STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF OAKLAND

IN THE MATTER OF:

THE ESTATE OF EVERETT CASEY,
Deceased.

Case No: 2012-342604-DE
HON. LINDA S. HALLMARK

/

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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 20th day of DECEMBER 2012.

Signed: Ryan J. Deel (P60599)

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OPINION AND ORDER

FILED DEC 20 2012
Film
Deputy Register of Probate

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

DEC 19 2012

IT IS ORDERED THAT Petitioner's Motion for Summary Disposition to Determine that Neither Bruce Keene nor Renee Keene is an Heir at Law or Interested Person is GRANTED.

IT IS FURTHER ORDERED THAT Petitioner's Motion for Summary Disposition Regarding the Admission of the 1997 Will to Probate is GRANTED.

IT IS FURTHER ORDERED THAT Petitioner's Motion for Summary Disposition Regarding the Return of Estate Property is GRANTED.

IT IS FURTHER ORDERED THAT an evidentiary hearing regarding the value of the funds contained in the safe shall be held February 4 and 5, 2013 at 8:30 a.m.

THE PARTIES

Everett Randolph Casey was married to MaryAlice Casey. They had two children Kathryn and Kirk. Corinne Keene worked in Mr. Casey's office in the 1960's. At the time, she was married to Robert Keene. She had two children Renee and Bruce. Robert Keene died in 1966.

Bruce Keene was hired by Mr. Casey as an engineer for his company, Precision Standard, Inc., where he worked until Mr. Casey's death. In 2011, Bruce Keene had a DNA test performed on blood retrieved from Mr. Casey from a bloody nose. The result was a 99.99% match that Bruce was the biological child of Mr. Casey. Mr. Casey died March 24, 2012.

PROCEDURAL HISTORY

On April 4, 2012, a petition for formal probate was filed by Kathryn Casey. She is seeking to determine heirs as Kirk Casey and Kathryn Casey, to admit a photocopy of a will dated July 18, 1997, and to appoint the nominated personal representative Gerald Rossi personal representative for the estate. On April 4, 2012, Gerald Rossi was appointed special personal representative pending a full hearing. On April 24, 2012, Bruce Keene filed objections to the petition claiming to be an heir to the estate. Mr. Rossi's appointment was continued as special personal representative until further order of the court by stipulation of the parties in an order dated April 25, 2012.

On May 2, 2012, Gerald Rossi filed a petition for the return of estate assets. Petitioner alleges that prior to his death, the decedent owned Precision Standard, Inc. (PSI). Bruce Keene was an employee of the company. The petition alleges that shortly before or after the death of the decedent, Mr. Keene removed $440,000 from the company safe along with the backup hard drive for the company, which contained proprietary information. Petitioner has demanded the return of the property, but the requests were denied.

In response, Bruce Keene and Renee Keene claim to be the children of the decedent. Mr. Keene alleges that Mr. Casey acknowledged paternity prior to death. Mr. Keene also alleges the property at issue was gifted to him by the decedent prior to his death.

At a hearing on May 16, 2012, the parties agreed to adjourn the matter to June 27, 2012. In the interim, it was agreed that the funds would be placed in the IOLTA account of Mr. Keene's counsel and that the hard drive would be held by the special PR's attorney.

On September 21, 2012, Petitioner Kathryn Casey filed a Motion for Summary Disposition to Admit Decedent's 1997 Will to Probate and a Motion for Summary Disposition to Determine that Neither Bruce Keene nor Renee Keene is an Heir at Law or Interested Person. On October 3, 2012, Kathryn Casey filed a Motion For Summary Disposition for Return of Assets Pursuant to MCR 2.116(C)(10). Bruce Keene filed responses to these motions on October 17, 2012. Renee Keene filed responses to the motions for summary disposition regarding the 1997 will and the determination of heirs on October 18, 2012. On October 22, 2012, Kathryn Casey filed a reply brief in support of her Motion for Summary Disposition to Determine that Neither Bruce Keene Nor Renee Keene is an Heir at Law or Interested Person. On October 23, 2012, Gerald Rossi as special personal representative filed concurrences in all of the motions filed by Kathryn Casey.

THE SUMMARY DISPOSITION STANDARD

Petitioner's motions for summary disposition are based on MCR 2.116(C)(5), (C)(8) and (C)(10).

With respect to a motion for summary disposition grounded on standing and brought under MCR 2.116(C)(5), the Court reviews and considers all of the pleadings, depositions, admissions, affidavits, and other documentary evidence to determine whether the party lacked the legal capacity to bring the action. *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003).

Petitioner moves for summary disposition under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual

allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Such a motion should be granted where the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt*, LLP, 481 Mich 419, 424-425; 751 NW2d 8 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* at 425.

KATHRYN CASEY'S MOTION FOR SUMMARY DISPOSITION TO DETERMINE THAT NEITHER BRUCE KEENE NOR RENEE KEENE IS AN HEIR AT LAW OR INTERESTED PERSON

a. Argument of the Parties

Kathryn Casey's motion is based on MCR 2.116(C)(5), MCR 2.116(C)(8) and MCR 2.116(C)(10). Petitioner makes three arguments in favor of her petition. First, she argues that the extent of Bruce Keene and Renee Keene's interest in this proceeding is limited to the rights that might possibly be conferred through intestacy or the discovery of a validly executed will that effectively revokes the 1997 will and identifies Bruce Keene and Renee Keene as devisees.

Bruce Keene and Renee Keene argue that because the will only makes reference to "children" as a class, the determination of the decedent's children is essential to making distributions under the will.

Second, Kathryn Casey cites MCL 700.2114(1)(a), which states: "If a child is born or conceived during a marriage, both spouses are presumed to be the natural

parents of the child for purposes of intestate succession." Petitioner argues that Bruce Keene and Renee Keene's mother Corinne Keene was married to Robert Keene when they were born. Accordingly, Robert Keene is the presumed natural father. Further, she argues that under MCL 700.2114(5), "only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent." Kathryn Casey concludes that because Robert Keene is the presumed father, only he could rebut the presumption of paternity and, since he has now passed away, the door has closed for Bruce and Renee to rebut the presumption.

Bruce Keene responds that there are methods to rebut the presumption of paternity under MCL 700.2114(1)(a). Those are contained in subsection (b), which states in relevant part:

> (b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
>
> ***
>
> (v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
>
> (vi) The man is determined to be the father in an action under the revocation of paternity act.

Bruce Keene argues that he is seeking to rebut the presumption of paternity under (v) and (vi), based on the DNA evidence. He also notes that his mother has filed a petition under the revocation of paternity act.

Finally, Kathryn Casey argues that under *In Re Estate of Quintero*, 224 Mich App 682; 569 NW2d 889 (1997), *paternity must first be disproven before a party can assert* that paternity lies elsewhere, for purposes of intestate succession. In that case, the biological children attempted to intervene under then Revised Probate Code Section 111(4)(a) through (d). They requested a determination that they were decedent's illegitimate children and therefore his heirs at law based on evidence of a mutually acknowledged relationship under what is now MCL 700.2114(1)(b)(iii).

Bruce Keene argues that *Quintero* was decided before the Estates and Protected Individuals Code (EPIC) was enacted, which adds additional methods to establish paternity under the Paternity Act. Further, MCL 700.2114(1)(b) was amended to add the Revocation of Paternity Act as a method to establish paternity on June 12, 2012. Mr. Keene argues that Petitioner analysis of *Quintero* is inapplicable to a determination under MCL 700.2114 (1)(b)(v) or (vi), which were not in place when that case was decided.

Renee Keene argues that Kathryn Casey failed to preserve the issue of standing because she failed to raise it in her first responsive pleading. She argues that Kathryn Casey's first responsive pleading is an Objection to Renee Keene's Demand for Notice, which indicates that Renee Keene is not entitled to notice under MCL 700.3205.

b. *Findings*

Kathryn Casey argues that Bruce Keene and Renee Keene are not interested persons and lack standing because their interest in the estate is limited to their rights as devisees under the decedent's will or their rights conferred through intestacy. MCL 700.1105(c) defines "interested person" as follows:

> (c) "Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.

Under this definition, it is clear that an interested person includes more than one who takes under intestacy or as a devisee of a will. An interested person also includes a child of the decedent, a creditor, an heir, among other things. In this case, Bruce Keene and Renee Keene claim they are the biological children of the decedent.

Bruce Keene argues that he is a child under MCL 700.2114(b)(v) and (vi). MCR 700.2114(b)(v) allows the probate court to determine that the decedent is the child's father, using the standards and procedures established under the paternity act. The plain language of the statute requires that there must have been a finding that Bruce Keene and Renee Keene were either born out of wedlock or born or conceived during a marriage but are not the issue of that marriage before the Court may make a determination under MCL 700.2114(b)(v). See *In Re Estate of Quintero*, 224 Mich App 682; 569 NW2d 889 (1997). In this case, Bruce Keene and Renee Keene's mother was married to Robert Keene when they were born. Thus, he is the presumed father and

there has been no determination that the children were not an issue of the marriage. Consequently, MCL 700.2114(b)(v) is inapplicable.

MCL 700.2114(b)(vi) is also inapplicable because it requires that a finding has already been made under the Revocation of Paternity Act. MCL 700.2114(b)(vi) states, "The man is determined to be the father in an action under the revocation of paternity act." The present tense of the statute indicates that the determination in an action under the Revocation of Paternity Act, must have occurred before the individual may be considered a child of the decedent under EPIC. Further, this court would lack subject matter jurisdiction to make such a finding because an action under the Revocation of Paternity Act must be filed in the Circuit Court. See MCL 722.1443.

Renee Keene argues that Kathryn Casey failed to preserve the issue of standing because she failed to raise it in her first responsive pleading. Under MCR 2.116(D)(2), standing must be raised in a party's responsive pleading, unless the grounds are stated in a motion for summary disposition filed prior to the party's first responsive pleading. She argues that Kathryn Casey's first responsive pleading is an Objection to Renee Keene's Demand for Notice, which indicates that Renee Keene is not entitled to notice under MCL 700.3205. MCL 700.3205 states:

> A person who wants notice of any order or filing pertaining to a decedent's estate in which the person has a financial or property interest may file a demand for notice with the court at any time after the decedent's death stating the decedent's name, the nature of the person's interest in the estate, and the address of the person or the person's attorney. If a proceeding is not pending at the time a demand is filed under this section, the person filing the demand must pay the fee required to commence a proceeding. The person filing a demand shall mail a copy of the demand to the decedent's attorney, if known, to the personal representative if one has been appointed, and to the personal

> representative's attorney. After filing the demand, the person is an interested person entitled to notice as provided in section 1401 and the other provisions of this act.

Under MCL 700.3205, a person is only entitled to notice if they have a financial or property interest in the estate. The objection preserved the issue of standing because it indicated that Renee Keene did not have an interest in the estate.

Bruce Keene and Renee Keene argue that because the will only makes reference to "children" as a class, they may, as biological children, be included in that class. Under EPIC, the term "child" is defined at MCL 700.1103(f), which states as follows:

> "Child" includes, but is not limited to, an individual entitled to take as a child under this act by intestate succession from the parent whose relationship is involved. Child does not include an individual who is only a stepchild, a foster child, or a grandchild or more remote descendant.

Neither Bruce Keene nor Renee Keene fall under the definition of a "child" as defined under EPIC and cannot be considered within that class under the will.

c. Conclusion

Bruce Keene and Renee Keene are not interested persons or heirs at law of the decedent.

MOTION FOR SUMMARY DISPOSITION
REGARDING THE ADMISSION OF THE 1997 WILL TO PROBATE

a. Argument of the Parties

Kathryn Casey has filed this motion to admit the July 18, 1997 will to probate pursuant to MCR 2.116(C)(10). In support of her motion, she presents an affidavit from Robert Pavlock, that the decedent executed the will on July 18, 1997. Petitioner states that the decedent met with Mr. Pavlock and Mary Lyneis in 2008, 2009, and 2011 to

review his estate plan and consider possible changes, but they allege he never executed a new will.

There is evidence that the 1997 will was lost in a house fire. The Decedent notified his counsel after the fire in 2001 that the will was lost in the fire and he requested another copy. An additional copy was provided to him by his attorney, Mr. Robert Pavlock.

Bruce Keene responds that Mary Lyneis admits to providing the Decedent with a new, revised estate plan in November 2001.[1] Mr. Keene argues that Ms. Lyneis would not know if the Decedent executed the documents. He argues that discovery must be conducted to locate and determine whether the 2011 estate plan was ever executed and whether the decedent revoked the 1997 will. Mr. Keene also argues that summary disposition is premature because he has issued discovery, which has not been answered.

Renee Keene argues that there remains a genuine issue of material fact as to whether the decedent revoked the 1997 will prior to his death. In support of her argument, she states that there is a question of fact because the original will was not attached to the Petition for Probate and there is an indication in the Kathryn Casey's pleadings that the decedent expressed a desire to revise his estate plan at different times.

b. Findings

A copy of decedent's will dated July 18, 1997 is attached to the Petition for Probate. It contains the signature of the decedent, the date and is signed by two

[1] See Affidavit of Mary Lyneis, Petitioner's Exhibit 9.

witnesses. Bruce Keene and Renee Keene do not dispute that the 1997 will is a validly executed will. They argue that there is a question of fact as to whether the decedent revoked the 1997 will and executed a subsequent estate plan.

Once the moving party has made a properly supported motion for summary disposition under MCR 2.116(C)(10), the opposing party is obligated "to rebut with documentary evidence defendant's contention that no genuine issue of material fact exist[s]." *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 N.W.2d 314 (1996). Here, Bruce Keene and Renee Keene argue that there is a question of fact as to whether the 1997 will was revoked and/or superseded by subsequent estate planning documents. In support of their position, they point to the affidavit of Mary Lyneis, which states: "In November 2011, at the request of Everett, I prepared a draft of a new Will which I forwarded to him for review. Everett acknowledged via facsimile that he received the draft of the will." The next paragraph of the affidavit reads: "Everett never finalized or signed the new Will prior to his death." Bruce Keene and Renee Keene argue that Mary Lyneis does not know whether he executed the documents. However, her affidavit unequivocally states that he did not finalize or sign these documents. Accordingly, her affidavit does not rebut the evidence presented by Katheryn Casey that the 1997 will is the only valid, unrevoked testamentary instrument issued by the decedent.

Bruce Keene and Renee Keene argue that the motion for summary disposition is premature because discovery is not complete. They argue that they have discovery requests pending regarding the issue of whether Mary Lyneis knows that the will prepared by her in November 2011 was not executed. "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is

no fair likelihood that further discovery will yield support for the nonmoving party's position." *Anzaldua v Neogen Corp*, 292 Mich App 626, 636; 808 NW2d 804 (2011).

In this case, there is no fair likelihood that further discovery would show that there is a question of fact as to whether the draft will prepared for the decedent in November 2011 was executed. Mary Lyneis' affidavit clearly states that he did not execute the will. Bruce Keene and Renee Keene have not presented any evidence to rebut this affidavit testimony.

Renee Keene argues there exists a question of fact as to whether the 1997 will should be admitted to probate because the will attached to the Petition for Probate is not an original. MCL 700.3402(1)(c) governs the admission of a copy where an original will is lost:

> If the original will is not in the court's possession or neither the original will nor an authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition must also state the will's contents and shall indicate that the will is lost, destroyed, or otherwise unavailable.

The affidavit of Robert Pavlock states, "On November 14, 2001, CASEY placed a phone call to AFFIANT's office to notify AFFIANT that the WILL had been burned up in a house fire, and to request that a copy of AFFIANT's office copy of the WILL be made and sent to CASEY."[2] The affidavit establishes that the will was destroyed in a house fire and there is no indication that the decedent intended to revoke the will. The fact that the original was destroyed in a house fire does not create a question of fact regarding he validity of the 1997 will.

Finally, as discussed above, Bruce Keene and Renee Keene are not heirs or interested persons. Accordingly, they do not have standing to challenge the will.

[2] Petitioner's Exhibit 7 at ¶ 5.

c. Conclusion

There is no genuine issue of fact that the July 19, 1997 will is valid and should be admitted to probate.

MOTION FOR SUMMARY DISPOSITION
REGARDING THE RETURN OF ESTATE PROPERTY

Kathryn Casey has filed this Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and requests that this court grant the Petition for the Return of Estate Property. This motion is based on Bruce Keene's affidavit attached to his response to the Petition for Return of Estate Property. In his affidavit, Mr. Keene states that the decedent gave only him the combination to the safe in his office, that the decedent told him everything in the safe was his and that he later entered the safe in Mr. Casey's presence and removed $20,000. When Mr. Keene removed the $20,000, he states that the decedent reiterated that all of the money in the safe was his to take as he pleased. He admits to having removed all of the money in the safe shortly prior to the decedent's death.

Mr. Rossi claims the safe contained $440,000. Mr. Keene claims there was $170,730.00 in the safe.

Kathryn Casey argues that there was no valid gift because it fails the requirement of a valid delivery. Ms. Casey argues that the fact that Mr. Keene had the combination to the safe does not show delivery. She argues that if that were true, any employee with a key or combination to the company safe could assert ownership rights to its contents. She also points out that decedent retained control over the safe and its contents at all times. At no time did the decedent lose dominion and control over the safe.

Ms. Casey also argues that evidence of donative intent must be looked at from the surrounding circumstances given that the only evidence of donative intent come from the self-serving statements of Mr. Casey.

Mr. Keene argues that he is the only person who has offered any evidence or testimony regarding the gift. He argues that the fact that he was given the combination to the safe, that the safe was located in his office, was told that the contents belonged to him, and was able to access the safe and remove the contents as he wished is sufficient to show a gift.

b. Findings

Ms. Casey argues that there was no valid gift because it fails the requirement of a valid delivery. The three elements necessary to constitute a valid gift are: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *Id.* at 611; see also *Davidson v Bugbee*, 227 Mich. App. 264, 268; 575 N.W.2d 574 (1997). *Bufe v. Rudell (In re Estate of Rudell)*, 286 Mich. App. 391, 404 (2009)

"As to delivery, it must be unconditional and it may be either actual or constructive; the property may be given to the donee or to someone for him. *In re Herbert's Estate*, 311 Mich 608. Such delivery must place the property within the dominion and control of the donee. *In re Herbert's Estate, supra*. This means that a gift *inter vivos* must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power of recall by the donor. *Lumberg v. Commonwealth Bank*, 295 Mich 566." *Osius v. Dingell*, 375 Mich. 605, 611; 134 N.W.2d 657 (1965).

Both parties rely heavily on *Shepard v Shepard*, 164 Mich 183, 200-201; 129 NW 201 (1910) for the principle that the court should look at the surrounding evidence to determine donative intent. In *Shepard*, the decedent had two sons. One son alleged that the decedent had given securities to him and that the next month the decedent gave the same securities to his brother. The brother agreed that the securities had been endorsed to both, but denied that they had been delivered, thereby nullifying the gift. After they were endorsed, the certificates were placed in a safe with other papers. Both brothers and the decedent had access to the safe. The Court found that where a father delivered securities to his sons, who placed marks upon them, and the parties dealt for some years with the property as belonging to the sons, who left the gifts in the safe of the donor, to which both had full access, a completed gift of the property was executed.

In this case, there is insufficient evidence of donative intent and delivery to show there was a valid gift of the contents of the safe. In his affidavit, Bruce Keene states that the decedent told him that "everything in the safe was mine" at paragraphs 6 and 7.[3] However, at paragraph 8, Mr. Keene states that at another time the decedent "reiterated that all of the money in the safe was mine to take as I please." At paragraph 9, he states: "At other times, Decedent told me that the money was not just mine, but also my wife's." Thus, at different times, the decedent made different statements regarding the money in the safe. The fact that the decedent told Mr. Keene that he could take the money as he pleased does not indicate that he was giving the money to Mr. Keene. Rather, it indicates that he could access the money and take what he

[3] See Petitioner's Exhibit 6.

wants. The decedent did not use the word "gift" or any other words signifying a transfer of ownership. Mr. Keene was permitted to remove $20,000 from the safe in the presence of the decedent. He did not testify that he removed any other money until March 22, 2012, shortly before the decedent died and while the decedent was hospitalized. Finally, the fact that the safe was kept in the offices of the company that was solely owned by the decedent indicates that there was no valid delivery because the funds were never outside of the decedent's dominion and control.

There is a question of fact regarding the amount money in the safe. The special personal representative Gerald Rossi claims the safe contained $440,000. Mr. Keene claims there was $170,730.00 in the safe. Kathryn Casey's affidavit indicates there was in excess of $500,000 in cash in the safe.[4]

c. Conclusion

There is insufficient evidence to establish there was a gift of the contents of the safe at Precision Standard, Inc. from the decedent to Bruce Keene. There is a question of fact as to the amount contained in the safe and an evidentiary hearing shall be conducted on that issue.

IT IS SO ORDERED.

DATED: 12-19-12

HON. LINDA S. HALLMARK
JUDGE

[4] Petitioner's Exhibit 2, at ¶ 20.