

NO. A12-0245

State of Minnesota
In Court of Appeals

In the Matter of:

The Estate of Tod R. Holmberg,

Decedent.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUE

When a person petitions the probate court for appointment as a personal representative in an estate does that constitute a “nomination” for purposes of Minn. Stat. §524.3-720?

STATEMENT OF THE CASE

This matter involves appeal from a denial of a request for payment of attorney fees by an interested person who petitioned for appointment as personal representative. The request for award of attorney fees was premised on the Appellant’s interpretation of Minn. Stat. §524.3-720. The District Court denied the motion.

Decedent left a handwritten and properly witnessed will. The Decedent did not nominate a personal representative in his will.

The Decedent’s surviving spouse, with priority of appointment, petitioned for appointment as personal representative to the Decedent’s estate. Notice was provided to the Decedent’s surviving children pursuant to Minnesota Law. Appellant objected to the surviving spouse’s petition, challenged the decedent’s will, and petitioned seeking appointment as personal representative of the estate. A trial was had on the petitions in Hennepin County District Court and after trial the Court issued its Order dated July 29, 2011 granting Respondent’s petition for appointment as personal representative and formally probating the Decedent’s will dated June 7, 2000.

Appellant then moved the District Court for an award of attorney fees under Minn. Stat. §524.3-720. After the issuance of the November 15, 2011 Order denying an award of attorney fees to Appellant and after denial of permission to file a motion for reconsideration of the Order, Appellant sought District Court review of the Order. District Court Judge Jay M. Quam denied Appellant’s motion in an Order dated January 3, 2012. This appeal followed.

FACTS

Decedent, Tod R. Holmberg divorced from Appellant's mother in 1989. The divorce action was extremely contentious and as a result the Decedent's relationship with his three children of that marriage was destroyed. The Decedent had no contact with his children for the many years between the divorce and the Decedent's death. Decedent married Respondent on June 12, 1993. Decedent Tod R. Holmberg completed a handwritten will on June 7, 2000 and had the will witnessed by two friends of his. This was done on the eve of an overseas trip the Decedent was taking with Respondent. (A-24) Mr. Holmberg died on December 13, 2009. After Decedent's death Respondent petitioned for appointment as personal representative of the Decedent's estate (A-2).

Appellant was not nominated in any will of the Decedent but petitioned for appointment. (A-11) In her petition for appointment, Appellant made numerous inaccurate allegations about the Decedent, the Respondent, and the nature and extent of Decedent's assets and property (A-17 through A-21). Among these was that Appellant alleged that Respondent had offered a fraudulent will for probate. (A-12)

Appellant's theory of the case at trial was that Decedent's handwritten and witnessed will might have been written by the Decedent but that witness signatures were not affixed to the will until after the Decedent's death. (A-24) Referee Dean Maus heard the trial and found that the will was valid. In his memorandum attached to his Order dated July 29, 2011 the Referee stated that it was completely logical and believable that at least two different pens were used to write the will and witness the will. The Court further stated that Respondent's sister testified credibly that she was present when Respondent found the will among Decedent's papers and that the will was completely signed at the time of its discovery. (A-24) The Court found that Respondent had

“more than” met her burden of proof. (A-25) The Court granted Respondent’s petition for appointment as personal representative, formally probated the Decedent’s will and denied Appellant’s petitions. (A-23)

Appellant then sought an award of attorney fees. (A-26) Respondent opposed that motion. The referee found that the Decedent’s will does not nominate a personal representative and that Respondent as surviving spouse and devisee of the Decedent has priority to serve as personal representative. The referee further found that neither Appellant nor Tod Carlson (Appellant’s brother) were nominated personal representatives in a will and that neither of them had priority superior to that of Respondent to serve as personal representatives. The referee did not find that Appellant’s petition for appointment constituted a nomination. (A-33, A-34 and A-37) In his letter denying the request for reconsideration Referee Maus succinctly set forth the legal analysis applicable to this situation. (A-37) Appellant’s review of the referee’s recommended order was unsuccessful (A-40 and A-42).

ARGUMENT

The standard of review for a District Court denial of payment of attorney fees is an abuse of discretion standard. In re Estate of Van Den Boom, 590 N.W. 2d 90,92 (Minn. App. 1999), review denied (Minn. May 26, 1999). Interpretation of statutes is a question of law reviewed denovo by the Court of Appeals. A.J. Chromy Constr. Co. v. Commercial Mech, Servces, Inc., 260 N.W. 2d 579, 582 (Minn. 1977).

When a person petitions the probate court for appointment as a personal representative in an estate does that constitute a “nomination” for purposes of Minn. Stat. §524.3-720?

The District Court properly interpreted Minn. Stat. §524.3-720. It should be pointed out at the outset that no one interested in this case and in no document filed in this case has anyone actually to “nominated” themselves or another person. Both Appellant and Respondent petitioned the Court for appointment. This was done without a nomination although Appellant argues that her petition acts as a “nomination” for purposes of the statute. Appellant is an “interested person” for purposes of the probate code (Minn. Stat. §524.1-201 (32)) and the District Court found as much in its order denying fees dated November 15, 2011. If an interested person was able to “nominate” themselves, or join in nominating one of them in cases where multiple interested persons had a common interest in the case, then the portion of Minn. Stat. §524.3-720 which addresses the circumstances in which interested persons are able to claim fees would be obviated. Any interested person could simply file a petition seeking appointment as personal representative in order to insure an award of attorney fees whether or not they were successful in prosecuting the proceeding. The statute references three different classifications of persons who might be entitled to award of expenses. These are: 1) “Personal representative” (appointed by the court), 2) “person nominated as personal representative” (nominated in a will of the decedent), and 3) “interested person” (defined by Minn. Stat. §524.1-201(32)).

Minn. Stat. §524.3-203 deals with priority among persons seeking appointment as personal representative. The statute provides that the person with highest priority is “the person with priority as determined by a probated will including a person nominated by a power conferred in a will.” Minn. Stat. §524.3-203(a)(1) No such person exists in this case since the probated will does not nominate a personal representative. The aforementioned priority of appointment statute does clarify, however, that it is a person “nominated by a power conferred in a will” that has the highest priority for appointment. Even if Appellant’s petition for

appointment constituted a nomination, which it did not, she was not entitled to appointment because there is no nomination by a power conferred in a will. Appellant therefore, was not entitled to the highest priority level among persons seeking appointment as personal representative. This distinction falls to Respondent who is “the surviving spouse of the Decedent who is a devisee of the Decedent.” (Minn. Stat. §524.3-203(a)(2)) The use of the term nomination in Minn. Stat. §524.3-203(a)(1) should be instructive in interpreting the use of the word in Minn. Stat. §524.3-720.

In the comment to Section 3-720 of the Uniform Probate Code it is noted in part:

a personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the “person named has an interest, as a fiduciary in seeking the probate of the will. [emphasis added]

The category in which the Appellant falls is that of an “interested person.” The fact that Appellant as an interested person petitioned for appointment does not allow her to claim that she is a “nominated” personal representative. The wording “nominated as personal representative” in Minn. Stat. §524.3-720 has consistently been interpreted to mean an individual nominated in a will. See, e.g, Estate of Torgenson, 711 N.W.2d 545,555 (Minn. App. 2006).

Minn. Stat. §524.3-720 also contains the language “or any interested person who successfully opposes the allowance of a will, is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred.” (emphasis added) This is the category Appellant falls into and she was not successful in opposing the allowance of the will. In Appellant’s brief at page nine (9) within the first full paragraph she argues that In re Sima, 2001 WL 989095(served and filed herein by Appellant) stands for the proposition that “a person named in a will who nominates herself as personal representative and who acts in good

faith is entitled to her necessary expenses and disbursements.” Sima does not say anything about a person “who nominates herself.” In Sima Ms. Manos petitioned for appointment because she was named in one of the decedent’s wills. She did not “nominate” herself. The Court in Sima stated the following in discussing Manos’ right to receive attorney fees:

the statute not only allows personal representatives to recover attorney fees, but also specifically allows nominated personal representatives to recover, whether or not the will in which they are nominated is admitted to probate. By including “nominated” personal representatives as well as personal representatives, the statute contemplates persons who have been nominated as personal representatives in wills that have not been admitted to probate prosecuting or defending will contests and recovering the expenses of that litigation, so long as they acted in good faith. [emphasis added]

The Sima Court went on in the following paragraph of the opinion to cite to Uniform Probate Code commentary in noting that “as a fiduciary for the estate’s successors, a person named as personal representative in a will that has not yet been probated is an interested person who may contest a will.” Sima at 2.

Appellant argues that the Probate Court ignored case law where the Court of Appeals has upheld application of Minn. Stat. §524.3-720 where no will names a personal representative. In support of this Appellant cites the case of Estate of Martignacco v. Estate of Adolph L. Martignacco, 689 N.W. 2d 262 (Minn. Ct. App. 2004). It is true that in Martignacco the decedent died intestate. The distinction Appellant fails to note is that in Martignacco a personal representative was appointed by the District Court and was seeking an award of attorney fees and expenses incurred after and as a result of that appointment by the Court. Thus the personal representative was seeking an award of fees based on the first three words contained in Minn. Stat. §524.3-720 and not as a “nominated” personal representative or “interested person.”

CONCLUSION

The decision of the District Court should be upheld. Appellant should not be allowed to claim expenses as a “nominated” personal representative under Minn. Stat. §524.3-720. To allow Appellant’s claim that she “nominated” herself and award her attorney fees and expenses under the statute would obviate the need for the remaining section of the statute which describes award of attorney fees to “interested person(s).” Appellant’s interpretation of the statute is inconsistent with the cited case law from both briefs herein. For all of these reasons Appellant’s requests should be denied.

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Dated: 4-6-12

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P. 132.01, Subd. 3

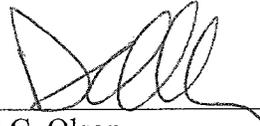
The undersigned certifies that the brief submitted herein was prepared using Microsoft 2003, complies with the typeface requirement of Minn. R. App. P. 132.01, and contains 2238 words.

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