YOUR LEGAL ADVISORS

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 2007-2017, 2019 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: September 10, 2020
RE: ***In re Conservatorship of Bjork***
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

BASEBALL LORE – Canadian Major Leaguers of Note

It is surprising to me that there are so few great Canadian baseball players.

There is but one; Ferguson Jenkins, in the Hall of Fame. Fergy was a pitcher primarily with the Chicago Cubs. He won the CY Young Award in 1971 and finished second twice in the CY Young voting. He was a 20-game winner seven times. The year he won the CY Young award he actually batted .243 and hit 6 round trippers driving in 20 runs. Five times he had fielding averages of 1.000. In the 71' season, he led the league with complete games 30. He accomplished this feat four times.

The only other Canadian who was close the making the "Hall" is still playing, 36-year old Joey Votto. Joey, a first baseman, has played his entire 14 years with the Cincinnati Reds. During that time, he has led the league in games (twice), plate appearances, doubles, walks (four times), one base percentage (seven times) and slugging percentage.

He has been named to the N.L. Allstar six times and won the MVP in 2010. He finished second to Geovany Soto in the Rookie of the Year voting in 2008 and, one need only ask what did Geovany do thereafter.

There is actually a measured stat called "Hall of Fame Monitor". In batting, he has a score of 88 and a likely admittee, ranks 100. In one Hall of Fame standard called "Gray Ink," he ranks 143 with the average Hall of Famer ranking 144.

I don't think his chances are great. What do you think?

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re Conservatorship of Bjork*

- Jury Trial – Only Legal Issues
- Jurisdiction – Acts Occurring Before Conservatorship
- Lien – A Proper Remedy
- Duress
- Self-Dealing by Conservator

Appellant obtained Doris' signature on two deeds immediately prior to a Conservatorship being established for Doris. The Conservator, Appellee, sued to set aside the deeds claiming undue influence. A Lis Pendens was filed on the real estate.

The parties settled. Part of the settlement called for Appellant to be deeded the properties subject to a mortgage in favor of Doris' Conservatorship estate to be granted by Appellant. Appellant refused to execute the mortgage. Appellee returned to the lower Court.

The lower Court dissolved the Lis Pendens and substituted a lien in favor of the Conservatorship and Ordered Appellee to deed the property to Appellant. The lower Court thereby effectuated this settlement in another manner.

Appellant appealed and made the following arguments to which the Court of Appeals replied.

1. The settlement was improper because the Conservator of Doris benefited through prospective intestate succession. The Court of Appeals cited MCR 5.407 and said that because a Guardian Ad Litem and the Court approved the settlement, the settlement was valid even though the Conservator might benefit in the future.

2. The wrongdoing preceded the establishment of the Conservatorship; therefore, the Court had no jurisdiction to set aside the deeds. Rejected. The lower Court had jurisdiction to determine the property rights of the protected individual.

3. I deserved a Jury Trial. Wrong. This is an equitable matter, and therefore, the Court sits without a Jury.

4. I made the settlement under duress because I faced financial ruin. Wrong. Even though you faced financial ruin, it was by lawful means, therefore, it did not constitute duress in the eyes of the law.

4822-4431-0730

STATE OF MICHIGAN

COURT OF APPEALS

In re Conservatorship of DORIS LELA BJORK.

BARBARA D. HURLESS, Conservator of DORIS LELA BJORK,

Petitioner-Appellee,

v

DENNIS BJORK,

Respondent-Appellant.

UNPUBLISHED
August 20, 2020

No. 350034
Ionia Probate Court
LC No. 2016-000362-CZ

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Respondent, Dennis Bjork, appeals as of right the probate court's order releasing a notice of lis pendens and placing a lien in the amount of $338,232 in favor of petitioner, the Conservatorship of Doris Lela Bjork, on certain real property pursuant to a stipulated order that memorialized as of record the parties' agreement to settle their outstanding claims. We affirm.

On October 24, 2016, Barbara Hurless (Hurless) filed a complaint as Doris's conservator and guardian against Dennis Bjork (Dennis). Hurless and Dennis are siblings and the children of Doris Bjork (Doris). In the complaint, Hurless alleged that she filed a petition for appointment as Doris's guardian and conservator because Doris was unable to know the extent of or manage her assets. However, after the petition was filed, but before the probate court had appointed Hurless as conservator and guardian, Doris signed two deeds purporting to transfer the real property ("Farm Property") to Dennis and herself as joint tenants with full rights of survivorship. Hurless further alleged that Doris did not remember signing the deeds and did not understand their importance. Hurless maintained that Dennis did not provide good and valuable consideration for the transfer and that he exerted undue influence over their mother. Hurless asked the probate court to determine that Doris was not competent at the time of the transfer, that there was not good consideration paid for the property, and that Dennis exercised undue influence over Doris and to

thus set aside the deeds. Hurless filed a notice of lis pendens[1] announcing the pendency of the action to set aside the deeds and clouding the title to the Farm Property.

After extended litigation, the parties, through their counsel as well as Doris's independently-appointed counsel and her guardian ad litem, agreed to the entry of a stipulated order settling all claims. Specifically, the conservatorship agreed to sell Dennis the Farm Property and farm equipment at issue for $350,000 in cash and the execution of a mortgage and interest-free note securing the balance of $338,232 payable upon either the death of Doris, the death of Dennis, or a Medicaid determination that the money is needed to be paid for Doris's care. Dennis also agreed to release any interest in and transfer to the conservatorship certain bank accounts that were in his parents' names before January 1, 2016. Finally, the order required that all of Doris's personal property remain at the Farm Property. The stipulated order asserted that it resolved all issues in the action and dismissed with prejudice any remaining claims.

Despite having agreed to the settlement, Dennis refused to sign the mortgage and note as required. Hurless thus asked the probate court to order Dennis to sign the mortgage and note or, in the alternative, to place a lien on the real property. Although Dennis sought to void the probate court's previous actions, alleging that it lacked subject-matter jurisdiction and claiming fraud on account of the probate court's refusal to accept the legitimacy of Doris's original transfer of the Farm Property, the probate court entered a lien on the property in favor of the conservatorship, released the notice of lis pendens, and ordered that Hurless quitclaim the property to Dennis subject to the lien. Dennis now appeals.

First, Dennis argues that the probate court lacked subject-matter jurisdiction because its order affected a property interest purportedly transferred before the conservatorship came into effect. We disagree.

"Whether a court has subject-matter jurisdiction is a question of law reviewed de novo." *Hillsdale Co Sr Services, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013). "In general, subject-matter jurisdiction has been defined as a court's power to hear and determine a cause or matter." *In re Lager Estate*, 286 Mich App 158, 162; 779 NW2d 310 (2009) (quotation marks and citation omitted). The probate court's jurisdiction is established by statute. See *id*. MCL 700.1302(c) provides that the probate court has exclusive legal and equitable jurisdiction over conservatorship proceedings. The probate court also has concurrent legal and equitable jurisdiction to determine the property rights or interests of protected individuals. See MCL 700.1303(1)(a); *Lager Estate*, 286 Mich App at 162-163. Dennis provides no caselaw or other rationale for why this conservatorship dispute, which concerns the legal ownership of the Farm

[1] A notice of lis pendens establishes "constructive notice to a purchaser of any real estate" that the real estate is the subject of pending litigation, MCL 600.2701(1), and is "designed to warn persons who deal with property while it is in litigation that they are charged with notice of the rights of their vendor's antagonist," *Richards v Tibaldi*, 272 Mich App 522, 536; 726 NW2d 770 (2006). "A purchaser who acquires property after the commencement of a suit and the filing of a notice of lis pendens is bound by the proceedings because '[o]ne may not purchase any portion of the subject matter of litigation and thereby defeat the object of suit.' " *Id*., quoting *Provident Mut Life Ins Co of Philadelphia v Vinton Co*, 282 Mich 84, 87; 275 NW 776 (1937).

Property, would not fall squarely within the jurisdiction of the probate court. Moreover, Hurless, as conservator, had a fiduciary duty to invoke the probate court's jurisdiction and act to protect Doris's assets, which she believed properly included the Farm Property. See MCL 700.5416; *In re Conservatorship of Brody*, 321 Mich App 332, 343; 909 NW2d 849 (2017).

Next, citing MCR 5.407, Dennis argues that the settlement was invalid because Hurless, as Doris's daughter, would benefit from it at the time of Doris's death as one of Doris's intestate heirs. We disagree.

MCR 5.407 provides:

> A conservator may not enter into a settlement in any court on behalf of the protected person if the conservator will share in the settlement unless a guardian ad litem has been appointed to represent the protected person's interest and has consented to such settlement in writing or on the record or the court approves the settlement over any objection.

It is undisputed that Hurless was a direct heir to Doris and, because Doris did not have a will, that she would receive an intestate share of Doris's estate after her death. However, because Doris's guardian ad litem (as well as her court-appointed attorney) consented to the settlement and the trial court approved the settlement as submitted, even assuming Hurless might benefit at some future date as a result of the preservation of Doris's assets, the prohibition set forth MCR 5.407 is not implicated and provides no basis for appellate relief.

We also reject Dennis's argument that he only agreed to settle because he was under duress. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Under longstanding principles of contract law, a contract entered into under duress is voidable. See *Clement v Buckley Mercantile Co*, 172 Mich 243, 253; 137 NW 657 (1912); *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). Historically, "[t]he law does not recognize duress by mere suggestion, advice, or persuasion, especially where the parties are at arm's length and represent opposing interests." *Clement*, 172 Mich at 253. Rather, the party seeking to avoid the contract "must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Farm Credit Servs of Mich's Heartland, PCA v Weldon*, 232 Mich App 662, 681; 591 NW2d 438 (1998) (quotation marks and citation omitted). "Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully." *Id*. (quotation marks and citation omitted). Moreover, "[i]n order to void a contract on the basis of economic duress, the wrongful act or threat must deprive the victim of his unfettered will" and "the party threatened must not have an adequate legal remedy." *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991).

As Hurless correctly points out, Dennis was represented by counsel at the time he entered into the settlement agreement, which undercuts any viable claim of duress. See *id*. He was free to refuse any settlement offer and to pursue his legal claims (and defend against the conservatorship's claims) in the normal course. See *id*. Although Dennis may have feared the economic consequences of Hurless successfully setting aside the deeds to the Farm Property, fear

of financial ruin was not enough to establish duress and there is no evidence that Hurless acted unlawfully in bringing about the settlement. Therefore, Dennis cannot establish duress. See *Farm Credit Servs*, 232 Mich App at 681.

In his final issue raised on appeal, Dennis argues that the probate court violated his constitutional rights by denying him a jury trial and by denying his motion seeking the probate court judge's disqualification. We find no merit in either contention.

"When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001). This Court reviews de novo questions of constitutional law. See *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014).

As an initial matter, Dennis only cites the Seventh Amendment of the United States Constitution.[2] However, "[t]he Constitution of the United States does not confer a federal constitutional right to trial by jury in state court civil cases." *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 183; 405 NW2d 88 (1987); see *Curtis v Loether*, 415 US 189, 192 n 6; 94 S Ct 1005; 39 L Ed 2d 260 (1974). Under prevailing state constitutional law, "[i]f the nature of the controversy would have been considered legal at the time [Michigan's] 1963 Constitution was adopted, the right to a jury trial is preserved." *Madugula*, 496 Mich at 705-706. "However, if the nature of the controversy would have been considered equitable, then it must be heard before a court of equity." *Id*. at 706. Indeed, "[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." *Id*. at 705 (citation omitted). Actions to set aside a deed are historically equitable in nature. See *Moran v Moran*, 106 Mich 8, 10-11; 63 NW 989 (1895); *Adams v Adams*, 276 Mich App 704, 713-714; 742 NW2d 399 (2007). Therefore, the probate court correctly determined that Dennis had no constitutional right to a jury trial.

Finally, we address Dennis's remaining argument that the probate court judge was biased against him. "Disqualification pursuant to the Due Process Clause is only required in the most extreme cases." *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009) (quotation marks and citation omitted). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality." *Armstrong*, 248 Mich App at 597 (quotation marks and citation omitted). In fact, even "a trial judge's remarks made during trial, which are critical of or hostile to counsel,

[2] The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. [US Const, Am VII.]

the parties, or their cases, ordinarily do not establish disqualifying bias." *In re MKK*, 286 Mich App at 567.

In this case, nothing about the probate court judge's statement that Dennis's actions relating to the Farm Property "raise[d] concerns that need to be sorted out" evidenced disqualifying bias. Indeed, the remark was facially accurate as Dennis's actions had caused the conservatorship to file suit to set aside the deeds. Even if this statement could reasonably be taken as critical or hostile to Dennis, that alone would not establish disqualifying bias. See *In re MKK*, 286 Mich App at 567.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Anica Letica