

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Judges: Kurtis T. Wilder, Mark J. Cavanagh, and Michael J. Kelly

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

LINCOLN ANDERSON WATKINS

Defendant-Appellant.

Supreme Court No. 142031

Court of Appeals No. 291841

Lower Court No. 06-008116-FC

BRIEF OF AMICUS CURIAE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF JURISDICTION

CDAM accepts and incorporates the statement of jurisdiction set forth in Defendant-Appellant's brief filed May 24, 2011.

STATEMENT OF QUESTIONS PRESENTED

- I. DOES MRE 404(b) PREVAIL OVER MCL 768.27a BECAUSE THE STATUTE VIOLATES THIS COURT'S CONSTITUTIONAL POWER TO ESTABLISH, MODIFY, AMEND AND SIMPLIFY THE PRACTICE AND PROCEDURE IN ALL COURTS OF THIS STATE; FURTHERMORE, WAS *MCDUGALL v SCHANZ* WRONGLY DECIDED?

The Court of Appeals and the parties did not address whether *McDougall v Schanz* was wrongly decided. As to the remaining part of the question:

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answers, "No".

Amicus CDAM answers, "Yes".

STATEMENT OF FACTS

CDAM accepts and incorporates the statement of facts set forth in Defendant-Appellant's brief filed May 24, 2011.

In its March 30, 2011 order granting leave to appeal (81a), this Court invited CDAM to file an *amicus curiae* brief.

I. MRE 404(b) PREVAILS OVER MCL 768.27a BECAUSE THE STATUTE VIOLATES THIS COURT'S CONSTITUTIONAL POWER TO ESTABLISH, MODIFY, AMEND AND SIMPLIFY THE PRACTICE AND PROCEDURE IN ALL COURTS OF THIS STATE; FURTHERMORE, *MCDOUGALL v SCHANZ* WAS WRONGLY DECIDED.

Issue Preservation

The Court of Appeals in the present case specifically held that the statute did not violate the separation of powers provisions of the Michigan Constitution, applying the test set forth in *McDougall v Schanz*.¹ This Court has discretion to apply a different test and overrule a wrongly decided case.²

Standard of Review

A separation of powers challenge to a statute is a question of law reviewed *de novo*.³

Discussion

CDAM agrees with Appellant and Appellee that MCL 768.27a and MRE 404(b) are irreconcilable, in that the statute plainly allows propensity evidence that the evidence rule excludes (see Appellant's brief, p 8-9; Appellee's brief, p 6-9). Therefore, this Court must resolve the separation of powers challenge in order to decide this case.

Const 1963, art 3, § 2 expressly provides for separation of the powers of the three branches of State government:

¹ See *People v Watkins*, unpublished opinion per curiam of the Court of Appeals, decided October 5, 2010 (73a), slip op, p 4-5; following *People v Watkins*, 277 Mich App 358, 363-365; 745 NW2d 149 (2007), citing *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

² See, e.g., *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008) (overruling prior precedent and adopting a new test to evaluate a double jeopardy challenge involving multiple punishment for the same offense).

³ *McDougall v Schanz*, *supra*, p 23-24.

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

As a corollary, Const 1963 art 6, § 5 provides, in pertinent part:

The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. . . .

Our 1963 State constitution does not, in so many words, specify whether evidence rules are included in the phrase “practice and procedure.” However, during the 1961 Constitutional Convention, the delegates ultimately rejected a proposal that would have added a provision that “where there is a conflict between supreme court rule and a statute concerning evidence or substantive law the statute shall prevail.”⁴ In opposing the proposal, delegate Robert J. Danhof observed:

Rules of evidence have historically been made by the courts over the years. They have developed through usage, through practice, through various cases, and with but very few exceptions, except as relates to presumptions and privileges, the rules of evidence as to what may be introduced are and should continue to be a court function. The legislature may write statutes as they relate to the substantive law, but the rulemaking power of the court as it relates to the admission of evidence should not be limited, as this would do.⁵

Delegate Eugene Wanger pointedly asked:

My question is, do you want the supreme court of the state, by court rule, to be able to override any statute which sets up a rule of evidence? As you know, we have many statutes which clearly say what is admissible in evidence and what is not, and this determines the outcome of many, many, cases. I just want to know, do you desire that the supreme court, under this section of the committee proposal, shall, by a court rule, be able to override any statute regarding a rule of evidence?⁶

⁴ 1 Official Record, Constitutional Convention 1961, p 1259; 1294.

⁵ *Id.*, p 1289.

⁶ *Id.*, p 1290.

Ultimately, Mr. Danhof responded:

Now, the question I was asked by Mr. Wanger is a very tough question, that is to say, should evidence be counted as procedure or not. Normally it is. Possibly there are some rules that should not be. We know that it is a difficult line between procedure and substantive in some cases. And, as a matter of fact, the same subject matter will sometimes be called substantive and sometimes procedural depending on the context. As far as I am concerned, if it is a rule of evidence of the ordinary type, let's say it is something about the hearsay rule, as to whether hearsay evidence should be admitted under some exceptions, there is no objection that I know of to the court determining whether it should be admitted or not, because that has to do with the way the case will be conducted in the court.^[7]

In *McDougall v Schanz*, *supra*, this Court set forth the following test to determine whether a court rule trumps an inconsistent statute:

We conclude that a statutory rule of evidence violates Const 1963, art 6, § 5 only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified. . . . Therefore, if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration the court rule should yield.^[8]

This Court went on to hold that MCL 600.2169⁹, setting forth detailed requirements for a person to qualify as an expert in a medical malpractice case, took precedence over MRE 702¹⁰:

⁷ *Id.*, p 1292.

⁸ *McDougall v Schanz*, *supra*, p 30-31 (citations and internal punctuation omitted).

⁹ See Appendix 1 for the full text of the statute.

¹⁰ At the time of the opinion in *McDougall*, MRE 702 provided: "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This Court subsequently amended the rule, effective January 1, 2004, to delete the word "recognized" in the introductory clause; delete the comma after "education"; and to insert at the end of the rule the clause: "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." 469 Mich xlv (2003).

[W]e conclude that § 2169 is an enactment of substantive law. It reflects wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists. We agree with the Court of Appeals dissent in *McDougall* that the statute reflects a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of defensive medicine, the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors—all matters well beyond the competence of the judiciary to reevaluate as justiciable issues.^[11]

More recently, our Court of Appeals, in *In re Moon Estate*,¹² held that MRE 601,¹³ which provides generally that all witnesses are competent to testify, trumps the so-called “dead man’s statute”, MCL 600.2166,¹⁴ which makes a witness incompetent to testify as to a matter equally known to the witness and a dead person, absent corroborating evidence. The Court of Appeals, applying the *McDougall* test, concluded:

The *McDougall* Court suggested that rules designed to “let the jury have evidence free from the risks of irrelevancy, confusion and fraud” are generally procedural in nature. 461 Mich at 31 n 15. Appellant argues that the substantive legislative purpose of the dead man’s statute is to prevent the living from lying about the dead. In other words, the statute is meant to prevent fraud and enhance the reliability of testimony in court. Therefore, the dead man’s statute is exactly the type of rule that *McDougall* held up as being purely procedural and thus subject to the Supreme Court’s

¹¹ *McDougall v Schanz, supra*, p 35 (internal punctuation omitted).

¹² *In re Moon Estate*, unpublished opinion per curiam of the Court of Appeals, decided January 27, 2011 (Docket No. 294176) (Appendix 2).

¹³ MRE 601 provides: “Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.”

¹⁴ MCL 600.2166(1) provides: “In an action by or against a person incapable of testifying, a party’s own testimony shall not be admissible as to any matter which, if true, must have been equally within the knowledge of the person incapable of testifying, unless some material portion of his testimony is supported by some other material evidence tending to corroborate his claim.”

rulemaking authority. *Id.* We hold that *McDougall* does not act to revive the dead man’s statute, and the probate court did not err by admitting appellee’s testimony.^[15]

Turning to the present case, MRE 404(b)(1) excludes propensity evidence in both criminal and civil cases. The court rule is designed to keep juries from hearing potentially irrelevant or confusing evidence, and, under *McDougall*, should be treated as procedural, not substantive; trumping MCL 768.27a.

Furthermore, to the extent *McDougall* requires a contrary result, the *McDougall* test is simply bad law, for several reasons:

First, it concedes too much power to our Legislature to pass rules of evidence, contrary to the intent of the framers of our 1963 Constitution.

Second, the phrase “judicial dispatch of litigation” is too vague. For example, does the Legislature have the power to enact legislation that precludes the Court of Appeals from reviewing unpreserved sentencing guideline scoring errors? See *People v McCraine*, 471 Mich 879, 881; 686 NW2d 488 (2004) (Markman, J, concurring) (“I am not as certain as Chief Justice Corrigan that, in light of MCR 6.429(C), such legislation would “fall within the Legislature’s authority.”)

Third, if this Court was concerned about the public policy behind a conflicting statute, it could, after publishing a proposal for comment and holding a public hearing, simply choose to amend the court rule to conform to the statute – which this Court did not do in the present case.¹⁶

¹⁵ *In re Moon Estate*, *supra*, slip op, p 5.

¹⁶ Compare *People v Kimble*, 470 Mich 305, 314 n 7; 684 NW2d 669 (2004), in which this Court found it unnecessary to resolve a conflict between MCR 6.429(C) and MCL 769.34(10), choosing instead to amend the court rule to conform to the statute.

SUMMARY AND RELIEF

For all of the above reasons, CDAM concurs in the relief requested in Defendant-Appellant's brief filed May 24, 2011. Furthermore, this Court should overrule *McDougall v Schanz*, *supra*, and hold that where a statutory rule of evidence conflicts with a court rule, the court rule prevails based upon this Court's power under Const 1963, art 6, § 5 to establish, modify, amend and simplify the practice and procedure in all courts of this state.

Respectfully submitted,

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APPENDIX 1

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.2169 Qualifications of expert witness in action alleging medical malpractice; determination; disqualification of expert witness; testimony on contingency fee basis as misdemeanor; limitations applicable to discovery.

Sec. 2169. (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

(d) The relevancy of the expert witness's testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(4) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis. A person who violates this subsection is guilty of a misdemeanor.

(5) In an action alleging medical malpractice, all of the following limitations apply to discovery conducted by opposing counsel to determine whether or not an expert witness is qualified:

(a) Tax returns of the expert witness are not discoverable.

(b) Family members of the expert witness shall not be deposed concerning the amount of time the expert witness spends engaged in the practice of his or her health profession.

(c) A personal diary or calendar belonging to the expert witness is not discoverable. As used in this subdivision, "personal diary or calendar" means a diary or calendar that does not include listings or records of professional activities.

History: Add. 1986, Act 178, Eff. Oct. 1, 1986;—Am. 1993, Act 78, Eff. Apr. 1, 1994.

Constitutionality: MCL 600.2169 is an enactment of substantive law. As such it does not impermissibly infringe the Supreme Court's constitutional rule-making authority over "practice and procedure." *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

Compiler's note: Section 3 of Act 178 of 1986 provides:

"(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

"(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

"(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

"(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

"(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

"(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988."

APPENDIX 2

STATE OF MICHIGAN
COURT OF APPEALS

In re MARK E. MOON ESTATE

KRISTINA MOON, Personal Representative of
the Estate of MARK E. MOON,

UNPUBLISHED
January 27, 2011

Appellant,

v

MERLIN MOON,

Appellee.

No. 294176
Eaton Probate Court
LC No. 08-045647-DE

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

This case arises from a dispute regarding whether certain property belongs in decedent's estate. The probate court held that a partnership existed between decedent Mark E. Moon and his father, appellee Merlin Moon, and that appellee therefore has a 50% ownership stake in several items that had been listed in the estate inventory. Appellant Kristina Moon, the personal representative of decedent's estate, brought this appeal. We affirm.

I. JURISDICTIONAL CHALLENGE

As a preliminary matter, appellee argues that this Court does not have jurisdiction to hear appellant's appeal because it was not timely filed. We disagree. The existence of subject-matter jurisdiction is a question of law, which this Court reviews de novo. *Smith v Smith*, 218 Mich App 727, 729; 555 NW2d 271 (1996).

An appeal of right may be taken within 21 days of the entry of a final order or judgment. MCR 7.204(A)(1)(a). An appeal of right may also be taken within 21 days after the entry of an order deciding a motion for reconsideration, rehearing, or a new trial, if that motion was brought "within the initial 21-day appeal period...." MCR 7.204(A)(1)(b). In this case, it is undisputed that appellant moved for reconsideration within 21 days of the probate court's final order and filed this appeal within 21 days of the probate court's Opinion on Motion for Reconsideration. Therefore, if the Opinion on Motion for Reconsideration constitutes an order disposing of that motion, this appeal is timely.

Appellee argues that there was no such order because the court did not label the Opinion on Motion for Reconsideration with the word “order.” Appellant counters that the opinion contained the same language that one would expect to see in an order, and therefore it should be treated as an order. The term “order” is not defined by the Michigan Court Rules. MCR 5.162 states that all orders of the probate court must be typewritten or legibly printed in ink and signed by the judge. The Opinion on Motion for Reconsideration meets these requirements.

If a statute or court rule does not define a term, the term should be given its ordinary meaning. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488, 2007. This Court may resort to a dictionary to determine the meaning of the term. *Id.* Black’s Law Dictionary (8th ed) defines “order” as a “written direction or command delivered by a court or judge.” In the Opinion on Motion for Reconsideration, the probate court stated, “[t]he Personal Representative’s Motion for Reconsideration is denied in its entirety for the reasons set forth above.” This sentence fully comports with the dictionary definition of “order” and is typical of a sentence normally labeled by courts as an order. In addition, MCR 1.105 states that the Rules should be construed “to secure the just, speedy, and economical determination of every action...” Appellant should not be denied the chance to appeal this case merely because the probate court did not use the word “order.” Therefore, appellant timely appealed the ruling of the probate court, and we have jurisdiction to hear this case under MCR 7.204(A)(1)(b).

II. APPELLEE’S STANDING TO OBJECT

Appellant’s first argument on appeal is that appellee did not have standing to object to the inventory of the estate because he is not an heir and not an interested person under MCR 5.125. Whether a party has legal standing to assert a claim constitutes a question of law that this Court reviews de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

Generally, to have standing, “a party must have a legally protected interest that is in jeopardy of being adversely affected.” *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997). A party raising a claim must have “some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.” *Id.*, quoting *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992); ; see MCR 5.119(B) (“An interested person may object to a pending petition orally at the hearing or by filing and serving a paper which conforms with MCR 5.113.”). Although appellee, as the father of decedent, is not an heir, MCL 700.1105(c) states that “interested person” includes “any other person that has a property right in or claim against a trust estate or the estate of a decedent.” Appellee claims an ownership interest in several pieces of property listed in the inventory. Therefore, he is an interested person under MCL 700.1105(c). As an interested person whose legally protected interest could have been adversely affected by the probate process, appellee had standing to object to the pending petition under MCR 5.119(B).

Appellee’s alleged ownership stake in the estate property is a real, legally protected interest that could be adversely affected by the probate process. Therefore, we find that appellee has standing to object to the inventory.

III. DISCOVERY SANCTIONS

Appellant next argues that appellee's claims should have been dismissed as a sanction for appellee's failure to comply with the probate court's discovery order. This Court reviews a trial court's decision regarding a discovery sanction for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Id.* A decision is an abuse of discretion if it falls outside the range of principled outcomes. *Id.*

In its Opinion on Motion for Reconsideration, the probate court found that dismissal would be too harsh a sanction under the circumstances. It found no evidence that the violation was willful and that no prejudice resulted to appellant. It also stated that appellee did not have a history of deliberately delaying or failing to comply with discovery requests. The court further noted that appellee responded to some of the discovery requests, at least in part. As a remedy, the court admonished appellee to take discovery more seriously in the future and stated that it would entertain a motion for costs.

On appeal, appellant does not argue that any of the probate court's findings were erroneous and does not provide any reason or authority suggesting why the court should have applied the sanction of dismissal as opposed to some lesser sanction. Appellant merely argues that the court failed to address her request to dismiss appellee's claims as a sanction for failure to comply with the discovery order. However, this argument is unpersuasive because the court in fact addressed the issue on reconsideration. The probate court stated its willingness to entertain a motion for costs, which falls within the range of principled outcomes given the mitigating factors listed by the court, none of which are disputed on appeal. The probate court did not abuse its discretion by refusing to dismiss the case as a discovery sanction.

IV. THE DEAD MAN'S STATUTE AND MRE 601

Appellant also claims that the probate court erred by allowing testimony from appellee regarding a partnership or joint venture between appellee and appellant. Appellant claims the testimony was barred by Michigan's dead man's statute, MCL 600.2166. The dead man's statute makes inadmissible a party's testimony "as to any matter which, if true, must have been equally within the knowledge of the person incapable of testifying, unless some material portion of his testimony is supported by some other material evidence tending to corroborate his claim." MCL 600.2166(1). Appellee counters that the statute was abrogated by the adoption of Michigan Rule of Evidence 601, which states that every person is competent to be a witness unless the court finds "that he does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." MRE 601. Appellant concedes that several decisions of this Court have held that MRE 601 abrogated the dead man's statute but argues that the statute is nonetheless good law under the analysis required by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

The constitutionality of a statute is a question of law, which this Court reviews de novo. *McDougall*, 461 Mich at 23. Statutes are presumed to be constitutional unless they are clearly unconstitutional. *Id.* at 24. A statute is unconstitutional if it impermissibly infringes the

Supreme Court's exclusive authority under Const 1963, art 6, § 5, to promulgate rules governing practice and procedure. *Id.* at 18.

In *James v Dixon*, 95 Mich App 527; 291 NW2d 106 (1980), this Court held that MRE 601 abrogated MCL 600.2166. The *James* Court noted that the courts have the power to adopt rules of evidence; therefore, any conflict between the statute and the rule must be resolved in favor of the rule. *James*, 95 Mich App at 530. The Court found that MRE 601 eliminated the incompetency imposed by the dead man's statute. *Id.* at 532; see also *Dahn v Sheets*, 104 Mich App 584, 588; 305 NW2d 547 (1981); *In re Backofen*, 157 Mich App 795, 801; 404 NW2d 675 (1987).

Authority holding that MRE 601 abrogated MCL 600.2166 has not been overruled, but appellant argues that it must be reevaluated in light of *McDougall*. In *McDougall*, the Supreme Court considered the interplay between MCL 600.2169 and MRE 702, each of which involves what expert testimony is admissible. 461 Mich at 24. The Court found that the statute and the rule clearly conflicted and considered whether the statute impermissibly infringed on the Supreme Court's constitutional authority to enact rules governing practice and procedure. *Id.* at 25-26. Because the Court is not authorized to enact rules that modify substantive law, the *McDougall* Court held that the statute would be unconstitutional "only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." *Id.* at 30 (internal citations omitted). The Court also briefly discussed what types of rules of evidence are generally procedural in nature.

In general, those rules of evidence designed to allow the adjudicatory process to function effectively are procedural in nature, and therefore subject to the rule-making power. Examples are rules of evidence designed to let the jury have evidence free from the risks of irrelevancy, confusion and fraud. On the other hand certain rules of evidence are inextricably involved with legal rights and duties. They are substantive declarations of policy, although they may be drafted in terms of the admission or exclusion of evidence. [*Id.* at 31 n 15, citing 3 Honigman and Hawkins, Michigan Court Rules Annotated, 2d ed., p 404 (emphasis omitted).]

The Court then found that MCL 600.2169 was an enactment of substantive law that modified the standard of care element of malpractice. *Id.* at 36.

Appellant argues that the dead man's statute reflects a legislative policy judgment beyond mere dispatch of judicial business. This argument is supported by the federal case of *Electronic Planroom, Inc v McGraw-Hill Cos, Inc*, 135 F Supp 2d 805 (ED Mich, 2001). The court in that case applied the *McDougall* rationale to the dead man's statute and found that the statute has a legislative purpose that witnesses not be permitted to lie about the dead, who are incapable of answering. *Id.* at 816, quoting *Hudson v Hudson*, 363 Mich 23, 31; 108 NW2d 902 (1961). The court found this purpose to reflect a policy judgment beyond mere dispatch of judicial business, and, therefore, found the dead man's statute to be applicable. *Id.* However, federal district court decisions are not binding upon this Court. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008), and we disagree with the *Electronic Planroom* court's reasoning.

The *McDougall* Court suggested that rules designed to “let the jury have evidence free from the risks of irrelevancy, confusion and fraud” are generally procedural in nature. 461 Mich at 31 n 15. Appellant argues that the substantive legislative purpose of the dead man’s statute is to prevent the living from lying about the dead. In other words, the statute is meant to prevent fraud and enhance the reliability of testimony in court. Therefore, the dead man’s statute is exactly the type of rule that *McDougall* held up as being purely procedural and thus subject to the Supreme Court’s rulemaking authority. *Id.* We hold that *McDougall* does not act to revive the dead man’s statute, and the probate court did not err by admitting appellee’s testimony.¹

V. PARTNERSHIP

Appellant argues that the evidence does not support the probate court’s finding that a partnership existed between appellee and decedent. The determination of whether a partnership exists is a question of fact. *Miller v City Bank & Trust Co, NA*, 82 Mich App 120, 123; 266 NW2d 687 (1978). This Court will not overturn the probate court’s findings of fact unless they are clearly erroneous. MCR 2.613(C); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Clear error exists when, despite any evidence supporting the finding, this Court is left with a firm and definite conviction that a mistake was made. *In re Mason*, 486 Mich at 152.

The party alleging a partnership has the burden of proving its existence. *Fletcher v Fletcher*, 197 Mich 68, 72; 163 NW 488 (1917). Appellant argues that the burden is stricter when the alleged partners are relatives, citing *Lobato v Paulino*, 304 Mich 668, 670-71; 8 NW2d 873 (1943). That rule first appeared in *Cole v Cole*, 289 Mich 202; 286 NW 212 (1939), which cited to *Fletcher*. However, *Fletcher* states that the burden is heavier in disputes between partners than against outsiders because the partners themselves should be able to produce stronger evidence regarding the existence of a partnership. *Fletcher*, 197 Mich at 72. The *Fletcher* Court did not indicate that it made any difference if the alleged partners were related.

¹ In addition, it is not at all clear that the dead man’s statute would bar appellee’s testimony. Material portions of his testimony were corroborated by documentary evidence or by appellant herself. MCL 600.2166(1); *Braidwood v Harmon*, 31 Mich App 49, 57-58; 187 NW2d 559 (1971), quoting Mich Law Rev Comm, First Annual Report, 1966, p 29 (“if any material portion is corroborated either by testimony of other witnesses or by demonstrative evidence, then the testimony of the survivor should be admitted”). At the evidentiary hearing, appellee produced a receipt for a planter he purchased, which was listed on the inventory of the estate, and a contract that he entered into to have a field sprayed with pesticide. An aerial photograph was also admitted showing that the barn, which appellee claimed he and decedent built together, sat on both appellee’s and decedent’s property. Appellee’s testimony was also corroborated in part by the testimony of appellant, who agreed that appellee originally purchased the planter, that decedent’s cattle grazed on appellee’s land, that appellee did not charge rent for pasturage, that decedent did pay rent for another of appellee’s fields, and that appellee had contracted on behalf of decedent to have a field sprayed. Moreover, appellant does not identify on appeal any particular testimony by appellee that should have been excluded.

Therefore, the probate court correctly concluded that stricter proofs are not required among relatives. Further, none of the cases defines the “stricter” burden. See *Fletcher*, 197 Mich at 72; *Lobato*, 304 Mich at 674; *Cole*, 289 Mich at 204.

Under Michigan law, “[a] partnership is an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit.” MCL 449.6. Two people may have a partnership without being aware that they are partners. *Byker v Mannes*, 465 Mich 637, 646; 641 NW2d 210 (2002). Even the complete absence of subjective intent to form a partnership is not dispositive to whether a partnership exists. *Id.* at 649. The key is that the parties associate themselves to run a business for profit as co-owners, “regardless of their subjective intent to form such a legal relationship.” *Id.* at 646. Receiving a share of the profits of a business is prima facie evidence that one is a partner in that business, but not if the profits are received as rent to a landlord. MCL 449.7(4)(b).

Other indicia of a partnership include mutual agency and joint liability, a common interest in the capital used in the business, and the sharing of profits and losses. *Lobato*, 304 Mich at 674; *Miller v City Bank & Trust Co, NA*, 82 Mich App 120, 125; 266 NW2d 687 (1978). It is not necessary that control be exercised as long as it exists. *Miller*, 82 Mich App at 125. An essential element of a partnership is the contribution by the partners of capital, credit, skill, or labor. *Michigan Employment Security Comm v Crane*, 334 Mich 411, 416; 54 NW2d 616 (1952).

The record provides strong support for the conclusion that most of these indicia are present in this case. The probate court found that appellee prepared the land for the new barn and made a deal with some Amish workers to have them erect it, while decedent provided the materials. Decedent purchased a John Deere 60 tractor, but appellee purchased the parts and did the necessary repairs himself. This pattern was repeated with other equipment. Appellee also contracted to have one of the fields sprayed with pesticide. Decedent paid rent for one of appellee’s parcels, which was used to grow crops, but did not pay rent for the barns or pasturage. Decedent did the milking, but appellee did the plowing and chopping.

The record supports the probate court’s findings on all of these points, and appellant does not object to any of the specific factual findings. The facts clearly show that decedent and appellee each provided substantial capital and labor to the farming operation, by purchasing parts or equipment and working on the farm. The fact that appellee contracted with workers to build a barn for the cows and also to have one of the fields sprayed shows that he had joint authority over the farming operations with his son.

The only element of a partnership that is disputable is whether appellee received a share of the profits and losses. The probate court found that the only compensation received by appellee was rent on one of the parcels being used by the farm. Under MCL 449.7, profits paid as rent to a landlord are not sufficient to constitute prima facie evidence of a partnership. However, the statute does not suggest that payments only as rent disproves the existence of a partnership, especially when all of the other indicia of a partnership are present.

In its Decision of the Court on Objection to Inventory, the probate court stated that “none of the usual indicia of partnership exist.” The court appears to have referred specifically to the

absence of a partnership certificate, and perhaps also to the way the farm's finances were handled and the lack of any explicit partnership agreement. Even so, the court found a partnership based on the facts described above. The arrangements in this case, if unusual for a partnership, nonetheless display all of the essential hallmarks of a partnership. It is perfectly reasonable to conclude that appellee and decedent intended to run the dairy farm as co-owners of a business for profit. Although there is an argument that appellee was merely helping out his son and would not have expected an ownership stake if his son had not died, there is enough support for the probate court's holding that this Court is not left with a definite and firm conviction that a mistake was made.

Finally, appellant argues that the probate court did not have the authority to disregard appellee's argument for finding a joint venture and to instead sua sponte find a partnership. However, appellant cites no authority in support of this position, so therefore, we need not consider it. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). Moreover, to the extent that the probate court may have violated appellant's procedural due process rights by raising an issue sua sponte, any error was rendered harmless by appellant's opportunity to address the issue in her motion for reconsideration. *Al-Maliki v LaGrant*, 286 Mich App 483, 485-86; 781 NW2d 853 (2009).

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens