

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

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In re Estate of JUNE LOUISA CUMMIN,  
Deceased.

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EDWARD MURPHY, Personal Representative of  
the Estate of JUNE LOUISA CUMMIN,  
Deceased,

FOR PUBLICATION  
September 9, 2003  
9:15 a.m.

Petitioner-Appellee,

V

BETH A. HEGYI,

No. 235495  
Clare County Probate Court  
LC No. 00-013321-SE

Respondent-Appellant.

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Before: Schuette, P.J., and Sawyer and Wilder, JJ.

WILDER, J.

Following a bench trial, respondent, Beth A. Hegyi, appeals by right the trial court's judgment ordering her to pay into the estate the funds that she received from renting and selling real estate previously owned by decedent, June Louisa Cummin. We reverse and remand.

I. Facts and Proceedings

In June 1992, decedent executed a durable power of attorney that conferred on respondent, her daughter, the authority to "lease, sell, assign, and convey interests in real or personal property of any kind now or hereafter owned by [decedent] on such terms and agreement as said attorney-in-fact may solely and discretionarily determine . . . ." On the same day, decedent executed a will that named respondent as her estate's personal representative and devised the residue of her estate to her children, respondent and petitioner, Edward Murphy. Decedent's will named petitioner as the alternate personal representative.

Around the same time, decedent moved into respondent's home and, subsequently, moved into a mobile home that she purchased and located next to respondent's residence.

Approximately sixteen months later, decedent moved into a residential care facility because she needed skilled nursing care. Over the next two years, decedent's dementia, from which she suffered intermittently before moving into the residential care facility, progressively worsened to the point that she occasionally failed to recognize members of her family. She resided in the residential care facility until her death on April 28, 1998.

Respondent and her husband testified at trial that over a period of several years, decedent repeatedly instructed respondent to transfer decedent's real estate to herself. According to respondent, decedent gave one of these instructions shortly after decedent transferred a portion of her real estate to decedent's stepdaughter's family. Decedent continued to instruct respondent to transfer the property after she moved into the residential care facility. Decedent requested, however, that when respondent transferred the property, she retain a life estate in the property for decedent.

On December 10, 1996, nearly two years after decedent moved into the residential care facility, respondent, acting as decedent's attorney in fact, transferred decedent's real property to herself by quitclaim deed, reserving a life estate in the property for decedent. After respondent executed the quitclaim deed, respondent rented the property and received \$3,000 in rental payments. On April 14, 2000, she sold the property for \$180,000.

Shortly after decedent died, petitioner inquired about receiving his share of the estate. Respondent did not disclose to him at that time that she had transferred the real estate to herself. Later, petitioner called respondent, and respondent informed petitioner that she had transferred the property to herself. On February 25, 2000, petitioner filed a petition for commencement of proceedings in the probate court and requested that he be appointed personal representative of the estate. The trial court appointed him the estate's personal representative on April 27, 2000. On July 19, 2000, petitioner filed a complaint against respondent in which he (1) alleged that respondent converted the estate's assets, (2) demanded an accounting of decedent's assets, and (3) requested that the trial court impose a constructive trust over decedent's real and personal property, including the proceeds from the real property. During opening arguments at the bench trial, petitioner argued that respondent had obtained ownership of the property by exerting undue influence over decedent.<sup>1</sup>

In its written opinion, the trial court determined that decedent had not been unduly influenced when she executed the power of attorney. The trial court also found that although

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<sup>1</sup> Petitioner did not plead undue influence in his complaint, but raised the issue in his motions for summary disposition before asserting it at trial. Respondent requested a directed verdict immediately following petitioner's opening statement because petitioner had not alleged undue influence in his complaint. The trial court denied respondent's motion, finding that although the words "undue influence" were not specifically used, the complaint contained sufficient allegations to inform respondent of petitioner's claims.

respondent and her husband credibly testified that decedent wanted respondent to have the property, respondent did not make the transfer until several months after decedent became mentally unsound and engaged in behavior that was inconsistent with merely wanting to fulfill decedent's wishes, such as misleading petitioner concerning the status of the property. Accordingly, the trial court concluded that respondent breached her fiduciary duty, arising from her status as decedent's attorney in fact, to refrain from self-dealing. The trial court held that respondent's transfer of the property to herself created a constructive trust in favor of the estate and that the estate was entitled to the money respondent received from renting and selling the property. This appeal followed.

## II. Standard of Review

This Court reviews for clear error a trial court's factual findings and reviews de novo questions of law, including issues of statutory construction. *Thomas v New Baltimore*, 254 Mich App 196, 200; 657 NW2d 530 (2002), citing *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

## III. Analysis

Respondent contends that the trial court erred by concluding that, despite decedent's instructions that respondent transfer the property to herself, respondent breached her fiduciary duty by transferring the property.<sup>2</sup> We conclude that the trial court erred in its legal analysis and, because the trial court's findings of fact conflict to the extent that we cannot apply them to the law governing this case, we remand for clarification and application.

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<sup>2</sup> Respondent also argues that the trial court improperly permitted petitioner to assert a claim of undue influence and that the trial court improperly denied her second motion for directed verdict, made at the close of petitioner's proofs. The trial court did not abuse its discretion by permitting petitioner to assert a claim of undue influence, in light of its accurate conclusion that respondent was reasonably informed of the claim. See *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992); *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973). Contrary to respondent's assertions, this claim was not newly asserted at trial. Petitioner raised this claim before trial during hearings on three motions for summary disposition, and, during one such hearing, the trial court characterized this case as "an undue influence case." Although respondent argued that the evidence did not support a claim of undue influence, respondent did not object to petitioner's failure to specify undue influence in the complaint.

Ordinarily, we review de novo the trial court's decision concerning a motion for a directed verdict. *Wiley v Henry Ford Cottage Hosp*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 233220, issued 7/10/03), slip op at 2. However, respondent's argument consists of merely conclusory statements that do not meaningfully analyze this issue. Accordingly, respondent has not sufficiently briefed this issue to merit our review. *Id.* at 6 (stating that a party may not "leave it to this Court . . . to . . . unravel or elaborate his argument . . ."), citing *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Respondent, as decedent's agent, owed a common-law fiduciary duty to decedent. *In re Susser*, 254 Mich App 232, 235-236; 657 NW2d 147 (2002). Common law agency principles, which generally apply to powers of attorney, permit an agent to personally engage in a transaction with the principal "with consent of the principal after a full disclosure of the details of the transaction." *Susser, supra* at 234-235, quoting *VanderWall v Midkiff*, 166 Mich App 668, 677-678; 421 NW2d 263 (1988); *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001), citing *VanderWall, supra* at 677.

Certain provisions of the Estates and Protected Individuals Code (EPIC) and its predecessor, the Revised Probate Code (RPC), restrict the authority of fiduciaries to personally engage in transactions with the estates that they represent. These limiting provisions, however, do not apply in this case. MCL 700.1214, contained in the EPIC, prohibits self-dealing by fiduciaries, except in limited circumstances that are not present in this case.<sup>3</sup> The EPIC was in effect at the time of the proceedings in this case and, therefore, ordinarily applies to these proceedings. MCL 700.8101(2)(b). However, because respondent's accrued right as owner of the property would be impaired by invalidating the transaction or imposing a constructive trust, MCL 700.8101(2)(d) precludes applying MCL 700.1214 to invalidate respondent's transfer of the property. See *In re Smith*, 252 Mich App 120, 127-128; 651 NW2d 153 (2002).

The RPC also contained a provision prohibiting fiduciaries from "engag[ing] in a transaction . . . with the estate which he represents" without written approval of the court. MCL 700.561. However, the RPC definition of "fiduciary," which governs our interpretation of MCL 700.561, see MCL 700.2, does not include an attorney in fact.<sup>4</sup> Accordingly, the EPIC and the

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<sup>3</sup> MCL 700.1214 provides:

Unless the governing instrument expressly authorizes such a transaction or investment, unless authorized by the court, or except as provided in section 4405 of the banking code of 1999, . . . a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents . . . . A fiduciary in the fiduciary's personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate's property. . . .

<sup>4</sup> MCL 700.5 stated:

(1) "Fiduciary" includes a conservator, guardian, personal representative, or a successor fiduciary. Fiduciary includes a testamentary trustee until section 598 applies. Fiduciary includes a plenary guardian or partial guardian appointed as provided in chapter 6 of Act No. 258 of the Public Acts of 1974, as amended, being sections 330.1600 to 330.1642 of the Michigan Compiled Laws.

(2) The following are fiduciaries:

(a) Conservator.

(continued...)

RPC do not restrict respondent's common-law authority to engage in a transaction with the principal.

In the instant case, the trial court erred as a matter of law in failing to acknowledge that an agent may engage in self-dealing if the principal consents and has knowledge of the details of the transaction. Additionally, the trial court erred as a matter of law by concluding that the passage of time and the change in decedent's mental status affected respondent's authority to transfer the property. The power of attorney that decedent executed was a durable power of attorney and, therefore, was still valid after decedent became incompetent. MCL 700.5501; MCL 700.5502. Accordingly, if decedent consented to the transaction with knowledge of its details, the timing of the transaction does not prevent its enforcement.<sup>5</sup>

However, we find it necessary to remand this case to the trial court because we cannot discern from the trial court's findings whether the trial court concluded that decedent freely consented to the transaction. Although the trial court found credible respondent's and her husband's testimony that decedent wanted respondent to have the property, the trial court also found that that respondent acted in a manner "incongruous with an individual who was simply attempting to comply with her mother's wishes." Additionally, the trial court's opinion referenced "changes in circumstances" that prohibited enforcing the transaction. We, however, find no evidence on the record that decedent revoked the power of attorney or changed her mind regarding the disposition of the property after instructing respondent to transfer it. Accordingly, we remand this case to the trial court for application of the foregoing legal principles to the facts of this case as the trial court finds them.

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(...continued)

(b) Foreign personal representative.

(c) Guardian.

(d) Personal representative including an independent personal representative.

(e) Trustee, to the extent included in subsection (1).

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(4) Whenever the term fiduciary is used in this act, unless otherwise specifically provided, any grant of authority to a fiduciary with respect to property is limited to a fiduciary serving as a personal representative, trustee, or conservator.

<sup>5</sup> Petitioner argues that that the transfer was invalid because the durable power of attorney did not authorize respondent to make gifts. Because the trial court's opinion does not address this argument, petitioner has not properly preserved it for our review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Regardless, this argument lacks merit. Respondent's authority to convey property encompassed the authority to convey property as a gift.

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

/s/ Kurtis T. Wilder

I concur in result only.

/s/ David H. Sawyer

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Before: Schuette, P.J., and Sawyer and Wilder, JJ.

SCHUETTE, P.J. (*concurring in part and dissenting in part*).

I concur in the majority's decision to reverse and remand this case to the Clare County Probate Court. However, I respectfully dissent as to the applicability of MCL 700.8101(2)(d) and the ruling of this Court in the case of *In re Smith Estate*, 252 Mich App 120; 651 NW2d 153 (2002).

The facts and circumstances of *In re Smith Estate* involved an evidentiary issue of whether a handwritten document was evidence of testamentary intent of the deceased or simply a desire to make a monetary gift in the future. This Court held that a devise under a will was not a vested or an accrued right. As a result, the *Smith* decision did not trigger the limiting provisions of EPIC, MCL 700.8101(2)(d) on the general prohibition against self dealing as contained in MCL 700.1214.

Here, I believe the prohibition against self dealing (MCL 700.1214) is not erased by the application of MCL 700.8101(2)(d) because no accrued or vested right exists under the facts and circumstances of this case. *See In re Smith Estate, supra*.

Therefore, upon remand, MCL 700.8101(2)(d) should not be applied in the legal review conducted by the probate court and MCL 700.1214 should be applied to the facts and circumstances of this case.

/s/ Bill Schuette