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STATE OF MICHIGAN

COURT OF APPEALS

In re EDWIN L. MCNEILLY REVOCABLE LIVING TRUST.

NANCEE MCNEILLY JELSEMA,

Petitioner-Appellant,

v

CINDRA L. TRUCKS, as Trustee of the EDWIN L. MCNEILLY REVOCABLE LIVING TRUST, RICHARD E. MCNEILLY, and FAITH E. MCNEILLY,

Respondents-Appellees.

UNPUBLISHED
April 16, 2020

No. 349360
Clare Probate Court
LC No. 18-017626-TV

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Petitioner, Nancee McNeilly Jelsema, appeals as of right from a judgment in favor of respondents that included an award of frivolous-action sanctions. We affirm the judgment, but vacate the award of frivolous-action sanctions.

Edwin L. McNeilly died on May 2, 2018, when he was 88 years old. He was survived by his wife of 38 years, Faith. Edwin had three children, Richard (a/k/a Rick), Cindra, and petitioner—who had a different mother. Petitioner was legally adopted by her stepfather in 1957, when she was a young child, and had no contact with Edwin until about 1982 when they reconnected. Edwin knew and was involved in the lives of petitioner's two sons, as well as her ten grandchildren. While petitioner communicated with Faith over the years, she had no relationship with Richard or Cindra.

Edwin had accumulated considerable wealth as a businessman before his death and had a number of trusts prepared during his lifetime. The subject of this case is an amended and restated trust dated April 18, 2018, about two weeks before Edwin's death. According to Edwin's daughter Cindra, in March 2018 Edwin told her that he wanted two people removed from his trust, including petitioner, and Cindra typed up those changes to a previous trust that had been executed in 2010 by Edwin. Edwin did not hire an attorney to amend his trust, although the original trust had been drafted by an attorney and Edwin used attorneys to complete his business at times. Because of the changes made to Edwin's trust, petitioner would only be receiving about $150,000 from two annuities instead of about $1.4 million via the trust.

Shortly after his death, on September 21, 2018, petitioner filed a petition to set aside Edwin's amended and restated trust dated April 18, 2018, which did not include petitioner as a trust beneficiary. Petitioner alleged that Edwin "was on his death bed, drugged, and barely awake when he allegedly executed the amended and restated trust." In the alternative, petitioner averred, Edwin "did not sign the amended and restated trust and his signature was forged." Edwin allegedly "did not have capacity to sign an amended trust because he was confused, drugged, and did not know close family members." Further, petitioner alleged, the amended and restated trust was a product of undue influence exerted by Faith, Cindra, and the notary, Lillian Lamerand, who was a beneficiary. And the trust was purportedly created as a result of fraud in that Cindra drafted the document for Edwin to sign but did not explain to him—and he could not understand—what he was signing and/or he never actually signed the document—his signature was a forgery. Petitioner asserted that Edwin "was on many drugs on the day of April 18, 2018 including morphine, had no capacity to sign any documents, did not know what he was signing, never signed anything, did not recognize who is family members were, and was otherwise incapable of making a decision to change his trust." Thus, petitioner asserted claims of forgery, lack of mental capacity, fraud, and undue influence with regard to the amended and restated trust and requested that the purported amended trust be set aside.

On April 12, 2019, petitioner filed her trial brief alleging that the amended and restated trust dated April 18, 2018 was allegedly executed only two weeks before Edwin's death while Edwin was in hospice care under the influence of several medications and of limited mental capacity. Petitioner asserted that the trust was void because of fraud, undue influence, lack of the requisite mental capacity, and/or forgery.

On April 16, 2019, respondents Cindra and Richard filed their trial brief asserting that Edwin's amended and restated trust dated April 18, 2018 was not invalid; he was alert, coherent, not drugged, and fully competent to execute the same. There was no forgery or undue influence. And the signing of it was properly witnessed by several people who were present. Accordingly, respondents argued in pertinent part, petitioner's action was frivolous under MCL 600.2591 and subject to mandatory sanctions, entitling respondents to costs and attorney fees as provided in MCR 1.109(E)(7) ("In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)."). Respondent Faith filed her trial brief raising substantially the same arguments.

A two-day bench trial began on April 24, 2019. In brief, petitioner testified that she was very close with her father, Edwin, but when she went to see him the day after he signed the trust documents at issue, on April 19, 2018 at about 4:00 p.m., he had no idea who she was. Edwin's

eyes were glazed over, he could not answer questions, was unable to have a conversation, and did not know her son, Tony, either. Faith told her that Edwin was on thirty or forty medications at that time.

Petitioner's son Tony, who is a medical doctor practicing family medicine, testified that he went to see Edwin on April 18, 2018, at about 1:30 p.m. When Tony arrived, Edwin was in bed sleeping but would awake and stare into space. He did not appear to recognize Tony and had a completely blank stare. After Edwin was out of bed, he seemed to be a bit more aware and might have even asked Tony about petitioner. But, Tony testified, Edwin did not seem capable of signing documents and transferring his assets at that time. He did not seem to have the capacity to understand what he was signing, and seemed to have memory difficulties. Tony believed that Faith had told him that Edwin was given morphine prior to Tony's arrival. Tony admitted that the hospice nurse was there while he was there and she charted that Edwin was alert and oriented to person, place, time, and situation, but Tony disagreed with that assessment.

Edwin's sister Eloise testified that she was present on April 18, 2018, when Edwin executed some documents. Eloise saw Edwin brought to the table and she believed that he did not know what was going on. She thought Edwin had no idea what he was signing. She even thought that she heard Edwin ask what he was signing and Cindra whispered something in his ear. Eloise, who was admittedly hard of hearing, was in the living room about eight or ten feet away from Edwin, who was facing away from her, so she did not see him actually sign the documents.

Petitioner presented the expert witness testimony of Dr. Daniel Fagan, an internal medical specialist, who reviewed Edwin's medical records and concluded that, considering his myriad of major illnesses and several medications, Edwin could have experienced altered mental status intermittently. That is, his mental status could have fluctuated from lucid one moment to periods of incapacity for minutes or hours in duration. However, Dr. Fagan noted that the hospice nurse saw Edwin on April 18, 2018, at about 1:18 p.m., and charted that he was alert and oriented to person, place, time, and situation and that was significant information.

Petitioner also presented the expert witness testimony of Erich Speckin, an expert in the areas of document analysis and handwriting examination with 27 years of experience. Speckin examined the documents at issue in this case and compared the handwritten signatures with nine known signature samples. He noted that there were elements found in the trust document signatures that were not found in the known samples, and there were elements that were consistent in the known signature samples that were not found in the questionable signatures. These handwriting characteristics in the trust document signatures led Speckin to conclude that there were indications of forgery.[1]

However, several people testified that they were present when Edwin executed the trust documents at issue in this case. Cindra testified that Edwin had discussed changing his trust beneficiaries while in the hospital in March 2018. He wanted petitioner removed as a beneficiary

[1] The scale of probability with regard to forgeries is: absolutely certain of forgery, highly probable of forgery, probable of forgery, and indications of forgery.

because he put her name on a $100,000 annuity. Edwin also wanted all rental properties removed from the trust and quit claimed to his rental management company that was going to be left to Cindra and her brother Rick. Faith was going to get everything else. Edwin executed the quit claim deeds and a transfer on death certificate on April 14, 2018.

On April 18, 2018, Cindra testified, she typed up the changes to Edwin's trust as he directed and, at about noon, he sat in his wheelchair at his dining room table and signed the trust documents. Edwin's secretary of 39 years, Lillian Lamerand, notarized his signature. Cindra's friend Barbara Houghton and Rick's friend Richard Larsen acted as witnesses. Also present when Edwin signed the trust documents were Faith, Cindra, Rick, Aric (Edwin's grandson), and Eloise. According to Cindra, Edwin flipped through the documents—as Richard Larsen and Faith also testified—before he signed them and said this is what he wanted before signing them. Cindra testified that Edwin knew what he was doing and he knew what he was signing. Cindra denied trying in any way to influence Edwin as to what he did with his trust, stating that was something no one would be able to do anyway. Edwin was very strong willed and could not be pushed into anything.

Richard Larsen testified that he watched Edwin sign the documents and Edwin never asked what he was signing. Edwin did nothing that led Richard to believe that he did not know what he was signing. Likewise, Barbara Houghton was about three feet away when she watched Edwin sign the trust documents. Edwin did not seem drugged and he appeared to be very competent to Barbara. Lillian Lamerand testified that she notarized the documents after watching Edwin sign them. Lillian also testified that Edwin was very particular about what he signed and he did not do anything that he did not want to do; no one could have talked him into anything. Faith testified that she also watched Edwin sign the documents and there was no indication that he did not know what he was signing; he knew.

There was other evidence presented which also suggested that Edwin was competent to sign the trust documents on April 18, 2018. The hospice nurse, Sarah Fink, who admitted Edwin to hospice care on the day before he signed his trust documents, on April 17, 2018, testified that Edwin was alert and oriented that day. She noted no cognition issues. Edwin was not started on morphine until April 26, 2018, when Sarah took the plastic from the bottle of liquid morphine and showed Edwin's family how it is administered. Dr. Douglas Mienk, Edwin's primary care physician also saw Edwin on April 17 and testified that Edwin's conversation was normal, he saw no sign of memory loss or abnormality, and nothing led him to believe that Edwin was not mentally capable of signing important documents.

Douglas Hoard, Edwin's CPA, testified that he was at Edwin's house in the morning on April 18, 2018, and Edwin knew who Douglas was and acted appropriately. Faith testified that Edwin was his old self that morning; he was weak but he talked the same and knew what was going on. The hospice nurse, Michele Graham, who saw Edwin on April 18, 2018, at about 1:20 p.m., shortly after he signed the trust documents, testified that Edwin answered her questions appropriately and did not appear to be drugged or mentally impaired when she saw him. Todd Lincoln, a friend who also sold insurance and annuities to Edwin for many years, testified that he was at Edwin's house and talked to Edwin on April 18, 2018, at about 2:30 p.m. Nothing led Todd to believe that Edwin was not in full control of his mental faculties; he knew Todd and talked appropriately to him. Todd never knew Edwin to do anything he did not want to do. Similarly, Alan Reiss, a friend who also sold real estate to Edwin for about 40 years, testified that he saw

Edwin on April 21, 2018, and even then Edwin was himself. Alan agreed that Edwin was very precise in what he wanted, always reviewed documents before signing them, and did not do anything he did not want to do.

After the bench trial, on May 29, 2019, the trial court issued its opinion and order denying petitioner's petition in its entirety. In brief, the court rejected petitioner's forgery claim, holding that several people observed Edwin sign the trust documents and their testimony was credible. The court rejected the claim that Edwin lacked sufficient mental capacity when he signed the trust documents, holding that respondents' witnesses were more reliable and credible than petitioner's witnesses. Edwin appeared to be acting in a manner consistent with his character as a strong-willed, sharp businessman who retained his mental faculties but tired more easily. Likewise, the court rejected the claim that respondents unduly influenced Edwin into revoking and amending his trust on April 18, 2018, holding that it was clear he remained in charge and directed Cindra and others as to what he wanted done in both March and April of 2018. The evidence showed that Edwin was an independent and savvy businessman who continued to hold meetings and make business decisions without being swayed or influenced by others. Finally, the court rejected petitioner's fraud claim which was primarily premised on Eloise claiming that Edwin asked what he was signing and Cindra whispered in his ear at the time he was signing the trust. The court noted that Eloise was admittedly hard of hearing, was standing across the room at the time, and did not see Edwin sign the documents. No one else observed these alleged occurrences. Further, the court held, "the claims of forgery, lack of mental capacity, fraud and undue influence were made in violation of MCL 600.2591 and under MCR 2.625 statutory sanctions are to be imposed against the Petitioner and awarded to the Respondents." The trial court ordered respondents to file a bill of costs within 21 days and noted that any party could request a hearing for review of the bill of costs. Thereafter, respondents' attorneys filed their bills of costs; one totaled $38,199.25 and the other totaled $18,277.75. This appeal followed.

Petitioner argues that the trial court erred in awarding frivolous-action sanctions because respondents had not filed a motion requesting sanctions as required by MCR 2.625 and MCL 600.2591. We disagree.

The interpretation of court rules, as well as questions of statutory construction, is subject to de novo review on appeal. *In re FG*, 264 Mich App 413, 417; 691 NW2d 465 (2004). The rules governing statutory interpretation apply equally to the interpretation of court rules. *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). If the plain and ordinary meaning of the language is clear, judicial construction is not necessary or permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Id*. at 649-650 (citation omitted).

MCR 1.109(E)(2) mandates that every document filed with the court must be signed by the person filing it or by at least one attorney. A petition initiating a legal action is such a filing. MCR 1.109(A), (C). The signature of the person filing the document constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for a change in existing law; and (3) the document is not filed for an improper purpose, such as to harass, cause delay, or increase the cost of litigation. MCR 1.109(E)(5). "If a document is signed in violation of this rule, the court, on the motion of a party

or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 1.109(E)(6). In addition, a party pleading a frivolous claim is subject to costs as provided in MCR 2.625(A)(2). MCR 1.109(E)(7). And MCR 2.625(A)(2), in turn, mandates that costs are to be awarded as provided by MCL 600.2591.

In this case, it is apparent that the trial court deemed the petition filed by petitioner to assert frivolous claims, and thus, to have been signed in violation of MCR 1.109(E)(5), as argued by respondents in their trial briefs. In its opinion and order, the court concluded that "the Petitioner has failed to present any material facts to support her claims." In other words, it appears the court concluded that petitioner's claims of forgery, lack of mental capacity, fraud, and undue influence were not "well grounded in fact." MCR 1.109(E)(5). The trial court may, on its own initiative, impose sanctions for the violation, including frivolous-action sanctions as set forth in MCR 2.625(A)(2), and as provided by MCL 600.2591. See MCR 1.109(E)(6), (7). Therefore, although respondents had not filed a motion requesting frivolous-action sanctions, the trial court was authorized under MCR 1.109(E)(6) to award such sanctions on its own initiative. Accordingly, petitioner's argument to the contrary is without merit.

Next, petitioner argues that the trial court erred in determining that her claims were frivolous. We agree.

A trial court's determination that a claim was frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

As discussed above, the trial court may award frivolous-action sanctions by authority of MCR 1.109(E)(6), (7), as set forth in MCR 2.625(A)(2), and as provided by MCL 600.2591. MCL 600.2591(3)(a) defines "frivolous" to mean at least one of the following:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

"The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Robert A Hansen Family Trust v FGH Inds, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008) (citation omitted). A claim is not frivolous merely because the claim is unsuccessful. *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 368; 844 NW2d 143 (2013).

In its opinion and order, the trial court considered each of the claims asserted in petitioner's petition to set aside Edwin's amended and restated trust dated April 18, 2018. With respect to

each claim, the trial court recited the evidence adduced at the bench trial that it considered before reaching its decision that petitioner did not prove the claim by a preponderance of the evidence. The court then summarily concluded that "Petitioner has failed to present any material facts to support her claims," and imposed frivolous-action sanctions. It appears, then, that the trial court awarded frivolous-action sanctions merely because petitioner did not prevail on her claims. This was improper. "To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate plaintiffs' claim at the time the lawsuit was filed." *In re Attorney Fees & Costs*, 233 Mich App 694, 702; 593 NW2d 589 (1999). As this Court explained in *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702; 909 NW2d 890 (2017):

> The frivolous-claim-or-defense provisions of the Michigan Court Rules and MCL 600.2591 impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. The reasonableness of the attorney's inquiry is determined by an objective standard, not the attorney's subjective good faith. The purpose of imposing sanctions for asserting a frivolous action or defense is to deter parties and their attorneys from filing documents or asserting claims or defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose. A court must determine whether a claim or defense is frivolous on the basis of the circumstances at the time it was asserted. [*Id*. at 731-732 (quotation marks and citations omitted).]

Accordingly, the trial court should have evaluated whether petitioner's petition was based on an objectively reasonable inquiry into the factual and legal viability of her claims—when the petition was filed—before awarding frivolous-actions sanctions to respondents. It appears to us that, had the trial court employed the proper analysis, frivolous-actions sanctions would not have been awarded.

Although the trial court made no inquiry into the facts relied upon by petitioner before she filed her petition, we may make some reasonable assumptions from the record evidence merely for explanatory purposes. In brief, in support of her claim of forgery petitioner presented the testimony of Erich Speckin at trial, an expert witness in the areas of document analysis and handwriting examination with 27 years of experience and extensive credentials. We assume he probably was consulted before the petition was filed in this matter. Speckin testified that there were indications that Edwin's signatures on the trust documents at issue in this case were not genuine, i.e., there were indications of forgery. Thus, while petitioner's claim of forgery was ultimately unsuccessful, facts existed to support that claim and the claim was not frivolous under MCL 600.2591(3)(a).

In support of her claim that Edwin lacked the requisite mental capacity to execute the trust documents, petitioner testified that when she saw Edwin the day after he allegedly signed the documents, his eyes were glazed over, he did not know who she was although they had a close relationship for forty years, he did not know her son Tony, and she was told that Edwin was on thirty or forty medications. Petitioner also presented the testimony of Edwin's sister Eloise who was present when Edwin allegedly signed the documents. We assume petitioner spoke with Eloise before the petition was filed in this matter as they had a friendly relationship. Eloise testified that she believed that Edwin did not know what was going on and had no idea what he was signing at

the time. In fact, she did not see him actually sign the documents; he was facing in the other direction. And she thought she heard him ask what he was signing, after which Cindra whispered something in his ear. Petitioner also presented the testimony of Dr. Daniel Fagan, a medical expert who reviewed Edwin's medical records and concluded that, considering the several major illnesses Edwin had and his medications, there was a potential for him to have fluctuating mental status which included periods of incapacity. We assume that Dr. Fagan was consulted before the petition was filed. Petitioner also presented the testimony of her son, Tony, who is a medical doctor practicing family medicine. He testified that he saw Edwin within a couple hours of him allegedly signing the trust documents and Edwin did not recognize him at all; he had a "completely blank stare." Tony did not think Edwin had the mental capacity to know what he was signing or the associated ramifications of doing so. And Tony recalled being told by Faith that Edwin was given morphine before he arrived that day. Thus, while petitioner's claim that Edwin lacked the requisite mental capacity to sign the documents was ultimately unsuccessful, facts existed to support the claim and the claim was not frivolous under MCL 600.2591(3)(a).

In support of her claim that Edwin was unduly influenced into revoking and amending his trust to exclude petitioner as a beneficiary, petitioner presented evidence that Cindra drafted the trust changes—not Edwin or his attorney. Because of the changes to Edwin's trust, petitioner was disinherited from the trust, which constituted a loss of over a million dollars. And petitioner had no relationship with Cindra or Cindra's brother Rick—both of whom had more access to Edwin than petitioner. Faith even testified that she really did not like petitioner. Further, the changes to Edwin's trust occurred shortly before his death, while he was suffering from several major illnesses and in hospice care, knowing he was going to die. Edwin was weak, under the influence of numerous medications, and had the potential of experiencing altered mental status that could last for hours according to Dr. Fagan. Thus, while petitioner's claim that Edwin was unduly influenced into amending his trust was ultimately unsuccessful, facts existed to support the claim and the claim was not frivolous under MCL 600.2591(3)(a).

In support of her claim of fraud with regard to the trust documents, there was evidence as discussed above that Eloise thought Edwin did not know what he was signing. She also believed that she heard Edwin ask what he was signing, after which Cindra whispered something in his ear. Further, the witnesses to the signing of the trust documents were the good friends of Cindra and Rick, and the notary had not only been Edwin's secretary, she was a family friend who was a beneficiary of Edwin's trust. In other words, the people who were involved in the amendment to Edwin's trust had close personal relationships to the exclusion of petitioner. Thus, while petitioner's fraud claim was ultimately unsuccessful, facts existed to support the claim and the claim was not frivolous under MCL 600.2591(3)(a).

In any case, the trial court clearly erred in awarding frivolous-action sanctions in this matter. The court did not apply the proper legal analysis by evaluating whether petitioner's petition was based on an objectively reasonable inquiry into the factual and legal viability of her claims at

the time the petition was filed. Accordingly, while the judgment is affirmed, the award of frivolous-action sanctions is vacated.

Affirmed in part, vacated in part.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher