

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of MICHAEL J. BRZOSKA.

MICHAEL J. BRZOSKA, JR.,

Petitioner-Appellant,

v

SHELLEY ROOSE,

Respondent-Appellee,

and

KATHLEEN BECKER,

Interested Party-Appellant.

UNPUBLISHED

May 6, 2008

No. 273189

Macomb Probate Court

LC No. 2001-169867-DE

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Petitioner and interested party, siblings Michael J. Brzoska, Jr., and Kathleen Becker, appeal as of right from the probate court order distributing the estate of the decedent, their late father Michael J. Brzoska, Sr., by equally dividing the shares of the decedent's business with their other sibling, respondent Shelley Roose. We reverse in part, vacate in part, and remand for proceedings consistent with this opinion.

This case arises from a dispute over estate distribution by three siblings following the death of their father. In July 2001, the last will and testament of the decedent was submitted to the court for informal probate with petitioner acting as the personal representative. In the initial stages of the proceeding, specifically during a February 2004 hearing, it was determined that respondent Roose had received an \$80,000 benefit from the decedent during his lifetime by entering into a purchase agreement for the sale of his home at a reduced price. Therefore, it was agreed by all parties that petitioner and the interested party were entitled to a credit of \$80,000.

In August 2004, respondent filed a petition to change the proceeding from informal to formal probate. However, at a September 2004 hearing, it was learned that a facilitator had been successful in resolving many outstanding issues involving the estate. The predominant concern

with the estate was the lack of liquidity and the amount of outstanding loans. The facilitator was successful in selling properties owned by the decedent. Additionally, the closing of respondent's purchase of the decedent's former residence had finally occurred. At this hearing, it was asserted that petitioner improperly made a stock distribution to himself as heir and to the interested person. Despite this assertion, the petition was not changed from informal to formal. Rather, with the aid of the facilitator, the parties agreed to a settlement wherein the personal representative was to file an accounting within 30 days and assets would be disclosed as part of the accounting.

At the next hearing to remove the personal representative held in December 2004, respondent objected to the prior stock distribution. The probate court advised that the issue was resolved, stating it was "Fait accompli." The court proceeded to address the stock distribution in greater detail, stating: (1) there was nothing to prohibit the personal representative (petitioner) from distributing in that manner; (2) there was a remedy by analyzing his actions in comparison to the best interests of the estate; (3) the issue could be addressed by hiring an evaluator to determine whether or not the stock distribution was an equitable distribution; and (4) the request was "almost groundless" at that stage of the proceeding in light of the preparation of the final accounting.

On July 29, 2005, the parties appeared for trial. At the commencement of the trial, the probate court requested stipulations from the parties regarding the issues that would be addressed. The court received stipulations, and the prior stock distribution by petitioner as personal representative was not raised. Despite the stipulation to limit the issues, counsel for respondent raised the prior stock distribution during trial. At that time, the probate court advised respondent that the motion had been addressed and denied. Because a final ruling by the court had occurred, respondent's recourse was to "bring a motion for reconsideration or to appeal." During the third and final day of trial, the probate court repeatedly questioned why respondent's counsel continued to raise the issue of the stock distribution when it was not one of the four issues to be resolved at trial.

The parties presented competing expert testimony regarding the appropriate valuation of the business during trial. However, there was no testimony regarding the prior stock distribution. Despite the absence of testimony on the issue, the probate court in its written opinion and order following trial ruled: "A proper distribution of the Estate may only be had by way of an equal distribution of the shares between all three heirs/devisees, as opposed to the proposed distribution of shares only to the Personal Representative and [interested party] Kathleen Becker." Despite the probate court's issuance of an opinion and order addressing the issues raised at trial, the parties could not agree on a final judgment. The probate judge stated that the case could proceed indefinitely if she did not intervene immediately. The judge proposed entering a judgment of her own in lieu of the parties' presentation of a final order. However, the probate court then proceeded to order the appointment of a special fiduciary to examine the books and work with the parties to arrive at a final judgment, final accounting, and proper distribution of the estate. Counsel for the interested party vehemently objected to appointment of a special fiduciary, citing an additional dissipation of the assets of a struggling business enterprise. Despite the objection, the probate judge stated, "I'm not prepared to inflict on anyone a judgment coming from this Court in the absence of the parties being able to agree." The probate court directed the parties to

work with the special fiduciary to “arrive at a reasonable resolution to this whole matter.” Petitioner and the interested party appeal as of right from the probate court’s order.

Petitioner and the interested party assert that the probate court’s decision to contradict the prior ruling regarding the stock distribution was erroneous because it violated the law of the case doctrine, violated procedural and substantive due process, and violated the doctrine of laches. We agree in part and vacate the portion of the probate court’s order providing for an equal distribution of the shares of the business.

Factual findings made by the probate court when sitting without a jury are reviewed for clear error. *In re Eggleston Estate*, 266 Mich App 105, 112; 698 NW2d 892 (2005). However, the court’s application of the law to the facts is reviewed de novo. *Id.* Juries are allowed to render inconsistent verdicts through compromise or leniency because they are not held to any rules of logic and possess the capacity for leniency. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984). However, these considerations are not applicable when a case is tried by a judge sitting without a jury. *Id.* Trial courts in bench trials must render logical verdicts and are precluded from exercising a jury’s capacity for lenity. *People v Hutchinson*, 224 Mich App 603, 605-606; 569 NW2d 858 (1997). Rather, in a bench trial, it is presumed that the judge possessed an understanding of the law. See *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). It is the policy of this state to allow individuals to dispose of their property after death to the extent allowed by law. *In re Bem Estate*, 247 Mich App 427, 447; 637 NW2d 506 (2001). It is the duty of the courts to execute the intent of the testator regarding the distribution of the estate, particularly where the intent has been expressed in the lawful provisions of a will. *In re Howlett’s Estate*, 275 Mich 596, 600-601; 267 NW 743 (1936). Interest may be allowed incident to deferred payments in order to carry out the decedent’s intent of equality in the division to the heirs. *Id.* at 602.

First, petitioner and the interested party contend that the probate court’s ruling violates the law of the case doctrine. We disagree. The law of the case doctrine provides that an appellate court’s decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The probate court’s decision was not appealed to the circuit court or Court of Appeals. We are unaware of any authority that provides that a court’s repeated adherence to one particular ruling becomes the law of the case. However, in the present case, the probate court apparently rendered an inconsistent decision, and in the process, deprived petitioner and the interested party of due process of law. Moreover, the function of the probate court, to effectuate the intent of the decedent, was defeated in the process. *Howlett, supra*.

Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept applied to any adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The procedural protections, which include fundamental fairness, are based on what the individual situation demands. *Id.* Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest

of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzanski v Dobrzanski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not require a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

Review of the record reveals that respondent received a benefit that her siblings did not. Specifically, she was able to obtain a \$260,000 home, the home of the decedent, for a price of \$180,000, a savings of \$80,000. All parties agreed that each sibling was entitled to a similar benefit. Thus, respondent agreed that petitioner and the interested party were each entitled to \$80,000 to offset the benefit that she had received during the decedent's lifetime. After the death of the decedent, the personal representative and the interested party worked in the family business, and the personal representative made a distribution of the stock to account for the \$80,000 benefit received by respondent. When respondent questioned the stock distribution by the personal representative, the probate court ruled that respondent could challenge the distribution by providing objections to the final accounting. Respondent's repeated questioning of the distribution at later hearings was rebuked by the probate court. When the time for trial arrived, the court requested that the parties narrow the issues to be raised at trial. It was concluded, *by stipulation*, that only four issues would be raised, and the issue of the prior distribution was not one of the issues. Thus, the probate court relied on the parties' stipulation of the issues when conducting trial. When respondent repeatedly attempted to inject the issue of the prior stock distribution at trial, the probate court precluded the introduction of evidence regarding that stock distribution. Despite the prior multiple rulings regarding the finality of the stock distribution and the limitation of the issues to be introduced at trial, the probate court *sua sponte* ordered a split of the business among the three heirs in the opinion and order issued following trial.

This course of action deprived petitioner and the interested party of due process of law. *Kampf, supra*. Petitioner and the interested party were deprived of notice that the stock distribution was even at issue and were deprived of the opportunity to present evidence regarding the propriety of the stock distribution in relationship to the \$80,000 benefit received by respondent. *Cummings, supra*.

Moreover, the parties stipulated to the issues to be addressed at trial. There was never a stipulation by the parties to examine the prior distribution of the stock. "A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). Entering into a stipulation may assist the parties in avoiding delay, trouble, and expense. *Id.* While stipulations of fact are binding on the court, stipulations of law are not binding. *Id.* Thus, although petitioner and the interested party characterize the probate court's action as a violation of law of the case doctrine, it is appropriately classified as a binding stipulation of fact. By disregarding the parties' stipulations, the probate court deprived petitioner and the interested party of due process of law and rendered a windfall in favor of respondent who received an \$80,000 benefit plus a one-third interest in the family business. Moreover, it appeared that the prior stock distribution occurred to account for the \$80,000 benefit to

respondent. It is important to note that petitioner and the interested party did not present evidence at trial of the manner in which an offset of \$80,000 each should occur in exchange for the benefit respondent received in the purchase of the decedent's home. The function of the probate court is to effectuate the intent of the decedent, see *Howlett, supra*, and all parties agreed that the intent of the decedent was for each heir to receive an \$80,000 benefit with respondent's receipt of that benefit occurring during the decedent's lifetime. Consequently, we vacate that portion of the probate court's order providing for equal distribution of the business and remand for entry of a final judgment that effectuates the division as intended by the decedent and in which respondent does not receive a windfall.

Petitioner and the interested party next submit that the probate court erred in appointing a special fiduciary to evaluate the present value of the decedent's business. Appointment decisions by a probate court are reviewed for an abuse of discretion. See *Comerica Bank v City of Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). Based on the posture of the case, the trial court's appointment of a special fiduciary constituted an abuse of discretion. *Id.*

In *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 120-121; 559 NW2d 54 (1996), this Court held that the trial court's appointment of an attorney as an expert witness to make factual findings, conclusions of law, a final recommendation, and a proposed judgment to dispose of the matter constituted an improper delegation of judicial authority. "[T]here are no constitutional or statutory authorities permitting a [probate] court judge the power to appoint a retired judge or any other person to sit as a court in a civil action." *Id.* at 120.

In the present case, this informal probate proceeding was commenced in 2001. Despite multiple requests to remove the personal representative and to change the status of the proceeding from informal to formal probate, the requests were refused. Rather, a facilitator was appointed and managed to resolve outstanding issues regarding the estate. When counsel for respondent suggested the facilitator review the propriety of the stock distribution, the facilitator refused, opining that the issue presented a legal issue for the court. Trial occurred with the parties stipulating to the issues to be resolved at trial, and the trial court issued an opinion and order resolving the trial issues. Thus, the only remaining issue was the preparation of a judgment to comport with the opinion and order. When *sua sponte* appointing the fiduciary without consulting the attorneys first, the probate judge stated that she had many alternatives to end the case, including simply entering her own judgment. However, she stated that the case would continue indefinitely if she did not intervene immediately. Therefore, she decided to appoint a special fiduciary to examine the books and work with the parties to arrive at a final judgment, final accounting, and proper distribution of the estate. The probate judge appointed a special fiduciary and stated that if he was unable to enter a judgment, then she would. After hearing the objection, the probate judge stated: "And until I get more background information on what's going on with Chardam Gear, which everyone would agree is the asset of the estate, I'm not prepared to inflict on anyone a judgment coming from this Court in the absence of the parties being able to agree. So you now have an opportunity to work with [the fiduciary] to see if you can arrive at a reasonable resolution to this whole matter."

In light of the above, the probate court's appointment of a fiduciary constituted an abuse of discretion. The probate court abdicated its responsibility to another individual because it did not want to "inflict ... judgment" upon the parties in the absence of an agreement. Although appointment of a fiduciary is permissible for limited functions, in the present case, the case had

been pending since 2001, and trial had occurred. The fiduciary was assigned tasks constitutionally designated for the probate court, *Carson, supra*, and was repetitive of issues resolved at trial. Disagreement over the terms of a final judgment presents a fairly ordinary occurrence. See *In re Kramek Estate*, 268 Mich App 565, 576; 710 NW2d 753 (2005). “Resolving such a dispute is a part of the normal function of the probate court.” *Id.* Accordingly, we vacate the probate court’s appointment of a special fiduciary. Rather, on remand, the probate court should resolve the terms of the final judgment, *Kramek, supra*, by executing the intent of the decedent that did not provide for a windfall to respondent.¹ *Howlett, supra*.

Reversed in part, vacated in part and remanded. We do not retain jurisdiction.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

¹ We are not suggesting that additional evidentiary hearings are necessary, particularly in light of the fact that this informal probate was filed in 2001. Rather, in resolving the stipulated issues submitted by the parties, the probate court should consider the equities of the situation. Although it did not use the date of the decedent’s death for valuation of the business, it should take into account that any increase in value was, in part, due to the efforts of petitioner and the interested party who worked in the business as their form of income and therefore, strived for its success. Moreover, while the purchase of the home did not transpire for years after the death, the estate nonetheless paid the taxes on the home. Thus, the ultimate disposition should mirror the intent of the decedent in achieving equality based on the factors at hand. See *Howlett, supra*.