

STATE OF MICHIGAN
COURT OF APPEALS

In re ALTHEA C. EVERARD TRUST, f/b/o
HESTER EVERARD STALKER.

PETER STALKER II and ELEANORE
STALKER FOSTER,

UNPUBLISHED
March 15, 2005

Petitioners-Appellees,

v

No. 251475
Wayne Probate Court
LC No. 00-146537-TT

FRANK WARD, HERBERT E. WARD,
ELEANORE BOOK KENNEDY, VIVIENNE
BOOK JAHNCKE, CYNTHIA BOWEN,
HERBERT V. BOOK, JR., and EDWARD BOOK,

Respondents-Appellants,

and

COMERICA BANK,

Respondent.

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Respondents appeal as of right from a probate court order granting summary disposition in favor of petitioners pursuant to MCR 2.116(C)(10). We affirm in part, vacate in part, and remand for further proceedings.

This appeal involves the residuary assets in a trust created pursuant to a May 6, 1927, will executed by Althea C. Everard (Althea), for the benefit of her daughter, Hester Everard (Hester), after Althea died in 1928. Althea's will also provided for the establishment of separate trusts for the benefit of her four other children, including Eleanore Book. A sixth trust was established for the benefit of Frank and Herbert Ward (hereafter the "Ward children"), the children of Althea's deceased daughter, Alice Ward. The trust for Hester and two of Althea's other children provided, in pertinent part:

For the lifetime of each of my said children aforementioned; that as each reaches the age of forty-five (45) years the entire of the assets comprising such separate trusts shall be paid over, distributed and conveyed to such child by the Trustee under her or his representative separate trusts, excepting property in the principal value of forty thousand dollars (\$40,000), which shall continue thereafter in trust, to be managed exclusively by the Detroit Trust Company, Trustee, under separate trusts in favor of each beneficiary; the income therefrom to be paid quarterly if possible, by the Trustee to each beneficiary. At the death of each of such child, the particular trust shall cease and the principal thereof, with any accumulations, shall at once pass to the issue of such deceased child.

“Issue” was defined in the will as “the child or children of any of my children or the children of my said deceased daughter, excluding, however, from such term any adopted children.” If a trust beneficiary died without issue, the trust assets were to be distributed to Althea’s other surviving children and the Ward children, or their issue by representation.

After Althea died in 1928, Hester adopted three children, David Stalker, petitioner Peter Stalker II (Peter Stalker), and petitioner Eleanore Stalker Foster (Eleanore Stalker). Hester died in 1997, survived by the two petitioners, who claimed entitlement to the residuary trust assets consisting of property in the principal value of \$40,000, and any accumulations for which Hester was the lifetime income beneficiary, under various writings executed by respondents or other family members beginning in 1936. Hester was also survived in 1997 by the Ward children, and her sister, Eleanore Book.

Eleanore Book died before petitioners’ petition to have the trust assets distributed to them was resolved by the probate court. But Eleanore Book had previously executed an assignment in 1965 of her interest in her siblings’ trusts to her five children (hereafter the “Book children”). The Book children and the Ward children, as respondents, jointly opposed petitioners’ petition. Respondents claimed entitlement to the residuary assets in Hester’s trust.

The probate court, after finding no genuine issue of material fact, determined that petitioners were entitled to have the trustee disburse the disputed trust assets to them. The probate court determined that Frank Ward was bound by a writing he signed in 1936, that Herbert Ward was bound by a writing that he signed in 1949, and that both Ward children were bound by a writing they signed in 1962. The probate court also determined that the Book children were bound by a letter that they wrote to petitioners in 1966 and, on that basis, ordered the trustee to make a distribution to petitioners that avoided any adverse tax consequences to the Book children.

I

On appeal, respondents first challenge the probate court’s decision on the ground that the 1936, 1949, and 1962 writings, as well as a 1958 writing executed by David Stalker and petitioner Peter Stalker, did not singularly or collectively meet the requirements of the Dodge act of 1921, 1921 PA 249. Petitioners, by contrast, argue that the Revised Probate Code (RPC), MCL 700.1 *et seq.*, which was adopted by 1978 PA 642, effective July 1, 1979, and repealed by 1998 PA 386, effective April 1, 2000, governs this case. Neither party claims that the Estates

and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, which became effective April 1, 2000, applies. See MCL 700.8101.

Although the probate court did not resolve this specific statutory issue, the record indicates that respondents challenged the applicability of the RPC when opposing petitioners' motion for summary disposition under MCR 2.116(C)(10). Because the facts necessary to resolve this issue are present, we will consider it. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

Our review is de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual support for a claim. We must evaluate the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Id.*

We conclude that respondents have not established that the Dodge act of 1921, as originally enacted or re-enacted and superseded in part by the Probate Code of 1939, 1939 PA 288, MCL 701.1 *et seq.*, applies to the 1936, 1949, and 1962 writings. See, generally, *In re Reeder Estate*, 380 Mich 655; 158 NW2d 451 (1968).

A court must give effect to the Legislature's intent as reflected in a statute. *Karl v Bryant Air Conditioning Co*, 416 Mich 558, 567; 331 NW2d 456 (1982). Because the RPC, MCL 700.991(c), contains a savings clause, the material question in this case is whether respondents have established an accrued right that will be impaired by application of the RPC.

An accrued right under a savings clause generally means a vested right. *Robinson v Steamboat Red Jacket*, 1 Mich 171, 177-178 (1849); see, also, *In re Cunningham Estate*, 131 Mich App 251, 254; 345 NW2d 681 (1983). Here, neither the Ward children nor the Book children have established any vested rights that are impaired by application of the RPC. The Ward children's vested rights arise from their status as residuary beneficiaries of Hester's trust. See *In re Childress Trust*, 194 Mich App 319, 323; 486 NW2d 141 (1992). The Book children, as assignees of Eleanore Book's rights under the various testamentary trusts when Hester died, stand in Eleanore's shoes with regard to the residuary of Hester's trust and, hence, similarly have vested rights. *Professional Rehabilitation Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

But we find no basis for respondents' claim that the Dodge act of 1921, or the Probate Code of 1939, established a right to have the validity of any act affecting trust assets determined under the statutory procedure in effect when the act occurred. The statutory procedure did not create a substantive defense. Under § 4 of the Dodge act of 1921, as well as under the Probate Code of 1939, MCL 702.48, a "definite method" was established for parties to compromise, settle, or adjust good-faith controversies or will contests, but other methods were not excluded. The fact that the procedure in the RPC, MCL 700.191, might differ from the prior statutory procedure does not preclude its retroactive application. Cf. *Karl, supra* at 574-576 (new statute

changing legal consequences of a prior act does not prevent retroactive application of a remedial statute).

Indeed, we are persuaded by respondents' argument that the statutory procedure does not apply to the 1936, 1949, and 1962 writings because there was no good-faith controversy by interested parties in Althea's estate. A person must have an interest in an estate in order to enter into an agreement to forbear from contesting a will. *Detroit Trust Co v Neubauer*, 325 Mich 319, 337; 38 NW2d 371 (1949). Here, the 1936 writing indicates only an agreement among certain trust beneficiaries to honor Hester's desire that her adopted sons be treated as her issue after they enter her home. The 1949 writing, which contains Herbert Ward's purported signature, expressed this same desire, but also includes Eleanore Stalker. The 1962 writing pertains to all three of Hester's adopted children. It purports to confirm and amplify prior agreements "in consideration of the mutual desires and covenants of all the parties hereto and of one dollar and other valuable considerations." It states an intent that the writing be "construed as an instrument of present and complete transfer of the interests herein assigned." None of these writings contain any promise to forbear from challenging the terms of the testamentary trust.

We note that even the RPC, MCL 700.191, arguably does not apply because there is no agreement amongst "interested parties," as defined in MCL 700.7(3), to alter their interests in the testamentary trusts. Rather, the writings are evidence of interested parties, including the Ward children and Eleanore Book, transferring their respective residuary interests in trust assets to non-interested parties, including one or both petitioners, in various writings. Trust interests are transferable. See *Glaser's Elevator & Lumber Co v Lee Homes, Inc*, 65 Mich App 328, 331; 237 NW2d 312 (1975). To the extent that respondents suggest that such a transfer cannot take place without a statutory procedure, we decline to consider this argument further because it lacks citation to any relevant supporting authority. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

In any event, we reject respondents' claim that a transfer of an interest in a testamentary trust is absolutely void if it is not executed by all trust beneficiaries. Even assuming that the RPC, MCL 790.191, applies to the 1936, 1949, and 1962 writings, a common-sense reading of the statute is that only parties to the agreement, and those having the statutorily provided representation, are bound by its terms. Cf. *Detroit Trust Co*, *supra* at 343 (finding all parties to an agreement that settled a controversy regarding how to construe a will and those interests represented by the parties were bound by the agreement). Because the probate court here only acted to bind persons who executed the 1936, 1949, and 1962 writings, we find no statutory basis for disturbing its decision.

We decline to address respondents' claim that the 1958 writing was invalid under the Dodge act of 1921 for failure to establish their standing to do so. The 1958 writing concerned a transfer from David Stalker and petitioner Peter Stalker of their interests to petitioner Eleanore Stalker, such that she would also be treated as "issue." Standing generally requires that the person, individually or in a representative capacity, have a real interest in a cause of action or a legal or equitable right, title, or interest in the subject matter of the controversy. *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992).

We also decline to address respondents' claims concerning the validity of Herbert Ward's signature on the 1949 and 1962 writings, and an alleged ambiguity in the 1962 writing, for failure to adequately brief these matters with citation to supporting authority, or to include these matters in the statement of questions presented. See *Prince, supra*; *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

II

Respondents next argue that a "single transaction" restriction in Althea's will limited the ability of beneficiaries to dispose of their trust interests. Because respondents' argument lacks citation to supporting authority, we deem this issue abandoned. See *Prince, supra*. In passing, we note that the disputed testamentary trust provision pertains only to the disposition of present and future stock in the Detroit Sulphite Pulp & Paper Company. Giving effect to Althea's clearly expressed intent, we decline respondents' invitation to construe the provision as also pertaining to the disposition of any interest in the trust corpus. See *In re Bem Estate*, 247 Mich App 427, 434; 637 NW2d 506 (2001).

III

Respondents next argue that the 1962 writing is not an enforceable donative assignment because it destroys inchoate interests of residuary beneficiaries who did not sign the 1962 writing. Respondents have not established that they presented this specific argument to the probate court, but we will address it because it presents a question of law. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Contrary to what respondents argue on appeal, a review of the probate court's decision does not disclose that the court focused only on the 1962 writing as the basis for its decision that petitioners were entitled to a distribution of the trust assets in which the Ward children had an interest. The probate court found that the Ward children were bound by the 1962 writing, as well as the earlier 1936 writing signed by Frank Ward and the 1949 writing signed by Herbert Ward.

Also, consistent with our discussion of respondents' first issue, we find no basis for respondents' claim that a transfer of trust interests is absolutely void if it is not executed by all trust beneficiaries. The authority cited by respondents for purposes of their specific challenge to the validity of the 1962 writing is unpersuasive. Respondents' reliance on MCL 554.31 – MCL 554.35 is misplaced because this case does not involve an estate in lands. Similarly, respondents' reliance on *Albro v Allen*, 434 Mich 271, 274; 454 NW2d 85 (1990), is misplaced because the issue in that case was whether a person with title to real property, as a joint tenant with rights of survivorship, can convey a life estate interest without the consent of the cotenant. Again, the instant case does not involve real property. Furthermore, the Court in *Albro* did not hold that a lack of consent voided the conveyance of the life estate. Rather, it held that "[e]ither cotenant may transfer her interest in the joint life estate and such a transfer has no effect on the contingent remainders." *Id.* at 287.

An assignment is not void simply because some other interested party did not consent to the assignment. See *McCluskey v Winisky*, 373 Mich 315, 318; 129 NW2d 400 (1964). Accordingly, the failure of all beneficiaries to sign the 1962 writing did not render it void. Because the probate court here acted to only bind the signers of the 1962 writing to its terms, we conclude that respondents and, in particular, the Ward children, have not established any basis for reversal.

IV

Finally, respondents claim that a 1966 letter executed by the Book children is an unenforceable promise to pay in the future. We agree. The probate court erred in finding the Book children bound by the 1966 letter because the Book children did not assign their rights under the testamentary trust to petitioners. A valid assignment has been defined as “a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned.” *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987).

Although the Book children expressed an intent in the 1966 letter to give petitioners and David Stalker the benefit of Hester’s trust after Hester’s death, they proposed to implement their intent by first receiving the trust assets, and then transferring those assets to petitioners and David Stalker in such a manner to avoid adverse gift tax consequences. An executory contract requires a valuable consideration. *Fischer v Union Trust Co*, 138 Mich 612, 617; 101 NW 852 (1904). Intentions to make a gift are not enforceable as a contract. *Riemersma v Riemersma*, 29 Mich App 485, 487; 185 NW2d 556 (1971). Hence, as a matter of law, the probate court erred in finding that the Book children were bound by the 1966 letter.

But we will not reverse a trial court’s decision when it reaches the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Here, the probate court reached the right result in determining that petitioners were entitled to receive the portion of the trust assets in which the Book children had an interest upon Hester’s death, as Eleanore Book’s assignee. Respondents did not show a genuine issue of material fact with regard to this issue. See *Veenstra, supra*. This is so because the record indicates that Eleanore Book survived Hester and, therefore, was the proper party to receive assets from the trust upon Hester’s death. The Book children, as Eleanore Book’s assignees under the 1965 assignment executed by Eleanore Book, merely stood in Eleanore’s shoes. Accordingly, they possessed whatever rights Eleanore would have possessed to the assets when Hester died. See *Professional Rehabilitation Assoc, supra*.

Eleanore Book perfected an assignment of her rights to her residuary interest in the testamentary trust to petitioner Peter Stalker, by gift, under the same 1936 writing signed by Frank Ward. Consideration is not required for an assignment if the assignor had a donative intent. *Johnson v Wynn*, 38 Mich App 302, 306; 196 NW2d 313 (1972). Petitioner Eleanore Stalker can share in those trust assets by virtue of her assignment from petitioner Peter Stalker in 1958.

We therefore affirm the probate court’s decision to the extent that it ordered the trustee to distribute to petitioners those trust assets that represented Eleanore Book’s residuary interest. But we vacate the probate court’s decision to require the trustee to make the distribution under

the terms of the 1966 letter because the Book children were not bound by that letter. We remand to the probate court for further proceedings regarding the distribution.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh