STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF OAKLAND

IN THE MATTER OF:

FRANKLIN Z. ADELL TRUST,
DATED JULY 17, 2002.

Case No: 2008-319178-TV
HON. LINDA S. HALLMARK

Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by mailing it to their addresses as disclosed by the pleadings of record with prepaid postage on the 3rd day of SEPTEMBER 2010.

Signed: Ryan J. Deel

OPINION AND ORDER

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan, on

SEP 0 3 2010

IT IS ORDERED that the portion of Petitioner's Petition to Surcharge Trustee Kevin Adell in the amount of $6,667,018 is DENIED.

FINDINGS

1) The payment of the sanctions judgment by Franklin Adell on April 3, 2006, was a gift to Kevin Adell and not a loan.

2) The payment of the sanctions judgment was an intra-family transfer and the presumption of a gift is applicable.

FILED Sept 3 2010
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Deputy Register of Probate

3) There was not a fiduciary relationship between Franklin Adell and Kevin Adell on April 3, 2006.

4) Even if a fiduciary relationship had existed, Kevin Adell did not exercise undue influence in order to obtain payment of the sanctions judgment.

5) There was never an express or implied promise to repay the sanctions judgment.

PROCEDURAL HISTORY

On September 30, 2009, Petitioners Laurie Fischgrund and Julie Verona, filed a Petition to Surcharge Trustee. The petition sought to surcharge Kevin Adell $25,000,000.00 for his actions as trustee. In part, the Petition alleges:

> "In 2006, Frank Adell made a payment of approximately $6,400,000.00 constituting a sanctions judgment against Kevin Adell related to Kevin's efforts to force John Richards *Home Building Co., LLC, into involuntary bankruptcy*. . . . Originally, in 2007, when there was no litigation pending, the payment of $6,400,000.00 for Kevin's Bankruptcy judgment was listed as an *asset* of Frank Adell's estate. Only in 2008, after this litigation commenced, did Kevin seek to have this asset re-characterized as a "gift" to his own benefit."

The issue before the Court is whether the $6,667,018 payment by Franklin Adell to the U.S. Bankruptcy Court should be treated as a gift or a loan to Kevin Adell. On July 7, 2010, the Court denied the cross-motions for summary disposition by Kevin Adell and Petitioners, ruling there were issues of fact for trial. The Court held an evidentiary hearing on July 27, 2010; July 29, 2010; July 30, 2010; August 2, 2010; August 3, 2010; August 5, 2010 and August 11, 2010.

PETITIONERS' WITNESSES: Lorraine New, Kevin Adell and Ralph Lameti.

RESPONDENT'S WITNESSES: Laurie Fischgrund, Julie Verona, Ralph Lameti, Roberta Colton, Margurite Lentz and Richard Mazzari.

ISSUE

Whether Kevin Adell should be surcharged $6,667,018.00, the amount paid by Franklin Z. Adell toward his sanctions judgment in the U.S. Bankruptcy Court, or whether the payment was a gift?

BURDEN OF PROOF

The burden of establishing a right to surcharge a fiduciary is upon those who seek to have him so charged. *In re Baldwin's Estate*, 311 Mich. 288, 311; 18 N.W.2d 827 (1945). The standard of proof to establish ownership of property by *inter vivos* gift is by preponderance of the evidence. *McKinney v. Kalamazoo-City Sav. Bank*, 244 Mich. 246; 221 N.W. 156 (1928).

BACKGROUND

A. THE ADELL FAMILY

Franklin Z. Adell was a businessman residing in Bloomfield Hills, Michigan. He was married to Sharon Adell and had three children: Laurie Fischgrund, Julie Verona and Kevin Adell.

Laurie Fischgrund and Julie Verona testified the family was very close. Sharon Adell was a stay-at-home mother. Franklin Adell and Sharon Adell had a traditional marriage and wanted their daughters to have traditional roles as wives and mothers. Franklin Adell and Kevin Adell had a close relationship and bonded over a mutual appreciation for exotic automobiles. It was undisputed that Franklin Adell and Kevin

Adell not only shared a close father-son relationship, they were also business partners and best friends.

Early in his career, Franklin Adell worked with his two brothers. The Adell Brothers invented a door guard, which they manufactured and sold to the automotive industry.

Kevin Adell testified that in 1978, Franklin Adell applied to the FCC for a television broadcast license. He received the license for WADL, channel 38, in 1988. Kevin Adell graduated from Arizona State University in 1988. He wanted to stay in Arizona, but his father enticed him to return to Michigan to work with him to build WADL. Franklin Adell and Sharon Adell used their home and life savings as collateral for the loan, and borrowed $3.3 million to build the station. On May 29, 1989, the station went on the air.

Kevin Adell testified that he built the station, originally working out of a trailer. His father was employed for Adell Brothers during the day until 4:30 p.m. Franklin Adell came after work to oversee Kevin Adell's efforts in building WADL.

Kevin Adell testified the station became profitable in 1991, when home shopping was put on the air. In 1992, Franklin Adell stopped working with his brothers and he and Kevin Adell worked as partners. In approximately 1991 or 1992, Kevin Adell began taking a salary and Franklin Adell determined the amount of his pay. Kevin Adell testified business picked up in 1992 when air time was sold to religious pastors.

In 1994, Kevin Adell and Franklin Adell formed Birmingham Properties, which owns a building located at 20733 West Ten Mile Road, in Southfield. The building was purchased for $750,000.00 using a line of credit for $1,000,000.00. Kevin Adell and

Franklin Adell formed STN.com in 1999. STN.com provides uplink and marketing services.

Kevin Adell testified he formed The Word Network on February 14, 2000. The Word is a non-profit corporation with 501(c)(3) status. STN.com and The Word operate out of the property owned by Birmingham Properties. Kevin Adell testified that STN.com, a for-profit company, paid expenses and salaries for The Word under a Services and Facilities Agreement.

On May 13, 2002, Sharon Adell died of breast cancer. On July 17, 2002, Franklin Z. Adell executed the Franklin Z. Adell Trust (Trust). During his lifetime, Franklin Adell served as trustee. On October 31, 2003, Franklin Adell amended and restated the Trust.

The Trust, as amended and restated, nominated Ralph Lameti as successor Trustee upon Franklin Adell's death. The Trust further provides:

> "If RALPH LAMETI predeceases Settlor, fails to qualify or for any reason discontinues to serve as Trustee, the successor nominated in writing by RALPH LAMETI will serve as successor trustee. Any successor Trustee may thereafter nominate in writing his or her own successor."[1]

The Trust also provided that Franklin Adell's children were to divide his personal property amongst them. The residue was to be divided into three equal shares between Laurie Fischgrund, Julie Verona and Kevin Adell. The shares were to be held in trust and distributed at the sole discretion of the Trustee.[2]

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[1] Petitioner's Exhibit 1, The Franklin Z. Adell Trust Under Agreement Dated July 17, 2002 as Amended and Restated, Article II., B.
[2] Petitioner's Exhibit 1, Article I., B.

B. THE JOHN RICHARDS HOME BUILDING CO., LLC, LITIGATION

On December 28, 2001, Kevin Adell contracted with John Richards Home Building Co., LLC, (JRH) to build a home. On June 6, 2002, Kevin Adell initiated a lawsuit against JRH after a dispute arose. Kevin Adell testified that on advice of counsel, he filed an involuntary bankruptcy petition against JRH in the U.S. Bankruptcy Court for the Eastern District of Michigan on June 24, 2002. The Bankruptcy Court dismissed the petition on July 15, 2002. In dismissing the petition, the Bankruptcy Court reserved the issue of sanctions against Kevin Adell.

On April 25, 2003, the Bankruptcy Court entered a sanctions judgment against Kevin Adell, awarding JRH $ 6,413,230 in punitive damages and attorney fees, pursuant to 11 U.S.C.S. § 303(i), as sanctions for commencing involuntary bankruptcy proceedings in bad faith.[3] He unsuccessfully appealed this order to the U.S. District Court for the Eastern District of Michigan, the Sixth Circuit U.S. Court of Appeals and the U.S. Supreme Court, which denied certiorari on October 2, 2006.[4]

In 2003, Kevin Adell moved to Florida to take advantage of Florida's generous homestead exemption and avoid the Bankruptcy Court Judgment. On September 17, 2003, the Michigan Bankruptcy Court issued an order that Kevin Adell sell his home in Naples, Florida, to satisfy the judgment within 60 days.

To protect his Florida home, Kevin Adell filed a petition for relief in the U.S. Bankruptcy Court for the Middle District of Florida on November 14, 2003. The Florida Bankruptcy was ultimately dismissed on February 14, 2006.

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[3] Petitioner's Exhibit 7.

[4] *Adell v. John Richards Homes Bldg. Co., L.L.C.*, 127 S.Ct. 85 (Mem), No. 01-1532 (2006).

On April 3, 2006, Franklin Z. Adell paid $6,667,018 to the U.S. Bankruptcy Court in Michigan to satisfy the sanctions judgment. JRH had been targeting the family businesses to collect on the judgment by filing garnishments to reach any funds owed to or held for Kevin Adell. Franklin Adell wanted Kevin Adell back in Michigan to run the family businesses. He also wanted to end the protracted litigation, which was beginning to threaten the family businesses.

C. THE TRUST CASE

Franklin Adell died on August 13, 2006. Pursuant to Article II. B. of the Franklin Z. Adell Trust, Ralph Lameti was nominated as successor Trustee upon Franklin Adell's death. *Under Article II (B) of the Trust:*

> "If RALPH LAMETI predeceases Settlor, fails to qualify or for any reason discontinues to serve as Trustee, the successor nominated in writing by RALPH LAMETI will serve as successor trustee. Any successor Trustee may thereafter nominate in writing his or her own successor."

The day after Franklin Adell's death, on August 14, 2006, Mr. Lameti appointed Kevin Adell successor trustee and Kevin Adell accepted the appointment the same day.

On April 24, 2007, Kevin Adell, as successor trustee, filed an Estate Tax Return on behalf of the Trust. Schedule F on that return (other miscellaneous property of the decedent's estate) lists the $6,667,018 as an "asset of the estate."

On September 26, 2008, Laurie Fischgrund and Julie Verona filed a Petition for Supervision and to Remove or Suspend Trustee, Compel Disclosure of Financial and Administrative Information, Compel Full and Complete Accounting, Determine Title to

Assets and for an Ex Parte Temporary Restraining Order and Preliminary Injunction. Laurie Fischgrund and Julie Verona allege that Kevin Adell has mismanaged the Estate and depleted Trust assets.

On September 30, 2009, Laurie Fischgrund and Julie Verona filed a petition to surcharge Kevin Adell for the $6,667,018, arguing that it was a loan to be repaid to the Trust. First, they argue Kevin Adell is precluded from calling the payment a gift under the doctrine of judicial estoppel because he filed a pleading in response to a motion to impose sanctions in the U.S. Bankruptcy Court for the Middle District of Florida on February 20, 2007, in which he characterizes the $6,667,018 as "a loan from his father." In an opinion dated March 28, 2007, the U.S. Bankruptcy Court wrote:

> "Adell has now paid the Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court. The funds were borrowed from his father, through his father's companies, and paid into the registry of the Court on April 3, 2006."

Petitioners allege that under the doctrine of judicial estoppel, the fact that Kevin Adell successfully asserted that the funds were a loan from his father to the U.S. Bankruptcy Court, precludes him from asserting that it is a gift in the Trust case.

Kevin Adell argues the doctrine of judicial estoppel does not apply. He contends the Florida Bankruptcy Court relied on representations of counsel that were without basis and no finding was made that the funds were a loan. Further, the statement in the Bankruptcy Court opinion is simply dicta, and not material to the determination that the funds had been paid and no further sanction should be imposed.

Secondly, Laurie Fischgrund and Julie Verona argue that Kevin Adell is bound to his statements on the Estate Tax return listing $6,667,018 as an Estate asset. Kevin

Adell responds that the Estate Tax Returns do not support the assertion that the payment was a loan. He argues the payment is listed in Schedule F (miscellaneous property) because the payment was made during the year of Franklin Adell's death. He goes on to argue that a loan would be listed under Schedule C as a note.

Kevin Adell argues that intra-family transfers are presumed gifts. Petitioners respond that Kevin Adell was in a fiduciary relationship with Franklin Adell and there is a presumption of undue influence, which places the burden of proof on the donee. *Grondziak v. Grondziak*, 12 Mich App 61, 162 NW2d 354 (1968). They argue that Kevin Adell was in a fiduciary relationship with Franklin Adell because Kevin Adell was Franklin Adell's "best friend" and trusted advisor, particularly regarding business matters.

I. JUDICIAL ESTOPPEL

On February 14, 2006, Kevin Adell's bankruptcy petition was dismissed in the Florida Bankruptcy Court. Franklin Adell paid the bankruptcy sanctions judgment in the Michigan Bankruptcy Court on April 3, 2006. Following this, JRH filed an Amended Motion to Impose Sanctions in the Florida Bankruptcy Court.

Kevin Adell, through his attorneys, filed a response to JRH's motion. Regarding the payment to the Michigan Bankruptcy Court, the response states:

> Adell has now paid the Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court. The funds were borrowed from his father, through his father's companies, and paid into the registry of the Court on April 3, 2006.[5]

[5] Petitioners' Exhibit 8 at paragraph 21 on page 8.

Roberta Colton, Kevin Adell's Florida Bankruptcy attorney authored the response. She testified that the response was not signed by Kevin Adell. Ms. Colton testified the information that the funds were "borrowed" came from pleadings in the Michigan Bankruptcy Court. She also testified that she had no discussion with Franklin Adell regarding the nature of the payment of the sanctions judgment. She testified there was a hearing on the motion in the Florida Bankruptcy Court, but no testimony or evidence was presented. Ms. Colton testified the opinion was based on the written record, including Kevin Adell's response to sanctions motions.

The Florida Bankruptcy Court denied JRH's Motion on March 28, 2007. JRH filed a Motion for Reconsideration or Rehearing on Order Denying Amended Motion to Impose Sanctions. On March 28, 2007, the Florida Bankruptcy Court issued an opinion denying JRH's motion for reconsideration. The Court wrote:

> ... Adell borrowed the funds from his father, through his father's company and on April 3, 2006, Adell paid the Sanctions Judgment in full, plus interest, into the registry of the Michigan Bankruptcy Court.[6]

Petitioners argue that because of Kevin Adell's response to the Amended Motion for Sanctions and the Florida Bankruptcy Court's opinion, the doctrine of judicial estoppel applies. In *Paschke v. Retool Industries*, 445 Mich. 502, 519 NW2d 441 (1994), the Michigan Supreme Court held:

> In the context of the administrative proceedings at issue, we adopt the "prior success" model of judicial estoppel:
>
> Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. [Lichon v. American Univ Ins Co, 435 Mich. 408, 416; 459 NW2d 288 (1990), citing Edwards

[6] Petitioner's Exhibit 7.

v. Aetna Life Ins Co, 690 F.2d 595, 598 (CA 6, 1982). (Emphasis omitted).]

> Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.
>
> *Id* at 509-510.

The rationale for the judicial estoppel doctrine was explained in *Edwards v. Aetna Life Ins Co*, 690 F2d 595, 599 (6th Cir. 1982):

> The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. See *Allen v. Zurich Ins. Co.*, [667 F.2d 1162, 1167 (4th Cir. 1982)]; *Konstantinidis v. Chen*, [200 U.S. App. D.C. 69, 626 F.2d 933, 939 (1980)] . . . Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled. See *Konstantinidis v. Chen*, 626 F.2d at 938.
>
> In light of the policies underpinning judicial estoppel, the rule can not be applied in a subsequent proceeding unless a party has successfully asserted an inconsistent position in a prior proceeding. *City of Kingsport v. Steel & Roof Structures, Inc.*, [500 F.2d 617, 620 (6th Cir. 1974)]. . . . Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or the second court was misled is not present. *Kingsport*, 500 F.2d at 620; *Konstantinidis v. Chen*, 626 F.2d at 939.

Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-599 (6th Cir. Mich. 1982).

In his dissent in *Paschke,* Justice Griffin noted that the use of the doctrine of judicial estoppel is disfavored. He wrote, "The doctrine of judicial estoppel is to be used with caution." *Paschke v. Retool Industries*, 445 Mich. 502 at 523. It is noteworthy that the doctrine of judicial estoppel has never been applied in a Michigan case.

In analyzing whether the doctrine of judicial estoppel applies in this case, the Court must evaluate whether Kevin Adell successfully asserted that Franklin Adell's payment of the Michigan Bankruptcy Court sanctions judgment was a loan in the Florida Bankruptcy Court and whether that position is inconsistent with his position in this case that the payment was a gift. The Florida Bankruptcy Court's holding regarding sanctions states:

> It should be noted that the imposition of sanctions is a matter of discretion, and this Court had the power and authority to deny the Motion in order to permit Adell's attempt to resolve this problem within the confines of Chapter 11. The fact that Adell failed to obtain confirmation and his case was ultimately dismissed is of no consequence in considering the JRH's Motion to Impose Sanctions. Adell rightfully relied on this Court's approval to pursue all available means to save his homestead. The post-filing litigation for which JRH now seeks sanctions was primarily initiated by JRH, who relentlessly pursued its claim and objected to the Debtor's every attempt to achieve rehabilitation through confirmation of his Chapter 11 Plans.
>
> This Court is satisfied that Adell attempted to pursue a legitimate goal within the utmost of his ability and, therefore, to impose a sanction would be a double punishment in addition to the $ 2 million judgment imposed by the Michigan Bankruptcy Court. In addition, considering the totality of the circumstances, this Court is satisfied that the Order entered by this

> Court was on the merits and, therefore, any further sanctions would be improper.
>
> *In re Adell*, 371 B.R. 541, 545-546 (Bankr. M.D. Fla. 2007).

To the extent that the payment of the sanctions judgment in the Michigan Bankruptcy Court had any bearing on the Florida Bankruptcy Court's ruling on JRH's motion for sanctions, it is clear from the opinion that the court focused on the fact that the judgment was paid and not whether the payment constituted a loan or a gift. There was no evidentiary hearing or finding of fact on the issue of the gift versus loan. There was no evidence presented that there was even a question of fact as to whether the payment of the sanctions judgment constituted a gift or a loan in the Florida Bankruptcy Court. Based on the opinion, the Florida Bankruptcy Court simply accepted the statement contained in Mr. Adell's response to JRH's Amended Motion for Sanctions. The case did not turn on whether the payment was a gift or a loan, but rather that the sanctions judgment was paid and the Florida Bankruptcy Court's desire to bring the "turbulent history of litigation between these parties" to a close. Because the gift versus loan issue was not ruled on by the Court, it cannot be said that Kevin Adell was successful in his assertion that the payment of the sanctions judgment was a loan. The Bankruptcy Court's statements regarding the "loan" from Mr. Adell's father was dicta.

It is true that Kevin Adell has taken inconsistent positions. In the bankruptcy case, his attorneys asserted that the sanctions payment was a loan from his father. Likely, they wanted to portray Kevin Adell as not having assets or easy access to assets. Nonetheless, that assertion was not made directly by Kevin Adell. It was made

in the course of lengthy, contentious litigation and was not essential to the Court's findings.

II. THE ESTATE TAX RETURNS

On April 24, 2007, Kevin Adell, as successor trustee, and Ralph Lametti, as the preparer, executed an IRS Form 706, United States Estate (and Generation-Skipping Transfer Tax Return) on behalf of the Trust. On Schedule F (Other Miscellaneous Property Not Reportable Under Any Other Schedule) of that return, the following was listed:

> ADELL JUDGEMENT IN THE AMOUNT OF 6,667,018 WAS A LIABLITY AGAINST THE DECEDENT'S SON KEVIN ADELL THAT WAS PAID BY THE DECEDENT AND RECORDED AS AN ASSET SEE JUDGEMENT [sic] SUMMARY AND COPY OF OFFICIAL CHECK[7]

On November 14, 2008, Kevin Adell and Ralph Lameti filed an Amended Form 706 and a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return.[8] The Amended Form 706 removed the $6,667,018 as a miscellaneous asset of the Estate. The Form 709, listed the $6,667,018 as a gift to Kevin Adell on Schedule A. Both the Amended Form 706 and the Form 709 contain the following statement:

> The estate tax return (form 706) included the legal judgment in the gross estate under the assumption the gift could be reported in the estate tax return given that the decedent's death and the gift both happened in 2006. It was latter [sic] learned upon legal advice that the gift should have been reported on a separate gift tax return and added back to the estate tax return as prior taxable gifts and not part of the gross estate.

Petitioners argue that the initial Form 706, executed April 24, 2007, listing the $6,667,018 payment of the sanctions judgment as an asset of the Estate evidenced

[7] Petitioners' Exhibit 2.

Kevin Adell's belief that it was a loan. They further argue the Amended Form 706 and the Form 709 dated November 14, 2008, was an attempt to re-characterize the loan as a gift.

Ralph Lameti testified the $6,667,018 which was used to pay the sanctions judgment against Kevin Adell was listed under Schedule F as an asset of the Estate because it was part of the taxable estate. This is distinguished from a financial asset, which would be owned by the decedent at the time of death. According to Lameti, the gift tax had not been paid on the $6,667,018 at the time of Franklin Adell's death on August 13, 2006, because it was not due until April 15, 2007. In order to pay the tax, Lameti believed he had to include it as an asset of the Estate on the Form 706. Because it did not fit into any other category, he listed it on Schedule F, which is "Other Miscellaneous Property Not Reportable Under Any Other Schedule." Lameti testified the Estate Tax and the Gift Tax are the same amount, so listing the payment as an asset of the Estate would pay the gift tax obligation that had not been paid.

Lameti testified that he believed the judgment payment must be included in the Form 706 due to the 6166 consideration. A 6166 election allows an estate to pay the Estate Tax over fifteen years rather than in a lump sum. This election must be approved by the IRS. Per Lameti, all gifts of closely held stock must be added back to the Estate, for the purpose of the 6166 election. He testified that gifts within three years of death are added back to the gross estate.

Mr. Lameti testified the Amended Form 706 and Form 709 were filed November 14, 2008. He stated that he filed the returns even though he did not feel it was necessary. He testified that tax counsel for the Trust recommended the amendment "to

[8] Petitioners' Exhibits 4 and 6.

make a better presentation." The Amended Form 706 removed the payment of the judgment from Schedule F. A Form 709 gift tax return was filed identifying the payment as a taxable gift. According to Lameti, the amended returns did not change the amount of the tax obligation. He testified that he does not know whether the IRS accepted the return.

Two experts testified regarding the returns. Lorraine New testified for the Petitioners. Marguerite Lentz testified for Respondent.

Lorraine New is an estate and gift tax attorney, licensed in Michigan. She was previously employed at the IRS in the Estate and Gift Tax Division for 19 years since 1988. At the IRS, she examined returns for legal and valuation issues. She testified she has written many articles on gifts and estate tax and has given presentations on the subject.

Ms. New testified that the IRS Form 706, Estate Tax Return, lists assets at the time of death and their values. Gifts must be added in to assets owned at death. Assets, such as life insurance, are also included, if they come into being at the time of death. The funeral expenses and debts are deducted from the gross estate to get to the taxable estate. There is a $1 million lifetime exemption, under which no gift tax would be due.

Ms. New testified that Schedule F of the Form 706 is for listing items owned by or due to the decedent. She stated that the instructions for Schedule F states that all items not reported elsewhere including debts and mortgages not evidenced by writing are to be included on Schedule F.[9] She states that the payment of the sanctions judgment identified on the Schedule F is a liability against the son paid by the decedent

and is owed to the Estate. She testified that because the payment of the judgment was listed on the Form 706, it must be repaid at the time of the Estate distribution. In other words, it would become part of his share as a beneficiary and is treated like an advance on his inheritance.

Ms. New testified that the only change between the initial Form 706 and the Amended Form 706 is the deduction of the payment of the sanctions judgment. She testified this is unusual because a Form 706 is usually amended to add assets.

Ms. New testified that a gift tax return (Form 709) is due on April 15th of the year following the gift or nine months following the death of the donor. The tax is due at the time of the return. This tax would be due before the Federal estate tax return. A taxpayer can file an extension to file a gift tax return, but there is interest and penalties for late payment of the tax.

Ms. New testified that she did not believe the Form 709 filed by the Trust was credible. She believes that it was filed too late and was inconsistent with the initial estate tax return (Form 706) filed by the Estate. She also based her opinion on the fact that it was filed without payment of the tax and approximately two years too late, with no extensions requested. This would subject the Estate to a penalty and interest. The return asks that the estate tax funds be applied to this gift tax, but she testified this is improper and harmful to the Estate. She testified the IRS commissioner refused to accept the gift tax return.

Ms. New testified that the gift of the payment of the sanctions judgment within four months of death was not consistent with the overall estate plan of Franklin Adell. The Trust provides an equal residue to each child. Mr. Adell had made gifts of homes

[9] The instructions to Schedule F of Form 706 were admitted as Petitioners' Exhibit 14.

and real estate previously. Ms. New testified that a $6,667,018 gift would make payment of the estate tax difficult. She also testified there is nothing to indicate that a gift was intended. She concluded that the initial Form 706 was the best indicator of Franklin Adell's intent. Based upon the return, she testified there was a "promise to repay" the funds out of salary and benefits. She testified that Franklin Adell controlled Kevin Adell's solvency and ability to repay the funds. She testified that a "promise to repay" is distinguished from a loan in that it is not in writing.

Marguerite Lentz testified as an expert in estate tax returns on behalf of Kevin Adell. Ms. Lentz testified she had been an attorney at Honigman, Miller, Schwartz and Cohn, LLP, for 27 years until May 2009. She has prepared estate tax returns for estates up to $100 million, as well as gift tax returns.

Ms. Lentz testified this was an unusual case because there was a large taxable gift that created a large tax liability within a year of Franklin Adell's death. She testified that whether the transfer was a gift or a loan would not change the amount of tax owed.

Ms. Lentz testified that the gross estate is defined under the Internal Revenue Code as "all property the decedent had an interest in at the time of death." This does not include a completed *inter vivos* gift. She went on to state that an inter vivos gift may be included in the estate for the purposes of the 6166 election.

Ms. Lentz testified regarding the criteria for making the 6166 election. To qualify, the decedent must be a U.S. Citizen and have an interest in a closely held business, which is defined as a sole proprietor, partnership, or ownership of at least 20% of the voting stock in a corporation with 45 fewer shareholders. The decedent must be active in the trade or business.

Ms. Lentz testified that the 6166 election requires that the value of the closely held businesses must be at least 35% of the adjusted gross estate to qualify for deferring the payment of the tax. Computation of the estate for the purposes of the 6166 election includes gifts and transfers within three years of the date of death to meet the 35% threshold. Gifts are then excluded and the 35% threshold must still be met. Ms. Lentz testified this was the reason the payment of the sanctions judgment was listed on Schedule F of the initial Form 706. Ms. Lentz stated that if it were a loan, such a large receivable would be listed on Schedule C. However, a large receivable without a note would be on Schedule F, if it were owed to the decedent. Debts to the trust would be listed on Schedule G.

Ms. Lentz testified the Form 709, gift tax return, lists the value of the gift. The donor is liable for the tax. The gift tax and the return for gifts in 2006 was April 15, 2007, and the fiduciary had to file the 709 on or before that date. Ms. Lentz testified that the 35% 6166 threshold could have been met even if the payment of the sanctions judgment was reported as a gift and the 709 was timely filed.

Ms. Lentz testified that the Trust's failure to timely file the 709 could have an impact on the Trust. Interest was due and the Trust could be subjected to a penalty. The gift tax is separate from the estate tax due on a Form 706, despite the fact that the tax rate is the same. She stated that the Amended 706 filed by the Trust is more accurate.

Ms. Lentz testified that the reason Mr. Lameti chose to include the payment of the sanctions judgment in the gross estate was to qualify for the 6166 election. She opined that it was an error for Mr. Lameti to not file a gift tax return along with the 706.

The fact that the payment of the sanctions judgment is listed on Schedule F could serve as evidence that there was an expectation of repayment. However, Mr. Lameti provided a plausible explanation that he was attempting to meet the 35% threshold for the 6166 election. The Estate was primarily comprised of non-liquid assets. The Trust would benefit from the installment payment option afforded by the 6166 election. The 6166 election requires that gifts and transfers within three years of the date of death be included in the estate. The estate tax rate and the gift tax rate are the same, so the amount of the tax liability would be the same. Mr. Lameti believed it was appropriate to include the payment of the judgment on the Form 706. Both experts agree this was not correct under the Internal Revenue Code, however, there was a disagreement between the experts regarding the proper listing of the sanctions payment. Mr. Lameti stated a plausible, if incorrect, reason for his actions. At the time of the original 706 filing, this litigation had not been filed. In November 2008, the amended 706 and 709 were filed, but at that time, Mr. Lameti was unaware of the gift versus loan issue. The Court cannot conclude that the filing of the original or amended returns were evidence of the donative intent of Franklin Adell. More likely, Mr. Lameti was attempting to save the Trust from an immediate estate tax liability.

III. THE PRESUMPTION OF INTRA-FAMILY TRANSFERS AS GIFTS

Under Michigan Law, intra-family transfers are presumed to be gifts. *Smith v Smith*, 215 Mich 556, 184 NW 501 (1921). Under this presumption, Franklin Adell's payment of his son's, Kevin Adell, sanctions judgment would be presumed to be a gift. Petitioners argue that Kevin Adell is not entitled to the presumption because the donee had a fiduciary relationship with the donor, giving rise to a presumption of undue

influence. *Grondziak v. Grondziak*, 12 Mich App 61, 162 NW2d 354 (1968). Petitioners allege that Kevin Adell had a fiduciary relationship with Franklin Adell due to their close relationship. They also contend when the payment was made, Franklin Adell was in failing health and vulnerable. He died within months after the payment was made.

In *Karmey-Kupka v. Karmey* (In re Estate of Karmey), 468 Mich. 68, 75; 658 NW.2d 796 (2003), the Michigan Supreme Court adopted the following definition of a fiduciary relationship:

> Black's Law Dictionary (7th ed) defines the term as:
>
> > *[a] relationship in which one person is under a duty to* act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships--such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client--require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.
>
> > *Karmey-Kupka v. Karmey* (In re Estate of Karmey), 468 Mich. 68, 75; 658 N.W.2d 796 (2003).

The Court went on to note:

> Although a broad term, "confidential or fiduciary relationship" has a focused view toward relationships of inequality. This Court recognized in In re Wood Estate, 374 Mich. 278, 287; 132 N.W.2d 35 (1965), that the concept had its English *origins in situations in which dominion may be exercised by* one person over another. Quoting 3 Pomeroy, Equity Jurisprudence (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when "'there is

> confidence reposed on one side, and the resulting superiority and influence on the other.'" 374 Mich. 283.
>
> *Id.*

The testimony established that Kevin Adell was very close to his father. He began working with his father shortly after he graduated from college. While Kevin Adell testified that he built WADL from the ground up, he acknowledged that it was Franklin Adell and Sharon Adell who obtained the FCC license and borrowed $3 million from the Detroit Pension Board to build the station. Kevin Adell testified his compensation was always determined by Franklin Adell. Kevin Adell testified that between 2005 and 2006, Franklin Adell fell and his health suffered. He was in and out of the hospital during this time period and Kevin Adell was given a greater role in running the day-to-day operations of the businesses. While Franklin Adell allowed Kevin Adell a great deal of authority to run his companies, the testimony was clear that the companies always belonged to Franklin Adell. Ultimately, Kevin Adell was running the companies with Franklin Adell's permission. Testimony clearly established that Franklin Adell was in control of his businesses even though he may have delegated authority to Kevin Adell. Kevin Adell never assumed a position of superiority to Franklin Adell. Franklin Adell and Kevin Adell shared a close father-son relationship and a close business relationship, but that relationship did not rise to the level of a fiduciary relationship between Kevin Adell and Franklin Adell.

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of

affirmative evidence that it was exercised, are not sufficient. *Kar v. Hogan*, 399 Mich. 529, 537; 251 NW.2d 77 (1976), citing *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912). In this case, there is no evidence that Kevin Adell ever requested that Franklin Adell pay the sanctions judgment. In fact, Kevin Adell felt the sanctions judgment was unjust and would likely never have paid it.

Ralph Lameti testified that Franklin Adell said he wanted Kevin Adell to stop fighting and return to Michigan. He wanted to end the bankruptcy. He testified Franklin Adell sold T-Bills to generate the funds to pay the sanctions judgment. Mr. Lameti also stated that Adell Broadcasting Company and STN.com could have been liable for the entire sanctions judgment because the companies had filed false garnishee disclosure statements. The testimony established that the companies were at risk of becoming entangled in Kevin Adell's bankruptcy.

There was no evidence presented that Kevin Adell ever requested that his father pay the sanctions judgment. To the contrary, it is clear from the testimony that Franklin Adell did not approve of the protracted litigation with JRH. He wanted Kevin Adell in Michigan to focus on running the Adell companies. It was also becoming clear that the companies were at risk due to the bankruptcy litigation. There is no evidence that Kevin Adell exercised any influence on Franklin Adell's decision to pay the sanctions judgment. Accordingly, the Court does not find any evidence of undue influence.

IV. DONOR'S INTENT

The payment of the sanctions judgment by Franklin Adell was a gift to Kevin Adell. It was uncontroverted that a written loan agreement was never executed. Although written loan agreements had been executed between Franklin Adell and Kevin

Adell in the past, there was no loan agreement or other writing regarding this transfer. Furthermore, Kevin Adell never agreed to repay his father. On the contrary, he opposed payment of the sanctions judgment and would have remained in Florida. Kevin Adell felt he could run the businesses from Florida and did not need to return to Michigan.

Franklin Adell wanted his son home. He was nearing the end of his life and had begun to have health problems. Franklin Adell was a traditional man, born in the first half of the Twentieth Century. He was close to his family, particularly Kevin Adell. Franklin Adell had become a wealthy man due to his own efforts and those of his son. He was less concerned over repayment than he was about having his son close at hand. Franklin Adell trusted Kevin Adell to earn significant amounts of money once the bankruptcy litigation ended and he concentrated full-time on the family businesses. In that way, he would be repaid. Franklin Adell trusted Kevin Adell to take care of the family. Franklin Adell was clear headed when he paid the sanctions judgment. He did not consult with anyone before making the decision. In fact, both daughters testified they were uncomfortable discussing with Franklin Adell any aspect of "Kevin's exile to Florida" or the judgment against him. Neither Ralph Lameti nor Richard Mazzari ever directly discussed whether Franklin Adell's payment constituted a gift or loan.

Franklin Adell did not discuss the payment with Kevin Adell or Mr. Lameti. He told Mr. Lameti he was paying the money to stop the fighting. He realized Kevin Adell would not stop fighting unless his father ended it. Franklin Adell did not need the permission or advice of anyone before making the payment. He acted unilaterally and there was no express expectation of repayment.

The Court finds the payment of the sanctions judgment is a gift. Insufficient evidence was presented to determine that Franklin Adell intended the payment of the sanctions judgment to be a loan. It was uncontroverted that note was never executed. Franklin Adell did not ever tell anyone he was making a loan. Furthermore, Kevin Adell never agreed to repay the funds to Franklin Adell. Franklin Adell did expect the funds to return to the Estate. Franklin Adell trusted that Kevin Adell would earn significant money back for the companies after the bankruptcy litigation terminated. This expectation is not evidence that the funds were a loan. Rather, it is evidence of Franklin Adell's motivation for paying the sanctions judgment.

DATED: 9-3-10

HONORABLE LINDA S. HALLMARK