

IN THE SUPREME COURT OF OHIO

08-0415

MICHAEL KOZAK

Appellee

v.

GEORGIANN JACKSON, INDIVIDUALLY
AND AS EXECUTOR OF THE ESTATE OF
ANN KOZAK

Appellant

On appeal from the Cuyahoga County
Court of Appeals
Eighth Appellate District

Court of Appeals
Case No. CA-06-088851

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

Dean Boland (0065693) (Counsel of Record)
18123 Sloane Avenue
Lakewood, Ohio 44107
216.529.9371 phone
866.455.1267 fax
dean@deanboland.com

COUNSEL FOR APPELLANT

Patricia Frutig
800 Fifth Third Center
Cleveland OH 44114-2655

COUNSEL FOR APPELLEE

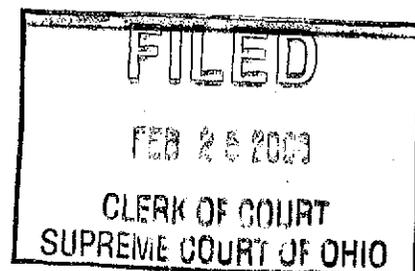


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The court of appeals has affirmed a completely new definition of the legal concept of a contract, devoid of any consideration, that is contrary to all previous authority. It also affirmed that assets not titled in a decedent's name at the time of her death can, nonetheless, be considered assets of the decedent's estate despite the undisputed fact that the assets transferred by decedent prior to her death were not transferred as a result of duress, fraud, deceit or any other improper purpose. This ruling is in direct contradiction to decisions in three other appellate districts; Burns v. Daily, 114 Ohio App.3d 694 at 702-703; Vogler v. Donley (Dec. 16, 1998), 7th Dist. No. 97 BA 63; Harpster v. Castle (June 28, 1993), 5th Dist. No. CA 1022

The eighth district also affirmed the probate court's creation of a new rule permitting a **non-party** to a contract to cancel that contract via the presentation of parol evidence in contravention of this court's rule established in Galmish v. Cicchini (Sep 20, 2000), 90 Ohio St.3d 22.

The court of appeals affirmed the unprecedented expansion of the probate court's jurisdiction to include presiding over contractual disputes between heirs in which neither the decedent nor the estate is a party contrary to the existing law of at least one other district. In the Matter of: The Estate of Victor Lee Harmon (Dec. 14, 1994), Pickaway App. No. 94 CA 6.

Finally, the court of appeals approved the probate court's ruling restricting one party from admitting evidence on a particular issue while permitting the other party to do so resulting in a one-sided and unfair trial. Essentially, Jackson adhered to the probate court's pre-trial evidentiary ruling and was prejudiced by the lack of evidence she was able to present. Meanwhile, complainant ignored the court's pre-trial evidentiary ruling, consistently offered

evidence in defiance of the court's order which evidence was inconsistently admitted and excluded over objections of Jackson. Appendix E at ¶27. Finally, **after the hearing** the court reversed the pre-trial evidentiary ruling to the detriment of Jackson and benefit of complainant.

This after-the-fact reversal of its own ruling resulted in the trial record being bereft of rebuttal and other relevant evidence by Jackson which was not offered in compliance with the court's pre-trial rulings.

STATEMENT OF THE CASE AND FACTS

In late 1996, Ann Kozak and her husband jointly owned at least three items at issue in this case – a house, a car and a bank account. In 1996, Ann Kozak and her husband gifted to Georgiann & her husband Wayne Jackson, \$40,000 in cash from their bank account. They also gifted in 1996 40,000 in cash from their bank account to complainant and his wife. In late 1998 Ann Kozak and her husband gifted to Georgiann Jackson a house they jointly owned. In early 1999 Ann Kozak gifted to Georgiann Jackson a car Ann Kozak owned. In short, all the disputed assets in this matter were transferred by decedent and her husband Mike Kozak (the parents of Jackson and complainant) to Jackson prior to the death of either parent. (See Appendix A Report of Magistrate dated September 29, 2005 which was adopted in total by the court in its journal entry dated December 5, 2005 Appendix B). Jackson was gifted these assets, in part, because of her being the only caregiver for her parents in the last seven years of their lives. Over the years decedent and her husband had gifted cars to complainant.

Ann Kozak's husband died testate in early June 1999. His will was handled and closed without incident or dispute. (See Case No. 1999 EST 0024135). No claim was made by any party that either the house, car or cash, half owned by Ann Kozak's husband at the time they were transferred to Jackson, were anything other than gifts to Georgiann Jackson. Ann Kozak

died testate on 6-30-1999 after her husband had died.

At the time of Ann Kozak's death she had two heirs, complainant (her son Michael Kozak) and Georgiann Jackson (her daughter). The siblings were not close in their adulthood as a result of childhood abuse inflicted by Complainant upon Jackson while they were both children.

Complainant assembled a large group of his extended family members and invited Jackson to meet him on July 18, 1999 ostensibly to discuss matters related to the anticipated filing of their mother's estate. At that meeting, Complainant and his family members engaged in several hours long argument and screaming event directed at Jackson, who is wheelchair bound, resulting, in at least one occasion, complainant and several of his family members barging into a bathroom after Jackson knowing she was ill with diarrhea. Complainant further intimidated Jackson into signing a piece of paper containing indicating "upon [Georgiann Jackson's] death" she would transfer ½ of the net value of the house and car that she currently owned to complainant. She did this in order to be permitted by complainant and his family to leave the house. This all occurred prior to Jackson's approval as executrix of Ann Kozak's estate.

The document complainant required Jackson to sign stated that ½ of the net value of these assets would be transferred to Michael Kozak, her brother, "upon her (Jackson's) death." Jackson is still alive as of this writing. The wording of the document was dictated to Jackson by complainant. The wording demonstrates that complainant acknowledged Jackson owned the house and car.

The application to probate Ann Kozak's will was filed on August 20, 1999. Jackson was approved as executor on January 31, 2000. Complainant filed a declaratory judgment action on April 29, 2005. His complaint sought to have Jackson ordered to place assets (or their value) she

owned and had owned and maintained for years – namely the house, car and cash
aforementioned – into Ann Kozak’s estate. The complaint did not allege Jackson obtained those
assets from her mother and father via any improper means.

Jackson filed a motion to dismiss the declaratory judgment. She argued, among other
things, that the assets listed in the declaratory judgment (the house car and cash) were all
transferred to her both her parents prior to the decedent’s death and were not properly considered
assets of the estate. Complainant himself had also been gifted by both Ann Kozak and her
husband \$40,000 in cash in three different years. Neither the probate court nor the court of
appeals has ordered him to place those funds into Ann Kozak’s estate.

Following a hearing on Jackson’s motion to dismiss, the magistrate found that the house
and car were **not part of Ann Kozak’s estate**. It ruled the assets were “not titled in the
decedent’s name at the time of her death” and were lawfully transferred to Jackson prior to the
Ann Kozak’s death. (See Appendix A). The probate court adopted this ruling in its entirety,
over complainant’s objections in its December 5, 2005 ruling. (Appendix B).

The motion to dismiss ruling omitted any reference to the legal status of the cash gift that
was identified as the third main asset in the complaint that complainant sought to be taken from
Jackson and placed into the estate.

Following the probate court’s ruling on Jackson’s motion to dismiss, a trial regarding the
declaratory judgment was scheduled on the remaining issues. Jackson filed a motion in limine.
Among other orders, Jackson requested the magistrate issue an order that no testimony or
evidence could be presented at the hearing by complainant regarding the house or car as the
magistrate and probate court had both agreed those assets **were not part of Ann Kozak’s estate**.
(Appendices A and B). On the morning of March 2, 2006, the date of the trial in this matter, the

magistrate verbally granted that portion of the motion in limine (Appendix C) and the hearing was held that afternoon. (The written report and recommendation of the magistrate's verbal motion in limine rulings was not filed until 4-3-06, approximately one month after the trial).

At the March 2, 2006 hearing, Jackson relied on the magistrate's motion in limine ruling and the probate court's prior order of December 5, 2005 that the house and car were not properly part of the estate. She prepared to produce evidence and respond to Complainant's evidence regarding the remaining item, the claimed cash given to her by her parents several years before either of them had died. She did not prepare to present or contend with complainant presenting any evidence regarding the house and car for the reasons stated above. Jackson entered objections to each occasion when complainant ignored the court's pre-trial ruling and attempted to offer evidence about the house and car. Some of those objections were sustained and some were overruled with that inconsistency unexplained. (Appendix E at ¶ 27).

Following the hearing with the magistrate, the magistrate recommended that Jackson be required to place the \$45,000 in cash into the estate. (Appendix C). The magistrate's report did not recommend that Jackson's house and car be placed into the estate as both had previously been omitted from consideration as estate assets by both the magistrate and the probate court itself. (Appendices A and B). Both parties filed objections to the magistrate's ruling for differing reasons. The probate court held an off-the-record hearing on those objections and asked the parties to attempt to settle the matter. The court asked that the parties inform him within a specified time whether a settlement had been reached. No settlement was reached. The complainant's counsel, Patricia Frutig, then contacted the court via letter and informed it that no settlement had been reached. She then went beyond the court's request and informed the court, falsely, that Jackson's counsel had said that if the court did not rule in Jackson's favor, an appeal

would be filed. Following receipt of that letter, the probate court modified the magistrate's ruling reversing its own pre-trial motion in limine evidentiary rulings and its December 5, 2005 order without explanation. (Appendices D and F).

The probate court ordered Jackson to deposit with the estate the value of the house and car gifted to her by **both her parents prior to either of them dying** and the cash **gifted to her by both her parents years prior to either of them dying**. (Appendix F). The deed to the house in this matter is a written contract. (Carroll v. Dirk 2006-Ohio-5254). The court, in effect, cancelled the deed to the house that had been transferred **from both Ann Kozak and her husband** to Jackson as well as cancelled the written contract transferring the car to Jackson. Despite being contrary to law and prior court rulings in this case, no explanation by the court for any of the following:

1. The reversal of the pre-trial evidentiary rulings
2. The reversal of its December 5, 2005 order.
3. The decision to rule upon a contract dispute between heirs not involving the decedent or estate as a party.
4. The decision to re-define a contract as one without consideration included.
5. The legal basis for the cancellation of two written contracts reliant solely upon parol evidence of a **non-party to those contracts**.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: A contract requires an offer, acceptance and consideration and no document purporting to be a contract is a valid contract without these three items. (Carroll v. Dirk 2006-Ohio-5254).

The court of appeals affirmed the probate court's finding that a document lacking consideration is a valid contract under Ohio law.

“To prove the existence of a contract, a party must establish the essential elements of a contract: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) **an exchange of consideration**; and (5) certainty as to the essential terms of the contract.” (*Carroll v. Dirk* 2006-Ohio-5254) (Emphasis added).

The document the court affirmed as a contract had no consideration. The following is the complete text of the alleged contract:

“To Whom It May Concern:

Effective this date, July 18, 1999, I Georgiann M. Jackson agree that ½ (50%) of the net value of the property at 15684 Glenridge Ave Middleburg Hts Ohio 44130 plus \$15,500 plus a 1996 Buick LeSabre Custom Limited VIN 1G4HR52K6TH424174 **shall directly be assigned to my brother** Mr. Michael Kozak III or his estate in the event of my death.” (Emphasis added).

Complainant conceded during trial that no consideration was provided in this document. The document contained no penalty for breach. It contained no time for performance other than “in the event of” *Jackson's* death. It contained no indication of a forbearance of some right or benefit by complainant as consideration. No evidence of forbearance by complainant of some right or benefit was presented to the court.

Allowing this rule to stand greatly expands the definition of contract as to encompass nearly any document containing any promise without consideration. It is also contrary to case law in the state of Ohio in every other appellate district.

Proposition of Law 2: If a court determines after a hearing or trial that its pre-hearing or pre-trial evidentiary rulings were in error, it is required to offer the parties another hearing or trial affording the parties the opportunity to present evidence consistent with the court’s revised evidentiary rulings.

At trial, Jackson followed the court’s ruling and did not offer any evidence supporting her position that the house and car were not part of the estate. Complainant, however, consistently

offered testimony at the trial in violation of the court's ruling. Jackson objected and those objections were sometimes sustained and sometimes not without explanation. (Appendix E at ¶27). Jackson declined to offer available rebuttal evidence on the house and car evidence that was inconsistently admitted to avoid "opening the door" to the previously excluded evidence on the house and car issues.

Following the trial, the probate court reversed its pre-trial restriction on testimony and evidence that could be admitted and ordered the house and car transferred from Jackson's possession into the estate. (Appendix D). The court of appeals ruled that this procedure of essentially changing the rules after the game has been played was appropriate. It also cited several times in its opinion to the lack of evidence presented at the trial supporting Jackson's position on the proper ownership of the house and car. Jackson's available rebuttal evidence on the house and car issue is necessarily absent from the trial record *because prior to the trial, the probate court and magistrate both ruled the house and car were not properly considered assets of the estate.* (Appendices A and B). If left to stand, the appeals court's decision represents a dangerous precedent for trial courts in Cuyahoga County and elsewhere. It provides them the ability to restrict testimony prior to hearings or trials and then after-the-fact change those rulings while not permitting either party a new hearing with the now changed rulings.

As this court recognizes, trial strategy is guided by pre-trial rulings. Decisions to offer evidence, not offer evidence, cross examine or not cross examine witnesses is bound by court rulings as to what can and cannot be offered as testimony and evidence. Georgiann Jackson was guided by those rulings at this trial and specifically did not offer evidence to challenge the complainant's claims on the house and car in accordance with the court's rulings. The complainant did offer such evidence, ignoring the court's rulings and was rewarded for his

efforts by a post-trial reversal of that evidentiary ruling leaving Jackson without now relevant and admissible evidence in the trial record to rebut the complainant's after-the-fact admissible evidence.

Proposition of Law 3: If title to an asset does not reside in the decedent upon her death, but passed to a third party by inter vivos transaction, then such property may not be included as an estate asset, and may not be retrieved by a summary proceeding in the probate court. Burns v. Daily, 114 Ohio App.3d 693 at 702-703; accord Vogler v. Donley (Dec. 16, 1998), 7th Dist. No. 97 BA 63; Harpster v. Castle (June 28, 1993), 5th Dist. No. CA 1022

The complainant alleged in his declaratory judgment that certain assets transferred to Jackson by her parents prior to the death of either one of them should be transferred into Ann Kozak's estate. Jackson filed a motion to dismiss this declaratory judgment pointing out that the listed assets, a house, car and \$40,000 in cash, were not titled in the decedent's name at the time of her death and were, therefore, not properly considered as assets of Ann Kozak's estate.

Complainant never alleged in his deposition or in court that the assets were transferred by his parents to Jackson as a result of duress, fraud, deceit or any other improper conduct by Jackson.

"In order for an asset to belong to a probate estate, title to the asset must rest in the decedent upon her death....If title to personal property resides in the decedent upon her death, title to that property passes over to the executor or administrator of the estate...and the property can be properly considered 'probate property' subject to a discovery proceeding under R.C. 2109.50....If, on the other hand, title does not reside in the decedent upon her death, but passed to a third party by inter vivos transaction or gift, then such property may not be included as an estate asset, and may not be retrieved by a summary proceeding in the probate court." (Burns v. Daily, 114 Ohio App.3d at 702-703; accord Vogler v. Donley (Dec. 16, 1998), 7th Dist. No. 97 BA 63; Harpster v. Castle (June 28, 1993), 5th Dist. No. CA 1022).

Following a hearing on Jackson's motion to dismiss, the magistrate found that house and

car disputed in this matter “were not titled in the decedent’s name at the time of her death, [and] they should not be included as assets of her estate.” (Appendix A at p.2). The report and recommendation did not address the \$40,000 cash gift. Jackson filed an objection to the magistrate’s report to have that issue addressed. Complainant filed objections to the magistrate’s ruling arguing the house and car should be included in the issues to be decided at the trial of this matter. Following a hearing with the probate court itself, all objections were denied and the magistrate’s report was adopted by the probate court verbatim. (Appendix B). All parties prepared for the upcoming trial with the knowledge that the house and car assets were completely outside the probate estate in accordance with Appendices A and B.

A trial was scheduled on the remaining issues from complainant’s declaratory judgment – mainly the \$40,000 cash transferred by Jackson’s parents to her years before either of them died and some other relatively insignificant issues. Prior to that trial, Jackson filed a motion in limine to insure that no testimony or evidence would be offered at trial on the issues of the house and the car consistent with the probate court’s December 5, 2005 ruling. (See Appendix B adopting Appendix A verbatim). Jackson filed that motion in limine based upon the court’s rulings and the above case law from other appellate districts.

The magistrate held a brief hearing the morning of trial as to Jackson’s motion in limine.

The magistrate ruled as follows:

Pursuant to the Report of Magistrate dated September 29, 2005 and the judgment entry dated December 5, 2005, the Motion in Limine was granted as to the following items:

- 1. The Plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to the property at 15684 Glenridge Avenue and its value; and**
- 2. The Plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to the 1996 Buick LeSabre and its value (Appendix C) (Emphasis added).**

The magistrate relied upon her prior report and recommendation, the probate court’s adoption of same and existing case law in all other districts as the basis for her motion in limine

rulings. Jackson did the same.

Jackson proceeded to prepare her trial strategy for the hearing based upon the magistrate's ruling reflected in Appendix C.

After the hearing, the probate court reversed the verbal and written motion in limine rulings of the magistrate reflected in her 4-3-06 report. (Appendix D). It also reversed the magistrate's (Appendix A) and its own prior rulings (Appendix B) that the house and car were not assets of the estate. (Appendix D). Including assets in an estate that were not owned by the decedent at the time of her death is contrary to all law in Ohio.

Proposition of Law 4: The probate court has no jurisdiction to rule upon a dispute regarding a contract between heirs even if that contract arises out of the death of a decedent or one of the parties is a fiduciary. In the Matter of: The Estate of Victor Lee Harmon (Dec. 14, 1994), Pickaway App. No. 94 CA 6.

Even assuming the document signed by Jackson is a contract between she and complainant, the probate court has no jurisdiction to rule upon a dispute regarding a contract between heirs.

"A probate court has no plenary power to order specific performance on a contract, even if that contract arises out of the death of a decedent or one of the parties is a fiduciary." (In the Matter of: The Estate of Victor Lee Harmon (Dec. 14, 1994), Pickaway App. No. 94 CA 6).

The magistrate's report following the March 2006 hearing found: "It was apparent from [Complainant's] argument that [he] was requesting that the probate court address a contractual matter between two parties, neither of which was the estate of Ann Kozak. The probate court is not the proper forum to address a contractual dispute between [Complainant] and Georgiann Jackson." (Appendix C). This ruling was consistent with the decision in Harmon. Although the probate court modified the the magistrate's 4-3-06 report and recommendation in some areas, it did not modify this finding, thereby, adopting it verbatim. (See Appendix D). The court of

appeals does not explain how they affirmed the probate court's ultimate decision when it contradicts the probate court's prior orders and the adoption of the above finding by the magistrate. Somewhere in all of this brief writing and oral argument, the existing case law ought to control the outcome of the matter.

The probate court, without comment on the existing case law, issued the subsequent court order requiring Jackson's assets placed into Ann Kozak's estate. The alleged contract provided in Proposition of Law 1 does not require payment by Jackson to any estate. The probate court and appeals court did not offer any application of current law or rules in support of its finding. The probate court reversed the magistrate's analysis and its own prior order adopting the magistrate's analysis that these items were not properly considered assets of Ann Kozak's estate and rendered a judgment decidedly adverse to Jackson. It did so only after receiving ex parte communication from complainant's counsel passing on a false threat of an appeal of the probate court's decision should it not be identical to the magistrate's report in Appendix C. It is not known what role this falsely communicated perceived challenge to the court's authority played in the surprising and unexplained reversal of pre-trial rulings, cancellation of written contracts with parol evidence from a non-party and exercise of jurisdiction over contracts between non-parties to the estate.

Proposition of Law 5: The parol evidence rule prohibits a **non-party to a contract** from contradicting the terms of the contract with any evidence of alleged or actual agreements. Galmish v. Cicchini (Sep 20, 2000), 90 Ohio St.3d 22.

The house at issue in this case was transferred by **both of Jackson's parents** to Jackson prior to their deaths. It was owned by Jackson's parents pursuant to a valid deed listing both of their names as owners.

A deed is a contract, and is therefore subject to the parol evidence rule. (John Deere

Indus. Equipment Co. v. Gentile (1983), 9 Ohio App.3d 251, 253). Therefore, the deed transferring the property from Ann Kozak to Jackson is a valid contract. (Id). The eighth district affirmed the probate court's ruling (Appendix F) despite the following:

1. **Complainant did not allege fraud, mistake, deceit or other invalidating cause permitting contract cancellation or the admission of non-contract testimony to modify that contract.**
2. **Complainant did not offer evidence of any improper conduct by Jackson in obtaining the deed.**
3. **The court did not find any improper conduct by Jackson in obtaining the deed.**

Despite obvious failure to comply with the rule this court established in Galmish, the court of appeals affirmed the probate court's cancellation of two written contracts, ordering Jackson's house or its value, with interest, placed into Ann Kozak's estate. The complainant offered only parol evidence via decedent hearsay contradicting this deed (i.e. written contract) and its terms.

The "parol evidence rule" states that absent fraud, mistake or other invalidating cause, a written agreement may not be contradicted or supplemented by evidence of prior or contemporaneous oral agreements. (Galmish v. Cicchini (Sep 20, 2000), 90 Ohio St.3d 22). The parol evidence rule protects the integrity of written contracts. (Id). Prohibiting parol evidence insures stability, predictability, and enforceability of finalized written instruments. The parol evidence rule "prohibits a party *who has entered into a written contract* from contradicting the terms of the contract with evidence of alleged or actual agreements." (Ed Schory & Sons v. Society Nat. Bank, 75 Ohio St.3d 433, 440 (1996)). (Emphasis added).

The eighth district court of appeals has established a rule that **non-parties** to contracts **can offer parol evidence** to contradict the terms of a written contract. This court has held that **parties** to a written contract **cannot offer parol evidence** to contradict terms of a written contract. Despite the clarity of the parol evidence rule in Galmish, the court of appeals affirmed the probate court's decision to ignore the rule and void the deed from Jackson's parents to

Jackson ordering the house, or its value, to be placed into Ann Kozak's estate. The court of appeals offers no legal basis for ordering an asset, half owned by Ann Kozak's husband at the time it was transferred to Jackson, to be transferred in its entirety into Ann Kozak's estate. It ignored the indisputable fact that ½ of the house was never owned by Ann Kozak prior to being transferred to Jackson.

Where the parties have entered into an unambiguous written contract, fully integrating their mutual understandings, intentions that are not expressed in the writing are "deemed to have no existence." (Astor v. IBM Corp., 7 F.3d 533, 539 (6th Cir.1993) and Aultman Hosp. Ass'n v. Community Mut. Ins. Co., 46 Ohio St.3d 51, 53 (1989)). Complainant did not allege nor provide any evidence the terms of that deed were ambiguous. The court did not make a finding that the contract was ambiguous, therefore, the court erred considering parol evidence when canceling that contract. (Galmish, Ed Schory & Sons and Astor).

Outside of the Eighth District's opinion in this case, no case law permits third parties to offer parol evidence contradicting terms of a written agreement. Case law clearly prevents either Jackson or her mother, were she alive, from offering parol evidence to modify the terms of the deed. It certainly prohibits a non-party like the complainant from offering such parol evidence.

This error by the probate court, affirmed by the court of appeals, was more than harmless. It was the sole basis by which the probate court cancelled that deed and ordered the house placed into the estate.

Proposition of Law 6: A court, when enforcing a contractual obligation, cannot impose new terms into that contract.

Assuming the document whose text is presented in its entirety in Proposition of Law 1 above is a contract as the court of appeals found, it obligates Jackson to pay to Complainant ½ the value of the net proceeds of the sale of the house and car noted in the document.

The court of appeals ruled that “[t]he contract in this case does not require the return of the car, house, or money to the decedent’s estate.” (Appendix E at ¶36). However, it affirmed the probate court’s order in Appendix F ordering the “contract” enforced requiring Jackson to place into the estate the house and car gifted to her prior to her parents’ deaths. Appendix E at ¶36 and the eighth district’s affirming the ruling in Appendix F are incompatible.

The purported contract has no other terms. The probate court’s interpretation of the alleged contract and enforcement of same underlines the problems avoided by prohibiting probate courts from litigating contracts that have neither the decedent nor the estate as a party. To make this document relevant to this estate, the probate court had to impute a term into the agreement that did not exist even implicitly in its plain language (i.e. that it required Jackson to place assets into Ann Kozak’s estate). Then, the court of appeals found the contract **did not require** the assets to be placed into Ann Kozak’s estate as the probate court ordered – but affirmed the probate court’s ordering of that precise transfer anyhow.

The text of the document does not obligate Jackson to place any assets into Ann Kozak’s estate. The agreement does not convert the listed assets to assets of Ann Kozak’s estate. The probate court’s September 8, 2006 order (Appendix F) enforced an obligation between Jackson and complainant to the benefit of an estate not mentioned in the document itself.

CONCLUSION

For the reasons set forth above, Georgiann Jackson respectfully requests this court accept for consideration the above listed propositions of law.

Respectfully Submitted,



Dean Boland (0065693)
18123 Sloane Avenue
Lakewood, Ohio 44107
216.529.9371 phone
866.455.1267 fax
dean@deanboland.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction has been served via ordinary U.S. Mail, postage prepaid, this 23rd day of February, 2008 upon the following:

Patricia Frutig
800 Fifth Third Center
Cleveland OH 44114-2655



Dean Boland (0065693)

APPENDICES

<u>Appendices</u>	<u>Description</u>
Appendix A	Magistrate's Report and Recommendation dated 9-29-05
Appendix B	Journal Entry of Probate Court adopted Magistrate's 9-29-05 Report and Recommendation dated 12-5-05
Appendix C	Magistrate's Ruling on Motion in Limine dated 4-3-06
Appendix D	Probate Court's Journal Entry overruling the motion in limine
Appendix E	Court of Appeals Journal Entry and Decision.
Appendix F	Probate Court's Journal Entry regarding complainant's declaratory judgment complaint.
Appendix G	Probate Court's Journal Entry granting complainant's objections to the magistrate's 4-3-06 motion in limine rulings.
Appendix H	Probate Court's Journal Entry denying all of Jackson's objections to the magistrate's 4-3-06 report and recommendation.

PROBATE COURT
FILED
SEP 29 2005
CUYAHOGA COUNTY, O.

IN THE PROBATE COURT
DIVISION OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL KOZAK, III,) 2005 ADV 101297
Plaintiff,)
vs.)
GEORGIANN JACKSON, Executrix) REPORT OF MAGISTRATE
of the Estate of Ann Kozak, Deceased,)
et al.,)
Defendants.)

This matter came to be heard on September 26, 2005 on an Amended Motion to Dismiss filed September 26, 2005 by Donna J. Powers. All interested parties were duly notified of the hearing. A transcript of the hearing was taken but has not been filed with the Court.

ISSUE

The issue before this Court for determination is whether the movant's order to dismiss the plaintiff's Amended Complaint for Declaratory Judgment should be granted by the Court for failure to state a claim upon which relief can be granted.

LAW

Civil Rule 12(B)

CONCLUSION and RECOMMENDATION

Civil Rule 12(B) provides in part:

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted...

DOCKETED

To prevail on a motion to dismiss pursuant to Civil Rule 12(B)(6), the moving party must be able to prove that the non-moving party failed to state a claim upon which relief can be granted.

The plaintiff filed his amended complaint on July 18, 2005. The complaint indicated that the defendant had possession of several assets which belonged to the estate of Ann Kozak. The complaint stated that the defendant was in possession of the following items:

1. Proceeds from the sale of the house.
2. A car.
3. Cash.
4. Intangible assets.
5. Tangible assets.

The pleadings filed by Ms. Powers and Ms. Frutig indicated that the house located at 15684 Glenridge Avenue and the 1996 Buick LeSabre were transferred from Ann Kozak to Ms. Jackson before the death of Ann Kozak. Since these assets were not titled in the decedent's name at the time of her death, they should not be included as assets of her estate.

Ms. Frutig stated that Ms. Jackson was in possession of \$45,000.00 in cash, personal property, as well as household goods which belonged to the decedent's estate. Ms. Powers' motion indicated that the decedent gave cash to Georgiann as a gift.

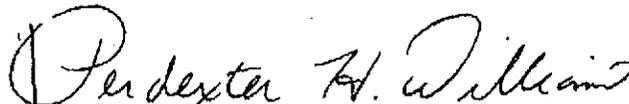
Clearly, there are issues which remain to be litigated in this estate. Mr. Kozak should be given an opportunity to prove that Ms. Jackson is in possession of cash,

intangible assets and tangible assets which belong to the estate of Ann Kozak. Should Mr. Kozak prevail, these assets must be returned to the estate of Ann Kozak. Therefore, based on a review of the pleadings, arguments made by the attorneys and applicable law, it is the recommendation of this Magistrate that the Amended Motion to Dismiss be denied.

Pursuant to Civ. R. 53(E)(2), a party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law unless the party timely objects to that finding or conclusion as required by Civ. R. 53(E)(3).

Respectfully submitted,

SEP 29 2005


PERDEXTER H. WILLIAMS
Magistrate

COPIES MAILED TO:

Donna J. Powers, Esq.
2 Berea Commons, Suite 215
P.O. Box 1059
Berea, OH 44017

Patricia R. Frutig, Esq.
600 Superior Avenue, East, Suite 800
Cleveland, OH 44114-2655

PROBATE COURT OF CUYAHOGA COUNTY

DIVISION OF THE COURT OF COMMON PLEAS

COURT HOUSE

CLEVELAND, OHIO 44113

RECEIVED OCT 3 2005

JOHN J. DONNELLY
PRESIDING JUDGE

JOHN A. POLITO
COURT ADMINISTRATOR
MAGISTRATE

JOHN E. CORRIGAN
JUDGE

September 29, 2005

Donna J. Powers, Esq
2 Berea Commons, Suite 215
P.O. Box 1059
Berea, OH 44017

Re: Kozak, III v. Jackson, et al.
Case No. 2005 ADV 101297

Dear Ms. Powers:

Enclosed please find a copy of the Report of Magistrate filed in this court as a matter of record.

For your information and guidance please refer to the Ohio Rules of Civil Procedure.

Very truly yours,



SHARON R. LIGGETT
Secretary

/srl

Enclosure

cc: Patricia R. Frutig, Esq.

Appendix A

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

PROBATE COURT
- FILED -
DEC - 5 2005
CUYAHOGA COUNTY, O.

MICHAEL KOZAK, III,)
Plaintiff,)
vs.)
GEORGIANN JACKSON, Executrix)
of the Estate of Ann Kozak, Deceased,)
et al.,)
Defendants.)

CASE NO. 2005 ADV 101297

JUDGMENT ENTRY

This matter is before the Court on an Objection to Magistrate's Report filed October 12, 2005 by Donna J. Powers, attorney for defendant.

The Court finds, after reviewing the entire file, including the Report of Magistrate and hearing oral argument, that the findings and conclusions of the Magistrate are well taken and should be adopted as the findings and conclusions of this Court.

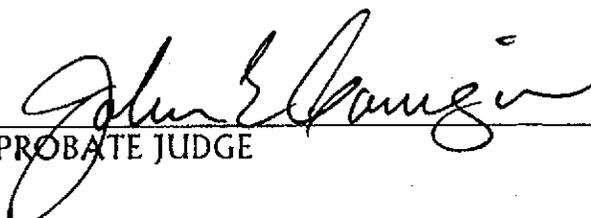
The Court further finds that the objection is not well taken and should be overruled.

Therefore, it is ORDERED that the Magistrate's Report is adopted as the findings and conclusions of this Court.

It is further ORDERED that the Objection to Magistrate's Report is OVERRULED.

It is further ORDERED that a Judgment Entry on the Amended Motion to Dismiss shall be filed instanter in accordance with this judgment entry.

DEC - 5 2005


PROBATE JUDGE

DOCKETED

PROBATE COURT
FILED
APR - 3 2006
CUYAHOGA COUNTY, O.

IN THE PROBATE COURT
DIVISION OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL KOZAK, III,)
Plaintiff,)
vs.)
GEORGIANN JACKSON, Individually,)
and as Executrix of the Estate of)
Ann Kozak, Deceased,)
Defendant.)

CASE NO. 2005 ADV 101297
REPORT OF MAGISTRATE

This matter came to be heard on March 2, 2006 on an Amended Complaint for Declaratory Judgment filed July 18, 2005 by Patricia Frutig; a Counterclaim of Georgiann Jackson filed December 28, 2005 by Donna Powers; and a Motion in Limine filed February 24, 2006 by Dean Boland. All interested parties were duly notified of the hearing. A transcript of the hearing was taken and filed with the court on March 27, 2006.

FACTS

Ann Kozak died testate on June 30, 1999 survived by her two children; Georgiann Jackson and Michael Kozak, III. Ms. Jackson was appointed the executrix of the estate of Ann Kozak on January 31, 2000. The inventory filed on May 26, 2000 included personal property valued at \$100,122.43. Ms. Jackson retained Donna Powers to represent the estate of Ann Kozak. Ms. Jackson retained Dean Boland to represent her in her individual capacity. Patricia Frutig and Mary Davis represented Michael Kozak, III. The issue before this Court for determination is whether the defendant was in possession of cash, tangible and intangible assets which belonged to the decedent and should be returned to the estate of Ann Kozak.

DOCKETED

LAW

Ohio Revised Code Section 2115.02

Bobko v. Sagen, (1989) 61 O. Ap.3d 397

CONCLUSION and RECOMMENDATION

Before dealing with the issues before this Court, attention must be directed to a motion filed with this court on September 26, 2005. Ms. Powers filed an Amended Motion to Dismiss on September 26, 2005. Ms. Powers requested that the amended complaint be dismissed for failure to state a claim upon which relief could be granted. The Report of Magistrate was filed on September 20, 2005. The report stated in part:

"The pleadings filed by Ms. Powers and Ms. Frutig indicated that the house located at 15684 Glenridge Avenue and the 1996 Buick LeSabre were transferred from Ann Kozak to Ms. Jackson before the death of Ann Kozak. Since these assets were not titled in the decedent's name at the time of her death, they should not be included as assets of her estate.

"Ms. Frutig stated that Ms. Jackson was in possession of \$45,000.00 in cash, personal property, as well as household goods which belonged to the decedent's estate. Ms. Powers' motion indicated that the decedent gave cash to Georgiann as a gift.

"Clearly, there are issues which remain to be litigated in this estate. Ms. Kozak should be given an opportunity to prove that Ms. Jackson is in possession of cash, intangible assets and tangible assets which belong to the estate of Ann Kozak."

Ms. Powers and Mr. Boland filed objections to the Report of Magistrate. Their objections were overruled. The Amended Motion to Dismiss was denied on December 5, 2005.

Pursuant to the Report of Magistrate dated September 29, 2005 and the judgment entries dated December 5, 2005, the Motion in Limine was granted as to the following items:

- " 1. The Plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to the property at 15684 Glenridge Avenue and its value; and
- "2. The Plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to the 1996 Buick LeSabre and its value..."

Pursuant to the Report of the Magistrate dated September 29, 2005 and the judgment entries dated December 5, 2005, the Motion in Limine was denied as to the following items:

- "3. The plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to any amounts of cash or property transferred to any party by Ann Kozak prior to her death; and
- "4. The Plaintiff is prohibited from presenting any testimony or argument at the upcoming hearing related to Exhibit A attached to the current amended complaint; and
- "5. The Plaintiff is prohibited from presenting any hearsay testimony, specifically, testifying as to what Ann Kozak, the decedent in this matter, allegedly said while alive at the upcoming hearing."

Although the amended complaint requested that these assets be included in the probate estate, Ms. Davis argued that pursuant to Exhibit 2, the plaintiff was entitled to 50 percent of the net proceeds from the sale of the real estate, funds given to the defendant by his parents to invest, and a vehicle. Ms. Davis made several attempts to address the agreement between the plaintiff and the defendant concerning the distribution of the proceeds from the sale of the real estate, cash and the vehicle. In

fact, most of the witnesses' testimony related to the events which led to the drafting and execution of Exhibit 2. As previously stated, the transfer of the real estate and the vehicle were completed before Mrs. Kozak's death. No action was filed concerning these items until after Mrs. Kozak died in 1999. The plaintiff did not argue that the transfers of real estate and vehicle was improper due to coercion, duress, undue influence or fraud.

In determining whether or not a declaratory judgment action may be brought in probate court, the issue is whether the assets in dispute are directly related to the administration of the estate. Bobko v. Sagen, supra. It was apparent from Ms. Davis' argument that she was requesting that the probate court address a contractual matter between two parties, neither of which was the estate of Ann Kozak. The probate court is not the proper forum to address a contractual dispute between Michael Kozak and Georgiann Jackson.

Ms. Davis requested that six exhibits be admitted as evidence. Exhibit 1 was a copy of a floor plan prepared by Roberta Kashi. Exhibit 2 was a copy of a document dated July 18, 1999. Exhibit 3 was a Christmas card and envelope from Georgiann Jackson to Mr. and Mrs. Nick Kashi. Exhibit 4 was a floor plan prepared by Michael Kozak. Exhibit 5 was a correspondence dated June 1, 2000 with attachments from Donna Powers to William Fumich, Jr. Exhibit 6 was a copy of a spreadsheet which included information on non-probate and probate assets within the estate of Ann Kozak.

Mr. Boland objected to the admittance of Exhibits 3, 5 and 6 into evidence. Mr. Boland argued that Exhibit 3 was inadmissible because it was not relevant. He further argued that Exhibits 5 and 6 were inadmissible because they were not relevant and the plaintiff failed to authenticate the spreadsheets.

All of the plaintiff's exhibits were admitted into evidence at the hearing. However, upon further consideration and after careful review of the records, it is recommended that Mr. Boland's objection regarding Exhibit 3 be sustained. This exhibit was not relevant to the issues before the Court.

The admissibility of Exhibits 5 and 6 were governed by Evid. R. 803(15) and Evid. R. 901(B)(1). Evid. R. 803(15) allows the admission of statements contained in a document purporting to establish an interest in property if the matter stated was relevant to the purpose of the document. Evid. R. 901(B)(1) states that an example of authentication is the testimony of a witness with knowledge of the matter. Exhibit 5 was addressed to William Fumich, Michael Kozak's attorney. Mr. Kozak testified that Exhibit 5 was a copy of the correspondence received by his attorney in June 2000 from Powers & Groh-Wargo. (T.p.135). Mr. Kozak further testified that the executrix provided him with a copy of Exhibit 6. (T.p.141).

Ohio Revised Code Section 2115.02 states in part:

"Within three months after the date of the executor's or administrator's appointment, unless the probate court grants an extension of time for good cause shown, the executor or administrator shall file with the court an inventory of the decedent's interest in real estate located in this state and of the tangible and intangible personal

property of the decedent that is to be administered and that has come to the executor's or administrator's possession or knowledge. The inventory shall set forth values as of the date of death of the decedent...."

It is one of the primary responsibilities of a fiduciary to gather all of the assets of the decedent's estate. These assets should be included in the estate's inventory.

Michael Kozak testified that his parents told him that they gave Georgiann Jackson \$45,000.00 to invest for them (T.p.118). He further testified that his parents gave monetary gifts to him and Ms. Jackson during the last several years of their lives. (T.p. 134). Mr. Kozak further testified that Ms. Jackson stated that the correct amount of the funds which were to be invested for their parents was \$45,000.00 (T.p. 126).

Although the defendant did not testify at the hearing, a copy of the deposition of Georgiann Jackson taken on February 18, 2006 and filed with the court on February 28, 2006. Mrs. Jackson stated that the correct amount was \$40,000.00. (G.J. - T.p.80). She further stated that the money was given to her as a gift. (G.J. - T.p. 83).

The evidence contradicts the defendant's statements. There is no dispute that Exhibits 5 and 6 were copies of documents which were given to the plaintiff by the defendant and her attorney. A review of the court files revealed that Ms. Powers provided the Court with a copy of Exhibit 6 at a hearing held December 8, 2003. There is also no dispute that the information within Exhibits 5 and 6 were produced

by the defendant, her attorneys or some other individual retained by the defendant. The third paragraph of Exhibit 5 included the following statement: "Enclosed, for your review, are copies of Mrs. Jackson's spreadsheets of her parents income, expenses and gifts for the years 1996 through 1999." It is also undisputed that Exhibit 6 included the following entry: "Cash: Held for Parents: \$45,000.00."

Mrs. Jackson had several years to review and amend this document. In response to the question concerning this entry, Mrs. Jackson stated that she did not type this entry. She further stated that this entry was incorrect. (G.J. - T.p. 98). However, there is no dispute that the defendant did not seek to correct or revise any of the entries within Exhibit 6 prior to the hearing. In response to the question as to why the \$40,000.00 gift was not included in Michael Kozak, Jr.'s Ohio estate tax return, the defendant stated that she did not know. (G.J. - T.p. 114). In response to the question concerning the lack of cash gifts listed with the Ohio estate tax return for Ann Kozak, the defendant stated she did not see any. (G.J. - T.p.117). In the present case, the plaintiff has provided the Court with clear and convincing evidence to prove that the defendant was in possession of cash in the amount of \$45,000.00 which belonged to the estate of Ann Kozak.

The filing of the counterclaim appeared to be disingenuous. The defendant did not produce one scintilla of evidence to prove that the plaintiff was in possession of any assets belonging to the estate of Ann Kozak. The testimony presented revealed that the plaintiff and defendant assisted each other with the removal of personal

property from their mother's house. The defendant's counterclaim should be dismissed for her failure to provide the Court with clear and convincing evidence to prove that the plaintiff was in possession of any assets which belonged to the estate of Ann Kozak.

Therefore, based on the evidence and applicable law, it is the recommendation of this magistrate that the defendant be ordered to pay over to the estate of Ann Kozak the amount of \$45,000.00. It is further recommended that the Counterclaim of Georgiann Jackson be dismissed.

Pursuant to Civil Rule 53(E)(2), a party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law unless the party timely objects to that finding or conclusion as required by Civil Rule 53(E)(3)

Respectfully submitted,

APR - 3 2006


PERDEXTER H. WILLIAMS
Magistrate

COPIES MAILED TO:

Patricia R. Frutig, Esq.
600 Superior Avenue, East
Suite 800
Cleveland, OH 44114-2655

Mary A. Davis, Esq.
600 Superior Avenue, East
Suite 800
Cleveland, OH 44114-2655

Donna J. Powers, Esq.
2 Berea Commons, suite 215
P.O. Box 1059
Berea, OH 44017

Dean Boland, Esq.
18123 Sloane Avenue
Lakewood, OH 44107

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88851

MICHAEL KOZAK III

PLAINTIFF-APPELLEE

vs.

GEORGIANN JACKSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Probate Division
Case No. 2005 ADV 101297

BEFORE: Sweeney, A.J., Kilbane, J., and McMonagle, J.

RELEASED: January 10, 2008

JOURNALIZED:

[Cite as *Kozak v. Jackson*, 2008-Ohio-50.]
ATTORNEY FOR APPELLANT

Dean M. Boland
18123 Sloane Avenue
Lakewood, Ohio 44107

ATTORNEYS FOR APPELLEE

Patricia M. Frutig
Mary Davis
Seeley, Savidge & Ebert Co., LPA
600 Superior Avenue, East
800 Bank One Center
Cleveland, Ohio 44114-2655

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

[Cite as *Kozak v. Jackson*, 2008-Ohio-50.]
JAMES J. SWEENEY, A.J.:

{¶ 1} Defendant-appellant, Georgiann Jackson (“appellant”), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

{¶ 2} This case involves an action filed by appellee, Michael Kozak III (“appellee”), for a declaratory judgment by the trial court, declaring a statement dated July 18, 1999 to be a contract or an enforceable promise. On February 5, 1999, Michael and Ann Kozak signed new wills, changing the appointment of the executor to their daughter, who is the appellant in this case. Michael and Ann Kozak died two weeks apart; Michael died on June 16, 1999, and Ann died on June 30, 1999.

{¶ 3} Michael and Ann’s wills were filed with the Cuyahoga County Probate Court on August 20, 1999. Appellant was appointed executor on January 31, 2000. The first inventory was filed on May 26, 2000. Appellee argues that he refrained from filing objections to the inventory and accounts because he believed his sister, the appellant, would abide by an agreement they had made on July 18, 1999. Appellee further contends that he filed a complaint for declaratory judgment only after he realized that his sister was not going to honor the alleged July 18, 1999 agreement.

{¶ 4} Appellee filed a complaint for declaratory judgment on April 29, 2005 and an amended complaint on July 18, 2005. Appellant filed an amended motion to dismiss on September 26, 2005, which was denied by the court on December 5,

2005. Appellant also filed an answer and counterclaim on December 28, 2005. A trial on the declaratory judgment action took place before the magistrate on March 2, 2006. Prior to the trial, the magistrate considered the motion in limine filed by appellant on February 24, 2006. The motion in limine was granted in part and denied in part. Appellee and appellant provided objections to the magistrate's ruling on the motion in limine on the record prior to the commencement of trial. The magistrate's report was filed on April 3, 2006. Cross objections were timely filed by both parties. The probate court allegedly held a hearing in chambers on July 21, 2006, where the court heard arguments that were not recorded by a court reporter and which are not part of the record.

{¶ 5} The lower court found in favor of appellee on all claims and counterclaims. The trial court's orders were journalized on September 8, 2006. The lower court overruled the motion in limine filed by appellant. The trial court found that the statement dated July 18, 1999 was an agreement between the parties to treat certain assets that were outside the estate of Ann Kozak as if they were included in the estate. The trial court ordered that the value of the house, the car, and \$45,000 in cash be credited to the estate along with applicable interest to be distributed among the heirs according to the will of Ann Kozak.

{¶ 6} Michael Kozak and his wife Ann Kozak died testate on June 16, 1999 and June 30, 1999, respectively. During the following weeks, their adult children,

Georgiann Jackson and Michael Kozak III, met at the Kozak home and began the task of clearing out and distributing various items.

{¶ 7} At the time of Ann Kozak's death she had two heirs, her son, Michael Kozak III, and her daughter, Georgiann Jackson. On July 18, 1999, prior to any probate court filings, appellant and appellee met at their mother's house to discuss various matters related to the division of the estate. Appellant was in poor health at the time of her parents' deaths, and appellee was concerned that his sister might die before their parents' assets could be distributed. Therefore, the title to the house, the car, and some cash had been transferred to appellant prior to the death of Ann Kozak for perceived protection and convenience. The parties entered into an agreement, dated July 18, 1999, concerning this division of parental assets.

{¶ 8} Appellee and appellant signed a document indicating that appellant would assign one-half the value of the house and the car to her brother, or his estate, in the event of her death.¹ The document was written by appellant's husband and signed by appellant and appellee in front of other family members. The signatures of appellant and appellee were witnessed by two different parties and notarized by another individual.

{¶ 9} The application to probate Ann Kozak's will was filed on August 20, 1999. Appellant was approved as executor on January 31, 2000. Since July 18,

¹See appellee's Exhibit 2.

1999, appellant has sold the house and the car and holds funds mentioned in the agreement. The relief sought by appellee at the lower court was a determination that the statement dated July 18, 1999 was a contract between interested parties in the administration of an estate or otherwise a document constituting a promise made by appellant upon which appellee relied. Appellee prevailed at the trial court level, and appellant now appeals.

II

{¶ 10} First assignment of error: “The court erred in denying Jackson’s motion in limine.”

{¶ 11} Second assignment of error: “The court erred in admitting testimony in violation of Evid.R. 804(B)(5).”

{¶ 12} Third assignment of error: “The court erred in permitting testimony about and admitting Exhibit 2.”

{¶ 13} Fourth assignment of error: “The court erred in failing to dismiss the complaint as it failed to allege Jackson’s contractual obligations to the estate.”

{¶ 14} Fifth assignment of error: “The court erred in reversing its original finding that the house was not an asset of the estate.”

{¶ 15} Sixth assignment of error: “The court erred in reversing its original finding that the car was not an asset of the estate.”

{¶ 16} Seventh assignment of error: “The court erred in finding the \$40,000 in cash was an estate asset.”

{¶ 17} Eighth assignment of error: “The court erred in admitting Exhibit 6 as it was unauthenticated, contains hearsay and was irrelevant.”

{¶ 18} Ninth assignment of error: “The court erred in admitting Exhibit 6 as it constituted communication pursuant to settlement.”

{¶ 19} Tenth assignment of error: “The court erred in not recusing itself after receiving ex parte communication from complainant’s counsel.”

III

{¶ 20} Because of the substantial interrelation between appellant’s first four assignments of error, we will address them together below. A trial court has broad discretion in the admission or exclusion of evidence at trial. Appellate courts review such determinations under the abuse of discretion standard. *Griffin v. MDK Food Servs.*, Cuyahoga App. No. 82314, 2004-Ohio-133. An abuse of discretion requires a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 21} Appellant argues in her first assignment of error that the trial court erred when it denied her February 24, 2006 motion in limine. This motion in limine sought

to eliminate evidence of a July 18, 1999 writing between the parties. The July 18, 1999 document between appellant and appellee, in its entirety, stated the following:

{¶ 22} **“To whom it may concern:**

Effective this date, July 18, 1999, I, Georgiann M. Jackson agree that ½ (50%) of the net value of the property at 15684 Glenridge Ave. Middleburg Hts., Ohio 44130 plus \$15,500 plus a 1996 Buick LeSabre Custom Limited VIN 1G4HR52K6TH424174 shall directly be assigned to my brother Mr. Michael Kozak III or his estate in the event of my death.”

{¶ 23} On March 2, 2006, the parties attended a hearing in order to determine the status of the July 18, 1999 document. The magistrate filed his report and recommendation on April 3, 2006.

{¶ 24} The magistrate ruled that testimony regarding the value of the property or the car was not allowed at the hearing. Specifically, the magistrate did not allow any testimony or argument “relating to the property at 15684 Glenridge Avenue and its value,” or any testimony or argument “related to the 1996 Buick and its value.”

{¶ 25} However, the magistrate did allow testimony and argument as to the other items in appellant’s motion in limine. Although the magistrate granted the first two items in appellant’s motion in limine, he denied items three, four, and five. The magistrate, therefore, allowed testimony as to amounts of cash or property transferred to any party by Ann Kozak and Exhibit A, the July 18, 1999 statement and testimony as to what Ann Kozak allegedly said while alive. Objections to the magistrate’s decision were filed and subsequently overruled by the trial court.

{¶ 26} Although the motion in limine was overruled by the trial court, the magistrate's decision was modified before it was adopted in the trial court's September 8, 2006 journal entry. The main modification in the trial court's September 8, 2006 entry stated that the value of the real property at 15684 Glenridge Avenue, Middleburg Heights, Ohio, as well as the 1996 Buick LeSabre, were now "included in the assets of the estate of Ann Kozak."

{¶ 27} There is a substantial overlap between the value of the house and the car when compared with testimony as to amounts of cash or property transferred and the information in Exhibit A. This overlap manifests itself in inconsistencies. For example, the magistrate permitted, over objection, testimony and evidence relating to the value of the house and the car on more than one occasion.² Yet on other occasions, objections to such testimony were sustained.³

{¶ 28} Given the circumstances in this case, it is illogical to assume that either the July 18, 1999 document, or "any testimony or argument at the upcoming hearing relating to any amounts of cash or property transferred to any party by Ann Kozak," could be discussed without addressing the actual content in the document.

²Tr. 45, 126, 127, 129, 130.

³Tr. 44, 166.

{¶ 29} The trial court determined that the magistrate erred in granting the exclusion of testimony concerning the first two items in appellant's motion in limine.⁴ We agree with the trial court's actions modifying the magistrate's decision by denying the motion in limine regarding the first four items. However, as discussed in more detail below, the requirements of Evid.R. 804(B)(5) were not met, and any hearsay statements by the decedent referenced in item five of the motion should not have been admitted. Therefore, we disagree with the lower court's denial of item five in the motion for limine. Although, it was error for the lower court to allow in hearsay testimony as to what the decedent allegedly said while alive, any error was de minimis. Even after removing any testimony concerning the fifth item in the motion in limine, the evidence that remains is still more than enough to support the lower court's decision.

{¶ 30} Appellant argues in her second assignment of error that the trial court erred in admitting testimony in violation of Evid.R. 804(B)(5). The admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296.

⁴Tr. 4.

{¶ 31} Evid.R. 804(B)(5) provides limited instances of when a decedent's hearsay statements may be brought into evidence. Evid.R. 804(B)(5) permits decedent hearsay testimony if *all* of the following apply:

“(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

“(b) the statement was made before the death or the development of the incompetency;

“(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.”

{¶ 32} Requirement (c) is not met by appellee's use of the decedent's hearsay testimony because appellee is not the executor or estate representative, and he did not offer the hearsay in rebuttal.

{¶ 33} Evid.R. 804(B)(5) is not intended to apply to the party opposing the decedent. Rather, it applies to the party that is substituted for the decedent. *Billikam v. Billikam* (1982), 2 Ohio App.3d 300. Appellee was not the executor; therefore, he was not entitled to offer hearsay testimony of the decedent. Moreover, “Evid.R. 804(B)(5) only permits hearsay offered to rebut testimony by an adverse party.” *Eberly v. A-P Controls* (1982), 61 Ohio St.3d 27. This district has followed the same decedent hearsay rule. “The statements objected to were not offered in rebuttal but were submitted *** as part of [a] case-in-chief ***[T]he statements are clearly inadmissible.” *In re: E.M., et al.* (Nov. 8, 2001), Cuyahoga App. No. 79249.

{¶ 34} As previously mentioned, although the requirements of Evid.R. 804(B)(5) were not met and any hearsay statements by the decedent referenced in item five of the motion should not have been admitted, the evidence is strong enough to support the lower court without it, and any error was de minimis.

{¶ 35} Appellant argues in her third assignment of error that the trial court erred in permitting testimony about and admitting Exhibit 2. This assignment is essentially the same as the argument in appellant's first assignment of error. The only difference is that appellant adds the additional argument that Exhibit 2 constitutes a contract between the parties.

{¶ 36} We find that the evidence in the record demonstrates that the signed July 18, 1999 document constitutes a meeting of the minds and satisfies all requirements of a contract. Although we agree with appellant that the writing constitutes a contract, that is where our agreement ends. The contract in this case does *not* require the return of the car, house, or money to the decedent's estate. Moreover, there is nothing in the contract to prohibit the trial court from permitting testimony concerning its terms into evidence.

{¶ 37} Appellant argues in her fourth assignment of error that the lower court erred in failing to dismiss the complaint because it failed to allege her contractual obligations to the estate. Appellant argues that the lower court should have dismissed the complaint. However, the trial court did have jurisdiction to determine

the declaratory judgment action pending before it. The probate court is a proper forum for rendering a declaratory judgment on a contract or writing constituting a contract if the property transferred is related to the administration of the estate.

{¶ 38} The writing dated July 18, 1999 was written in the context of handling the affairs of Ann Kozak after her death. The writing sets forth the understanding between appellant and appellee that all net assets were to be distributed equally between the two, consistent with the terms of their mother's will. The writing would not have been prepared, signed, and notarized if Ann Kozak had not died. Accordingly, it is a probate matter to determine whether or not the July 18, 1999 writing is a contract.

{¶ 39} The jurisdiction of the probate court is defined by R.C. 2101.24, which provides in pertinent part:

"(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute."

{¶ 40} Those matters which may properly be placed before the court include declaratory judgment actions involving the administration of an estate. R.C. 2101.24; *Corron v. Corron* (1988), 40 Ohio St.3d 75, 78-79, 531 N.E.2d 708, 711-712.

{¶ 41} Moreover, R.C. 2721.03 provides in pertinent part:

"Any person interested under a deed, will, *written contract*, or *other writing constituting a contract*, or whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance,

contract, or franchise, may have determined any question of construction or validity arising under such instrument, constitutional provision, statute, rule, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

{¶ 42} In addition, R.C. 2721.05 provides that:

"Any person *interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust*, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto in any of the following cases:

(C) To determine *any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.*"
(Emphasis added.)

{¶ 43} These statutes, taken together, allow one responsible for the administration of an estate, or personally interested in the administration of an estate, to bring a declaratory judgment action in the probate court regarding written instruments potentially affecting the rights and property which are the subject of an estate. *Corron v. Corron*, 40 Ohio St.3d at 78, 531 N.E.2d at 711.

{¶ 44} Applying the foregoing to this action, it is clear that the probate court had jurisdiction to determine the validity of the July 18, 1999 writing. The evidence demonstrates that the assets described in the July 18, 1999 writing should be treated as if they were in the estate, in accordance with the agreement of the parties. We find the actions of the lower court to be proper.

{¶ 45} Accordingly, appellant's first, second, third, and fourth assignments of error are overruled.

{¶ 46} Because of the substantial interrelation between appellant's fifth, sixth, and seventh assignments, we address them together below. Appellant argues that the trial court erred in reversing the original finding that the house, car, and cash were outside of Ann Kozak's estate.

{¶ 47} As previously mentioned, substantial evidence, including several documents as well as the testimony of Patricia Lawer, Roberta Kashi, Nicholas Kashi, Katherine Kozak, Michael Kozak III, and Wayne Jackson, was presented to the trial court. This evidence demonstrates that the July 18, 1999 writing was a contract to treat the house, car, and cash as if they were in the estate and should be divided equally between the parties. Appellant failed to produce any evidence demonstrating that the lower court abused its discretion or acted improperly regarding these three items.

{¶ 48} Accordingly, appellant's fifth, sixth, and seventh assignments of error are overruled.

{¶ 49} Appellant argues in her eighth and ninth assignments of error that the trial court erred in admitting Exhibit 6, a statement delineating probate and nonprobate assets. Exhibit 6 contained the following entry: "Cash: Held for Parents: \$45,000.00." The Exhibit 6 statement was filed with the probate court on December

8, 2003 as part of the administration of the estate of Ann Kozak.⁵ The preparation of inventories is one of the primary responsibilities of the fiduciary; however, appellant never amended this court filing. Moreover, appellant had several years to review and amend this document and never did. Appellant alleges that she did not type the \$45,000 entry. However, there is no dispute that she did not seek to correct or revise any of the entries within Exhibit 6 prior to the hearing.

{¶ 50} There is no evidence in the record to support appellant's claim that the exhibit was prepared or presented for purposes of settlement. The purpose of Rule 408 is to allow parties to have private, free-flowing settlement discussions. Trial Exhibit 6 is not derived from private communication between the parties. It is not marked "for settlement purposes." There is nothing private about this document; it was filed with the court as a representation as to the disposition of estate and nonestate assets.

{¶ 51} Exhibit 6 was not related to settlement and was previously filed with the court, therefore admitting it did not constitute error.

{¶ 52} There is nothing in the record demonstrating that Exhibit 6 was unauthenticated, contained inadmissible hearsay, was irrelevant, or constituted communication pursuant to settlement. We find no error on the part of the lower court.

⁵See magistrate's report, p. 6.

{¶ 53} Accordingly, we overrule appellant's eighth and ninth assignments of error.

{¶ 54} Appellant claims in her tenth assignment of error that the lower court erred in not recusing itself after receiving an alleged ex parte communication from appellee's counsel.

{¶ 55} However, a review of the record demonstrates that appellant did not request that the judge recuse himself. In addition, the record demonstrates that appellant did not bring any alleged potential conflict to the court's attention either before or after the trial court's decision was docketed. Moreover, appellant never filed an affidavit of prejudice to have the judge removed from the case. It is not within the purview of this court to void a trial court judgment on the basis of an argument that the trial judge should have been disqualified. If a party believes that a judge is biased and should not preside over a case, the burden is on that party to file an affidavit of disqualification with the Supreme Court of Ohio. *Furlan v. Saloka*, Cuyahoga App. No. 83186, 2004-Ohio-1250.

{¶ 56} It is a well established principle of law in Ohio that a party cannot raise new issues for the first time on appeal. *McCarthy, Lebit, Crystal & Haiman Co., LPA v. First Union Management, Inc.* (1993), 87 Ohio App.3d 613, 620, 622 N.E.2d 1093, 1097; *Addyston Village School Dist. Bd. of Edn. v. Nolte Tillar Bros. Constr. Co.* (1943), 71 Ohio App. 469, 26 O.O. 379, 49 N.E.2d 99; *State Planters Bank & Trust*

Co. v. Fifty-Third Union Trust Co. (1937), 56 Ohio App. 309, 9 O.O. 297, 10 N.E.2d 935; *Hiller v. Shaw* (1932), 45 Ohio App. 303, 187 N.E. 130.

{¶ 57} Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. Nor do appellate courts have to consider an error which the complaining party could have called, but did not call; to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78.

{¶ 58} Accordingly, appellant's tenth assignment of error is overruled.

{¶ 59} We find that the lower court's actions were proper. The lower court properly denied appellant's motion in limine and did not abuse its discretion. Any error on the part of the lower court regarding the fifth item in the motion in limine was harmless error and did not affect the decision. The July 18, 1999 writing memorialized the agreement of the parties to treat the car, cash, and house as if they were part of Ann Kozak's estate.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., CONCURS;

CHRISTINE T. McMONAGLE, J., CONCURS IN JUDGMENT ONLY

PROBATE COURT
FILED
SEP - 8 2006
CUYAHOGA COUNTY, O.

IN THE PROBATE COURT DIVISION
OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Michael Kozak, III.)
Plaintiff,)
vs.)
Georgiann Jackson, Executrix of the)
Estate of Ann Kozak, Deceased, et. al,)
Defendants.)
CASE NO. 2005 ADV 101297
JUDGE JOHN E. CORRIGAN
JUDGMENT ENTRY

This matter is before the Court on **Cross Objections of Kozak to the Magistrates' Report of April 3, 2006**, filed April 27, 2006, by Patricia R. Frutig, attorney for Plaintiff Michael Kozak, III.

The Court finds after reviewing the entire file, including the Magistrate's Report, and conducting a hearing on the objections that the cross objections are well-taken and should be granted and the decision of the magistrate adopted as modified as the decision of this Court.

The Court further finds that the value of the real property at 15684 Glenridge Avenue and the 1996 Buick LeSabre be included in the assets of the Estate of Ann Kozak, deceased, plus any interest that has accrued on any of the investments.

Therefore, it is **ORDERED** that the Cross Objections of Kozak to the Magistrates' Report of April 3, 2006, are **GRANTED** and the decision of the magistrate **ADOPTED AS MODIFIED** as the decision of this Court.

It is further **ORDERED** that a judgment entry on the Amended Complaint for Declaratory Judgment be filed instanter in accordance with this entry.

It is further **ORDERED** that the Clerk of the Court shall serve upon all parties notice of the judgment and date of entry pursuant to Civ. R. 58(B).

SEP 8 2006
DATE

John E. Corrigan
PROBATE JUDGE

DOCKETED

Appendix G

Probate Court of Cuyahoga County
Division of the Court of Common Pleas

PROBATE COURT
FILED
SEP - 8 2006
CUYAHOGA COUNTY, O.

MICHAEL KOZAK, III,)
Plaintiff,)
vs.)
GEORGIANN JACKSON, Executrix)
of the Estate of Ann Kozak, Deceased,)
et al.,)
Defendants.)

DOC. NO. 2005 ADV 101297
JUDGMENT ENTRY

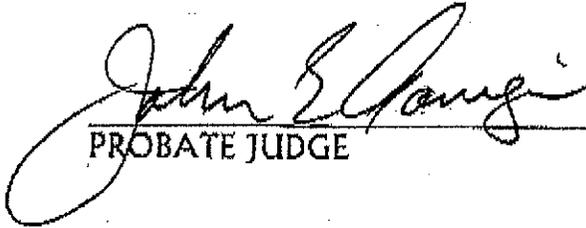
This matter is before the Court on an Objection to Magistrate's Report filed April 17, 2006 by Dean Boland, attorney for Georgiann Jackson.

The Court finds, after reviewing the entire file, including the Report of Magistrate and conducting a hearing, that the objections are not well taken and should be overruled and the decision of the magistrate adopted as modified as the decision of this Court.

Therefore, it is ORDERED that the Objection to Magistrate's Report is OVERRULED and the decision of the magistrate adopted as modified as the decision of this Court.

It is further ORDERED that the Clerk of the Court shall serve upon all parties notice of this judgment and date of entry pursuant to Civ. R. 58(B).

SEP 8 2006


PROBATE JUDGE

DOCKETED