STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

IN THE MATTER OF THE ESTATE OF:
KATIE C. VARDIMAN, Deceased
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Case No. 2012-777561-DE
Hon. Milton L. Mack, Jr.

ANGELA WILLIAMS, BRENDA HARRIS,
Petitioners,
Vs.
CAROL GORDON, COSTELLA JONES,
COLLEEN MONTGOMERY, AUDREY BELAMY
MAUREEN MUHAMMED, LISA J. SUTTON, Personal Representative of the Estate of Katie C. Vardiman, Deceased, and SWANSON FUENRAL HOME, a Michigan Corporation,
Respondents.
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OPINION

On April 6, 2010, the court appointed Michigan Guardianship Services as guardian and conservator for Katie Vardiman ("Katie"). Previously, on April 28, 2008, Katie had designated her granddaughter, Angela Williams ("Williams"), as the sole beneficiary of her life insurance policy.[1] While the guardianship and conservatorship was in place, Katie executed changes to the beneficiary designation of that life insurance policy on April 24, 2010, and July 1, 2010. On August 11, 2010, the court appointed Audrey Bellamy ("Bellamy") as the successor guardian and conservator. The change of beneficiary designations added Bellamy as a beneficiary of the life insurance policy and deleted Williams.

Katie died on December 27, 2010. Williams brought this petition seeking to have the beneficiary change designations declared void because Katie had been under guardianship and conservatorship at the time she signed the designation. She argued that pursuant to the Michigan Supreme Court's decision in *Acacia Mut Life Ins Co v Jago,* 280 Mich 360; 273 NW 500 (1937), Katie was conclusively presumed to lack the capacity to execute those documents and they were therefore void.

The parties appeared for trial on September 26, 2013, and submitted the video testimony of Dr. Means as well as a series of exhibits. The parties also stipulated to the

[1] Petitioners' Amended Trial Exhibit List, exhibit E.

admission of the court's guardianship file and the reports contained in that file. Based on the court's review of that evidence, the court makes the following findings of fact and conclusions of law.

On February 26, 2010, Katie's daughter Maureen Muhammad ("Muhammad") filed a petition seeking to be appointed guardian of Katie. On the same date, Bellamy filed a petition seeking to be appointed as conservator. Muhammad was appointed temporary guardian and Bellamy special conservator on March 8, 2010.

Williams filed objections to these petitions claiming she had been the caregiver for Katie for the previous 10 years and should be appointed as guardian and conservator. The guardian ad litem ("GAL") met with Katie and reported that she was ambivalent on who she would prefer as her guardian but would prefer Williams if she could return home. However, the GAL reported extreme family conflict over who should serve and recommended the appointment of a professional to serve as guardian and conservator citing an incident at the nursing home where Katie resided on March 31, 2010, when the police were called to remove two of Katie's other daughters from the nursing home. At the hearing on April 6, 2010, the court appointed Michigan Guardianship Services as guardian and conservator.

On June 15, 2010, Bellamy filed a petition to modify the guardianship and conservatorship asking that she be appointed to replace Michigan Guardianship Services as guardian and conservator for Katie. The hearing was held on August 11, 2010. Katie was present. Bellamy did not disclose that change of beneficiary designations had been signed by Katie before and after she filed her petition to modify.

The GAL reported that Katie had recovered and did not seem to need a guardian. In his written report he noted that Dr. Means found, on July 1, 2010, that Katie was able to make her own decisions but that Katie preferred for Bellamy to remain as her primary caregiver and, if need be, her guardian and conservator. Dr. Means testified that she recalled Katie as "really sharp" and that she was capable of making decisions regarding finances and medical matters. Dr. Means found Katie to be "clearly competent". No evidence was offered to suggest that Katie was incapacitated as of July 1, 2010, the date Katie signed the final change of beneficiary designation. Nevertheless, Williams argues that the rule in *Acacia* created a conclusive presumption that Katie did not have the capacity to change her beneficiary designation.

The validity of the change of beneficiary designation turns on whether the presumption of incapacity is conclusive or not. If the presumption is conclusive, the beneficiary designations signed by Katie will be void, regardless of the absence of any actual evidence of incapacity. However, if the presumption is rebuttable, the advocates for the change of beneficiary designations would have the duty to present evidence to meet or rebut the presumption as provided in MRE 301.

Acacia Mut Life Ins Co v Jago, 280 Mich 360; 273 NW 599 (1937) is often cited for the proposition that if a person is under guardianship, that person is "conclusively" presumed to

lack capacity to contract. However, three years later, the Supreme Court in *Wies v Brandt*, 294 Mich 240; 293 NW 773 (1940), cited *Acacia* for the proposition that: "The presumption is that she could not make a valid contract while under guardianship as a mentally incompetent person." *Wies, supra* at 247. The *Wies* court did not include the word "conclusively" and instead weighed the evidence, treating the presumption of invalidity as being subject to being overcome with proof that the ward was mentally competent.

In *Acacia*, a guardian had been appointed for the person and the estate of Mrs. Jago. Mrs. Brisbee claimed that a portion of an insurance policy had been assigned to her while Mrs. Brisbee was under the guardianship. The court concluded that "while an insane or incompetent is under actual and subsisting guardianship of estate" that person "is conclusively presumed incompetent to make a valid contract, notwithstanding it was made during a lucid interval." The court wrote that such an action was invalid without the knowledge and consent of the guardian.

In contrast, in *Wies*, Brandt, an attorney, was appointed special (temporary) guardian of Pauline Wies on March 22, 1938. Wies had suffered a severe stoke on February 28, 1938. Brandt was appointed general guardian on April 22, 1938. While Wies was under guardianship, Brandt had her execute a trust on January 5, 1939, giving him control over her estate. The guardianship was terminated on January 19, 1939. Brandt had Wies execute an affidavit on January 20, 1939, confirming the execution of the trust.

Wies then filed a complaint charging Brandt with fraud in procuring the execution of the trust. The trial judge took testimony from Wies and found no fraud. The Supreme Court held that because she was under guardianship, it was presumed that she could not make a valid contract. The Court did not end the inquiry there. The Court held that that issue and the existence of the fiduciary relationship meant that in order for Brandt to sustain the validity of the trust he would have to satisfy the court that at the time of execution of the trust, Wies was mentally competent and undue influence was not used. The Court held that Brandt did not prove the trust was valid.

However, if the Supreme Court in *Weis* was of the opinion that the presumption was "conclusive", and not subject to rebuttal, it would not be necessary to review the facts and the Court would not offer Brandt the opportunity to satisfy the Court that at the time of execution of the trust she was mentally competent to execute the trust. It is worth noting that 6 of the 7 justices who decided *Wies* also decided *Acacia.*

Acacia cited *Chase v Spencer*, 150 Mich 99 (1907) to support its position. *Chase* cited *Rice v Rice*, 50 Mich 448 (1883) which held that testamentary capacity was not disproved by the determination that cause existed for guardianship. In *Chase*, the Supreme Court held that the

capacity to dispose of property and to execute proper conveyances is not necessarily disproved by the determination of the probate court.

Justice Wiest, who participated in *Acacia* and *Wies*, wrote a concurrence in *Weis* where he stated that the trust was presumptively void and that this presumption, supported by the testimony of the grantor, without any evidence to the contrary, commanded revocation of the trust deed.

Finally, the Supreme Court in *Hooker v Tucker*, 335 Mich 429 (1953) made it clear that presumptions "never prevail against positive proof and are only introduced to supply the want of real facts." Presumptions simply cast the burden on the opposite party of going forward with the proof. For example, while deposits in a joint account are presumed to establish title to the surviving depositor pursuant to MCL 487.703, that presumption can be rebutted.

At first glance it would appear that *Acacia* and *Wies* are in conflict. However, the *Acacia* court observed that *without the knowledge and consent of the guardian a transaction would be void*. In *Acacia*, the guardian did not know of the transaction. In contrast, the guardian in *Wies* prepared the document and therefore knew of and consented to the transaction. *Acacia* and *Weis* can be reconciled by concluding that together they hold that in the absence of the knowledge and consent of the guardian, a transaction by the ward is conclusively void. However, if the guardian knows of and consents to the transaction it would not be void unless the fiduciary is also the beneficiary of the transaction. In that case the presumption of undue influence would also be invoked and the guardian would have the burden to come forward with evidence to rebut the presumption that the ward was incompetent as well as the presumption that the change of beneficiary was the result of undue influence.

In this case, no evidence was introduced that the guardian, Michigan Guardian Services, knew of or consented to the change of beneficiary designation. Therefore, under the rule in *Acacia* the change of beneficiary designations executed by Katie during her guardianship would be void.

It has been argued that the statutory framework upon which *Acacia* and *Wies* rely, no longer exists. It is true that the statutory framework for the appointment of guardians and conservators has been replaced with a series of statutes culminating with the adoption of the Estates and Protected Individuals Code (EPIC) that provides a detailed list of the rights persons retain while subject to guardianship proceedings.[2]

[2] This Court is well aware that under the doctrine of stare decisis trial courts are bound by the binding precedent established by the Supreme Court and the Court of Appeals. MCR 7.215(C)(2). However, where case law lacks continued viability because it has been superseded by more recent legislative developments and intervening changes in the court rules, the strict application of this doctrine has been questioned. See In re Nestorovski Estate,

Since *Acacia* and *Wies*, the duties of guardians have been divided by statute into guardians and conservators. Different standards exist for the appointment of a guardian and a conservator. A guardian can be appointed if a person lacks the capacity to communicate informed decisions due to a physical condition (MCL 700.1105(a)), while a conservator can be appointed if the person is unable to effectively manage her affairs for reasons that do not include incompetence (MCL 700.5401(3). Therefore, the appointment of a guardian or conservator no longer necessarily means that a person is "insane or incompetent" as described in *Acacia*.

While *Acacia* held that a contract entered into without the knowledge and consent of a guardian by a person under guardianship of an *estate* is conclusively presumed to be invalid, MCL 700.5407 expressly provides that a determination that a basis exists for the appointment of a conservator *"has no effect on the protected individual's capacity."* In addition, MCL 700.5316 provides that a probate court can authorize a protected person "to function without the consent or supervision of the individual's guardian or conservator in handling part of his or her money or property." It can be argued that the legislature has rejected the notion that a person who has a conservator is conclusively presumed to lack the capacity to contract since incapacity is not a condition precedent to the appointment of a conservator but that court authority is required for any transaction.

In addition, EPIC, provides that the appointment of a conservator vests title in the conservator as trustee as to the wards property and provides that the ward's property is not transferable or assignable by the protected individual.[3] Without title, the ward would not be able to enter into transactions involving property covered by this section without prior court approval.

EPIC also creates a preference for limited guardians (MCL 700.5306) and gives the ward the right to nominate a person of their choice to serve as guardian. The guardian is required to consult with the ward before making a major decision. EPIC encourages courts to authorize an individual with a guardian to function without the supervision or consent of the guardian in handling his property (MCL 700.5316 and MCL 700.5407).

The legislature also provided in EPIC that the ward had a right to seek termination or modification of the guardianship by letter to the judge and that at a hearing on such a request, the ward would have the same procedural rights as on an initial petition for the appointment of

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283 Mich. App. 177, 196, 769 N.W.2d 720 (2009); Ashley Ann Arbor, LLC v. Pittsfield Charter Twp., 299 Mich. App. 138, 149, 829 N.W.2d 299, 305 (2012) appeal granted, 494 Mich. 875, 832 N.W.2d 390 (2013) and appeal dismissed, 494 Mich. 879, 833 N.W.2d 327 (2013).

[3] MCL 700.5419.

a guardian which includes requiring the proponent of continuing the guardianship to prove by clear and convincing evidence that the ward is still incapacitated.

The legislature has clearly expressed its desire that guardianships respect the ability of individuals under guardianship to develop maximum self-reliance and independence (MCL 700.5306). It can be argued that to hold that the action of a ward in changing a beneficiary designation is *conclusively* presumed to be invalid is to ignore recent legislative history as well as the current statutory framework for guardianships, including the long standing principle that testamentary capacity is not necessarily lost by the appointment of a guardian.

Further evidence of the legislative trend to promote self-reliance and independence is illustrated in the repeal of MCL 551.6 in 2001. That statute provided that no insane person or idiot was capable of marriage. In other words such a marriage was conclusively invalid. Now, such a marriage is voidable, not void.

Finally, recent, unpublished case law addressing the "conclusive" presumption relative to an individual's lack of capacity to contract if under a guardianship appears to treat this historical presumption as more of a rebuttable one. For example, in *Franklyn v. Maxwell*, 270138, 2007 WL 4404697 (Mich. Ct. App. Dec. 18, 2007), the Michigan Court of Appeals reversed a trial court decision to grant summary disposition as to a complaint for fraud, misrepresentation and conversion of property. In that case a daughter/guardian was trying to invalidate the sale of her mother's home on the basis that she was not competent to enter the real estate transaction due to a guardianship. In denying summary disposition the Court of Appeals stated:

> Michigan law has long held that a person under a guardianship is conclusively presumed incompetent to make a valid contract and that any contract made by a person under guardianship is void. *Wies v. Brandt,* 294 Mich. 240, 247; 293 NW 773 (1940); *Acacia Mutual Life Ins. Co. v. Jago,* 280 Mich. 360, 362; 273 NW 599 (1937); *May v. Leneair,* 99 Mich. App 209, 215; 297 NW2d 882 (1980).
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> Additionally, MCL 700.5134(b) and 700.5423(3) require that if the real property, or any interest in real property, of the ward is sold during the course of the guardianship, the guardian must notify all interested parties and obtain court approval. Here, the guardianship was in effect when the real estate transaction occurred between Armstrong and defendant, and there was no involvement or approval by the guardian or court. Although the trial court cited contract language and some evidence, which might suggest that Armstrong competently entered into the contract, it could not under this record resolve that issue by way of a motion for summary disposition.

> We also hold that the complaint's factual assertions-which were sworn to by plaintiff-contained sufficient factual support on Counts I-III to withstand summary disposition at this stage of the proceedings.

Franklyn v. Maxwell, 2007 WL 4404697 (Mich. Ct. App. Dec. 18, 2007)

Additionally, in *Metropolitan Life Ins. Co. v. Davis*, 10-12005, 2010 WL 3941449 (W.D. Mich. Oct. 6, 2010) a Federal District Court in Michigan in an interpleader action over the payment of insurance proceeds, held that issues of fact remained as to competency requiring a bench trial.

In that case, some evidence was provided that the Wayne County Probate Court had previously found the ward in need of a guardian and conservator, but additional evidence was also provided by a GAL stating that she was competent during the same time frame. As the Court stated:

> In determining the mental competency of the insured to change the beneficiary of an insurance policy, ... the test is whether he had sufficient mental capacity to understand the business in which he was engaged, the extent of his property, the manner in which he desired to dispose of it, and who were dependent on him.
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> *Id.* (internal quotations omitted). A person under guardianship is conclusively presumed to be incompetent. *Acacia Mut. Life Ins. Co. v. Jago,* 280 Mich. 360, 362 (1937); *see Stevens v. State Farm Mut. Auto. Ins. Co.,* No. 285766, 2009 WL 3683317, at *2 (Mich.Ct.App. Nov. 5, 2009).
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> Defendant Poe, alleging undue influence and incompetence, bears the burden of showing undue influence, incompetence, or both on March 1, 2008, the date the beneficiary was designated. In her pleadings, Poe alleges that Judge Maher determined that in 2007, the decedent's designation of Defendant Davis as his guardian and conservator was invalid “because of him [sic] mental state,” but provides only the documentation that was allegedly deemed invalid, not the court's order taking that action. (Def. Poe's Sept. 1 Letter 1, Ex. 4.) She provides some proof that the guardian ad litem appointed by the court found the decedent to be incompetent in August 2009, but the guardian ad litem's report also reveals that a therapist evaluated the decedent as competent around the same time period. (*Id.* Ex. 1, at 4.)

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> The court finds that, while some evidence has been presented with regard to the competency of, and the undue influence asserted over, the decedent, a bench trial will be necessary to determine the validity of the March 1, 2008 beneficiary designation and to resolve this matter.

Metro. Life Ins. Co. v. Davis, 10-12005, 2010 WL 3941449 (W.D. Mich. Oct. 6, 2010).

It is arguably appropriate to hold that a court ward, without express reserved authority, is presumed to lack the capacity to enter into a contract or change a beneficiary designation but permit the introduction of evidence to rebut the presumption. The proponent would need to show that the ward possessed "sufficient mind to understand in a reasonable manner the nature and effect of the act which the person is engaged." *In re Erickson Estate,* 202 Mich App 329, 332; 508 NW2d 181 (1993).

At the hearing on August 11, 2010, the GAL stated he had visited Katie on August 6, 2010. He reported that she had recovered tremendously from her cancer surgery and was completely mobile. She was impeccably dressed and was totally cognizant about the pending court proceedings. She displayed no confusion. She knew the day of the week, the date, the name of the President and the President's wife as well as her birthday. She stated she needed a guardian to assist her with medical decisions and other decisions affecting her welfare.

The GAL reported that Dr. Means found Katie competent to make decisions regarding her personal and financial means. The GAL questioned Katie as to why she felt she needed a guardian given her ability to manage her own affairs. She replied that given her age and her medical history, she wanted a guardian in place should the need for one arise in the future. No evidence was offered that Katie was incapacitated. Katie was not merely having a "lucid interval", she had recovered. Based on Katie's request, the court honored her wish and appointed her daughter as her guardian and conservator. It appeared that Katie was using the existing guardianship and conservatorship as an estate planning device to be ready when needed.

If the *conclusiveness* of the presumption set forth in *Acacia* has been superseded, the proponent would still have to produce evidence to rebut the presumption of incompetence. At a minimum, evidence should be offered to show that the ward possessed "sufficient mind to understand in a reasonable manner the nature and effect of the act which the person is engaged." *In re Erickson Estate, supra.* To permit a lesser quantum of proof would introduce uncertainty into the question of the authority of court wards to act independent of their fiduciaries and impair the protection provided by EPIC for vulnerable wards from exploitation.

This is precisely why transactions like the ones at issue in this case should be brought to the court's attention for approval. "Don't ask, Don't tell" does not work for persons who knowingly transact with court wards. In fact, MCL 700.5316 expressly provides that: "To the extent the individual is authorized to function autonomously, a person may deal with the individual as though the individual is mentally competent." This language strongly suggests that without permission to act, a transaction will be deemed void.

In this case, Bellamy and Muhammad knew Katie had a guardian and conservator. They did not seek authority for Katie to execute change of beneficiary designations of her life insurance policy during her lifetime. In addition, they offered no evidence relating to the circumstances surrounding the execution of the change of beneficiary forms. No testimony was offered that Katie understood in a reasonable manner the nature and effect of the change of beneficiary designations. As such, even if *Acacia's conclusive* presumption lacks viability, they have failed to offer sufficient evidence to rebut the presumption that Katie lacked the capacity to execute the change of beneficiary designations.

Finally, Bellamy and Muhammad were both court appointed as fiduciaries for Katie prior to being named as beneficiaries of her life insurance policy and after Michigan Guardianship Services was appointed as guardian and conservator. Both were in a confidential or fiduciary relationship with Katie. Both benefited from the transaction and both had the opportunity to influence Katie. As such, the presumption of undue influence has been established. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985).

Williams had served as Katie's caregiver for 7-10 years. She was named as the sole beneficiary on her grandmother's life insurance policy in 2008. The new change of beneficiary designation gave her nothing. This sudden change, done in secret, without explanation, combined with the presumption of undue influence, supports a finding of undue influence. The proponents of the July 1, 2010, change of beneficiary designation offered no evidence surrounding the circumstances that led to the signing of these change of beneficiary designations. As such no evidence was offered to show that the documents were not the product of undue influence.

The court finds that even under the view that the presumption of incompetence of court wards to make a valid contract is not a *conclusive* presumption, the change of beneficiary designations are void. An order pursuant to MCR 2.602 consistent with this Opinion may be presented.

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Milton L. Mack, Jr.
Judge of Probate

Dated: