S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re PAYMENT Estate.

PHILIP L. PAYMENT, JR., Personal Representative of the Estate of PHILIP L. PAYMENT, SR.,

Appellee,

v

TERRY ANN POLL,

Appellant.

UNPUBLISHED
November 17, 2009

No. 281723
Mackinac Probate Court
LC No. 02-006992-DE

In re Estate of PHILIP L. PAYMENT, SR.

PHILIP L. PAYMENT, JR., Personal Representative of the Estate of PHILIP L. PAYMENT, SR.,

Appellee,

v

TERRY POLL,

Appellant.

No. 282529
Mackinac Probate Court
LC No. 02-006992-DE

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

In these consolidated probate appeals, Terry Poll appeals as of right the probate court's denial of her petition seeking imposition of a constructive trust (Docket No. 281723), and appeals by delayed leave granted the probate court's approval of the final accounting filed by Philip Payment, Jr. (Docket No. 282529), the personal representative of the estate of decedent Philip Payment, Sr. We affirm in part, reverse in part, and remand for further proceedings.

I. Underlying Facts and Proceedings

The decedent died on December 1, 2001, and left three surviving children, Philip Payment, Jr. (hereinafter Philip, Jr.), Gregory C. Payment, and Terry Poll. At the time of the decedent's death, he owned some personalty, a small amount of cash and a van with a trade-in value of $3,500. The decedent also held vendor interests in four Texas land contracts. In May 2001, the decedent had designated Philip, Jr. as the beneficiary of a financial account the decedent held with Edward Jones, worth approximately $290,000 when the decedent died.

In January 2002, Philip, Jr. petitioned the probate court for appointment as the personal representative of the decedent's estate and informal probate of a will the decedent executed in July 2001. In March 2002, the probate court issued letters of authority appointing Philip, Jr. as the estate's personal representative. In November 2002, the court entered a certificate of completion declaring the decedent's estate "fully administered."

In February 2003, Poll filed with the probate court a "petition to request the imposition of a constructive trust and request for accounting," which Poll amended in February 2007. The amended petition sought (1) a full accounting of the decedent's estate, and (2) "an order imposing a constructive trust on . . . assets of" the decedent held by Philip, Jr., on the basis that Philip, Jr. (a) unduly influenced the decedent's transfer of his Edward Jones financial account, and (b) violated his fiduciary responsibility to comply with the provision of the decedent's will directing $1,000 monthly payments to the decedent's children, ignored his duty to give a full accounting, and converted to his own use the decedent's 1997 van.

In September 2007, the probate court entered an order accepting a May 2007 accounting supplied by Philip, Jr, which covered the period between December 7, 2001 and April 30, 2007. In October 2007, the probate court held a bench trial concerning the propriety of imposing a constructive trust on the decedent's Edward Jones financial account. Poll theorized at trial that the decedent's Edward Jones account assets should have ended up in trust for the decedent's three children, in conformity with Part III of his July 2001 will, which reads as follows:

> It is my intention by this will to dispose of all separate property, which I may own. My assets, all mature bonds, mature stocks and mature annuities will be put into C.D. or any safe haven. The money will be dispersed at $1,000.00 per month to each of my children, until all is gone.

James Frederick Schmidt, a former Edward Jones investment representative, testified that the decedent had visited him seeking explanation of a "transfer on death" account option. Schmidt recalled that he explained to the decedent "that whoever he listed as the beneficiary there would be the recipient of whatever we were holding at Edward Jones," and "that in doing that, this particular portion of assets that were there did not have to go through probate. It would automatically go to whoever was listed as the beneficiary." Schmidt added that he habitually told his customers that they could utilize the transfer on death option to divide an account amongst several beneficiaries. In Schmidt's opinion, the decedent understood his explanation of the transfer on death option. The decedent thereafter executed in Texas a contract to transfer on

his death the contents of his Edward Jones account to Philip, Jr.[1] The decedent's account thus transferred into Philip, Jr.'s account on the decedent's death, although Philip, Jr. denied at trial having had any knowledge of his identity as the decedent's transfer on death beneficiary.

Poll testified that when she visited Michigan for the decedent's funeral, Philip, Jr. gave her a copy of the decedent's will. According to Poll, Philip, Jr. rebuffed her initial inquiries about the extent of the decedent's estate, but shortly thereafter told her the estate "was worth $598,000.00. And that . . . it would be split between all three of us. And it would last . . . ten, twenty years." Poll attested that she and the decedent shared a good relationship, and that they fought only once a couple years before his death.

Philip, Jr. recalled that each May through October between 1995 and 2001, the decedent returned north from Texas or elsewhere in the southwest and spent summers at Philip, Jr.'s Hessel residence. Philip, Jr. characterized the decedent as a healthy, vigorous, private, and self-reliant man, with whom he "did not speak much" before Philip, Jr.'s retirement in 1995. Philip, Jr. insisted that he and the decedent never spoke about the extent of the decedent's assets, his estate plan, or the Edward Jones account transfer on death provision. After the decedent's death, Philip, Jr. discovered the decedent's will in his van, sought appointment as the personal representative of the decedent's estate, as the decedent had requested, and began making monthly payments to his siblings in conformity with Part III of the decedent's will. Philip, Jr. testified that he made payments to his siblings from the value of the decedent's separate property, which consisted almost entirely of his land contract equities;[2] Philip, Jr. denied ever intending to pay his siblings with the money he received from the decedent's Edward Jones account, which he believed belonged to him personally. However, on October 21, 2002, Philip, Jr.'s attorney sent Poll's counsel a letter containing the following pertinent portion:

> Following our telephone conversation, I spoke with Philip Payment, Jr. He indicated that he intends to use the funds that were transferred to him to attempt to comply with the directions in his father's will. As you can see, the estate [has] total assets before expenses in the amount of $32,733. That money is tied up in land contract receivables and the estate is not capable of making the $1,000 per month payments to each of the three beneficiaries. Those funds are to be disbursed first.

To handle the trust set out in the decedent's will, Philip, Jr. opened a checking account in May 2002 with $4,482.38 of his personal funds. Philip, Jr. also deposited into the checking account money he received from the decedent's land contract vendees, and some additional money from Philip, Jr.'s personal funds. From the checking account, Philip, Jr. paid Poll $6,900 and his brother $7,730; Philip, Jr. averred that if the checking account ran short, he would deposit money from his Edward Jones account to cover the checks. When asked why Greg

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[1] The decedent's Edward Jones account had contained, among other things, a money market fund, municipal bonds, utility trusts, and mutual funds.

[2] Philip, Jr. submitted an inventory of the decedent's estate to the court, which listed the land contract values at $32,733.14.

Payment had received more money than Poll, Philip, Jr. explained that his brother occasionally needed some extra money, and that his brother had received an extra payment after Philip Jr. had ceased paying Poll when she began contesting the will, contrary to a no-contest clause in the will.[3]

The probate court found that Part III of the decedent's July 2001 will created a trust. But the court found that the trust did not encompass the decedent's Edward Jones account assets, and reasoned as follows that it found no basis for the imposition of a constructive trust on the Edward Jones account funds that the decedent transferred to Philip, Jr. via the transfer on death mechanism:

> And the Court believes that to impose the constructive trust, yes, undue influence, fraud, . . . misrepresentation, those kinds of things, are certainly clear cut ways of the Court deciding to impose a constructive trust. But there is . . . also the language in the case law cited by the parties . . . that discusses this . . . idea of perhaps not having any specific fraud or undue influence that can be pointed to on the part of, in this case . . . [Philip, Jr.], if there is some unconscionable . . . result in withholding funds. . . .
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> . . . [H]owever, it's . . . [defense counsel's] burden of proof initially to establish some sort of an unconscionable result. And while the proceeds certainly were not distributed equally, the Court can't find from the evidence that was presented . . . that a constructive trust should be imposed. . . . [F]irst of all, I think all the parties believe, and the testimony was pretty consistent that Mr. Payment, Sr. . . . certainly was a vibrant and healthy, independent man. And the most significant testimony beyond that, . . . the Court found Mr. Schmidt's testimony to be significant in the fact that the Court has to allow people to disburse their assets however they choose to do so. Mr. Schmidt indicated that it was his habit as he did these transfers upon death to explain those procedures to people who were coming in and requesting that to happen. That it would be outside of their estate. And that if you named a beneficiary, that's who that's going to go to. . . .
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> . . . [T]here's nothing in the record to suggest that, that number one Mr. Payment, Jr. had any knowledge that this was occurring. Number two that there was any mental deficiency of any kind on . . . Mr. Payment, Sr.'s ability to understand what was going on. And obviously he did have a close relationship with Phil, Jr. for whatever reason and to the extent that it's relevant had a lesser relationship, maybe it was distance, maybe he . . . didn't approve of the way [Poll] conducted herself, but I don't . . . believe . . . that we really even need to get there. Because there hasn't been any showing of . . . anything that would lead to a

[3] Greg Payment died in 2003 without a spouse or children, and Philip, Jr. thus sent his brother no further trust payments.

> constructive trust, whether it's an unconscionable result, or fraud, duress, or undue influence. . . . I have to acknowledge . . . . [t]he language cited in *Potter*[*v Lindsay*, 337 Mich 404; 60 NW2d 133 (1953),] having reached the conclusion about the transfer itself, it's the Court's opinion, question of the resulting constructive trust, cannot enter into the decision.
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> Candidly, if we can't . . . allow people to do that, there's no sense in doing these transfers upon deaths. I understand your argument [defense counsel], that perhaps there was some behind the scenes discussion with Phil, Jr. . . . and that the timing of when that . . . transfer on death and the new Will was drafted may have lead [sic] to that, but the Court can't just suppose that. . . . [T]he Court hasn't heard any evidence to suggest anything close to that. And, so, the Court's going to deny the request for imposition of the constructive trust.

The "order after bench trial" entered by the court specified that Poll "failed to demonstrate undue influence or a breach of fiduciary duty and that the petition for the imposition of a constructive trust is hereby denied."

II. Standard of Review

Poll maintains that the decedent's Edward Jones account constituted a part of the testamentary trust res created by the decedent's July 2001 will, and that the probate court should have imposed a constructive trust on the decedent's Edward Jones account because Philip, Jr. wrongfully refused to incorporate these funds into the testamentary trust and share the funds with her. "This Court reviews de novo the trial court's conclusions of law and equitable decisions" like whether to impose a constructive trust. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 496; 739 NW2d 656 (2007). However, we review the probate court's underlying factual findings for clear error, which exists when, although some evidence supports the court's finding, our review of the whole record leaves us with the definite and firm conviction that the court made a mistake. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

III. Transfer of the Decedent's Edward Jones Account under Michigan Probate Statutes

The parties do not dispute the probate court's finding that the decedent's will created a trust, or that the decedent's three children each were one-third trust beneficiaries. They disagree only with respect to what property funded the testamentary trust.[4] We find that the clear and unambiguous language of several statutory provisions in the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, dictates that under the facts of this case, the funds in the decedent's Edward Jones account transferred to Philip, Jr. on his father's death, and thus do not comprise a part of the decedent's testamentary estate.[5] In MCL 700.2602, the Legislature

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[4] No particular words are necessary to create a trust, but the substantial terms of the trust must be established, including the identities of beneficiaries, what share each beneficiary takes, and what property will fund the trust. *Brooks v Gillow*, 352 Mich 189, 199; 89 NW2d 457 (1958).

[5] We commence a statutory construction analysis "by consulting the specific statutory language at issue." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610

(continued…)

announced the general principle that "[i]n the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a will," subsection (1), and that "[a] will may provide for the passage of all property that the testator *owns at death* and all property acquired by the estate after the testator's death" subsection (2). (Emphasis added). The Legislature expressly recognized the nonprobate nature of a "transfer on death" contract in MCL 700.6101:

> (1) *A provision for a nonprobate transfer on death* in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of similar nature *is nontestamentary*. This subsection includes a written provision in the instrument that is intended to result in 1 or more of the following:
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> * * *
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> (c) Property the decedent controls or owns before death that is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before, at the same time as, or after the instrument. [Emphasis added.]

In MCL 700.6309(1), the Legislature reiterated that "*[a] transfer on death* resulting from a registration in beneficiary form *is effective by reason of the contract* regarding the registration between the owner and the registering entity and this part, *and is not testamentary*." (Emphasis added). Regarding the effect of a transfer on death designation, MCL 700.6306 sets forth,

> The designation of a TOD beneficiary on a registration in beneficiary form does not affect ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all the surviving owners without the consent of the beneficiary.

Because the evidence at trial established that the decedent transferred his Edward Jones account to Philip, Jr. alone via a transfer on death election, a nonprobate transfer, Philip, Jr., in

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(…continued)

(2002).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Id.* (internal quotation omitted).]

his capacity as the personal representative of the decedent's testamentary estate, neither had the authority to incorporate the Edward Jones account into the estate nor owed Poll any fiduciary duty concerning the Edward Jones account funds. The probate court did not clearly err to the extent it found that the decedent independently, knowingly, and voluntarily signed the transfer on death document assigning his Edward Jones account to Philip, Jr. Consequently, as a matter of law, the EPIC dictated that the decedent's Edward Jones account, which transferred to Philip, Jr. on his death through a nonprobate transfer, did not belong to the testamentary estate.

IV. Other Indicia Allegedly Reflecting Proper Placement of the Decedent's Edward Jones Account in Trust

Poll insists that, irrespective of the EPIC-mandated, nonprobate transfer of the decedent's Edward Jones account to Philip, Jr., the decedent's Edward Jones assets remain within the scope of the testamentary trust because the decedent transferred the Edward Jones account with the expectation that Philip, Jr. would use the Edward Jones money to fund the testamentary trust, and Philip, Jr. acknowledged his responsibility to do so. Our Supreme Court considered a similar contention by the plaintiffs in *Harmon v Harmon*, 303 Mich 513; 6 NW2d 762 (1942). In *Harmon*, *id*. at 515, the decedent owned an abstract office that he sold to the defendant, his son by a former marriage. The plaintiffs, the decedent's wife and her son with the decedent, complained that the defendant held the abstract office in trust for them because (1) the decedent had authored a memo stating his hope that the defendant would provide for the plaintiffs; (2) the defendant acknowledged in testimony that he had partially performed the intended trust by making payments of abstract office proceeds to the plaintiffs; and (3) other witness testified that the defendant had advised them he would "take care of" the plaintiffs through his acquisition of the abstract office. *Id*. at 515-519.

The Supreme Court commenced its analysis with the following relevant observations:

> A trust of personalty is not within the statute of frauds and its existence and terms may be shown by parol. Its existence may be inferred from the facts and circumstances of the particular case. But the evidence must be very clear and satisfactory and find some support in the surrounding circumstances and in the subsequent conduct of the parties.
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> The bill of sale from the doctor to the defendant is an outright transfer to the latter with no conditions attached. The will which was made some five months after the bill of sale further indicates that the doctor apparently wished defendant to have the abstract business absolutely. Nothing was said about a trust or contract in either of these instruments.
>
> It is our opinion that the memorandum left behind by the d[ecedent] neither set up a valid trust nor was it intended to create one. . . . This [the memorandum's language] shows the d[ecedent] intended to convey and did convey absolute title to defendant, but did desire him to know what the doctor's wishes were in regard to the use of the profits from the abstract business. This was morally binding only. [*Harmon*, 303 Mich at 519-520.]

The Supreme Court additionally noted the defendant's testimony that the decedent had "never discussed the transfer of the abstract business as being anything but an outright sale; and that [the] defendant did not see or know of the memorandum until four days after his father's death." *Id*. at 521. In conclusion, the Supreme Court rejected the plaintiffs' trust claim, summarizing as follows:

> On this record we find no legally binding trust was intended or created. Nor is there any evidence in the record of a contract being intended or entered into for the benefit of [the] plaintiffs by the d[ecedent] and [the] defendant. [The d]efendant is under a moral duty only to provide for [the] plaintiffs. Whatever he gave Dorothy Harmon or will give depends alone on his willingness to perform a moral obligation in compliance with his father's desire. . . . [*Id*. at 521-522.]

In this case, as in *Harmon*, the decedent father performed a nonprobate transfer of an asset, the Edward Jones account, to his son, Philip, Jr., and Poll, another child of the decedent, claimed that the decedent intended for Philip, Jr. to hold the decedent's Edward Jones account in trust for her benefit. And like the defendant in *Harmon*, Philip, Jr. partially performed the allegedly intended trust by utilizing some of the decedent's Edward Jones account funds to make testamentary trust payments to himself, his brother, and Poll. In an additional similarity with *Harmon*, Philip, Jr. expressed to Poll his intent that he would take care of her. In yet more similarities to *Harmon*, (1) the method of nonprobate transfer, the "transfer on death" contract executed by the decedent, contains no hint or suggestion that his Edward Jones account should be held in trust for anyone; and (2) no evidence tends to show that the decedent had discussed the transfer on death transaction with either Philip, Jr. or Poll. Although one may infer that the decedent intended to transfer his Edward Jones account to Philip, Jr. so he could create a trust for all of the decedent's children, one could also reasonably presume that the decedent transferred his Edward Jones account outright to Philip, Jr., with whom the record demonstrates the decedent shared the most substantial relationship. Absent clear and satisfactory evidence that the decedent intended to create a trust funded by his Edward Jones account, we detect no clear error in the probate court's finding that the decedent transferred his Edward Jones account outright to Philip, Jr. for his sole possession or ownership, not for Philip, Jr. to hold in trust for the benefit of the decedent's children.

V. Ademption by Extinction

Moreover, even adopting Poll's position that the decedent's will referenced the types of assets comprising his Edward Jones account as a group of property that should fund the testamentary trust in Part III of the July 2001 will, the intended bequest of "all mature bonds, mature stocks and mature annuities" was adeemed.

> "If property which is specifically devised or bequeathed remains in existence, and belongs to testator at his death, slight and immaterial changes in its form do not operate as an ademption,"

> but

> "The real question is, whether the specific property is in existence at the death of the testator, and whether testator then owns the interest which may pass

> under his will. If the property which is described in the will is not in existence, or does not belong to testator, at his death, the legacy fails." [*Hankey v French*, 281 Mich 454, 462-463; 275 NW 206 (1937), quoting 2 Page on Wills (2d ed), §§ 1328, 1333.]

See also *In re Thornton*, 192 Mich App 709, 712; 481 NW2d 828 (1992), quoting Atkinson, Law of Wills (2d ed), § 134, p 741: "A testamentary gift of testator's specific real or personal property is adeemed, or fails completely, when the thing given does not exist as part of his estate at the time of his death." Here, because the decedent's Edward Jones account went to Philip, Jr. via a statutory, nonprobate transfer on the decedent's death, the bequest of annuities, bonds and stocks in Part III of the decedent's will was extinguished by ademption and could no longer fund the testamentary trust. See MCL 700.2511(1) (noting that to create a testamentary trust the will must "devise property to the trustee of a trust").

VI. Constructive Trust

Poll urged the probate court to impose a constructive trust on the Edward Jones account transferred to Philip, Jr. if the court found that he had a fiduciary duty to incorporate the decedent's account into the property comprising his testamentary trust. Unlike express trusts or resulting trusts, which derive from agreement or the settlor's intention, constructive trusts exist by operation of law. *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978). "Constructive trusts are creatures of equity and their imposition makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest." *Id*. Constructive trusts can arise from "fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property." *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931). But a constructive trust "will not be imposed upon property owned by parties who have in no way contributed to the reasons for imposing a constructive trust." *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). Because Philip, Jr. did not owe a fiduciary duty that encompassed his responsibility to include the decedent's Edward Jones account in the testamentary trust, as a matter of law the probate court correctly found that no basis supported the imposition of a constructive trust on the decedent's Edward Jones account in Philip, Jr.'s possession.

VIII. Accounting-Related Claims

Poll additionally raises several related challenges to the probate court's approval of Philip, Jr.'s final accounting. We review for clear error the probate court's findings of fact, but consider de novo the legal question whether the probate court's accounting approval comported with applicable statutes. *Sweet Air Investment*, 275 Mich App at 496; *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002).

The EPIC mandates that a personal representative account to certain interested individuals.

> The personal representative shall keep each presumptive distributee informed of the estate settlement. Until a beneficiary's share is fully distributed,

> the personal representative shall annually, and upon completion of the estate settlement, account to each beneficiary by supplying a statement of the activities of the estate and of the personal representative, specifying all receipts and disbursements and identifying property belonging to the estate. [MCL 700.3703(4).]

An account also must detail attorney fees the personal representative paid during an accounting period. MCL 700.3705(1)(d)(iv).

Philip, Jr. filed a first and final accounting covering the period between December 7, 2001 and April 30, 2007, which procedure violated the statutory requirement that he file annual accountings. MCL 700.3703(4). Poll objected to the accounting on multiple grounds, including that Philip, Jr. had unequally distributed the estate, and that he had converted to his personal use the decedent's Edward Jones account and the decedent's van. Poll urged the probate court to prevent Philip, Jr. from charging to the estate any attorney fees related to his defense of her petition, and to award Poll the attorney fees necessitated by Philip, Jr.'s wrongful conduct. After two hearings to address Poll's objections, the probate court ultimately accepted the accounting, reasoning that "as a practical matter, the Court believes that the accounting that was filed some six years after the fact as result of the court order, while not perfect is accurately [sic], describes what occurred. And to a lesser degree, what continues to occur." The probate court authorized Philip, Jr. to collect from the decedent's estate the attorney fees arising from the litigation of Poll's petition. The court denied Poll's request for attorney fee reimbursement related to her efforts to identify estate assets and obtain an accounting.

A. Propriety of Charging Philip, Jr.'s Litigation-Related Attorney Fees to the Estate

A personal representative possesses statutory authority to "[p]rosecute or defend a claim or proceeding . . . for the protection of the estate and of the personal representative in the performance of the personal representative's duties." MCL 700.3715(x). And MCL 700.3715(w) permits a personal representative to "[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties . . . ." Under MCL 700.3720, "If a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred."

Poll submits that because the challenged attorney fees were incurred to defend Philip, Jr.'s exclusion of a contested asset from the estate, they did not benefit the estate and thus were not chargeable to the estate. This Court has held, in interpreting language in the repealed revised probate code, that "legal services rendered in behalf of an estate are compensable where the services confer a benefit on the estate by either increasing or preserving the estate's assets." *In re Sloan Estate*, 212 Mich App 357, 362; 538 NW2d 47 (1995), citing, among other cases, *In re Baldwin Estate*, 311 Mich 288, 314; 18 NW2d 827 (1945), and *In re Prichard Estate*, 164 Mich App 82, 86; 416 NW2d 331 (1987). However, "[a]ttorney fees incurred by an executor to defend against a petition for his removal are properly chargeable to the estate where no wrongdoing is proved." *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996) (affirming the fiduciary's award of attorney fees because the "appellants failed to prove any wrongdoing on the part of the fiduciary").

Moreover, the plain language of MCL 700.3720 now expressly permits a personal representative to recover from the estate the expenses incurred in defending an estate-related proceeding, provided only that the representative acts in good faith. Here, the record simply does not substantiate that Philip, Jr. conducted himself in bad faith while defending against Poll's petition or while performing any other conduct as the estate's personal representative. We detect no clear error in the probate court's finding that Philip, Jr. acted in good faith, and we thus conclude that the probate court did not commit legal error in charging Philip, Jr.'s litigation-related attorney fees to the estate.

B. Unequal Distribution to Will Devisees

The EPIC directs that

> [a] fiduciary shall observe the standard of care described in section 7302 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; *impartiality between heirs, devisees, and beneficiaries*; care and prudence in actions; and segregation of assets held in the fiduciary capacity. [MCL 700.1212(1) (emphasis added).]

The evidence the parties presented to the probate court showed that between August 2002 and February 2003, Philip, Jr. disbursed by check $7,730 to Greg Payment, and $6,900 to Poll and himself.

The legal ground on which Philip, Jr. defended the inequitable distributions involved MCL 700.3703(1), which imposes on the personal representative "a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate." Philip, Jr. avers that he ceased Poll's disbursements when he became aware that she had retained counsel in preparation to challenge his conduct related to the decedent's Edward Jones account. According to Philip, Jr., his cessation of disbursements to Poll intended to enforce Part VI of the decedent's will, which provides as follows:

> If any beneficiary or remainderman under this will in any matter, directly or indirectly, contests or attacks this will or any of its provisions, any share or interest in my estate given to that contesting beneficiary or remainderman under this will is revoked and shall be disposed of in the same manner, provided herein as if that contesting beneficiary or remainderman and predeceased me without issue.

Poll's challenges, as reflected in her petition, amended petition, and objections to Philip, Jr.'s accounting, centered on Jr.'s performance of his duties as the estate's personal representative, i.e., his alleged conversion of assets and failure to account. Poll's challenges did not, either directly or indirectly, contest or attack the decedent's will itself. Accordingly, Philip, Jr. had no legal excuse for his failure to evenly distribute the estate assets, in accordance with

Part III of the decedent's will, and as dictated by MCL 700.1212(1). In light of Philip, Jr.'s unequal distribution of estate funds, he must remedy the inequality by paying Poll her share of the $830 excess he gave to Greg Payment, specifically one-third of $830, or $276.67.[6]

C. Poll's Request for Attorney Fees

Poll lastly complains that the probate court erred in declining to awarding her the attorney fees she incurred in disputing Philip, Jr.'s improper accounting and conversion of estate assets, like the decedent's van and the Edward Jones account. Poll asserts that Philip, Jr. "should be ordered to pay attorney fees as a surcharge for his mishandling of the estate" pursuant to MCL 700.1308(1), which sets forth the following:

> A fiduciary is liable for a loss to an estate that arises from embezzlement by the fiduciary; for a loss through commingling estate money with the fiduciary's money; for negligence in the handling of an estate; for wanton and willful mishandling of an estate; for loss through self-dealing; for failure to account for an estate; for failure to terminate the estate when it is ready for termination; and for misfeasance, malfeasance, nonfeasance, or other breach of duty.

The record amply establishes that Philip, Jr. neglected to prepare or present estate accountings between his appointment as the personal representative of the decedent's estate and April 2007, and neglected to place within the estate the $3,500 trade-in value of the decedent's van. The record also reveals that these failings of Philip, Jr. prompted Poll's initiation of probate proceedings to obtain an accounting of the decedent's estate, into which Philip, Jr. eventually included the $3,500 van trade-in amount. Therefore, the probate court should have surcharged against Philip, Jr. the amounts of Poll's attorney fees attributable to her proper and successful efforts to identify the van as an estate asset and the attorney fees attributable to her effort to obtain an accurate accounting of the decedent's estate. Consequently, we remand for the probate court to ascertain the attorney fee amounts attributable to Poll's efforts to require Philip, Jr.'s compliance with the EPIC concerning inclusion of the van as an estate asset and the production of a final accounting. The probate court should award to Poll two-thirds of these attorney fees, one-third of which she bears responsibility because of her status as a one-third beneficiary of the estate under the decedent's will.

We finally observe that because the decedent's estate does not include his Edward Jones financial account, and because the attorney fees that Philip, Jr. incurred in the course of defending Poll's petition are chargeable to the estate, the estate has a negative balance of $7,491.02, according to the amended final accounting filed in December 2007. And because the

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[6] The parties have advised that the excess paid to deceased brother Greg Payment is not recoverable from any estate in his name.

parties each constitute beneficiaries or devisees of one-third of the decedent's estate, the probate court should order each of the parties to bear responsibility for one-third of the estate shortfall.

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

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher