STATE OF MICHIGAN

COURT OF APPEALS

In re Marion R. Craig Trust.

JENNIFER HELLEBUYCK,

Petitioner-Appellant,

v

EARL TILLEY,

Respondent-Appellee.

UNPUBLISHED
April 23, 2013

No. 307618
Oakland Probate Court
LC No. 2011-335836-TV

In re Marion R. Craig Trust.

CITY OF AUBURN HILLS, a/k/a AUBURN HILLS SENIOR CITIZENS CENTER,

Petitioner-Appellant,

v

EARL TILLEY,

Respondent-Appellee.

No. 307684
Oakland Probate Court
LC No. 2011-335836-TV

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

This case involves two consolidated appeals from the same lower court file. In Docket No. 307618, petitioner, Jennifer Hellebuyck, appeals as of right from an order granting summary disposition for respondent, Earl Tilley. In Docket No. 307684, petitioner, City of Auburn Hills, a/k/a Auburn Hills Senior Citizens Center (the City), appeals as of right from the same order. We affirm.

First, petitioners argue that the trial court erred in granting summary disposition to Tilley because a genuine issue of material fact exists regarding whether decedent Alan Craig's suicide note was a valid holographic will. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Likewise, this Court reviews de novo questions of statutory interpretation and a probate court's construction and interpretation of the language used in a will or trust. *Ward v Michigan State Univ* (*On Remand*), 287 Mich App 76, 79; 782 NW2d 514 (2010), *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). In construing a will, a court should "ascertain and give effect to a testator's intent, which it gleans solely from the plain language of the will unless there is an ambiguity. If possible, each word of a will should be given meaning." *In re Raymond Estate*, 276 Mich App 22, 27; 739 NW2d 889 (2007), aff'd 483 Mich 48 (2009).

"A proponent of a will has the burden of establishing prima facie proof of due execution in all cases . . . ." MCL 700.3407(1)(b). MCL 700.2502 states:

> (1) Except as provided in subsection (2) and in sections 2503, 2506, and 2513, a will is valid only if it is all of the following:
>
> (a) In writing.
>
> (b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
>
> (c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> (2) *A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.*
>
> (3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting. [Emphasis added.]

Thus, a holographic will is valid if it is dated, signed by the testator, and the material portions are in the testator's handwriting. MCL 700.2502(2). Here, it is undisputed that Alan's suicide note is in his handwriting, it bears his signature, and it is dated November 22, 2010, five days before he committed suicide. Accordingly, the note meets the statutory requirements for a valid holographic will.

Petitioners contend, however, that the suicide note is not a will because portions of the note are illegible given that it was soiled with Alan's blood, and thus, it is impossible to know whether Alan intended the note to be his last will and what he meant by saying that he wanted "Earl" to be his "beneficiary." However, two forensic analyses of the suicide note, one by the Oakland County Sheriff's Office, and the other by Tilley's expert, Thomas P. Riley, a forensic document examiner, provided transcriptions of the contents of the note. These transcriptions were consistent with one another in directing the finder of the note to "[p]lease call Beverly at Comerica[,]" providing Beverly's phone number, and saying to "[t]ell [Beverly] I want Earl to be my beneficiary." Petitioners have conceded that the note contained this language, and that discovery revealed that the "Beverly" referenced in the note is Beverly Sucheneck, the trust officer at Comerica Bank who handled the trust and whom Alan would call whenever he needed money from the trust. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Further, aside from the trust, Alan's assets amounted to less than $5,000, consisting of a checking account, two safe deposit boxes, and personal property. There is no indication that Sucheneck controlled or managed Alan's non-trust assets. Thus, the record provides no basis to support petitioners' contention that Alan may have intended to make Tilley the "beneficiary" of anything other than his mother's trust.

In addition, the transcriptions of the suicide note contained other language making it clear that Alan intended for the note to be his last will. It is undisputed that the note was dated five days before Alan committed suicide. The language of the note reflects Alan's awareness that he was going to commit suicide, expresses what was plainly meant as his final messages to various persons, asks that his dog be taken care of, and directs the manner in which to dispose of his property after his death. According to Riley's transcription, in addition to directing the finder of the note to tell Beverly at Comerica Bank that Alan wanted Earl to be his beneficiary, the note directs Alan's friend Bart Gable to "tell Earl Tilley (my cousin) he get's [sic] everything. You [Bart] and Robin are welcome to my stuff here at the house." The plain meaning of this language indicates that Alan was leaving his personal property in his house to Bart and Robin, and "everything" else to Tilley. The note then specifically indicates that Earl is to be the beneficiary of the trust, referencing the trustee by corporate and individual names. Petitioners presented no evidence to rebut Riley's transcription and otherwise failed to present a genuine issue of material fact on this issue. Accordingly, petitioners' contention that it is unclear whether the suicide note was intended as a last will lacks merit.

Second, petitioners argue that a genuine issue of material fact exists regarding whether Alan had the testamentary capacity to make a will. We disagree.

MCL 700.2501 states:

(1) An individual 18 years of age or older who has sufficient mental capacity may make a will.

(2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:

(a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.

(b) The individual has the ability to know the nature and extent of his or her property.

(c) The individual knows the natural objects of his or her bounty.

(d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

In other words, "[a] person executing a will must have testamentary capacity, i.e., be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make." *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001) (internal quotation marks and citations omitted). "[T]estamentary capacity is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution." *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). "A contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." MCL 700.3407(1)(c).

Here, petitioners have not met their burden of demonstrating that Alan lacked testamentary capacity. Although evidence reflects that Alan suffered a drug addiction, depression, and anxiety, there is no indication that these conditions rendered him incompetent to make a will on November 22, 2010, the date that he executed his holographic will. Evidence that a person is addicted to drugs or alcohol is not, by itself, proof of incompetence. *Boerema v Johnson*, 357 Mich 433, 438; 98 NW2d 596 (1959); *In re Walz's Estate*, 215 Mich 118, 123-125; 183 NW 754 (1921). Rather, to show incompetence, "[t]he evidence must show that at the time in question the person's reason was overthrown." *Boerema*, 357 Mich at 438. See also *Wilcox v Wilcox*, 221 Mich 290, 301; 191 NW 242 (1922) (internal quotation marks and citation omitted) ("Evidence of habitual drunkenness, old age, weakness of body, shortness of memory, and a few incoherent expressions is not sufficient to establish testamentary incapacity."); *In re Walz's Estate*, 215 Mich at 123 ("It was not sufficient to show that testatrix was addicted to the drug habit, without showing that she was incapacitated mentally thereby in fact at the time the will was made."); *Wright v Fisher*, 65 Mich 275, 284; 32 NW 605 (1887) ("A drunkard is not an incompetent, like an idiot, or one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded, or his reason dethroned, by actual intoxication."). Moreover, "[a] testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected thereby." *In re Ferguson's Estate*, 239 Mich 616, 627; 215 NW 51 (1927).

Alan's mental illnesses were apparently managed as of the date that his medical records end in May 2009. Alan checked himself into drug rehabilitation facilities at various points, indicating that he recognized his addiction issues and was seeking to overcome them. Although the autopsy report indicated that a trace amount of alcohol and barbiturates were in Alan's body when he died, there is no evidence that he was intoxicated by these substances to the extent that he lacked testamentary capacity when he executed the holographic will five days before committing suicide. Also, a psychiatrist who reviewed Alan's records, suicide note, and autopsy findings concluded that although Alan "suffered from an episodic mood disorder and suffered from drug dependence and may have been depressed, there is no evidence that any of those conditions in any way impaired his ability to make decisions or understand the issues involved in preparing his Last Will & Testament. There is no evidence of any impairment to his competency."

Moreover, petitioners presented no evidence proving that Alan lacked sufficient mental capacity to know the nature and extent of his property, to know the natural objects of his bounty, or to understand that he was providing for the disposition of his property after death. In fact, the holographic will itself demonstrated that Alan was competent. Cf. *In re Walz's Estate*, 215 Mich at 124 (holding that testimony of witnesses that the testatrix was mentally incompetent to make and execute the will "raised no question for the jury, under the undisputed fact that she dictated her own will, and such will itself negatives completely all such testimony."). Alan wrote his holographic will, and the document reflects his understanding that he was providing for the disposition of his property after his death. He indicated that he was leaving "everything" to Earl Tilley, except that Bart and Robin Gable could have his personal property in his house, and he directed the finder of the note to tell Beverly at Comerica, the trustee of his mother's trust, that Earl was to be his beneficiary. Alan made other statements in the note reflecting his awareness that he was going to commit suicide, such as expressing final messages to various persons and asking that his dog be cared for. Alan also had the ability to know the nature and extent of his property, as reflected in his references to the items in his house and the trustee of his mother's trust. Further, Alan knew the objects of his bounty. His parents had predeceased him, he was an only child, he was never married, and he had no children. Alan felt close to Tilley, his first cousin, as reflected in another letter Alan had written stating that Tilley was Alan's "hero" since Alan was a child. Moreover, petitioners have presented no evidence that Alan lacked the ability to understand the general nature and effect of signing the will. A review of the document reveals that Alan understood the effect of signing the document, given his awareness that he was planning to commit suicide and his expressions of how his assets should be disposed. Accordingly, no genuine issue of material fact exists regarding Alan's testamentary capacity.

Third, Hellebuyck argues that Alan revoked the holographic will by intentionally soiling it with his blood. We disagree. Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Hellebuyck did not argue below that Alan revoked the holographic will by intentionally soiling it with his blood, and the trial court did not address or decide that issue. Because Hellebuyck's argument is not preserved, this Court's review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the

outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010) (footnote omitted).

Hellebuyck has presented no evidence to support her unpreserved contention that Alan revoked the will by intentionally soiling it with his blood. MCL 700.2507(1) provides:

> (1) A will or a part of a will is revoked by either of the following acts:
>
> (a) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.
>
> (b) Performance of a revocatory act on the will, *if the testator performed the act with the intent and for the purpose of revoking the will* or a part of the will or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or a part of the will. A burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touches any of the words on the will. [Emphasis added.]

Here, although the holographic will was soiled with blood, given its proximity to Alan's body and the manner in which he committed suicide, there is no basis to conclude that Alan *intended* to saturate the will with his blood. A reasonable inference is that Alan left the note nearby so that the person who found his remains would also find the note. Because there is no evidence that Alan soiled the will with blood "with the intent and for the purpose of revoking the will," MCL 700.2507(1), a genuine issue of material fact regarding revocation does not exist.[1] Thus, Hellebuyck has failed to establish a plain error affecting her substantial rights.

Fourth, petitioners argue that the trial court erred in considering Riley's laboratory report that determined the content of the holographic will. Petitioners suggest that Riley's opinion was unreliable and that the trial court failed to exercise its gatekeeping function. However, this issue is waived for appellate review. "[A] party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention." *Craig ex rel Craig v Oakwood Hosp*, 471 Mich

[1] The principal case relied on by Hellebuyck for this argument, *In re Leech's Estate*, 277 Mich 299, 304; 269 NW 181 (1936), is inapposite. In that case, the contestants wanted to introduce testimony regarding a second will, which the evidence undisputedly showed had been destroyed by the testatrix, to prove revocation of the first will. *Id.* The Court held that there was no evidence to prove the legal execution of the second will, and thus, the testimony regarding the second will was insufficient to defeat the effect of the first will. *Id.* Here, unlike *In re Leech's Estate*, there is no evidence that Alan intended to destroy the will by saturating it with his blood when he committed suicide. Thus, because there is no evidence of intentional destruction, Hellebuyck's argument that a presumption of revocation exists in the circumstances of this case is unavailing. And "[a] contestant of a will has the burden of establishing . . . revocation." MCL 700.3407(1)(c).

67, 82; 684 NW2d 296 (2004). "Waiver is defined as the intentional or voluntary relinquishment of a known right." *Sherry v East Suburban Football League*, 292 Mich App 23, 33; 807 NW2d 859 (2011). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). Here, petitioners failed to bring the gatekeeper obligation to the trial court's attention, and thus, waived any claim of error.

Even if we treat this issue as unpreserved, petitioners have not established a plain error affecting their substantial rights. *Carines*, 460 Mich at 763. An error must be clear or obvious "to avoid forfeiture under the plain-error rule." *In re Smith Trust*, 274 Mich App 283, 286; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule "incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). The trial court must act as a gatekeeper to ensure that all expert opinion testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004).

> This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id*. at 782.]

Although it is "not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Edry*, 486 Mich at 640.

Petitioners have identified no basis in the existing record to conclude that Riley's expert opinion was unreliable.[2] Riley's laboratory report described the methods and equipment he used to examine and recover information from the blood-saturated suicide note. Riley's report explained:

> Both sides of [the suicide note] were examined visually and instrumentally. Instrumental examinations were conducted utilizing a Video Spectral Comparator (VSC4C). The instrumental examinations were done to attempt to recover information obscured on the [suicide note] by presumed blood. These instrumental examinations are made to determine how the ink entries respond to energy excitation (light) when viewed with specialized video instrumentation, such as the VSC. Ink responds to this excitation by absorbing, transmitting, or by reradiating the wavelengths of light, usually at longer wavelengths (referred to as luminescence or fluorescence). These responses may allow for the separation of ink from inks or liquids obscuring the information, when examined with the VSC.

The report indicated that the result of the examination was as follows: "The ink used for the writing on [the suicide note] was found to produce luminescence at certain wavelengths of light energy, while the presumed blood transmitted the infrared light slightly. These different responses allowed portions of the obscured information to be viewed." The report included photographs illustrating the results of the examination, and attached a transcription of the suicide note based on the findings.

Riley's report also referenced what appears to be supporting literature regarding forensic document examination. In particular, when indicating that the suicide note was examined visually and instrumentally, the report cited a document entitled "ASTM Standard Guide E1422-05, 'Standard Guide for Test Methods for Forensic Writing Ink Comparison.'" The report also cited a document called "ASTM Standard Guide E2290-07a, 'Standard Guide for the Examination of Handwritten Items,' ASTM International, West Conshohocken, PA, www.astm.org/Msgs/www.astm.org."[3]

---

[2] Petitioners' arguments focus on the reliability of Riley's opinion rather than his qualifications as an expert. We note that Riley's report indicates that he is a forensic document examiner, a "Diplomate of the American Board of Forensic Document Examiners, Inc.[,]" and a member of the "American Society of Questioned Document Examiners[.]"

[3] The website cited above contains the following description of the referenced organization:

> ASTM International, formerly known as the American Society for Testing and Materials (ASTM), is a globally recognized leader in the development and delivery of international voluntary consensus standards. Today, some 12,000 ASTM standards are used around the world to improve product quality, enhance safety, facilitate market access and trade, and build consumer confidence.

In addition, as the trial court noted, a crime lab technician from the Oakland County Sheriff's Department processed the scene of the suicide, attempted to read as much of the note as possible, and provided a transcription that is consistent with Riley's transcription in relevant respects. Although the Oakland County lab technician did not recover all of the information that Riley recovered with his equipment, the lab technician did transcribe the same pertinent language in which Alan stated, "Please call Beverly @ Comerica 313-282-6297. Tell her I want Earl to be my beneficiary." Petitioners have not challenged the Oakland County lab technician's transcription; indeed, petitioners concede that the suicide note contained the above quoted language. Given the overall consistency in the two transcriptions, petitioners have failed to establish any clear or obvious error in considering Riley's report.

Further, petitioners do not explain on what basis they challenge Riley's methodology. They fail to present facts suggesting that Riley's opinion was not the product of reliable principles and methods or that Riley did not apply the principles and methods reliably to the facts of this case. Thus, petitioners have failed to develop an argument regarding precisely how Riley's opinion was unreliable. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position. Insufficiently briefed issues are deemed abandoned on appeal." *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004) (internal quotation marks and citations omitted).

The City suggests that the lack of development of the record regarding the reliability of Riley's opinion is attributable to Tilley because, as the proponent of Riley's opinion, Tilley bore the burden of establishing its admissibility. It is true that the proponent of evidence has the burden of establishing admissibility. *Edry*, 486 Mich at 639. However, as discussed, petitioners failed to preserve this issue below by calling the gatekeeping obligation to the trial court's attention. Thus, petitioners have the burden of establishing a clear or obvious error that prejudiced them, in order to avoid forfeiture under the plain-error rule. *Duray Dev, LLC*, 288 Mich App at 150; *In re Smith Trust*, 274 Mich App at 285-286. Accordingly, because petitioners identify no basis to question the reliability of Riley's opinion, they have not established that the trial court clearly or obviously erred in considering Riley's report and his transcription of the suicide note.

Petitioners also suggest that they lacked an opportunity to inquire into the reliability of Riley's opinion. It is true that Riley's report was not provided until Tilley moved for summary disposition on October 25, 2011, and the existence of the report was not disclosed until Tilley timely shared his exhibit list on September 21, 2011. However, Tilley disclosed Riley as an expert in forensic document analysis on August 22, 2011, in accordance with the deadline in the

> ASTM's leadership in international standards development is driven by the contributions of its members: more than 30,000 of the world's top technical experts and business professionals representing 150 countries. Working in an open and transparent process and using ASTM's advanced electronic infrastructure, ASTM members deliver the test methods, specifications, guides, and practices that support industries and governments worldwide. [http://www.astm.org/ABOUT/aboutASTM.html (accessed March 26, 2013).]

trial court's scheduling order, and discovery ended on September 21, 2011. Petitioners fail to explain why they could not have deposed Riley in the discovery period that remained after Tilley timely disclosed him as an expert in forensic document examination. Accordingly, this argument lacks merit.

Finally, petitioners contend that even if the suicide note is a valid holographic will, it did not effectively exercise Alan's testamentary power of appointment granted to him by his mother, Marion Craig's trust. In particular, petitioners contend that the suicide note disposes of Alan's entire estate through a residuary clause, which cannot operate to exercise a power of appointment where the trust provides an express gift in default of the exercise of the power of appointment. We disagree with petitioners' arguments because Alan's holographic will did not dispose of his entire estate through a residuary clause.

The Powers of Appointment Act (POAA), MCL 556.111 *et seq.*, defines a "power of appointment" as

> a power created or reserved by a person having property subject to his or her disposition that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received. The term power of appointment may include a power of amendment or revocation, but does not include a power of sale or a power of attorney. [MCL 556.112(c).]

A "'[g]ift in default' means a transfer to a person designated in the creating instrument as the transferee of property if a power is not exercised or is released." MCL 556.112(j). Here, it is undisputed that Marion's trust granted a testamentary power of appointment to Alan, allowing him to appoint the trust assets to certain "qualified appointees" including Tilley, and that the trust contained an express gift in default, which would divide the trust assets equally among Tilley, Hellebuyck, and the City, if Alan did not exercise his power of appointment. The central issue is whether Alan's holographic will exercised his power under the trust to appoint the trust assets to Tilley: if so, then Tilley is entitled to the trust assets; if not, then the express gift in default applies and the assets are to be divided among Tilley, Hellebuyck, and the City.

The provision of the POAA at issue here, MCL 556.114, provides:

> Unless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power. Subject to the other provisions of this section, if there is a general power exercisable by will with no express gift in default in the creating instrument, a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property operates to exercise the power, but in all other cases

such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

Petitioners rely on *In re Hund Estate*, 395 Mich 188; 235 NW2d 331 (1975), to support their argument. In *In re Hund Estate*, Herbert Hund's will placed his estate into a marital trust and a residuary trust and granted his wife, Helen Hund, a testamentary power of appointment with respect to the corpus of a marital trust. *Id.* at 192-193. Herbert's will also provided an express gift in default that if Helen failed to exercise her power of appointment, then the corpus of the marital trust was to be combined with the residuary trust and distributed to the residuary beneficiaries. *Id*. at 193. Helen's will disposed of her entire estate through a residuary clause that did not expressly refer to her power of appointment or to the corpus of the marital trust. *Id*. Applying MCL 556.114, our Supreme Court held that the residuary clause in Helen's will did not manifest an intent to exercise her power of appointment because Herbert's will provided an express gift in default. *Id.* at 197.

We conclude that *Hund* is distinguishable. Unlike Helen's will in *Hund*, Alan's holographic will did not dispose of his entire estate through a residuary clause. Rather, Alan's will contained a specific instruction with respect to his power of appointment, stating: "Please call Beverly at Comerica[,] 313-282-6297[,] tell her I want Earl to be my beneficiary[.]" Petitioners concede that the "Beverly" referenced in the will is Beverly Sucheneck, a trust officer at Comerica Bank, the trustee; that Sucheneck had arranged distributions from the trust to Alan; and that Alan would call Sucheneck whenever he needed additional money from the trust. Petitioners do not contend that the name "Earl" refers to anyone other than Tilley, and Tilley is referenced by full name and as Alan's cousin earlier in Riley's transcription of the note as the person to whom Alan is leaving "everything." Thus, the portion of the holographic will stating, "Please call Beverly at Comerica[,] 313-282-6297[,] tell her I want Earl to be my beneficiary[,]" is not a residuary clause but rather is a specific instruction to make Tilley the beneficiary of the trust.

Because Alan did not dispose of his entire estate through a residuary clause, the second sentence of MCL 556.114, providing that a residuary clause operates to exercise a power of appointment only if there is no express gift in default, is inapplicable. Rather, as the trial court correctly noted, it is the first sentence of MCL 556.114 that applies. In particular, that sentence states that a power of appointment is exercised "if the instrument either expressly *or by necessary implication from its wording*, interpreted in light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power." MCL 556.114 (emphasis added). Here, the necessary implication of the wording of the holographic will is that Alan was exercising his power of appointment in favor of Tilley. The will, drafted a few days before Alan committed suicide, contained an instruction to tell the trustee, Sucheneck, that Alan wanted Earl to be his beneficiary. Because there is no evidence that Sucheneck managed or controlled any of Alan's assets other than the trust, the necessary implication of the wording is that Alan was exercising his power under the trust to appoint the trust assets to Tilley. Although the will did not explicitly recite the power of appointment, Alan would have had no power to transfer the trust assets except by virtue of his power of appointment under the trust. Accordingly, the holographic will manifests his intent to exercise that power. MCL 556.114.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood