have agreed to for what their contract shows they did agree to." *Id.*

We reject appellant's invitation to recognize implied limitations on the transfer of assets by the surviving spouse of an agreement to make a mutual will. With respect to other contracts, this Court has explained:

> The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent. An unambiguous contract must be enforced according to its terms. The judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. [*Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004) (citations and internal quotation marks omitted).]

These principles apply to a contract to make a mutual will. Petitioner acknowledges that the contract does not expressly limit the parties from transferring assets. Unlike some other jurisdictions, "Michigan law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 13; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich 913 (2007) (citations and quotation marks omitted). Regardless of whether the transfers were made for the purpose of avoiding the testamentary disposition, the agreement did not restrict Carlton from disposing of

the assets as he saw fit.[4]

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

[4] We need not consider petitioner's challenge to respondents' assertion that jointly held assets are not assets "possessed" by the decedent at the time of his death. The complaint did not present this theory; rather, the complaint concerned whether Carlton breached the agreement by disposing of the assets during his life. Moreover, the issue is inadequately briefed by petitioner. He raises it in his reply brief and only cites two cases, neither of which addresses the meaning of "dies possessed."