

CASE NO. A120245

STATE OF MINNESOTA
IN COURT OF APPEALS

3

In the Matter of:

The Estate of Tod R. Holmberg,

Decedent.

APPELLANT LISA A. ROY'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

- 1. Does the plain language of Minn. Stat. § 524.3-720 require a nomination of a personal representative to be made in will to authorize payment of necessary expenses and disbursements to a nominated personal representative who prosecutes a matter in good faith?**

The Fourth Judicial District Probate Court denied Appellant Lisa Roy's motion for her necessary expenses and disbursements as a nominated personal representative under Minn. Stat. § 524.3-720 on the basis that, although Ms. Roy was nominated to serve as a personal representative and prosecuted the action in good faith, she had not been named in a will to serve as personal representative.

Estate of Martignacco v. Estate of Adolph L. Martignacco, 689 N.W.2d 262 (Minn. Ct. App. 2004)
Minn. Stat. § 524.3-720
Minn. Stat. § 645.16

- 2. Is payment of necessary expenses and disbursements under § 524.3-720 available to a party nominated as personal representative who acts in good faith or is it limited to only those incurred after appointment as personal representative?**

The Court stated that case law suggests eligibility for payment of necessary expenses and disbursements would only commence once a Court has appointed a personal representative and that person had defended or prosecuted an action for the estate.

In re Estate of Torgerson, 2008 WL 4224534 (Minn. Ct. App. Sept. 16, 2008)
In re the Estate of Sima, 2001 WL 989095 (Minn. Ct. App. Aug. 28, 2001)
Minn. Stat. § 524.3-720

STATEMENT OF THE CASE

This matter involves a motion before the Fourth District Probate Court for payment of a nominated personal representative's necessary expenses and disbursements, including reasonable attorney's fees under Minn. Stat. § 524.3-720. The Probate Referee Dean Maus denied the motion and on review, Judge Jay Quam upheld denial of the motion on the basis that current case law has only applied Minn. Stat. § 524.3-720 when a personal representative is named in a will.

After Decedent passed away, his widow petitioned the court to be named personal representative of Decedent's estate. With her petition, the widow offered a holographic will that did not name a personal representative. Based on perceived improprieties in the widow's actions, including the offering of what appeared to be a fraudulent will, one of Decedent's two daughters by a previous marriage filed a probate petition, supported by her brother. In her petition, the daughter nominated herself as personal representative on the belief that the widow was unqualified to serve as personal representative.

At trial before a Probate Referee Dean Maus, the daughter presented expert testimony regarding the will's witness signatures. After trial, the Referee found the will to be valid and appointed the widow as personal representative. The daughter then moved the Probate Court for payment of her necessary expenses and disbursements, including reasonable attorneys' fees under Minn. Stat. § 524.3-720 as a person nominated to serve as personal representative. Although the Referee found that the daughter had prosecuted the matter in good faith, he denied the daughter's motion, reasoning that the

daughter did not qualify for relief under § 524.3-720. The daughter requested permission to file a motion for reconsideration of the denial of her motion, which the Referee denied. The daughter then filed a Notice of Review of the Referee's denial of her motion for necessary expenses and disbursements. Following oral argument, the Probate Judge denied the daughter's motion, holding that Minn. Stat. § 524.3-720 only applies to individuals nominated in a will to serve as personal representative. This appeal followed.

FACTS

Decedent Tod R. Holmberg passed away on December 13, 2009. (A-2) Despite knowing that her husband had children from his first marriage, Respondent Janice Hanson-Holmberg, did not include the children, including Appellant Lisa A. Roy, in Decedent's obituary. (A-20) Mrs. Hanson-Holmberg did not notify Tod Holmberg's children of their father's death until April 12, 2010 when Mrs. Hanson-Holmberg's counsel contacted Ms. Roy's mother seeking addresses to serve Mrs. Hanson-Holmberg's "Petition for Formal Probate of Will, Formal Appointment of Personal Representative and Construction of Will." (A-1, A-2) After learning of their father's death and reviewing Mrs. Hanson-Holmberg's petition, Lisa Roy and her brother, Tod Carlson, believed Mrs. Hanson-Holmberg was seeking to prevent other heirs and beneficiaries from properly receiving probate and non-probate assets from Decedent's estate.¹ (A-20 *et seq.*)

Supported by her brother, Lisa Roy filed a *pro se* "Petition for Formal Probate of Estate Intestate, Formal Appointment of Personal Representative" which nominated her

¹ Tod Holmberg's third child, Michele Whetstone, did not participate in this matter.

to serve as personal representative² on the belief that Mrs. Hanson-Holmberg was not qualified to serve as personal representative. (A-11) Among the claims in her petition, Ms. Roy asserted her belief that Mrs. Hanson-Holmberg undervalued assets, improperly requested an order changing the beneficiary designations on Decedent's assets to Mrs. Hanson-Holmberg, and offered a fraudulent will for probate. (A-12) The Referee set the matter on for trial.

After retaining counsel and conducting discovery, Ms. Roy narrowed the issues for trial to whether Mrs. Hanson-Holmberg presented a fraudulent will with her petition, rendering Mrs. Hanson-Holmberg unqualified to serve as a personal representative. At trial, Ms. Roy presented expert testimony that showed that the witnesses, who were Mrs. Hanson-Holmberg's best friend and her best friend's husband, used a different red ink than the red ink used by the Decedent to draft his holographic will. (A-9, 24) At the trial's conclusion, the Referee found that the will was valid and that Mrs. Hanson-Holmberg was qualified to serve as personal representative. (A-23)

Ms. Roy filed a motion with the Court requesting an order for the estate to pay Ms. Roy's necessary expenses and disbursements, including reasonable attorneys' fees under Minn. Stat. § 524.3-720 for prosecuting her Petition in good faith as a person nominated as personal representative of the estate. (A-26) Mrs. Hanson-Holmberg opposed the motion, asserting that Ms. Roy could not be nominated for the purpose of the statute

² Ms. Roy's petition met the requirements of Minn. Stat. § 524.3-402 and at no time during the proceedings prior to her post-trial motion for necessary expenses was there any challenge to Ms. Roy's nomination as personal representative.

because she was not nominated in a will.³ (A-29) The Referee found that Ms. Roy acted in good faith in prosecuting her action,⁴ but denied her motion, reasoning that § 524.3-720 does not apply because although she was nominated in her petition, Ms. Roy was not nominated in a will. (A-33) Ms. Roy submitted a letter request to bring a motion to reconsider, which the Referee denied, again reasoning § 524.3-720 has been interpreted to mean an individual nominated in a will. (A-35, 37)

Ms. Roy then filed a Notice of Review of the Referee's denial of her motion for necessary expenses and disbursements on the basis that the plain meaning of the statute does not require a nomination to be made by a will. (A-38) Following oral argument, the Probate Judge denied the Ms. Roy's motion, holding that Minn. Stat. § 524.3-720 "has been held to mean a nomination in a will in numerous cases." (A-41) The Probate Judge further stated that "even when such a nomination is made, case law suggests that the attorney's fees and costs eligible to be paid by the estate under Minn. Stat. §524.3-720 are limited to the fees incurred during the party's tenure as personal representative." *Id.* (citation omitted.)

ARGUMENT

The Court of Appeals will not reverse a district court's denial of payment of necessary expenses including attorney's fees unless there has been an abuse of discretion. *See In re Estate of Van Den Boom*, 590 N.W.2d 350, 354 (Minn. Ct. App. 1999), *review*

³ Mrs. Hanson-Holmberg did not contest the amount of the fees, costs, and expenses submitted by Ms. Roy.

⁴ Mrs. Hanson-Holmberg did not seek reconsideration or review of the Court's finding that Ms. Roy acted in good faith and has not appealed the finding to this Court.

denied (Minn. 1999). However, the interpretation of a statute is a question of law that the Court of Appeals reviews de novo. Lolling v. Midwest Patrol, 545 N.W.2d 372, 375 (Minn. 1996). In denying Ms. Roy's motion for payment of her necessary expenses and disbursements under Minn. Stat. §524.3-720, the Probate Court erred in interpreting the statute by ignoring the plain language of the statute, by failing to determine whether the statute is ambiguous before looking past the text of the statute, by misapplying case law that does not address the statute's application to the present facts, by ignoring application of the statute to cases where no will names a personal representative, and by stating that case law suggests the statute only applies to expenses incurred after appointment as personal representative.

1. The language of Minn. Stat. §524.3-720 is plain and does not require a person nominated as personal representative to be named in a will.

When evaluating a statute under Minnesota law, the Court is guided by Minn. Stat. § 645.16, which provides:

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn. Stat. § 645.16 (2011). The statute in question, Minn. Stat. § 524.3-720 provides, in relevant part, that “[a]ny person nominated as personal representative who . . . prosecutes any proceeding in good faith, whether successful or not . . . is entitled to receive from the estate necessary expenses and disbursements, including reasonable attorneys’ fees

incurred.”⁵ Minn. Stat. § 524.3-720 (2011). Although a previous version of the statute included a requirement that the person be named in a will, the Legislature removed the requirement, and the plain language of the current statute does not require a nominated personal representative to be named in a will.⁶

Based on the plain language of the statute, Ms. Roy must meet two requirements to be authorized payment from the estate for her necessary expenses and disbursements, including reasonable attorneys’ fees. First, she must be a person nominated as a personal representative. Second, she must have prosecuted her proceeding in good faith. In meeting the first requirement, as the Probate Court noted, “Lisa A. Roy nominated herself as personal representative.” (A-34)⁷ In meeting the second requirement, the Probate

⁵ The complete text at issue is:

Any personal representative or person nominated as personal representative who defends or prosecutes any proceeding in good faith, whether successful or not, 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 attorneys' fees incurred.

Minn. Stat. § 524.3-720 (2011).

⁶ Repealed in 1974, the precursor to Minn. Stat. § 524.3-720 provided:

When any person named as executor *in a will or codicil* defends it or prosecutes any proceedings in good faith and with just cause, for the purpose of having it admitted to probate, whether successful or not, or if any person successfully oppose the allowance of any will or codicil, he shall be allowed out of the estate his necessary expenses and disbursements in such proceedings together with such compensation for his services and those of his attorneys as the court shall deem just and proper.

Minn. Stat. § 525.49 (1972) (emphasis added).

⁷ Mrs. Hanson-Holmberg nominated herself as personal representative in precisely the same manner. Neither was named in Decedent’s will to serve as personal representative.

Court held that Ms. Roy prosecuted the matter in good faith. (A-33) There is no ambiguity as to whether Ms. Roy meets both requirements and is entitled to her necessary expenses and disbursements under the statute.

2. The Probate Court did not determine whether the relevant language of Minn. Stat. §524.3-720 is ambiguous before disregarding the text and pursuing the spirit of the statute in case law and drafting history.

Under Minn. Stat. § 645.16 cited above, “the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” In his order denying Ms. Roy’s motion, the Probate Judge simply stated:

The Court finds that the provision in Minn. Stat. §524.3-720 referring to a nomination of a personal representative has been held to mean a nomination in a will in numerous cases. See *In re Estate of Torgerson*, 2008 WL 4224534, *In re the Estate of Feyen*, 2005 WL 2850413, *In re the Estate of Sima*, 2001 WL 989095.

(A-41) At no point did the Probate Court address the issue of whether the plain language of § 524.3-720 is ambiguous before looking to past the text to determine its application.

3. The Probate Court misapplied case law to the application of Minn. Stat. §524.3-720 by citing cases that do not address whether the statute applies where, as here, no will names a personal representative.

To reach its conclusion that Minn. Stat. §524.3-720 does not apply to Ms. Roy’s claim for her necessary expenses and disbursements, the Probate Court cites three cases that do not address the question of whether the statute applies to Ms. Roy in this matter. The three cases are: *In re Estate of Torgerson*, 2008 WL 4224534 (Minn. Ct. App. Sept. 16, 2008), *In re the Estate of Feyen*, 2005 WL 2850413 (Minn. Ct. App. November 1,

2005), and In re the Estate of Sima, 2001 WL 989095 (Minn. Ct. App. Aug. 28, 2001).

Ms. Roy addresses these cases in turn.

First, in Torgerson, the Minnesota Court of Appeals upheld the payment by the estate of a nominated personal representative's necessary expenses and disbursements, including attorneys' fees even though the will in which he was named was not admitted to probate and he was never appointed personal representative.⁸ In re Torgerson, 2008 WL 4224534 at 2. Likewise, Sima provides 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. In re Sima, 2001 WL 989095 at 3. Neither case addresses whether the statute applies to a probate where no will exists or where a will does not name a personal representative, as is the case here.

Further, in Feyen, the Court of Appeals rejected a claim for fees under §524.3-720 because the claim for fees was made by the attorney for the nominated personal representative, not the nominated personal representative herself. In re Feyen 2005 WL 2850413 at 3. In this matter, Feyen does not apply because it is Ms. Roy, the nominated personal representative acting in good faith, pursuing her necessary expenses and

⁸ The Court of Appeals held:

A district court may award attorney fees to “[a]ny personal representative or person nominated as personal representative who defends or prosecutes any proceeding in good faith, whether successful or not.” Minn.Stat. § 524.3-720 (2006). Section 524.3-720 not only allows a personal representative to recover attorney fees, but also specifically allows recovery of attorney fees by an individual who is nominated as personal representative, whether the will in which that individual is nominated is admitted to probate or not. (Citation omitted.)

disbursements. Again, as with Torgerson and Sima, Feyen does not address whether the statute applies where no will names a personal representative.

4. The Probate Court ignored case law where the Minnesota Court of Appeals has upheld application of the statute where no will names a personal representative.

By holding that §524.3-720 only applies when a personal representative or nominated personal representative is named in a will, the Probate Court's ignores this Court's ruling in Estate of Martignacco v. Estate of Adolph L. Martignacco, 689 N.W.2d 262 (Minn. Ct. App. 2004). In Martignacco, the decedent died without a will. *Id.* at 264. Although the Court held that the personal representative was not entitled to necessary expenses and disbursement after the point when he failed to cooperate in good faith with an heir who presented credible evidence of parentage, the Court authorized payment under § 524.3-720 for the self-nominated⁹ personal representative's necessary expenses and disbursement prior to that point.¹⁰ *Id.* at 271-72 Therefore, the Minnesota Court of Appeals applies the relevant portion of § 524.3-720 to matters where, as here, no will names a personal representative and a person nominates himself or herself in good faith.

5. The Probate Court erred by opining that the statute only applies to the payment of necessary expenses and disbursements incurred while serving as

⁹ See *Id.* at 264. The appellant former personal representative petitioned the Probate Court for appointment.

¹⁰ The awarding of fees to the personal representative in Martignacco up to the point he received evidence of parentage would include payment of his necessary expenses and disbursements while he was a nominated personal representative prior to appointment.

personal representative and not those incurred while serving as a nominated personal representative.

Although the Probate Court held that §524.3-720 does not apply because Ms. Roy was not named in a will to serve as personal representative, the Court cited In re the Estate of Zeno, No. A04-1866, 2005 WL 1272090 (Minn. Ct. App. May 31, 2005), for the proposition that “caselaw suggests that the attorney's fees and costs eligible to be paid by the estate under Minn. Stat. §524.3-720 are limited to the fees incurred during the party's tenure as personal representative.” (A-41) The holding in Zeno is inapplicable in this matter, as the claim for fees was brought under a different section of §524.3-720. In re Zeno, 2005 WL 1272090 at 2. Moreover, the very cases the Probate Court cites above specifically provide payment of necessary expenses and disbursements incurred while a party was nominated to serve as personal representative (and never appointed as personal representative). As the Torgerson Court stated:

Section 524.3-720 not only allows a personal representative to recover attorney fees, but also specifically allows recovery of fees by an individual who is nominated as a personal representative, whether the will in which that individual is nominated is admitted to probate or not.

In re Torgerson, 2008 WL 4224534 at 1. Payment of a nominated personal representative's necessary expenses and disbursements by the estate is clearly authorized under §524.3-720.

Fees on Appeal

As an additional matter, Ms. Roy requests to supplement her submitted claim for attorney's fees and costs with those she has incurred bringing her motion, review, and

appeal. In In re Estate of Evelyn Evenson, 505 NW2d 90 (Minn Ct. App. 1993), this Court held that “[a]s Minnesota Statute 524.3-720 allows reimbursement of expenses and disbursements in all estate litigation” the statute applies to reasonable costs including attorney’s fees on appeal. Evenson, 505 N.W.2d at 92. The Court of Appeals confirmed the application of the statute to fees incurred while seeking the fees in Torgerson, holding that “[r]eimbursement the . . . nominated personal representative not only for fees incurred [in the underlying action] but also for fees incurred in seeking those fees is consistent with the statute.” Torgerson, 2008 WL 4224534 at 3.

CONCLUSION

Based on the plain language of Minn. Stat. §524.3-720, the application of the statute by this Court to matters where no will named a personal representative, Ms. Roy’s nomination as personal representative, and the Probate Court’s finding that Ms. Roy acted in good faith in bringing her action, the decision of the Probate Court should be reversed. Ms. Roy requests an order directing the Probate Court to award her necessary expenses and disbursements including reasonable attorney’s fees to be paid by the Estate of Tod R. Holmberg. Ms. Roy further requests an order permitting her to supplement her attorney’s fees request to add fees incurred in bringing her motion, review, and appeal.

Dated: March 8, 2012

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CERTIFICATE OF COMPLIANCE

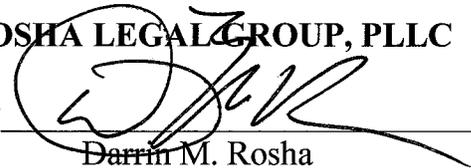
WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the brief submitted herein was prepared using Microsoft Word 2007, complies with the typeface requirement of Minn. R. App. P. 132.01, and contains 3,505 words.

Dated: March 8, 2012

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