STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2336

In re the Estate of: John Kenneth Rutt,
a/k/a John K. Rutt and John Rutt, Deceased.

Filed October 12, 2010
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Carver County District Court
File No. 10-PR-06-104

Bonnie M. Fleming, The Law Office of Bonnie M. Fleming, P.A., Minneapolis, Minnesota (for appellants Peter F. Rutt and David J. Rutt)

Phillip R. Krass, Rachel R. Myers, Malkerson Gunn Martin LLP, Minneapolis, Minnesota (for respondents Carol Breeggemann, JoAnne Ege, Jeanette Hentges, Marsha Markstrom, Rosemary Schmitt, and Paula Corrigan)

Frederick R. Kopplin, Kopplin Law Office, Minneapolis, Minnesota (for respondent Mary McKendrick)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

In this probate action, appellants challenge the district court's orders approving the personal representative's final account, as amended to include certain amounts

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

transferred to appellants during the decedent's lifetime and an account payable reflecting an unpaid portion of the value of the decedent's lake home, which was sold to one of the appellants before decedent's death, and awarding to respondents attorney fees incurred in pursuing those assets on behalf of the estate. We affirm the district court's decisions to include the additional assets in the final account and to award attorney fees. But because we conclude that the district court erred by imposing the attorney-fee award against appellants rather than the estate, we reverse the attorney-fee judgment against appellants and remand for further proceedings consistent with this opinion.

FACTS

John Kenneth Rutt (decedent), who died on September 10, 2006, was survived by his eight children: appellants David J. Rutt and Peter F. Rutt and respondents Carol Breeggemann, JoAnne Ege, Jeanette Hentges, Marsha Markstrom, Rosemary Schmitt, and Paula Corrigan. Decedent left a will nominating David Rutt and Corrigan as co-personal representatives and providing for his estate to be divided equally among his children, except for Peter Rutt, who was to receive $5,000 less than his siblings. David Rutt and Corrigan were also empowered to act, and did act, on decedent's behalf as attorneys-in-fact during his lifetime. Because of familial conflicts that had developed, the district court appointed an independent personal representative and ordered a supervised administration of the estate.

Over the course of the next year, issues arose regarding whether certain property in the possession of David Rutt and Peter Rutt was property of the estate. The dispute encompassed decedent's lake home, which was sold to David Rutt before decedent's

death; certain funds transferred before decedent's death and held in a Voyager Bank account in the names of David Rutt and Peter Rutt; and proceeds received by David Rutt from the sale, after decedent's death, of a van, the original purchase of which had been reimbursed by decedent.

On January 5, 2009, the personal representative filed a supplemental final account and petitioned to complete settlement of the estate. The final account included as assets of the estate the funds held in the Voyager Bank account but did not include the lake home or the proceeds from the sale of the van. The district court held an evidentiary hearing on the final account, hearing testimony from all but one of decedent's children, the independent personal representative, and decedent's personal attorney. The testimony, viewed in the light most favorable to the judgment, disclosed the following facts.

In December 2004, decedent was residing in his trailer home in Arizona when he fell gravely ill and was admitted to an intensive-care unit. Decedent was in a coma, and the doctors did not expect him to survive. Breeggemann, Ege, and Hentges flew to Arizona and spent several days with their father, during which time he began to recover. In February 2005, David Rutt traveled to Arizona to bring his father back to Minnesota.

While in Arizona, David Rutt sold decedent's mobile home for $6,800. For reasons that he was unable to explain, David Rutt used his power of attorney to transfer title to the mobile home first into his own name and then to the ultimate buyer. The buyer wrote out a check to David Rutt for $6,800. David Rutt held onto the mobile-

home-proceeds check for several months, waiting to see what his father wanted to do with it.

On July 8, 2005, David Rutt used the check to open an account in his own name at Voyager Bank (the Voyager Bank account). He testified that his father told him "to take and open up an account with whatever I wanted to do. He didn't care. So that's what I did with that money and that's how I opened that—up that account." David Rutt further testified that he believed that his father was giving him the mobile-home sale proceeds because "[his] dad never said anything that he wanted it back." At some point, David Rutt added Peter Rutt's name to the Voyager Bank account. Peter Rutt testified that his father instructed him to add his name to the Voyager Bank account.

Upon his return to Minnesota, decedent spent time in a physical-rehabilitation facility before moving into assisted living and, ultimately, a nursing home. Decedent was not able to return to his lake home in Remer. In May 2005, in order to determine what amount could be borrowed against the lake home, with Corrigan's knowledge, David Rutt obtained an appraisal valuing the lake home at $285,000. Around the same time, David Rutt began to express his interest in purchasing the lake home. David Rutt first offered decedent $180,000 for the lake home in June 2005.

After being advised that he might need to sell his lake home, decedent, David Rutt, and Corrigan met with decedent's attorney, Todd Andrews, to discuss financial planning. Andrews advised that decedent could transfer certain sums to family members to be preserved for his later use for items not covered by medical assistance. Andrews testified that, under then-effective law, decedent could shelter assets by transferring them

out of his name. Andrews drafted a family-distribution agreement to govern the use of transferred funds before and after decedent's death. But decedent was noncommittal about medical-assistance planning, and the family-distribution agreement was never executed.

In September 2005, believing that David Rutt had signed a purchase agreement for the lake home, Corrigan used her power of attorney to cancel that purchase agreement. Corrigan and David Rutt subsequently discussed the manner in which a sale of the lake home should be handled and reached several points of agreement. Corrigan sent David Rutt a confirming letter, dated October 4, 2005, stating her agreement with his ideas that (1) the distribution agreement should be executed as soon as possible; (2) any offer to purchase the lake home should be communicated to all siblings in advance; (3) the siblings should have the option to buy into and participate in the purchase of the lake home; (4) the appraisal should be distributed to all siblings; and (5) no documents should be executed without advance disclosure to all siblings. David Rutt acknowledged receiving Corrigan's letter but never responded.

On November 1, 2005, David Rutt deposited $3,868.73 into the Voyager Bank account. The funds came from an IRA in decedent's name. David Rutt testified that the check was a gift to him.

On November 18, 2005, low on cash to pay for his nursing-home care, decedent took out a $75,000 home-equity line of credit. Between November 23, 2005, and February 1, 2006, Corrigan, acting as attorney-in-fact for decedent, wrote out four checks for $4,198 to David Rutt, who deposited them into the Voyager account. Corrigan

testified that these checks were intended to be preserved for decedent's use in connection with the medical-assistance planning the family had discussed. The amount of the checks was the amount that Andrews had advised was the average monthly cost of nursing-home care and the amount that could be transferred monthly without disqualifying decedent from medical assistance beyond a particular month.

David Rutt testified that he understood that the four $4,198 checks were gifts from his father. He acknowledged that the checks were issued in connection with the medical-assistance planning and that the money was intended to remain decedent's money "[a]t the beginning," but nevertheless insisted the money was his because the family distribution agreement never was executed and "[b]ecause the check was written out to [him] and [he] put it in [his] account."

After they were subsequently advised that a change in the law would soon preclude the benefit of the monthly transfers, David Rutt and Corrigan discussed transferring a lump sum from the line of credit into the Voyager account and agreed to transfer $30,000. Despite this agreement, David Rutt transferred the balance of the home-equity line and used his power of attorney to make out a check to himself and Peter Rutt for $50,376. David Rutt testified that he obtained the check at decedent's direction, and that he understood it to be a gift to him and Peter Rutt.

Also in early 2006, David Rutt titled in his own name a van that he had purchased and outfitted with a handicap lift. Decedent had reimbursed David Rutt for both the purchase and the modification expenses. David Rutt testified that his father insisted that he put the van in his name because he took his father "every place." Peter Rutt testified

to a telephone conversation during which decedent expressed his desire for David Rutt to title the van in his own name.

In January 2006, unbeknownst to Andrews or any of the respondents, David Rutt and decedent executed a purchase agreement on the lake home for $185,000. Peter Rutt was present at the closing and testified that he represented decedent as his oldest son.

In March 2006, decedent discussed the lake home with Corrigan, telling her that he had not yet decided to sell to David Rutt and that he did not want to give up $100,000 of the appraised value. Decedent told Corrigan, Schmitt, and Breeggemann that he was being pressured to sell his property to David Rutt. Respondent Hentges testified that her father discussed with her in April or May 2006 the possibility of selling the lake home and buying a one-level townhome. At decedent's request, Hentges called a real-estate agent, who informed Hentges that the property had already been sold. Breeggemann testified that she did not find out about the sale until June 2006, when someone pulled the property records.

In March 2006, Andrews drafted a proposed letter for decedent to send to his children, which stated that decedent had decided to sell his house to David Rutt for less than the appraised price and asked the children to respect his decision.[1] Andrews shared that draft with decedent, who in turn discussed it with Corrigan. Corrigan summarized those discussions in a March 23, 2006 memorandum to Andrews. In that memorandum, Corrigan relayed decedent's statement that he had not yet done anything with the

[1] It is not clear from the record exactly when Andrews became aware that the sale of the lake home to David Rutt had been completed.

property and his desire to have input from all of the children before making a decision about the sale of the lake home. Conveying decedent's disagreement with the portion of the letter indicating his decision to sell the house to David Rutt, Corrigan wrote, "Ken indicated that it does not reflect his message. He did not decide to sell the property to Dave yet. He stated that Dave pushed for that message to be in the letter and Dave has pushed for the property so bad."

Decedent's signature appears on a letter dated May 24, 2006, that was sent to at least some of the respondents. That letter, addressed "To All of My Children," indicates that decedent had "decided to sell [his] home to David at a price which [he] felt was fair based on the situation and [his] desires and goals." The letter continues:

> I understand that the full fair market value of the house might be greater than the amount which Dave is paying. However, in order to keep it in the family and to allow me continued access to it I have decided to sell the house to Dave. I hope you will understand my actions and trust that you will respect them.

Schmitt read the letter to decedent in early June 2006, and testified:

> I said "Dad, I got this letter. Have you seen it?" And he kind of looked at me and then he sat there and I read it to him. It was one of the hardest things I've ever done in my life, and he looked kind of sad. And I said, "Well, did you sign it?" And he said, "I suppose he had me sign something. I could have."

On May 26, 2006, Schmitt, still unaware that a sale had already taken place, spoke with Andrews and conveyed decedent's desire to meet with his attorney alone.

Andrews met with decedent alone on June 10, 2006, to discuss whether he was satisfied with the sale of his house to David Rutt. Andrews taped the conversation.

Decedent told Andrews that he had "made this decision with Dave" and "figure[d] that's good enough." He said that he was "satisfied with that . . . but . . . I don't want everybody to be mad at me." Decedent also said that "after I die then they can do whatever they want." More than once, decedent said that David Rutt told him that if he sold it to David Rutt, the nursing home would not be able to take it. Responding to a series of leading questions from Andrews, decedent confirmed that he understood that he may have gotten more money from a third-party sale and that it was important to him to be able to visit the lake home and continue to store his personal belongings there. Andrews offered to write a letter to decedent's children conveying his wishes. On June 15, 2006, Andrews sent a letter to all of the children, describing his conversation with decedent and stating that decedent was "satisfied" with the sale of the lake home to David and that "the sale is final."

Decedent's health had been improving during 2006, but in August 2006, he fell while visiting the lake home. Thereafter, his health declined, and on September 10, 2006, he passed away. On September 14, 2006, the day that their father was buried, David Rutt and Peter Rutt withdrew and divided between themselves the funds in the Voyager Bank account—approximately $80,000. In May 2007, David Rutt sold the van for $13,500.

At the close of the evidentiary hearing, the personal representative moved to amend the inventory and final account to include as additional estate assets the lake home and the $13,500 in proceeds from the sale of the van. The district court granted the motion to amend, directing that the inventory and final account include as estate assets (1) $13,500 as an account receivable due the estate from David Rutt; (2) $73,592, the

amount deposited into the Voyager Bank account, as an account receivable due from David Rutt and Peter Rutt, joint and several; and (3) $80,000 as an account receivable from David Rutt and representing

> the court determined difference between the court determined market value and the price paid by David J. Rutt to Decedent for [the lake home] . . . the court determined value reflects a reasonable reduction based upon savings inuring to Decedent and the estate for the transfer/sale being finalized without agency commissions being incurred.

The district court also granted respondents' request for attorney fees, elaborating that "[i]n its over fifteen years on the bench, preceded by over fifteen years of general practice, this Court can honestly say it has not seen a case which so warrants an award of attorney's fees as the one presented here."

The district court stated that it had created accounts receivable rather than rescinding transactions to "obviate[] the possibility of not recovering the van or tying up a bank account which has already been emptied of the funds placed there" and to avoid "disturbing the chain of title to the [lake home] and interfering with any security interests that David may have created against the property."

The district court did not separately set forth findings of fact, instead stating:

> The submissions from the Personal Representative and the sibling heirs and devisees, excluding that of David and Peter Rutt, accurately and very adequately set out the factual nuances of this case, as well as the legal principles surrounding the provisions of this Order. To the extent these submissions are consistent with the terms of this Order, the Court is adopting these factual and legal arguments.

But the district court did make an express finding that David Rutt and Peter Rutt owed and breached fiduciary duties to decedent, stating that decedent

> entrusted his two sons (as well as a daughter) to oversee important life-sustaining and asset-maintaining measures for his benefit. It is evident from the record that David and Peter took advantage of this relationship to their own betterment, and to the direct detriment of their father, and to a lesser extent, their siblings.

Moreover, although the district court did not make express credibility findings, its rejection of David Rutt's and Peter Rutt's recitation of facts implies such a finding. Further evidencing the rejection of appellants' testimony is the court's following statement, in denying appellants' request to submit additional evidence in response to the personal representative's change in position:

> [B]ased on the record to date this court concludes that such testimony would be highlighted by the convenient recall of a series of previously suppressed selfserving snippets of memory. Such testimony would in all likelihood be just as illogical and incredulous as that already offered by David and Peter in support of their unwarranted conduct.

The district court subsequently approved the personal representative's amended supplemental final account, and judgment was entered. This appeal follows.

D E C I S I O N

This court's review of a probate order is limited to determining whether the district court's findings are clearly erroneous or whether it erred in applying the law. *In re Estate of Simpkins*, 446 N.W.2d 188, 190 (Minn. App. 1989).

I.

Appellants first challenge the district court's failure to make express factual findings. "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially . . . ." Minn. R. Civ. P. 52.01; *Moylan v. Moylan*, 384 N.W.2d 859, 863 (Minn. 1986) (quoting Minn. R. Civ. P. 52.01). "Findings are necessary to support a judgment and to aid the appellate court by providing a clear understanding of the basis and grounds for the decision." *Moylan*, 384 N.W.2d at 863. This court has "strongly caution[ed] that wholesale adoption of one party's findings and conclusions raises the question of whether the trial court independently evaluated each party's testimony and evidence." *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). Notwithstanding this admonition, adoption of a party's proposed findings "is not reversible error per se." *Id.* (citing *Sigurdson v. Isanti County*, 408 N.W.2d 654, 657 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987)).

We agree that the district court's findings of fact in this case could be more complete. The district court made few express factual findings and no credibility findings. But we nevertheless reject appellants' assertion that the case must be remanded for additional findings. Notably, the underlying, or circumstantial, facts in this case are largely undisputed. Moreover, although the district court's order does not expressly so state, it is clear that the district court found not credible David Rutt's and Peter Rutt's testimony that the decedent intended to gift certain amounts and items to them. And, importantly, the district court did make an express finding on the adjudicative fact that David Rutt and Peter Rutt owed and breached fiduciary duties to decedent. Under these

circumstances, we conclude that remand for additional findings is not warranted. *See, e.g.*, *Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand for additional findings because it was clear from record and the district court's order what findings the district court would make on remand).

II.

Appellants challenge the district court's finding that they owed and breached fiduciary duties to decedent. "The existence of a fiduciary relationship is a question of fact." *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). "A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic or merely personal." *Id.* (quotation omitted). There is ample evidence in the record to support the district court's finding that David Rutt and Peter Rutt owed and breached fiduciary duties by diverting decedent's assets for their own use. The record is replete with testimony that decedent trusted David Rutt and that he relied on David Rutt to advise him on his financial situation. In particular, the taped discussion between Andrews and decedent reflects decedent's reliance on David Rutt's advice in agreeing to sell the lake home for less than the appraised value. Appellants' arguments against the existence of a fiduciary duty rely on their characterization of the facts—in particular their testimony that decedent directed their actions—which the district court, as the fact-finder, rejected. Thus, we conclude that the district court's findings that David Rutt and Peter Rutt owed and breached fiduciary duties to the decedent are not clearly erroneous.

III.

Appellants challenge the district court's denial of their request to submit additional evidence in the event the district court granted the personal representative's motion to amend the final account to include the lake home and the $13,500 in proceeds from David Rutt's sale of the van.[2] This court reviews that decision for an abuse of discretion. *Hamilton v. Killian*, 296 Minn. 256, 259-60, 207 N.W.2d 703, 705 (1973). The facts surrounding both David Rutt's purchase of the lake home and his titling and sale of the van were fully explored at trial, and appellants were aware of respondents' position that both were estate assets, even though that was not the personal representative's initial position. Thus, we conclude that the district court's decision to deny additional evidence was not an abuse of discretion. *See, e.g., State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (noting the district court's discretion under Minn. R. Evid. 403 and 611 to limit or preclude cumulative evidence).

IV.

Appellants challenge the district court's imposition of a cash account receivable from David Rutt in relation to the lake home rather than rescission of the sale of the property. Appellants cite no statute or caselaw in support of their position, nor are we able to locate authority addressing the issue. In general, when hearing probate matters, a district court has "full power to make orders, judgments and decrees and take all other

[2] In their appellate briefing, appellants assert that the record should be reopened not only to allow additional testimony, but also additional discovery. The argument for additional discovery is new on appeal and, thus, has been waived. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that issues not argued to the district court are waived on appeal).

action necessary and proper to administer justice in the matters which come before it." Minn. Stat. § 524.1-302 (2008); *see also* Robert A. Stein, *Stein on Probate* § 2.03(a), at 2-8 (4th ed. 2009) ("Probate courts have the implied power to do whatever is reasonably necessary to carry out the powers expressly conferred on them."). Moreover, the probate code is to be "liberally construed and applied to promote the underlying purposes and policies," which include "discover[ing] and mak[ing] effective the intent of a decedent in distribution of property" and "promot[ing] a speedy and efficient system for liquidating the estate of the decedent and making distribution to successors." Minn. Stat. § 524.1-102 (2008).

Given the district court's broad equitable powers and the purposes of the probate code, we are reluctant to conclude that the district court exceeded its authority by creating the account receivable in lieu of rescission. But we need not resolve the issue because it appears that any error in this regard was harmless. *See* Minn. R. Civ. P. 61 (stating that harmless error is not a basis for modifying a judgment or order unless refusal to take such action is inconsistent with substantial justice). David Rutt does not complain about retaining ownership of the lake home; nor has he demonstrated that he is in a worse position financially than he would be if the sale of the home were rescinded. Following rescission, the home likely would be purchased from the estate—either by David Rutt or by one or more of the respondents who expressed interest in the property during decedent's lifetime—at the appraised price. Appellants argued to the district court that the home is worth less than the appraised value, citing the lower value assigned by taxing authorities and the difficulty of appraising lake property in northern Minnesota. But we

conclude that the district court's valuation finding is not clearly erroneous. *See Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001) (holding that a district court's valuation finding should not be set aside unless clearly erroneous).

V.

Appellants challenge the district court's award of attorney fees to respondents. This court reviews a district court's decision to award attorney fees for an abuse of discretion. *In re Estate of Balafas*, 302 Minn. 512, 516, 225 N.W.2d 539, 541 (1975). Under Minn. Stat. § 524.3-720 (2008),

> when, and to the extent that, the services of an attorney for any interested person contribute to the benefit of the estate . . . such attorney shall be paid such compensation from the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made or from such services.

Appellants assert that the district court erred both by granting an award of fees and by ordering a judgment in the amount of that award against them personally, rather than ordering that fees be paid from the estate. Because the services of respondents' attorney benefited the estate with the return of more than $150,000 of improperly diverted assets, we conclude that the district court did not abuse its discretion by awarding attorney fees. But we agree that the award is properly recovered from the estate, rather than from appellants personally. Accordingly, we reverse the attorney-fee judgment against appellants and remand for further proceedings, which may include amendment of the final accounting to reflect the attorney-fee award.

Affirmed in part, reversed in part, and remanded.