STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals, Hon. K. F. Kelly, Presiding

SUSAN TKACHIK, Successor Personal Representative of the Estate of Janet Elaine Mandeville, Deceased,

Docket No. 138460

Plaintiff-Appellant,

vs.

FRANK MANDEVILLE, JR.,

Defendant-Appellee.
_____/

BRIEF ON APPEAL -- APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

Index of Authorities ii

Statement Concerning Appellate Jurisdiction and Standard of Review iii

Statement of Questions Involved iv

Counter Statement of Facts 1

Argument 3

I. A CONTRIBUTION CLAIM AGAINST THE DEFENDANT-APPELLEE ON AN UNJUST ENRICHMENT THEORY IS NOT APPROPRIATE UNDER THE FACTS OF THIS CASE 3

II. THE ESTATE'S ARGUMENT IS TANTAMOUT TO A "POSTHUMOUS DIVORCE" AND IS PRECLUDED BY ESTABLISHED PUBLIC POLICY 7

Relief Requested 9

INDEX OF AUTHORITIES

Page

CASES

Buell v Orion State Bank, 327 Mich 43; 41 NW2d 472 (1950) 3, 5

Michigan Medical Service v Sharpe, 339 Mich 574; 64 NW2d 713 (1954) 4

People v Sobczak-Obetts, 463 Mich 687, 694-695; 625 NW2d 764 (2001) 9

Potter v Lindsay, 337 Mich 404; 60 NW2d 133 (1953) 4

Strohm v Keopke, 362 Mich 659 (1958) 3

Tokar v Estate Tokar, 258 Mich App 350, 355; 671 NW2d 139 (2003).....7

MICHIGAN STATUTES

MCL 552.102 7

MCLA 700.2607 7

MCL 700.2801 ..... 5, 7-9

MCL 700.2801(2) 9

MCL 700.2801(2)(e)(i).....2

MCL 700.2803 8

MCL 700.2803(2)(b) 9

OTHER AUTHORITIES

76 A.L.R.2d 1004 (2004).....7

STATEMENT CONCERNING APPELLATE JURISDICTION AND STANDARD OF REVIEW

Appellee accepts Appellant's Statement of the Basis of Jurisdiction and Standard of Review as complete and accurate.

STATEMENT OF QUESTIONS INVOLVED

Appellee accepts Appellant's Statement of Questions Involved as follows:

WHETHER AN ESTATE MAY BE ENTITLED TO CONTRIBUTION FROM A DECEDENT'S HUSBAND OR WIFE BASED ON THE DECEDENT'S MAINTENANCE OF PROPERTY WHICH WAS HELD AS TENANCY BY THE ENTIRETY WITH THEIR SPOUSE.

Michigan Court of Appeals Answered:	"No"
Macomb County Probate Court Answered:	"No"
Plaintiff-Appellant Answers:	"Yes"
Defendant-Appellee Answers:	"No"

COUNTER STATEMENT OF FACTS

Plaintiff/Appellant, the Decedent's Estate of Janet Mandeville, Deceased, brought action in the Macomb County Probate Court against Defendant-Appellee Frank Mandeville, Jr., the Decedent's surviving spouse, seeking to prevent Frank Mandeville, Jr. from receiving title to real estate held with the Decedent by the entireties and for contribution alleging the Decedent paid the mortgage, insurance and property taxes on the real estate during Appellee's absence. On Motion for Reconsideration, this Court entered its Order on September 28, 2007 remanding this matter to the Court of Appeals for consideration of the narrow issue of the legal question whether a contribution claim against the Defendant, based on an unjust enrichment theory, is appropriate under the facts of the case. (Page 50a of Appendix). The Court of Appeals issued its Opinion on February 5, 2009 concluding that a contribution claim predicated upon a theory of unjust enrichment for expenses made related to an entireties property is not appropriate when brought by the Decedent's Estate against the surviving spouse, affirming the Probate Court's grant of summary disposition (51a).

As set forth in the Court of Appeals' Opinion, the record has established and it is undisputed that the Defendant and Decedent Janet Mandeville married in 1975 and remained married until the Decedent's death on July 13, 2002. In 1984, the Defendant and the Decedent purchased a single-family residence in Macomb County, Michigan titling the property in the name of "Frank Mandeville, Jr. and Janet Elaine Mandeville, his wife" and in 1987 acquired property in Ogemaw County, Michigan being titled in the name of "Frank Mandeville, Jr. and Janet E. Mandeville, husband and wife" creating tenancies by the entireties (51a – 52a). As the Court of Appeals noted, the Defendant and the Decedent held both properties free and clear of any lien or encumbrance until 1999 when the parties jointly mortgaged the Macomb County

property obtaining a loan in both of their names for $200,000.00 (52a). The Defendant was absent for an approximate 18-month period prior to the Decedent's death. As correctly noted by the Court of Appeals, the Decedent never sought a divorce or separation nor did the Decedent file an action for family support based on spousal abandonment, noting that according to an Affidavit of the Decedent's close friend submitted as part of the record, neither the Decedent nor the Defendant considered their marriage to be terminated (52a).

Shortly prior to her death, the Decedent executed a Trust and Will disinheriting Defendant, stating it was her intent "to give nothing to my husband". Defendant commenced an action seeking to set aside the Decedent's Will and Trust, however, the Probate Court dismissed the contest pursuant to MCL 700.2801(2)(e)(i) because the Defendant had been absent from the Decedent for more than a year. Appellant then filed a Complaint requesting a determination that the Probate Court's previous ruling operated to destroy the tenancy by the entireties converting the tenancy by the entireties to tenants in common, entitling the Estate to retain a one-half interest in the properties. The Probate Court denied this request finding that MCL 700.2801(2)(e)(i) does not terminate the tenancies in the entireties, but rather, by the express provisions of the statute, is limited in its application to intestate succession, spousal entitlements and priority among persons seeking appointment as personal representative. Appellant than filed an Amended Complaint seeking contribution for the Decedent's maintenance of the properties during the Defendant's absence, including insurance, taxes and mortgage payments. This claim was also summarily dismissed by the Probate Court holding that tenancies by the entireties is held without regard to who provided contribution (53a).

The Court of Appeals issued its detailed written Opinion commencing at page 51a of the Appendix essentially concluding that a person is not unjustly enriched by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution, further refusing to create an action for posthumous divorce and refusing to interfere and change the way the parties agreed to hold title.

ARGUMENT

I. A CONTRIBUTION CLAIM AGAINST THE DEFENDANT-APPELLEE ON AN UNJUST ENRICHMENT THEORY IS NOT APPROPRIATE UNDER THE FACTS OF THIS CASE.

Appellant again argues several cases recognizing a co-tenant's right to bring a contribution claim against another co-tenant to recover the cost of taxes, mortgage payments and insurance, relying upon Strohm v Keopke, 362 Mich 659 (1958). The Strohm Court held, however, that the doctrine of contribution between co-tenants is based purely upon equitable considerations to prevent unjust enrichment. Appellant fails to recognize the survivorship feature of married parties holding title to real estate as tenants by the entireties. As set forth in the Court of Appeals Opinion at page 54a of Appellant's Appendix, a tenant by the entirety has no interest separable from that of the other, one spouse being legally unable to alienate or encumber the property without the other spouse's consent, both spouses having the right of survivorship. This case is correspondingly distinguished from the authority relied upon by Appellant which is inapposite in its entirety.

Appellant also fails to address or refute the legal principle set forth by this Court in 1950 in the case of Buell v Orion State Bank, 327 Mich 43; 41 NW2d 472 (1950) where the Supreme Court stated that "No person is unjustly enriched unless the retention of the benefit would be unjust." (Id. at 56) further stating:

> **One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.** (Id.)

A person is not unjustly enriched by receiving a benefit which the law provides or by receipt of a benefit pursuant to an express agreement of the parties. Michigan Medical Service v Sharpe, 339 Mich 574, 577; 64 NW2d 713 (1954). As the Supreme Court stated in Potter v Lindsay, 337 Mich 404; 60 NW2d 133 (1953):

> Having reached this conclusion about the transfer itself, it is my opinion the question of resulting or constructive trust or unjust enrichment can not enter into the decision. If a party competent to make a contract or agreement enters into the contract with full knowledge of the consequences and with an intention to be bound by her act, then a court of equity has no power to set it aside. Equity follows the law. Equity enforces a legal contract. This being true, plaintiff can not claim unjust enrichment or unmerited reward as a ground for a constructive trust.
>
> (Id. at 413).

Likewise here, Appellant cannot claim unjust enrichment or unmerited reward as a ground for contribution.

Instead of refuting or distinguishing the foregoing authorities, Appellant instead continues to argue divorce and property division cases from other jurisdictions. All of the cases relied upon by Appellant involved a Court's division of property between a living husband and wife in the context of domestic relations actions. In those cases, as in partition cases between co-tenants, the Court is called upon to make an equitable division of the property rights existing between the two litigants before the Court. These cases are inapplicable to a decedents' estate, after the death of the spouse, pursuing the surviving spouse for contribution. Real estate held by the entireties with rights or survivorship, jointly owned bank accounts and other jointly owned assets, ownership of which all pass title by operation of law upon the death of one of the joint

owners, cannot be considered unjust enrichment to the recipient. If Appellant's arguments are accepted, then every such recipient of jointly owned property, real or personal, is subject to suit for contribution to prevent unjust enrichment to recover the deceased joint owner's interest. This argument is precluded by the Buell opinion as well as by the agreement of the parties made between Mr. and Mrs. Mandeville when deciding to take title as tenants by the entireties. There is no obligation in any jurisdiction for a joint owner to be required to pay the deceased owner his or her interest or expenses upon the death of that owner and title passing to the survivor. The surviving joint owner receiving title by survivorship, as the parties agreed when titling the property, is not unjustly enriched and no claim for contribution can lie.

In her brief, Appellant recognizes the Court of Appeals' distinction between the application of the doctrine of contribution to a tenancy by the entireties held by two living persons seeking a property division of their jointly owned asset from this case involving an action by the deceased owner's estate against the surviving joint owner. Appellant, however, fails to refute this distinction. Instead, Appellant argues that the Legislature has already determined that a compelling state interest exists by passing a statute which provides that spouses that are willfully absent from the marriage are barred from receiving any inheritance. Appellant, however, fails to recognize the express provision set forth in Section 2 of MCL 700.2801 providing that, for purposes of parts 1-4 of EPIC (Intestate Succession, Spousal Elections/Allowance and Preference as Appointment of Personal Representative), a surviving spouse does not include a spouse who is willfully absent for more than a year (2)(e)(i). This statute is limited in its application by the Legislature and does not apply to jointly owned assets or rights of survivorship, bequests in Wills or Trusts, beneficiary designations, etc. This statute provides no support for Appellant's arguments to apply the doctrine of contribution to avoid

unjust enrichment. The joint owner surviving to sole ownership as a result of the way title to the property was made by agreement of the parties is not unjustly enriched and the doctrine of contribution has no application.

Further, as the Court of Appeals noted in its Opinion, the record establishes that the parties were married for approximately 27 years, from the date of their marriage in 1975 until the death of the Decedent in July of 2002. The Court of Appeals' Opinion correctly recognized that there was never any action for divorce, separation, abandonment, etc. by the Decedent prior to her death nor did either party consider the marriage to be dissolved. The Court of Appeals further recognized that the property was held free and clear until 1999 when the parties jointly obtained a loan and mortgaged the Macomb Township property for $200,000.00 (52a), the Appellate Court noting that at the death of the Decedent, the balance on the mortgaged remained at $167,000.00 (53a). While Defendant survived to title, Defendant takes the property subject to the mortgage balance and must pay the same. Appellant should not be heard to claim unjust enrichment where Defendant-Appellee is obligated to pay the mortgage the proceeds of which were retained by Appellant.

As the Court of Appeals recognized in its Opinion (55a), unlike the cases relied upon by Appellant between two co-tenants or married tenants by the entireties seeking the division of their property interests, the Defendant here only received that which was given to him by operation of law, without any obligation, ownership of the whole entireties property. The Decedent's Estate cannot claim contribution from the surviving spouse as it relates to entireties property on a theory of unjust enrichment as there is no inequity, nor any law, with which to force restitution from a surviving spouse who owns property in the entirety (at 55a). Unlike property divisions between living persons, one is not unjustly enriched by retaining benefits

acquired which law and equity give him absolutely without any obligation on his part to make restitution, especially where the benefit results from the express agreement of parties reached when they titled their jointly owned asset between themselves with full rights of survivorship.

II. THE ESTATE'S ARGUMENT IS TANTAMOUT TO A "POSTHUMOUS DIVORCE" AND IS PRECLUDED BY ESTABLISHED PUBLIC POLICY.

There is no question that Appellant is seeking to obtain contribution as in the context of a property division in a divorce as clearly shown by Appellant's brief and the myriad domestic relations cases cited therein both from the State of Michigan and other jurisdictions. A Court is without jurisdiction to render a judgment of divorce and thereafter distribute jointly held property including entireties property (MCL 552.102) after the death of one of the parties as there must be living parties or there can be no relationship to be divorced. (55a, Court of Appeals Opinion at p. 5) (Tokar v Estate Tokar, 258 Mich App 350, 355; 671 NW2d 139 (2003)). As the Court of Appeals correctly noted at page 5, in reality, Appellant is seeking to create a new cause of action that would permit post-death property distribution in accord with domestic relations law which would run directly against the long established law and statutory provisions regarding descent and distribution.

Appellant relies upon MCL 700.2801 and the Annotated Law Reports (76 A.L.R.2d 1004 (2004)) to argue a policy supporting contribution/exoneration. Contrary to Appellant's reliance upon the Annotated Law Reports article, the Michigan Legislature has by statute precluded any claim of exoneration or contribution at section 2607 of EPIC, MCLA 700.2607. This statute specifically provides that a devise passes subject to any mortgage or other security interest existing on the date of death without right of exoneration. Appellant argues that under the A.L.R. article, a surviving spouse could seek exoneration which impliedly authorizes an estate to

seek exoneration or contribution from the surviving spouse. While Appellee denies this alleged corollary, the Michigan Legislature has expressly precluded exoneration, defeating Appellant's policy argument. Correspondingly, as there is no right of exoneration in Michigan by statute, Appellee is obligated to pay the remaining mortgage balance on the property, precluding any claim of unjust enrichment.

Appellant then relies upon MCL 700.2801 arguing that the Court of Appeals failed to recognize the "compelling state interest" and "public policy" that prevents an absent spouse "from benefiting from that absence". Contrary to Appellant's argument, however, MCL 700.2801 is limited in its own terms to parts 1- 4 of EPIC governing intestate succession, spousal elections and preference for appointment of personal representative. This statute, by its own terms, does not apply to any jointly owned real estate, jointly owned accounts, beneficiary designations or other "benefits" a joint owner would receive by the death of the other joint owner. The public policy espoused by the Legislature in this section only precludes a willfully absent surviving spouse from taking under the laws of intestacy, making spousal elections or from being personal representative. The statute does not preclude any and all "benefit" as argued by Appellant.

The limited scope of the policy of MCL 700.2801 is in stark contrast to the public policy espoused by the Legislature in the Michigan Slayer Statute, MCL 700.2803. This statute does not contain any limiting definitional language as 700.2801, and rather, the Slayer Statute is written in the broadest terms providing for a forfeiture of all benefits, not only intestate inheritances under EPIC, but also all interests which are revocable, including insurance benefits and specifically including the severance of tenancy by the entireties property. The Slayer Statute specifically provides that the felonious and intentional killing of the Decedent:

> (b) Severs the interest of the decedent and killer in property held by them at the time of the killing as joint tenants with rights of survivorship, transforming the interests of the decedent and killer into tenancies in common.

(MCL 700.2803(2)(b)).

The Slayer statute goes even further by containing a catch all provision which, in accordance with case law authority, specifically provides that regardless of any omission from the statute, a killer cannot profit from his or her wrong.

If the Legislature wanted to establish public policy as argued by Appellant precluding a surviving spouse who was "absent" from receiving any "benefit" as a result of the spouse's death, the Legislature could have written the broad Slayer Statute provisions into MCL 700.2801. Instead, the Legislature, in its expression of policy, distinguished between a willfully absent spouse and a spouse who murders the Decedent. The Legislature's pronouncement of policy in MCL 700.2801 expressly precludes Appellant's argument. As the Court of Appeals noted, the judicial role precludes imposing different policy choices than those selected by the Legislature (citing People v Sobczak-Obetts, 463 Mich 687, 694-695; 625 NW2d 764 (2001).

RELIEF REQUESTED

Unlike the cases cited by Appellant, in this case, Appellee is not unjustly enriched by receiving a benefit involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution, especially where the benefit arises from the express agreement of the parties reflected by the way they titled their real estate when it was acquired over 20 years ago as tenants by the entireties with full rights of survivorship. Likewise, the public policy argued by Appellant is expressly refuted and precluded by the policy espoused by the Legislature in limiting the preclusive scope of MCL 700.2801(2).

WHEREFORE, Appellee prays this Honorable Court affirm the rulings of the Court of Appeals and the Macomb County Probate Court dismissing Appellant's claim for contribution.

Respectfully submitted,

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By: _____

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