STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ALBERT PAPAZIAN.

MARK PAPAZIAN,

Petitioner-Appellant,

v

ALBERT PAPAZIAN,

Respondent-Appellee,

and

SUSAN COBB, SOCIAL SECURITY AGENCY, and STEPHEN ALBERY,

Intervening Petitioners.

UNPUBLISHED
July 3, 2007

No. 273795
Oakland Probate Court
LC No. 06-302222-CA

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Petitioner appeals as of right an order granting summary disposition in favor of respondent. We affirm.

I. Basic Facts and Procedure

This case arises out of a struggle between petitioner and his sister, Susan Cobb, concerning the control and disposition of respondent's estate. Respondent is a 79-year-old (at the time of the lower court proceedings) widower, who owns a restaurant named Hunter House in Birmingham, Michigan ("HHB"). When respondent's wife died in 1996, respondent stopped working at HHB and assigned power of attorney to his son, petitioner. Petitioner, who ran a different Hunter House restaurant in downtown Detroit ("HHD"), also began working at HHB around this time. Also around this time, Cobb, respondent's daughter, started managing respondent's finances for him. Soon after this, Cobb began handling HHB's banking and payroll matters while petitioner supervised HHB's day-to-day operations.

After Cobb and petitioner started running HHB, their relationship became contentious. At some point thereafter, petitioner accompanied respondent to see Barry Bess, an attorney, to prepare an estate plan. Respondent admitted that he signed this estate plan even though he had never read its contents. On December 26, 2003, respondent executed a quitclaim deed conveying to petitioner the land on which HHB was located. However, respondent denied that he had ever knowingly executed this deed and claimed that petitioner must have tricked him into signing it. Later, respondent said Todd Papazian, petitioner's son, informed him that the deed was used as collateral for a loan to support HHD.

Sometime in 2005, Cobb reviewed respondent's estate plan with her attorney. After Cobb told respondent about the contents of the estate plan, respondent went to the Kemp and Klein law firm in October or November of 2005 to review the estate plan. When respondent's attorney advised him that he had, in fact, signed the quit claim deed that petitioner used as collateral for a loan, respondent revoked petitioner's power of attorney and revised his estate plan to leave his entire estate to Cobb, thereby excluding petitioner. In December, 2005, respondent filed a complaint against petitioner alleging that petitioner wrongfully converted corporate assets from HHB and fraudulently deeded HHB to himself.

In January, 2006, petitioner filed a petition to appoint a conservator for respondent alleging respondent's mental deficiency, dementia in the form of memory loss and undue influence from Cobb. The court appointed Don Slavin as guardian ad litem for respondent. In February, 2006, respondent filed an objection to the petition for conservatorship. The objection noted that petitioner filed the petition to gain an advantage in the ongoing litigation between himself and petitioner.

Following the filing of the pleadings, petitioner served Cobb with two subpoenas. Both sought Cobb's financial records relating to respondent's assets. Cobb filed motions to quash the subpoenas. Between Cobb's filings of her motions to quash, petitioner filed a motion to compel Cobb's deposition. In May, 2006, respondent filed a motion to compel petitioner's deposition. The court held a hearing May 22, 2006, to address the motions as well as the original petition.

At the hearing, petitioner requested that the court compel Cobb to provide financial documents and undergo a deposition. Cobb informed the court that she was running respondent's restaurant, she had adequate financial support from her husband, and she never wrote checks on behalf of respondent to herself for personal gain. Following the hearing, the court ordered: (1) respondent to undergo an independent medical examination by Dr. Gerald Shiener; (2) petitioner and Cobb to be deposed; and (3) Cobb to bring documents in her possession or control evidencing property Cobb received from respondent in the previous three years, financial documents in respondent's name, and all deeds owned individually by respondent. Cobb subsequently provided all of respondent's bank account information in her possession, but noted that she did not have documents in her possession or control evidencing property conveyed to her by respondent or evidencing stock certificates or deeds in respondent's name. Dr. James Henderson, respondent's personal physician, was also deposed. Henderson said respondent did not have any memory problems. Henderson further noted respondent was capable of performing complex procedures required in treating his diabetes.

In July, 2006, respondent filed a motion for summary disposition. Respondent claimed that petitioner sought the conservatorship in order to control respondent's litigation against him.

In addition, respondent argued that undue influence was not grounds to prevent the making of an estate plan or to grant a conservatorship, and that respondent had more than sufficient mental capacity to manage his affairs based on the assessments by Shiener, Henderson and Slavin, the guardian ad litem.

In his response to the motion, petitioner claimed that summary disposition was inappropriate because: (1) respondent and Cobb refused to comply with discovery requests; (2) respondent was unable to manage his property and business affairs, had a mental deficiency, and was wasting his estate; and (3) Shiener's and Henderson's conclusions conflicted with the evidence presented in this case.

At the summary disposition motion hearing, respondent argued that Sheiner's report demonstrated that a conservator was unnecessary.[1] Petitioner responded that Sheiner's report actually demonstrated that respondent was unaware of the contents of his original will and claimed that Cobb unduly influenced respondent. The court then questioned respondent at length regarding his family and finances. Respondent admitted he did not know that his original estate plan provided for the disposition of his business to petitioner, but also said he did not actually read the plan. Respondent also said that Cobb had been paying his bills and writing checks since his wife died.

In September, 2006, the probate court granted respondent's motion for summary disposition and dismissed the petition. The court reasoned, based on Dr. Shiener's report and its own questioning of respondent, there was no issue of fact as to whether respondent was able to effectively manage his property and business affairs because of alleged mental illness, mental deficiency, or disability under MCL 700.5401(3). The court also noted that, given Shiener's report, respondent's inability to recall the disposition of his property in his estate plan was not sufficient to show that respondent suffered from a mental illness, deficiency, or disability.

II. Analysis

On appeal, petitioner argues that a genuine issue of material fact exists concerning respondent's memory loss that suffices as a "mental deficiency" under MCL 700.5401(3). We disagree.

A. Standard of Review

The Court reviews de novo an order granting summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion

[1] Shiener concluded that respondent "displays no gross disorder of thinking," and explained "[t]here is no question that his cognition is fully intact." Shiener further elaborated that respondent "manifests no impairment in his cognition, mental state, judgment, or any other mental or physical function that would in any way impair his abilities to understand the issues involved in making financial decisions, managing his own assets, and acting in his own behalf. I find no evidence that he is vulnerable to any undue influence. He does acknowledge conflict, as any father would, given the nature of the dispute within his family."

under MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing the motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). In determining whether a trial court's ruling on a motion for summary disposition is proper, this Court only reviews evidence available to the trial court when it ruled on the motion. *Maiden, supra* at 126 n 9. Consequently, the additional exhibits petitioner presented in his motion for reconsideration are not properly before this Court. *Id*.

B. Conservatorship Proceedings

MCL 700.5401 governs conservatorship proceedings. Specifically, MCL 700.5401(3) provides:

> The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> > (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
> >
> > (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

Petitioner contends that respondent's ignorance of details concerning the disposition of his estate and the execution of the quitclaim deed amounts to abnormal memory loss constituting a "mental deficiency" under § 5401(3). Michigan Courts have not defined "mental deficiency" under § 5401(3). However, we need not address what constitutes a "mental deficiency" in this case because respondent's ignorance of the details concerning his estate plan and the deed was a consequence of respondent's method of managing his affairs rather than the result of abnormal memory loss.

Specifically, since the time of his wife's illness and death in 1996, respondent has completely entrusted his family with his financial and business affairs. For example, in 1996, respondent signed a form giving petitioner power of attorney over his affairs. In addition, when his wife became ill, respondent abdicated any managerial role in the restaurants, even though he was the sole owner of that business, and relied upon Cobb and petitioner to run it. Also during this time, Cobb began managing respondent's personal finances, i.e., paying his bills and issuing checks on his behalf because respondent had difficulty writing. Moreover, petitioner accompanied respondent to an attorney's office to prepare his estate plan, which respondent

signed without reading, and Cobb accompanied respondent to a different attorney's office to revise this estate plan, which respondent also signed without reading. Indeed, by the time of his deposition in 2006, respondent was completely reliant upon Cobb to manage his personal and business affairs.

In light of this, although respondent admitted that one of the signatures on the deed could be his and that he did not recall signing the deed, it appears that this inability to recall signing the deed was a mere consequence of respondent's systematic manner of placing all his important financial and business affairs in the hands of his family rather than the result of memory loss so severe as to require a conservator.

Underscoring the conclusion that respondent did not suffer from memory loss constituting a "mental deficiency" are the assessments by the independent psychologist and the guardian ad litem. Dr. Shiener concluded that respondent "manifests no impairment in his cognition, mental state, judgment, or any other mental or physical function that would in any way impair his abilities to understand the issues involved in making financial decisions, managing his own assets, and acting in his own behalf." Similarly, respondent's guardian ad litem "did not attribute any significance to [respondent's] lack of knowledge of his business affairs because [entrusting his affairs to his family] is what he chose to do [with] his business." In addition, respondent provided detailed answers to the trial court's questions regarding his financial information at the summary disposition motion hearing.

C. Documents' Relevance To Respondent's Mental State

Petitioner argues that Cobb's refusal to follow the probate court's discovery order prevented him from gathering relevant evidence in this case. However, petitioner does not specify how Cobb violated the order other than to argue that Cobb refused to provide relevant documents. Here, the discovery order at issue specifically ordered Cobb to undergo a deposition and to provide petitioner with documents in her possession or control evidencing property that she received from respondent in the previous three years, financial documents in respondent's name, and all deeds owned individually by respondent. Cobb was deposed on August 2, 2006, and presented respondent's bank statements and check registers. Cobb affirmed that the documents she presented were the only documents required by the discovery order in her possession or control.

Despite this, on August 11, 2006, petitioner filed a motion for discovery sanctions. On August 28, 2006, Cobb again affirmed that she had provided all documents required by the discovery order in her control or possession. There is no evidence in the record that Cobb failed to comply with the discovery order. Indeed, other than making the blanket assertion that Cobb refused to provide relevant documents, petitioner has failed to show how Cobb violated the discovery order.

Regardless, even if Cobb withheld any of the documents required by the discovery order, none of these documents would have had any bearing on whether respondent suffered from abnormal memory loss. Therefore, summary disposition was appropriate in this case. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003) (summary disposition may be "appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.")

D. Undue Influence

Petitioner next argues that Cobb unduly influenced respondent and, as a result, respondent wasted and dissipated his assets. "To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

Petitioner claimed below that Cobb misrepresented the contents of the original estate plan to respondent, falsely accused petitioner of having drug problems, falsely accused petitioner and petitioner's wife of stealing money from the business, convinced respondent that petitioner tricked him into signing the deed, convinced respondent to file a lawsuit against petitioner, and converted $138,000 from respondent's accounts. As a result of these actions, petitioner contends that Cobb became the sole heir to respondent's estate and completely controlled all of respondent's assets. Evidence was presented that Cobb provided respondent inaccurate information about his estate plan and told respondent that she had heard petitioner had a drug problem. However, respondent claimed that he did not exclude petitioner from his revised estate plan until after learning from his attorney that he had signed the quitclaim deed over to petitioner. Further, it was after respondent learned this information that he initiated his lawsuit against petitioner. Thus, it does not appear that Cobb unduly influenced respondent's decisions in these matters.

Moreover, no affirmative evidence was presented showing that Cobb told respondent that petitioner or his wife had stolen money from Hunter House or that Cobb told respondent that petitioner had tricked him into signing the deed. On the contrary, Cobb expressly denied both of these allegations and indicated that it was likely that respondent first told her that petitioner had tricked him into signing the deed. In addition, no affirmative evidence was presented showing that Cobb exercised any control over the initiation of respondent's lawsuit against petitioner or that Cobb had converted any money from respondent.[2]

In light of this, petitioner has failed to make any showing that respondent's estate has been wasted or dissipated or that protection is needed for respondent's support, care, or welfare. MCL 700.5401(3)(b). Although it is true that respondent altered his estate plan to leave his entire estate to Cobb upon his death, it does not follow that respondent's estate will be wasted just because petitioner is not included in this revised estate plan. Moreover, even if Cobb withdrew $138,000 from respondent's bank account as petitioner alleges, petitioner has presented no evidence that this money was converted – especially in light of the fact that Cobb

[2] Petitioner cites bank statements to show that Cobb converted money from respondent's account over and above respondent's living expenses. However, these statements were attached to petitioner's motion for reconsideration and were not before the probate court when it ruled on respondent's summary disposition motion. Therefore, this Court may not consider this evidence in reviewing this issue. *Rozwood, supra* at 126 n 9.

has been managing respondent's assets for over ten years. It is also worth noting that Shiener found "no evidence that [respondent] is vulnerable to any undue influence. Thus, petitioner's claim fails.

The words "undue influence" do not appear in MCL 700.5401(3). In making his argument, petitioner claims that whether undue influence falls within the purview of MCL 700.5401(3) is an issue of first impression. In support of his proposition, petitioner cites a Nebraska Supreme Court decision, *In re Estate of Oltmer*, 214 Neb 830; 336 NW2d 560 (1983). The crux of the *Oltmer* Court's ruling was that a conservator must be appointed to avoid the waste or dissipation of the respondent's estate due to undue influence. *Id*. at 831-833.

Notwithstanding the fact that cases from sister jurisdictions are not binding on this Court, *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 183 n 35; 658 NW2d 804 (2002), petitioner in this case has failed to establish that respondent was the victim of undue influence. Thus, we need not consider whether undue influence falls within the purview of MCL 700.5401(3).

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra