STATE OF MICHIGAN

COURT OF APPEALS

In re SARAH HANDELSMAN TRUST.

LOWELL SCHULTZ,

Petitioner-Appellant,

v

FRANCES GOLDMAN and COMERICA BANK,

Respondents-Appellees.

UNPUBLISHED
October 17, 2006

No. 268483
Oakland Probate Court
LC No. 1997-260650-TI

In re ZELIG HANDELSMAN TRUST.

LOWELL SCHULTZ,

Petitioner-Appellant,

v

FRANCES GOLDMAN and COMERICA BANK,

Respondents-Appellees.

No. 268484
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LC No. 1997-260649-TI

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

This case involves petitioner's claim of right to rent derived from the upstairs portion of an Old Woodward Avenue building in Birmingham. The building is co-owned by the Sarah Handelsman Trust and the Zelig Handelsman Trust. Respondent Frances Goldman is one of Sarah Handelsman's two daughters. Respondent Comerica Bank (hereinafter "Comerica") is a successor trustee of the Sarah Handelsman Trust. Petitioner, Lowell Schultz, is married to Sarah Handelsman's other daughter, Rochelle Schultz.

Petitioner appeals as of right from the probate court's order denying his motion for summary disposition with respect to his entitlement to upstairs rents received after Sarah Handelsman's death in August 2003, which he maintains was a gift from Handelsman. We affirm.

I. FACTS

Litigation over the upstairs rents began in 2003, when Comerica filed a motion for partial summary disposition. Comerica requested that the probate court "determine that Sarah Handelsman made a gift to her son-in-law Lowell Schultz of the rents from the second floor tenants of the property located at 124/126/128 Old Woodward, Birmingham." On October 31, 2003, the probate court granted Comerica's motion for partial summary disposition, excepting from its order any upstairs rents received after Sarah Handelsman's death in August 2003.

In a prior appeal, this Court held that Sarah Handelsman made a valid gift of the upstairs rents to petitioner in 1985. *In re Handelsman*, 266 Mich App 433, 434-439; 702 NW2d 641 (2005). Shortly after this Court's decision, petitioner filed a motion in the probate court, requesting summary disposition pursuant to MCR 2.116(C)(8) and (10) concerning his entitlement to upstairs rents received after Sarah Handelsman's death. Petitioner argued that the law of the case doctrine required recognition of this Court's previous ruling that Sarah Handelsman made a valid and unconditional gift of the upstairs rents. Petitioner further maintained that respondent did not present any evidence that Handelsman intended to limit the gift.

Respondent answered that the law of the case doctrine did not apply because this Court's prior decision did not consider the post-death rents, which were expressly excluded from the probate court's October 2003 order. Respondent also maintained that there were factual disputes regarding Handelsman's intent in the disposition of upstairs rents after her death. On February 3, 2006, the probate court denied petitioner's motion for summary disposition and concluded that "upon [Handelsman's] death, the power to make a gift other than through the trust or some other document ended."

II. REVOCATION OF GIFT

Petitioner contends that the probate court erred by denying his motion for summary disposition on the basis that Sarah Handelsman's death revoked the gift of upstairs rents. We disagree.

A. Standard of Review

This Court reviews a lower court's summary disposition ruling de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). The probate court did not specify under which subrule of MCR 2.116(C) it considered petitioner's motion, but because the court referred to the documentary evidence proffered by petitioner as related to Sarah Handelsman's intent, we

presume that the court applied MCR 2.116(C)(10), which tests the factual support of a claim.[1] When reviewing a motion premised on subrule (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 facts exists to warrant a trial." *Walsh*, *supra* at 621.

This Court also reviews de novo whether the law of the case doctrine applies in particular circumstances. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law. [*Ashker*, *supra* at 13.]

Additionally, the doctrine does not apply if the facts underlying the prior appellate ruling have materially changed. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).

B. Analysis

This Court previously held "that the trial court did not err in granting partial summary disposition for petitioner [Comerica] because respondent failed to proffer any admissible evidence in support of her claim that Handelsman did not make a gift of the upstairs rents to her son-in-law." *In re Handelsman*, *supra* at 435. This Court further held that "our review de novo of the record convinces us that . . . reasonable minds could not differ and would find that Handelsman intended the upstairs rents as a gift to Schultz." *Id*. at 439. In so holding, this Court rejected respondent's contention that the rents were compensation.

The parties did not previously raise, and this Court did not previously address, the scope of Sarah Handelsman's intended gift. Furthermore, in the October 2003 order constituting the basis for the previous appeal, the probate court explicitly refused to consider the upstairs rents generated after Handelsman's death. This Court did not previously decide the precise question of law raised by the parties in this appeal. Therefore, we conclude that the law of the case doctrine does not apply here. *Ashker*, *supra* at 13.

Gifts by their nature are irrevocable. Thus, the probate court erred when it held that Sarah Handelsman's death automatically revoked or terminated any gift of upstairs rents to petitioner. Respondent offers no authority supporting the proposition that a gift already given

[1] Petitioner improperly invoked MCR 2.116(C)(8) as a basis for summary disposition because the instant dispute does not involve a claim for relief set forth by respondent.

may be revoked.[2] Moreover, Michigan law recognizes that a donor cannot revoke a completed gift.

> It may be stated generally that the three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift.[3] It is essential that title pass to the donee. As to delivery, it must be unconditional and it may be either actual or constructive; the property may be given to the donee or to someone for him. Such delivery must place the property within the dominion and control of the donee. *This means that a gift inter vivos must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power to recall by the donor*. As to acceptance, it is said that the donee is presumed to have accepted the gift where such is beneficial.
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> An heir, devisee, or legatee may convey by gift or otherwise his interest in property comprising a decedent's estate prior to the final order of distribution by the probate court. [*Jones v Causey*, 45 Mich App 271, 274-275; 206 NW2d 534 (1973) (emphasis added), quoting *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965).]

After a donor has made a valid inter vivos gift, "[b]eing fully executed, it [i]s not subject to revocation." *Kwiatkowski v Antonecki*, 329 Mich 32, 37; 44 NW2d 856 (1950).[4]

Sarah Handelsman's death could have terminated the gift only if she had intended to limit petitioner's enjoyment of the upstairs rents to the duration of her lifetime. As discussed above, this Court's prior decision did not delineate the scope of Handelsman's gift. As the donor, Handelsman had the authority to condition the gift of upstairs rents to petitioner. 38A CJS, Gifts, § 38, pp 217-218. Therefore, Handelsman could have limited petitioner's enjoyment of the upstairs rents as she saw fit.[5]

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[2] This Court need not consider a position for which a party has failed to cite authority. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 480; 666 NW2d 271 (2003).

[3] In the prior proceeding, respondent conceded that the requisite gift elements of delivery and acceptance had been satisfied. *Id*. at 438.

[4] Respondent also fails to cite authority in support of the proposition that the purported gift of upstairs rents payable after Sarah Handelsman's death qualifies as incomplete because "the gifts [a]re serial in form and consist[] of a stream of income payable monthly, over a period of years." See *Belle Isle Grill Corp*, *supra* at 480.

[5] For example, she could have limited the upstairs rents for the duration of her lifetime or petitioner's; for the period that she retained ownership of the South Old Woodward business

(continued…)

In support of petitioner's contention that Sarah Handelsman intended the gift of upstairs rents to continue indefinitely, he presents the same two items of evidence that Comerica previously submitted in this Court: (1) a September 25, 2003 affidavit of Janet Stanfield, a Comerica Bank trust officer; and (2) the April 2002 deposition testimony of David Raitt, who since the 1970s had performed estate planning work for the Handelsmans.[6] In order to determine whether a gift exists in a particular case, our Supreme Court has observed that evidence of the grantor's donative intent "must be clear." *Moore v Beecher*, 277 Mich 604, 610; 269 NW 617 (1936).

Petitioner's evidence primarily establishes that around 1993, Handelsman stated that she wanted petitioner to continue to receive upstairs rents *for some unspecified time period*.[7] The record simply does not contain any facts that would indicate the temporal nature or extent of the gift of upstairs rents. To hold that Handelsman intended to give the upstairs rents to petitioner indefinitely would require us to engage in sheer speculation. The evidence presented by petitioner does not support a reasonable inference that Handelsman clearly intended to give him an indefinite gift of upstairs rents that would continue after her death. As a result, the probate court properly denied petitioner's motion for summary disposition.

Although the probate court's reasoning was faulty, the court correctly denied the motion because petitioner failed to establish that the law of the case doctrine applies or that a genuine issue of fact exists concerning his entitlement to the gifted upstairs rents accruing after

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(…continued)

property; for as long as her trust owned the business property; or for as long as the property generated upstairs rents.

[6] As petitioner observes, respondent has introduced no evidence tending to suggest that Handelsman intended to somehow limit the gift of upstairs rents to petitioner; as in the prior appeal, respondent refers only to documentation apparently unrelated to Handelsman's 1985 donative intent as allegedly creating a genuine issue of material fact, specifically the 1993 restatement of the Sarah Handelsman Trust that makes no mention of the gift of upstairs rents, *In re Handelsman*, *supra* at 436-437. See *Braidwood v Harmon*, 31 Mich App 49, 55-56; 187 NW2d 559 (1971) (explaining that "[m]erely because the will makes no mention of the claimed gift does not tend to negate the claim that there was a completed gift" because "[i]f a gift is complete the property given ceases to be part of the donor's estate; there is no need to recite the gift in his will").

[7] This was before Handelsman was declared incompetent in 1995.

Handelsman's death.[8] *Manuel v Gill*, 270 Mich App 355, 376-378; 716 NW2d 291 (2006).

Affirmed.

/s/ William B. Murphy
/s/ Bill Schuette

[8] Petitioner contends that the probate court erred in refusing to hold additional evidentiary hearings. Even if this were the case, petitioner has not shown that he could have introduced any additional evidence that would affect the probate court's ruling regarding the post-death upstairs rents. MCR 2.613(A). In the absence of any additional evidence concerning Handelsman's 1985 intent regarding the length of the gift of upstairs rents, the probate court may wish to consider whether the post-death rents constitute residual property of Handelsman's estate. If such is the case, respondent could split the rents with Rochelle Schultz pursuant to the terms of the 1993 restated Sarah Handelsman Trust agreement.

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Before: Davis, P.J., and Murphy and Schuette, JJ.

DAVIS, P.J. (*concurring*).

I concur in the result reached by the majority sustaining the trial court's ruling.

I only write separately to indicate that I believe, after considerable review of this matter, that the trial court's rationale for its ruling provides the better foundation for the ruling. In particular, the trial court concluded that the gift was only of rents until Ms. Handelsman's death because she did not convey any of the corpus of the trust. I disagree with the majority's finding of fault with the trial court's reasoning.

It is axiomatic that a gift donor can only give what he or she actually has, and the donor cannot give away "the interest of a third party." *Fischer v Union Trust Co*, 138 Mich 612, 616-619; 101 NW 852 (1904). The record evidence indicates that at all relevant times, Ms. Handelsman's personal interest in "the upstairs rent" was strictly as an income beneficiary of her trust, which was in turn partially an income beneficiary of the Zelig Handelsman Trust.

As the trial court found, there is no indication of record that Ms. Handelsman took any action in her capacity as a trustee to assign any portion of the corpus of the trust to appellant. Ms. Handelsman's status as an income beneficiary of her trust terminated with her death, so any gift dependant on that entitlement could not have extended beyond her death. Therefore, presuming she made an unqualified gift to petitioner of her right to receive "the upstairs rent," that gift terminated with her death.

I would affirm both the trial court's result and the trial court's reasoning.

/s/ Alton T. Davis