# STATE OF MICHIGAN

# COURT OF APPEALS

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In re Estate of EDWARD JOSEPH MCCORMICK, Deceased.

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ERIC A. BRAVERMAN, Personal Representative of the Estate of EDWARD JOSEPH MCCORMICK, Deceased,

Petitioner-Appellee,

v

LINDA MCCORMICK and MARY MCCORMICK,

Respondents-Appellants.

UNPUBLISHED
December 11, 2008

No. 277558
Wayne Probate Court
LC No. 1992-513517-DE

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Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Respondents appeal as of right the order of the probate court discharging petitioner as personal representative and granting his petition to allow the 12th, 13th, and 14th and final accounts and for complete estate settlement. We affirm.

The disposition of this estate has been the subject of much litigation and has a long factual and procedural history. Since decedent's death in 1992, respondents Mary McCormick ("Mary"), decedent's former spouse,[1] and Linda McCormick ("Linda"), one of their children, have filed numerous lawsuits in both state and federal court. By 2003 or 2004, the only asset remaining in the estate was the real property located at 8995 Henry Ruff Road ("the property"). On December 18, 2003, the property was damaged by fire. On January 23, 2004, the Family Division of the Wayne Circuit Court ("the circuit court") appointed a receiver to collect the

[1] See *McCormick v Braverman*, unpublished opinion of the Court of Appeals, issued May 24, 2002 (Docket No. 222415), vacated in part by *McCormick v Braverman*, 468 Mich 858, 657; NW2d 118 (2003) (recognizing judgment of divorce). Given recognition that Mary and the decedent were divorced, her participation in the administration of decedent's estate is questionable. MCL 700.2801.

insurance proceeds and ensure that the necessary repairs were completed. At that time, Mary had a life estate in the property, but it was extinguished when she failed to comply with the condition of her life estate that she maintain insurance for the property in the name of the Estate of Edward McCormick. In 2005, the receiver sold the property. On March 5, 2007, petitioner filed petitions to allow the 12th annual, 13th annual, and 14th and final accounting, and a petition for complete estate settlement. The final petition year indicated assets of $5,018.87, but liabilities of $435 in fees and costs and $7,564.50 in petitioner's attorneys' fees, thus creating a negative balance. A hearing was held on April 2, 2007. Respondents appeared at the hearing and Linda initially objected to the petitions on the basis that the petitioner and the probate court should have been removed from the case. The probate court noted that no notice was filed in regard to respondents' objection. MCR 5.102.[2] Linda then indicated that she objected to the closing of the estate, and the probate court permitted her to place on the record her various objections to petitioner's and the previous administrator's administration of the estate. The probate court then heard similar objections to closing the estate from Mary. The probate court, citing respondents' extensive history of litigation in regard to the estate, granted the petition without holding an evidentiary hearing on respondents' objections.

## I. Disqualification

We first address Linda's argument on appeal is that the probate court erred in closing the estate without hearing her motion for disqualification of the probate judge. We disagree.

Whether the probate court followed proper procedure is a question of law, which we review de novo. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002). Proper interpretation of a court rule is also reviewed de novo as a question of law. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

MCR 2.003(C) sets forth the procedure for filing a motion for disqualification:

> (1) *Time for filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.
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> (2) *All Grounds to Be Included; Affidavit*. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

[2] MCR 5.102, provides that:

> A petitioner, fiduciary, or other moving party must cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons. It must state the time and date, the place, and the nature of the hearing. Hearings must be noticed for and held at times previously approved by the court.

In addition, MCR 5.102, which pertains to notices of hearing in probate court, provides:

> A petitioner, fiduciary, or other moving party must cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons. It must state the time and date, the place, and the nature of the hearing. Hearings must be noticed for and held at times previously approved by the court.

Here, Linda served on the interested parties on March 30, 2007, notice that a hearing on her previously filed motion for disqualification of Judge Mack and petitioner[3] had been set for April 2, 2007. However, she apparently failed to notice the motion for hearing. The probate court stated on the record at the hearing on petitioner's petition to close the estate on April 2, 2007, that Linda had failed to notice her motion and schedule a hearing with the probate court. The court did not err in declining to hear the motion for disqualification. See *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 693; 625 NW2d 470 (2001), citing *Forest v Parmalee* (*On Rehearing*), 60 Mich App 401, 405; 231 NW2d 378 (1975), citing 60 CJS Motions and Orders § 10, p. 17 ("[T]he motion . . . on the day of trial was properly denied where plaintiff, although filing the motion well before trial, failed to notice it for hearing.").

## II. Outstanding Claims Against Estate

Respondents' next argue on appeal that the probate court abused its discretion in closing the estate where there were outstanding claims against the estate and petitioner had not accounted for all the estate's assets. We disagree.

At the time of the proceedings in probate court that are the subject of this appeal, the only asset remaining in the estate was the property.[4] Respondents have failed to provide any evidence of additional assets in the estate at the time the probate court closed the estate.

Respondents also claim that the probate court improperly closed the estate because there were claims pending against it. However, they have provided no evidence that there were claims outstanding when the probate court granted petitioner's petition to close the estate. They allege that Mary has a claim for alimony against the estate; however, in a July 12, 2004, order, the circuit court terminated all obligations of the estate to Mary. The probate court found that it was not unjust or inequitable to do so because of Mary's wrongful extraction of approximately $22,000 of marital assets, and her "abusive litigation tactics that have drained the resources of the estate until the only remaining asset is the marital home."

In addition, Linda recorded a lis pendens in the chain of title to the property, but it was discharged by a January 20, 2005, order of the circuit court. Noting that it had been previously

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[3] On appeal, Linda makes no claim of error with respect to the probate court's refusal to address her motion for petitioner's removal; she only mentions the probate court's refusal to hear her "petition for recusal" of the probate judge.

[4] In its July 13, 2004, Opinion and Order, the Family Division of the Wayne County Circuit Court noted that the only asset remaining in the estate was the marital home.

determined that Linda had no title interest in the property, the order discharged the lis pendens Linda had recorded in the chain of title to the property and enjoined her from further encumbering the property. Finally, respondents have provided no evidence to support their contentions that there were outstanding tax liens against the property.

## III. Hearing on Accounts

We address respondents' remaining argument on appeal is that the probate court abused its discretion in closing the estate without holding an evidentiary hearing on their objections to petitioner's accountings and to his requested personal representative and attorney fees.

We review issues of statutory construction de novo as questions of law, "[b]ut appeals from a probate court decision are on the record, not de novo." *In re Estate of Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The probate court's findings of fact are reviewed for clear error, MCR 2.613(C); *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999), while its substantive decisions, including whether to close a probate hearing, are reviewed for an abuse of discretion, *In re Estate of Weber*, 257 Mich App 558, 560; 669 NW2d 288 (2003). We also review a probate court's award of attorney fees for an abuse of discretion. *In re Estate of Adams*, 257 Mich App 230, 236; 667 NW2d 904 (2003). "An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (internal quotations and citations omitted). "[W]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

Respondents essentially argue that the probate court abused its discretion in approving the accountings without holding an evidentiary hearing because petitioner did not adequately account for income and disbursements. Respondents' primarily contention is that petitioner improperly claimed attorneys' fees for participation in lawsuits in which the estate was not a party.

MCR 5.310(C)(2) sets forth the relevant requirements for accountings:

> (c) Contents. All accountings must be itemized, showing in detail receipts and disbursements during the accounting period, unless itemization is waived by all interested persons. A written description of services performed must be included or appended regarding compensation sought by a personal representative. This description need not be duplicated in the order. The accounting must include notice that (i) objections concerning the accounting must be brought to the court's attention by an interested person because the court does not normally review the accounting without an objection; (ii) interested persons have a right to review proofs of income and disbursements at a time reasonably convenient to the personal representative and the interested person; (iii) interested persons may object to all or part of an accounting by filing an objection with the court before allowance of the accounting; and (iv) if an objection is filed and not otherwise resolved, the court will hear and determine the objection.

> (d) Proof of Income and Disbursements. After filing and before the allowance of an accounting, the personal representative must make proofs of income and disbursements reasonably available for examination by any interested person who requests to see them or as required by the court. An interested person, with or without examination of the proofs of income and disbursements, may file an objection to the accounting with the court. If an interested person files an objection without examining the proofs and the court concludes that such an examination would help resolve the objection, the court may order the interested person to examine the proofs before the court hears the objection.

With respect to MCR 5.310(C)(2)(c), petitioner's 13th and 14th accountings included itemized statements of receipts and disbursements, and a written description of his services was attached to the 14th accounting, in which he requested compensation for his services as personal representative.[5] Petitioner's accountings all included the required notices regarding objections.

Here, respondents failed to file an objection to the accountings with the probate court. The lower court record only shows that respondents filed a proof of service for a "hearing set for 4-2-2007 . . . before Judge Mack." The proof of service also states: "Notice of hearing on previously filed motion for disqualification of J. Mack and Braverman." The lower court record does not contain any filing of objection to the accountings, and thus, the probate court did not err in dismissing respondents' objections.

Respondents also claim that petitioner violated MCR 5.310(C)(2)(d) by refusing to provide proof of expenses when Linda went to his office. MCR 5.310(C)(2)(d) provides in part, that "[a]fter filing and before the allowance of an accounting, the personal representative must make proofs of income and disbursements reasonably available for examination by any interested person who requests to see them or as required by the court."

At the hearing, petitioner admitted that Linda came to his office to review proofs of income and disbursements. Although the record is not clear in regard to which records Linda sought, petitioner explained that he could not provide Linda a "list of expenses and receipts [that] was prepared [by] Mr. Findling in the course of the receivership," as those records pertained to the circuit court action, not the instant case. Because the records sought by Linda were primarily related to the circuit court action and prepared and possessed by the receiver, not petitioner, we cannot conclude that petitioner failed to make those records reasonably available for examination. Moreover, even assuming that petitioner should have made these records available for examination, respondents cannot show error requiring reversal. Respondents could have filed an objection without examining the proofs and simply failed to do so. MCR 5.310(C)(2)(d). Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 331; 125 NW2d 869 (1964). Thus, reversal is not required.

[5] There was no income or any disbursements during the period covered by the 12th accounting.

Respondents also specifically object to the fees petitioner charged the estate for his services as personal representative and attorney. Mary argues that the probate court lacked jurisdiction to award petitioner fees generated from circuit court and federal district court cases. However, she fails to cite any authority for this proposition. As personal representative, petitioner had the authority to defend or prosecute proceedings on behalf of the estate in good faith and was "entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." MCL 700.3720. See also *In re Duane v Baldwin Trust*, 274 Mich App 387, 400; 733 NW2d 419 (2007), quoting MCL 700.3715(x) ("A personal representative is authorized by EPIC[6] to '[p]rosecute or defend a claim or proceeding . . . for the protection of the estate and of the personal representative in the performance of the personal representative's duties.'") (Footnote added; change in *Duane*.)

In addition, the probate court did not abuse its discretion in failing to hold an evidentiary hearing to respondents' specific objection to a $41,485 payment petitioner earlier received from the estate. Respondents claim that petitioner improperly paid himself $41,485 from the estate and concealed the payment by failing to list it in his 12th, 13th, and final accounts. Petitioner's invoice dated March 2, 2007, which is attached to the final accounting, shows a payment of $41,485 on June 21, 2006. This payment is not listed as a disbursement on the "Account of Fiduciary"; however, it is listed in the attached list of the receiver's transactions, to which the "Account of Fiduciary" refers. The account lists a zero balance on hand from last account, and the only income from the accounting period as $5,018.87 in "Funds received from Receiver (see attached report from receiver)." This amount is the balance remaining and returned to the estate once the receiver fulfilled his monetary obligations. Pursuant to an order of the circuit court, the receiver had the authority, among other powers, to sell the property. The order further provided that the proceedings from the sale of the property were to be "applied to the following expenses in the following order of priority":

> a. To pay the fees and expenses of the Receiver; and
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> b. To pay the fees and costs of Eric Braverman and Frank Rhodes;
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> c. The balance to be divided equally between Michael McCormick and Nancy Calus (formerly known as Nancy McCormick), Susan McCormick, Richard and Linda McCormick.

The record indicates that the receiver was specifically authorized by court order to compensate petitioner using the proceeds from the sale of the property. Respondents have not presented evidence of a favorable appeal of that ruling, and thus we agree with the probate court that the respondents' claim in this regard is res judicata. See *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001).

Linda further argues that petitioner failed to account for the disbursement of $118,763.51 received by the estate for the sale of the property. However, petitioner's 13th accounting reflects

[6] The Estates and Protected Individuals Code, MCL 700.1101 *et seq.*

both the receipt of $118,763.51 ($118,000 from the sale of property, plus $763.51 in "tax proration,") and the same total leaving the estate as "monies turned over to circuit court receiver." The "Seller's Closing Statement," which is attached to the 13th accounting, provides more detail. It shows an $118,000 credit for the purchase price of the property, and two credits totaling $763.51 for taxes paid by the seller in advance. The "Charges" column lists several items, including a $105,156 "payoff" to the receiver, a $7,080 broker's commission and several other taxes and fees. As noted, *supra*, petitioner and the receiver were authorized to pay the receiver's fees and expenses from the sale of the property.

Finally, contrary to respondents' arguments on appeal, petitioner, as personal representative, did have the authority to sell the property without seeking authorization from the probate court. "Until termination of the appointment, a personal representative has the same power over the title to estate property that an absolute owner would have, in trust, however, for the benefit of creditors or others interested in the estate. This power may be exercised without notice, hearing, or court order." MCL 700.3711. Also, under MCL 700.3715(f), it is proper for a personal representative to "[a]cquire or dispose of property, including land in this or another state, for cash or on credit, at public or private sale; and . . . abandon estate property." Moreover, it appears that petitioner worked with the receiver to sell the property, and the receiver had explicit authority to sell the property pursuant to an order of the circuit court.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh