

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH D. SMALLEGAN, Individually and as
Trustee of the FLORENCE J. SMALLEGAN
CHARITABLE REMAINDER UNITRUST
UNDER AGREEMENT DATED OCTOBER 31,
1998, and Personal Representative of the Estate of
FLORENCE J. SMALLEGAN,

Plaintiff-Appellant,

v

RONALD J. KOOISTRA and KOOISTRA &
DANTUMA,

Defendants-Appellees.

UNPUBLISHED
March 20, 2007

No. 272838
Ottawa Circuit Court
LC No. 04-049107-CZ

Before: O'Connell, P. J., and Murray and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' summary disposition on all counts pursuant to MCR 2.116(C)(8). We affirm.

This case arose when the decedent, Florence Smallegan, approached defendant, Ronald Kooistra, in need of an estate plan. Mr. Kooistra referred her to individuals at American Express Financial Advisors, who prepared an in-depth estate plan for her. Plaintiff, Florence's son and only heir, participated in most of the estate planning discussions along with Mr. Kooistra. Central to the estate plan designed by American Express was a Charitable Remainder Unitrust (CRUT), which would remove \$900,000 worth of appreciated stock from Florence's estate and place it in plaintiff's limited control as the CRUT's trustee. The American Express representatives advised that the estate's assets could be replaced with proceeds from a life insurance policy funded by the CRUT's distributed earnings. Pursuant to this plan, defendants drew up the CRUT documents. Even after the aged decedent was denied life insurance coverage, the American Express representatives assured her that they could find a life insurance policy to replace the value of the stock, so she executed the CRUT and transferred the stock to the trust.

After another set of denied applications, the decedent gave up trying to enter a life insurance contract. Although the trust paid a percentage of its value to Florence every year, all its remaining assets would be distributed directly to a designated charitable organization when

Florence died. Plaintiff was left to expend his own assets to salvage what was left of his awaited inheritance. Decedent eventually died without the anticipated life insurance in place. Plaintiff filed this suit against defendants to recover the value of the nonexistent insurance proceeds, and defendants essentially demurred, claiming that the trust worked as designed and did not contain any errors for which they could be held liable. The trial court applied the “four corners” rule adopted in *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), and granted defendants’ motion for summary disposition on all remaining matters under MCR 2.116(C)(8).

On appeal, plaintiff first claims that the ambiguities in the CRUT and the legal presumptions derived from defendants’ loss of Florence’s file provide sufficient evidence of malpractice within the estate planning documents. We disagree. We review de novo a trial court’s decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether phrased as an evidentiary limitation or put in terms of a beneficiary’s standing, the “four-corners” rule precludes a beneficiary from introducing extrinsic evidence to undermine the viability or intent of a clear and unambiguous testamentary document. *Mieras, supra* at 303. Because the law must presume that the stated intentions contained in testamentary documents accurately reflect a decedent’s intent, a beneficiary’s suit against a drafting attorney for malpractice is similarly dependent upon evidence gleaned from the drafted instruments themselves. *Id.* If the instruments do not contain internal inconsistencies, ambiguities, or other evidence of the drafting attorney’s poor craftsmanship, then a would-be beneficiary may not establish the attorney’s malpractice with outside evidence of the decedent’s “true” intent. *Id.* Once reserved for wills, this evidentiary limitation now extends to other alternative testamentary instruments such as trusts. *Bullis v Downes*, 240 Mich App 462, 467-470; 612 NW2d 435 (2000). In short, if a testamentary document clearly performs a function as designed, a would-be beneficiary has no grounds to challenge whether its function was actually intended by the decedent. *Mieras, supra* at 304-305.

Here, the CRUT itself clearly reflects Florence’s intent to distribute \$900,000 in stock out of her estate in 1998, and nothing presented in the trial court indicates that it had any contrary effect. It does not contain confusing or ambiguous language and does not mention any intent to preserve the assets that are clearly and unambiguously being committed to charity. Nevertheless, plaintiff argues that the CRUT contained an insurance clause, which raises an ambiguity regarding whether the CRUT actually intended to replace its assets with insurance proceeds. However, the clause that plaintiff points to only relates to insurance policies owned by the CRUT and does not indicate that the CRUT was designed for or conditioned upon insurance obtained to benefit plaintiff. In fact, the CRUT’s provisions adamantly prohibit plaintiff from using any CRUT assets for his own benefit, and plaintiff concedes that Florence only intended to pay for the life insurance policy out of the CRUT’s periodic payments to her. Therefore, the CRUT’s insurance clause does not create an ambiguity.

Next, plaintiff points to Florence’s application for life insurance and asserts that the application constitutes a testamentary document that should be read together with the CRUT to reveal its true, but failed, intent. However, we agree with the trial court that a rejected insurance application does not qualify as a testamentary document under the “four corners” rule. A mere application for insurance does not distribute any of the estate’s assets and does nothing to increase a beneficiary’s capital. Once the application was rejected, it lost all its potential force and value, and Florence could not have reasonably intended it to affect the distribution of her

estate after her demise. See *Bullis, supra* at 468. Therefore, the trial court correctly found that the rejected life insurance application did not qualify as a testamentary document.

Plaintiff next argues that the legal presumptions generated by defendants' spoliation of evidence should have precluded summary disposition. We review for abuse of discretion a trial court's decision regarding the proper sanction for spoliation of evidence. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). It is undisputed that defendants lost Florence's file, including her will, so the puzzle of Florence's documented testamentary intent was missing at least one major piece. However, plaintiff does not raise any issue relating to the malpractice of losing the file, forcing plaintiff to probate the estate. Instead, plaintiff argues that defendants' loss of Florence's file raises the legal presumption that it contained evidence that was unfavorable to defendants' handling of the CRUT. Again, plaintiff has not argued that the missing will itself contained tax-saving measures or other means of providing him with a greater portion of his mother's estate, but merely argues that the trial court should have presumed that the will created an ambiguity that would open the door for parol evidence of defendants' malpractice regarding the CRUT.

Plaintiff has never even speculated about what the will could have possibly contained to support his claims. Although a judge may allow a jury to draw unfavorable inferences about an absent article of evidence, it may also decide that the nature of the missing evidence does not warrant the bald assumption that it would support a highly unlikely claim of what the deceased might have done. See *Id.* at 160-161. This holds true especially when the actions of the deceased do not reveal any inclination to undo what the testamentary document accomplished.

The trial court did not abuse its discretion by concluding that it was unwilling to assume that the missing will would have discussed the decedent's intent to acquire life insurance. A will by its nature only has effect after the opportunity for meaningful discussion about obtaining life insurance has been rendered academic. Even if this type of statement existed, it would not be of a testamentary nature (how the decedent wants the estate distributed), but of a colloquial nature, describing unfulfilled intentions or regrets. See *Bullis, supra*. Moreover, the point of funding a transfer of assets with life insurance is to take assets out of the estate and convert them into assets for beneficiaries. The point of a will is to distribute the assets that remain in the estate postmortem. Under the circumstances, the trial court correctly concluded that defendants' failure to preserve the will did not warrant the court's indulgence in an unreasonable presumption that Florence's missing will contained a declaration of her true intentions regarding the life insurance and the CRUT. *Brenner, supra*. Because plaintiff fails to point to anything that might conflict with the CRUT's clear and unambiguous intent, the trial court correctly limited its analysis to the CRUT's four corners. *Mieras, supra* at 303. Therefore, plaintiff's cause of action must derive from something other than his mother's decision to establish the CRUT. *Id.*

Plaintiff alternatively argues that even if the CRUT itself is an unassailable legal instrument that faithfully carried out its expressed intent, defendants still committed malpractice by advising his deceased mother to place her assets into the irrevocable trust without first acquiring the anticipated life insurance. The problem with this argument is that, without undoing the CRUT, the theory of malpractice would have only created a cause of action in Florence. Plaintiff fails to demonstrate how defendants breached any duty to him as personal representative of her estate, trustee of the CRUT, or individually as a potential beneficiary of Florence's residuary estate as it existed at the time of her death.

Although plaintiff claimed that Florence was emotionally hurt by her imprudent failure to obtain life insurance before transferring the stock into the trust, she nevertheless chose to establish the trust, and we are not free to look outside the CRUT's four corners for reasons to second-guess that decision. *Id.* The CRUT effectively moved assets from Florence to her desired charitable beneficiary, simultaneously decreasing her estate and its tax burden and preserving the maximum amount of gross benefit for the charity. See *id.* at 304-305. Therefore, her estate did not "lose" the amount of money that went into the CRUT, and her estate has no claim for reimbursement. See *id.* at 290 (Levin, J.). Because the estate did not lose anything, plaintiff may not bring suit to recapture the assets transferred on its behalf.¹ See *id.* Likewise, plaintiff was clearly not the intended beneficiary of the CRUT, because by its terms it plainly and unambiguously prohibits him from using any of its assets for his own personal gain. If plaintiff had his druthers, the CRUT would have gone totally unfunded, so plaintiff has no claim against defendants in his capacity as the CRUT's trustee.

Finally, plaintiff does not have a personal claim against defendants because they never owed him an individual duty to deter Florence from transferring her assets into the trust. Essentially, plaintiff claims that, in hindsight, defendants owed him a duty to warn Florence not to transfer the stock into the trust without first obtaining effective "replacement" insurance. The problem with this argument is that plaintiff has failed in his challenge to the CRUT itself, so we must presume that Florence fully intended to transfer her stock into the trust, even when that meant that plaintiff might never recover the value of those assets. The damage claimed on appeal is the loss of the value to the estate of the stock transferred to the CRUT, which was presumptively an intended consequence of Florence's actions. Defendants did not do anything to make Florence less insurable and did not interfere with her attempts to obtain life insurance, so they are not liable for her inability to acquire life insurance coverage. Because plaintiff cannot hold defendants liable for Florence's decision to transfer her assets into the CRUT, and fails to establish any cognizable claim against them for Florence's failure to obtain insurance coverage, he fails to point to anything that can substantiate his claim for malpractice regarding the CRUT.

Furthermore, the trust was executed October 31, 1998. Florence did not die until August 10, 2002. During that time, Florence understood that obtaining the desired insurance was problematic because she was declined coverage three days before executing the trust agreement. Yet she took no action during the last four years of her life to disavow the trust, rescind its establishment, or seek recourse against those who recommended it. Under the circumstances, the trial court correctly determined that summary disposition was appropriate.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis

¹ The trial court's opinion on this matter was cryptic, but we agree with its clear and final grant of summary disposition on this and every other one of plaintiff's claims.