

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of the MORRIS A. PERKINS TRUST

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JOHN A. PERKINS,

Petitioner-Appellant,

v

SALLY PERKINS, Trustee of the Morris A. Perkins Trust, MICHAEL E. THOMAS, MICHAEL E. THOMAS, P.C., SHAWN BRECHT, and DEANNA BRECHT,

Respondents-Appellees.

UNPUBLISHED

August 2, 2005

No. 256086

Lapeer Probate Court

LC No. 02-033173-TV

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No. 257418

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Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In these consolidated trust cases, in docket #256086, appellant John A. Perkins appeals as of right a July 13, 2004, Lapeer County Probate Court opinion and order which granted appellee Sally Perkins' motion for summary disposition against appellant's oral contract claim. In docket #257418, appellant also appeals the July 28, 2004, order implementing the probate court's December 11, 2002<sup>1</sup> decision that the Morris A. Perkins trust is unambiguous as the order of the court. We reverse and remand.

## I. FACTS

On January 9, 1999, while on his deathbed, Morris A. Perkins (Morris), father of appellant John Perkins (John or appellant) and husband to appellee Sally Perkins (Sally or appellee Perkins), signed a deed and a trust that transferred the Perkins farm<sup>2</sup> to the trust. The deed and trust were prepared by attorney/appellee Michael Thomas who had been sent to see Morris in the hospital a few days before his death by John's minister. Neither John, Morris, nor Sally had a previous relationship with appellee Thomas. Appellee Thomas had also prepared a will for Morris to sign. According to appellee Thomas' testimony, Morris was too weak from illness to sign the will the day he signed the deed and trust. Morris Perkins died January 10, 1999. According to John, Sally provided most of the information used to prepare the trust, deed, and will. Sally was Morris' principal caregiver during the last days of his life and was present at the time the deed and trust were signed.

A certificate of trust was also prepared and signed by Morris on the same day he signed the deed and trust. It provided that the Perkins farm was not to be sold without consent from all of the trustees. John alleges he and Sally acted as co-trustees after the death of Morris and signed various documents as co-trustees such as bank signature cards, various dairy farm contracts, and a security agreement. Before Morris' death, John had lived and worked on the farm as an employee.

On October 5, 2001, Sally signed and recorded a second certificate of trust existence and authority which Sally claims was required and prepared by the Lapeer County Bank & Trust when she refinanced a loan on the trust property. The new certificate did not require the consent of all the trustees to sell the real property. Later, Sally, without consent from John, listed the farm for sale with real estate agent, appellee Shawn Brecht. Sally executed an option to purchase the Perkins farm with appellee Deanna Brecht, appellee Shawn Brecht's wife.<sup>3</sup>

In October 2002, John filed a petition with the Lapeer County probate court to confirm the status of the trustees and void the option agreement, or in the alternative, void the option agreement and enjoin the trustee from the sale of real estate. Appellant alleged he should be

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<sup>1</sup> Occasionally referred to as the December 3, 2002, opinion in attorney briefs and motions. The hearing took place December 3, 2002, and the ruling was issued December 11, 2002.

<sup>2</sup> 4781 McDowell Road, Lapeer, Michigan 48446

<sup>3</sup> Appellant alleges the sales contract contains self-dealing language that individually benefits appellee Perkins and is inconsistent with her duties as a fiduciary. Appellee Perkins agreed as part of the option agreement to terminate the lease between herself and the appellant. Appellant alleges he was not aware of these facts during initial proceedings in December 2000.

named a co-trustee and the option agreement executed by Sally to appellee Deanna Brecht should be declared void and the sale enjoined. Appellee Perkins filed a counter petition to affirm her status as sole trustee, approve the option agreement, or in the alternative, to order the sale of real property. In reliance of the plain language of the trust, and without extrinsic evidence, the probate court found the trust was not ambiguous and that Sally was not a beneficiary, but the sole trustee; thus, she had the proper authority to sell the property or execute an option agreement.

In January 2004, appellant filed an underlying petition alleging four separate claims: (1) enforcement of a contract to transfer property at death; (2) to set aside the trust for fraud and undue influence; (3) to determine title to real property and to invalidate real estate sales contract and option; and (4) for malpractice and other relief.

In March 2004, appellee Perkins motioned for summary disposition for all claims alleged against her by appellant in January 2004. First, appellee Perkins argued that MCR 2.203(A) and MCL 700.2514 barred appellant's alleged oral contract claim with Morris Perkins. The court found that MCR 2.203(A) did not bar appellant's new claims, but granted appellee Perkins summary disposition because in 1977, when the oral contract was allegedly made, under MCL 722.52, appellant was not an adult competent to contract. Appellant appeals the court's grant of summary disposition. Second, appellee Perkins argued appellant's claims to determine title to real property and to invalidate the real estate sales contract and option should be barred pursuant to *res judicata* claiming these issues had already been decided. Third, she motioned for summary disposition for the claim to set aside the trust for fraud and undue influence arguing they were non-meritorious as a matter of law and also barred by the court. The court denied summary disposition for the two latter motions, finding there were genuine issues of disputed facts.

## II. SALLY PERKINS AS BENEFICIARY UNDER THE TRUST

Appellant argues that the trial court erred in determining that Sally Perkins was not a beneficiary under the trust. We agree.

### A. Standard of Review

The probate court examined the language of Morris' trust and determined the legal effect of that language. Consequently, this is an issue of law and our review of the probate court's determination of the legal effect of the language in Morris' trust is *de novo*. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). An *inter vivos* trust is sufficiently similar to a will as to apply the standard of review applicable to a will. *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000).

### B. Analysis

The trial court erred in determining that Sally Perkins was not a beneficiary of the trust, but was a trustee, co-trustee or successor trustee. This error was critical because the court ultimately concluded that the trust was ambiguous, but that the ambiguity could be resolved because Sally was not a beneficiary. Appellees agree that the trial court erred in concluding that Sally was not a beneficiary.

This Court finds that Sally was a beneficiary under the trust. In article IV, section 4A.2, the trust states, “[m]y spouse shall be the sole beneficiary of this Marital Trust.” Further, the trust states in article II, section 2.2, that income and principal may be distributed to Sally during Morris’ lifetime. Additionally, article IV, section 4B.2(a), names Sally as the surviving spouse as the recipient of the net income of the trust from the family trust share.

At the time Morris signed the trust, MCL 700.3(2), the Revised Probate Code (RPC), was in effect. It provided:

“Beneficiary” as it relates to trust beneficiaries, includes a beneficiary of a present or future interest, vested or contingent, and the owner of an assignment or other transfer. Beneficiary includes a party entitled to enforce the trust if the trust is a charitable trust.

Thus, under MCL 700.3(2), Sally, as a recipient of income for life from the marital and family shares of the trust, would be considered a beneficiary.

Sally would also be considered a beneficiary under the current statute. The Estates and Protected Individuals Code (EPIC) became effective in 2000 and defines beneficiary in relevant part under MCL 700.1103(d) as:

“Beneficiary” includes, but is not limited to, the following:

- (i) In relation to a trust beneficiary, a person that is an interested trust beneficiary.
- (ii) In relation to a charitable trust, a person that is entitled to enforce the trust.

An interested trust beneficiary is defined under MCL 700.1105(d) as:

"Interested trust beneficiary" means a person that has 1 or more of the following interests in the trust:

- (i) Life estate.
- (ii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal.
- (iii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal upon termination of an interest of a person described in subparagraph (i) or (ii).
- (iv) Presently exercisable or testamentary general or special power of appointment.

The trial court looked to provisions in the trust for definition of the word “beneficiary.” The court concluded that in section 4B.3(a) the trust creates beneficiaries after the death of Morris and Sally, and, as a result, Morris must not have intended Sally to be considered a beneficiary of the trust. This assumption is incorrect. Sally could still be a beneficiary before her death and is

specifically named in the trust as a beneficiary of the marital trust. Therefore, viewing the provisions of the trust, in conjunction with statutory definitions of “beneficiary,” the trial court erred in finding that Sally was not a beneficiary.

The trial court based its determination that the trust was unambiguous on the erroneous conclusion that Sally Perkins was not a beneficiary. We find that Sally Perkins was a beneficiary under the trust and remand this case for proceedings consistent with that conclusion.

### III. CONTRACT WITH A MINOR

Appellant argues that the trial court erroneously concluded that the contract between Morris and John was unenforceable because John was a minor when the promise was made. We agree.

#### A. Standard of Review

We review a trial court’s rulings for summary disposition motions de novo. See *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) when there is “no genuine issue as to any material fact.” A question 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 General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion under this rule, the trial court must consider “the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.” *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

#### B. Analysis

The probate court held that when appellant made the alleged oral contract with his father, appellant was 15-years-old, thus he was not an adult competent to contract under MCL 722.52, which states:

- (1) Except as otherwise provided in the state constitution of 1963 and subsection (2), notwithstanding any other provision of law to the contrary, a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age.

While the statute clearly defines the age of majority, it does not indicate that a minor lacks the capacity to form an effective contract. Contracts with a minor are divided into three classes: “(1) Those absolutely void, which are, as a matter of law, disadvantageous to the infant, and under no circumstances for his benefit; (2) voidable contracts,—those which may or may not be for his benefit; (3) binding contracts,—that is, contracts for necessities.” *Lynch v Johnson*, 109 Mich 640, 643; 67 NW 908 (1896). In this case, appellant formed an alleged oral contract at age 15 with his father which is voidable, meaning appellant could have affirmed or disaffirmed the contract upon reaching the age of majority. In *Semmens v Floyd Rice Ford, Inc*, 1 Mich App 395, 400; 136 NW2d 704 (1965), this Court adopted the following: “the contracts of an infant, whether executed or executory, are voidable, and such contracts of an infant *are voidable at his*

*election* or option after attaining his majority, *and not void*, in the absence of a statute providing otherwise.”

We reverse the trial court’s grant of appellees’ motion for summary disposition. The trial court erred as a matter of law in determining that the contract between Morris and John was unenforceable because John was a minor when the promise was made. This Court does not hold that there is in fact an enforceable contract between John and Morris. However, we remand for further proceedings because the grant of summary disposition was based on an incorrect statement of law.

#### IV. COMPULSORY JOINDER

We note that appellees argue that the compulsory joinder rule of MCR 2.203 should apply to this case and should bar the entire proceeding in docket # 256086. This issue was not preserved for appeal. Reply briefs may contain only rebuttal argument, and raising an issue in a reply brief is not sufficient to properly present an issue for appeal. MCR 7.212(G); *Maxwell v Dep’t of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello