STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0236

Michael J. Larkin,
Appellant,

Linda K. Larkin, et al.,
Plaintiffs,

vs.

Wells Fargo Bank, N.A.,
Respondent,

Christina Larkin,
Respondent,

Susan Schulze Hoff, et al.,
Respondents.

Filed September 17, 2012
Affirmed in part and reversed in part
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CV-10-4725

Eric Bond Anunobi, Eric Bond Law Office, PLLC, Minneapolis, Minnesota (for appellant)

Julian C. Zebot, Richard G. Wilson, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for respondent Wells Fargo Bank)

Mark V. Steffenson, Craig A.B. Freeman, Henningson & Snoxell, Ltd., Maple Grove, Minnesota (for respondent Christina Larkin)

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

Melanie A. Full, Leonard, Street & Deinard P.A., Minneapolis, Minnesota (for respondents Susan Schulze Hoff, et al.)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

Appellant Michael Larkin challenges a district court order enforcing a settlement agreement in probate proceedings arising out of disputes among the trustees, including appellant, of a trust created by appellant's father. Larkin asserts that the district court erred by removing him as power of attorney for his mother and appointing a professional power of attorney to replace him; enforcing a settlement agreement that was not signed by his mother; and denying his motion for voluntary dismissal without holding a hearing on that motion. We affirm in part and reverse in part. We affirm the district court's removal of appellant as power of attorney, enforcement the settlement agreement, and denial of appellant's motion for voluntary dismissal, but we reverse the district court's appointment of a professional power of attorney to replace appellant.

FACTS

Robert Larkin, father of appellant Michael Larkin, created a trust during his lifetime. Upon Robert's death, the revocable trust was to be split into two separate trusts, a marital trust and a residuary trust (collectively, trusts). Robert's wife, Florence Larkin, Robert's eldest son, Patrick Larkin, and Norwest Bank were to serve as trustees. Norwest Bank subsequently became Wells Fargo Bank (Wells Fargo). The trusts were to be

administered solely for the benefit of Florence Larkin during her lifetime. Upon Florence's death, the residuary trust was to be administered for the benefit of several charitable organizations and Robert and Florence's children, including appellant Michael Larkin (Larkin). The marital trust was to be administered for the benefit of their grandchildren.

Robert died on June 20, 2000, and Patrick Larkin died in September 2008, leaving only Florence Larkin and Wells Fargo as trustees.[1] In a letter to Wells Fargo dated May 19, 2009, Michael Larkin identified himself as attorney-in-fact for Florence Larkin, and stated that he was assuming her role as trustee. In the letter, Larkin informed Wells Fargo that Florence Larkin would no longer work with Wells Fargo to administer the trusts.

On October 9, 2009, Wells Fargo filed two petitions in probate court to remove Florence Larkin as co-trustee of the residuary trust and the martial trust. The basis of the petitions was Florence Larkin's lack of cooperation as a trustee. On March 4, 2010, Larkin sued Wells Fargo, individually and as power of attorney for Florence Larkin, for negligence, breach of fiduciary duty, and negligent misrepresentation, and sought removal of Wells Fargo as a corporate trustee. Larkin filed an amended complaint on April 28. Larkin named the other trust beneficiaries as plaintiffs in the matter.

Wells Fargo moved for partial summary judgment on its petitions. By order dated August 6, 2010, the district court granted Wells Fargo partial summary judgment and

[1] The Trust Agreement provided that if Patrick Larkin could not serve as trustee, Sandra Schulze, Robert Larkin's daughter, was to succeed as trustee. Sandra died on June 22, 2011, and the Trust Agreement did not provide for Sandra's replacement as a trustee.

found that Florence could not "circumvent [Robert's] intention by using a power of attorney to allow Michael Larkin to serve as *de facto* trustee" because the trust specifically provided that "a successor need not be appointed if Florence Larkin is unable to serve." The district court concluded that "Michael Larkin cannot administer the Trust on behalf of Florence Larkin pursuant to a general power of attorney."

On January 28, 2011, the district court ordered all parties and beneficiaries of the trust to mediate their claims. At the mediation, the parties reached a written settlement agreement, which included the following terms:

> [I]nterested parties who participated in the mediation, other than Wells Fargo, will petition the court for a new corporate trustee to replace Wells Fargo pursuant to Minn. Stat. § 501B.16(9)(v) . . . through [a Request for Proposal process] . . . .
>
> Mutual releases will be executed releasing all trustees . . . as well as Michael Larkin, attorney in fact for Florence Larkin, both of whom asserted he was authorized to act on behalf of Florence as trustee . . . .
>
> . . . .
>
> Any disputes between the parties regarding language of releases or settlement agreements as well as selection of the new trustee will be resolved by binding arbitration without right to appeal except for the statutory bases for appeal . . . .
>
> Florence Larkin will resign as trustee.

All the parties that participated in the mediation initialed each page and signed the written settlement agreement. Wells Fargo drafted a formal settlement agreement based on the written version signed by the parties and circulated the draft to all the parties. Larkin and Florence Larkin did not respond to, or comment on, the circulated draft.

The district court scheduled a status conference for May 25, 2011. Shortly before the status conference, Larkin, through his attorney, also circulated a draft settlement agreement (Larkin draft), which had been signed by Larkin and Florence Larkin. At the status conference, the district court received the Wells Fargo draft settlement agreement and the Larkin draft and ordered the parties to engage in binding arbitration to settle disputes regarding the settlement agreement.

Pursuant to the district court's order, the parties engaged in binding arbitration regarding the terms of the settlement agreement. On July 29, 2011, the arbitrator issued its award, confirming the terms of the handwritten settlement agreement and adopting Wells Fargo's draft settlement agreement. The arbitrator found that Larkin's draft contained several provisions that directly contradicted the written settlement terms and were asserted "in bad faith." On August 22, 2011, Larkin filed a motion to vacate the arbitration award. The district court denied Larkin's motion and confirmed the arbitration award. The district court further ordered the parties to move forward to effectuate the settlement agreement.

On January 11, 2012, the district court held a telephone conference to discuss the parties' progress on the settlement agreement. Wells Fargo and several of the beneficiaries informed the court that they had started the request for proposals process to select a new trustee as required by the settlement agreement, but that Larkin had refused to participate in the process. The trustee candidates had voiced reservations about the process because Larkin was acting as power of attorney for Florence Larkin, the trust beneficiary, and was refusing to participate in the process. At the conference, Larkin

informed the court that he had no intention of signing the settlement agreement or participating in the selection process for a new corporate trustee.

On January 13, 2012, Larkin filed a motion seeking dismissal of himself as a party from the lawsuit. The district court initially scheduled a hearing on February 6, 2012, but upon further consideration, denied the motion without a hearing by order dated January 25, 2012. The district court found that Larkin, "wishe[d] to remove himself from this litigation because it [had] not resulted in the outcome he hoped for," which was not an appropriate reason to dismiss him as a party in the case. In the same order, the district court also revoked Larkin's power of attorney for Florence Larkin, "to the extent it allows [Larkin] to act on her behalf in trust related matters," and appointed Daniel Lodahl, a professional unrelated to the family, to serve as his replacement. This appeal follows.

D E C I S I O N

I. Power of Attorney Revocation

The district court revoked Larkin's power of attorney over Florence Larkin "to the extent it allows him to act on her behalf in trust related matters," and appointed a professional replacement. The district court stated that Michael Larkin's actions, in refusing to participate in finding a successor corporate trustee, were "not in the best interests of Florence Larkin," but provided no statutory or caselaw support for the revocation. This court reviews the district court's legal conclusions de novo. *Gellert v. Eginton*, 770 N.W.2d 190, 194 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009).

Larkin argues that the district court committed reversible error by revoking the power of attorney because it can only be revoked by Florence. "An executed power of attorney may be revoked only by a written instrument of revocation signed by the principal and . . . acknowledged before a notary public." Minn. Stat. § 523.11, subd. 1 (2010). Chapter 523 does not grant the district court authority to revoke a validly executed power of attorney. Thus, the district court erred by revoking Larkin's power of attorney. We will not reverse the revocation, however, if the error was harmless. *See Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) ("In addition to their burden to show error, appellants have the burden on appeal to demonstrate that the trial court error caused them prejudice."), *review denied* (Minn. June 28, 1993); Minn. R. Civ. P. 61 (stating that harmless error is to be ignored).

Florence executed a general power of attorney, designating her son Michael Larkin as her attorney-in-fact, under Minn. Stat. § 523.23. Florence granted Michael Larkin the authority to, among other things, engage in "fiduciary transactions" on her behalf. Florence could not, however, delegate her fiduciary duties regarding the trusts unless she was authorized to do so under the trust agreement. *See* Minn. Stat. § 523.24, subd. 9 (2010) ("Nothing in this subdivision authorizes delegation of any power of a fiduciary unless the power is one the fiduciary is authorized to delegate under the terms of the instrument governing the exercise of the power . . . ."); Minn. Stat. § 501B.152 (2010) (stating that a trustee can delegate his or her fiduciary duties "[u]nless prohibited or otherwise restricted by the terms of the trust instrument").

Here, the trust agreement does not allow Florence to delegate her fiduciary duties as a trustee. Under the terms of the trust agreement, if Florence ceases to act as trustee, the trusts would have only two remaining trustees, Patrick Larkin and Wells Fargo;[2] it does not provide for a replacement of Florence as a trustee:

> If settlor's wife, Florence D. Larkin, does not qualify as trustee by acceptance of the office of trustee and entering into the duties thereof or if, *having qualified, she resigns, dies or for other reasons ceases to act as trustee*, settlor's son, Patrick E. Larkin, and Norwest Bank Minnesota, National Association, shall act thereafter as the trustees.

(Emphasis added.) Because the trust agreement does not allow Florence to delegate her fiduciary duties, her general power of attorney could not give Michael Larkin the authority to act as trustee on her behalf. Thus, Michael Larkin never had authority to act on his mother's behalf on trust matters, and the district court's error in revoking Larkin's power of attorney was harmless. *See Bloom*, 499 N.W.2d at 845.

In its partial summary judgment order on Wells Fargo's probate court petitions, dated August 6, 2010, the district court found that Michael Larkin could not administer the trust on behalf of Florence Larkin "pursuant to a general power of attorney" based on the reasoning above. Because the trust agreement did not provide for her replacement, the district court found that Florence Larkin was attempting to "circumvent the Settlor's intention by using a power of attorney to allow Michael Larkin to serve as *de facto* trustee." The January 25, 2012 order affirms the district court's previous order that Larkin could not administer the trusts on Florence's behalf.

[2] Here, Patrick Larkin's replacement, Sandra Schulze, predeceased him; therefore the trust would have only one remaining trustee, Wells Fargo.

Because the trust agreement does not provide for a replacement trustee for Florence, the district court had no authority to appoint a professional power of attorney on trust matters. Thus, we reverse the district court's appointment of a professional power of attorney.

II. Confirmation of the Settlement Agreement

Larkin contends that the district court erred by confirming the settlement agreement because Florence Larkin was not present at the mediation and did not sign the written settlement agreement.[3] Although Florence Larkin was not physically present at the mediation, she was represented at the mediation by two attorneys who signed the written settlement agreement on her behalf. No evidence in the record suggests that the attorneys lacked authority to enter into a settlement on Florence's behalf. *See* Minn. Stat. § 481.08 (2010) ("An attorney may bind a client, at any stage of an action or proceeding, by agreement . . . made in writing and signed by such attorney.").

Additionally, Florence Larkin's subsequent actions indicate that she agreed to be bound by the written settlement agreement. Florence Larkin made no objections to the agreement for several months and signed Michael Larkin's draft of the written settlement agreement. Florence Larkin only raised issues regarding its validity after two of her attorneys resigned and she had new lead counsel. A change in representation, however, is not appropriate grounds for voiding a settlement agreement. *See Schumann v.*

[3] Additionally, Larkin argues that Michael Deasey, was "not present nor a signatory to the agreement." Larkin did not raise this argument at the district court level. Therefore the record is not developed on the issue, and it is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Northtown Ins. Agency, Inc., 452 N.W.2d 482, 485 (Minn. App. 1990) ("A party who voluntarily enters into a settlement agreement cannot avoid the agreement upon determining after consultation with replacement counsel that the agreement has ultimately become disadvantageous or the settlement amount paltry.").

III. Rule 41 Motion

Finally, Larkin argues that the district court erred by not holding a hearing on his motion to be dismissed from the action under Minn. R. Civ. P. 41. Larkin does not contend that the district court's rule 41 analysis is erroneous; rather, he only objects to the district court's failure to hold a hearing before denying his motion. Generally, "[w]e review a district court's decision on a rule 41 motion for an abuse of discretion," *N. States Power Co. v. City of Sunfish Lake*, 659 N.W.2d 271, 275 (Minn. App. 2003), *review denied* (Minn. June 25, 2003); but "[t]he district court's conclusions of law, including the interpretation of statutes and rules, are reviewed de novo." *In re Conservatorship of Smith*, 655 N.W.2d 814, 817 (Minn. App. 2003).

Under Minn. R. Civ. P. 7.02, motions require written notice to the parties, and a hearing "unless the particular rule under which the motion is made specifically provides that the motion may be made ex parte." Rule 41.01 does not provide that a voluntary dismissal motion may be granted ex parte. *See* Minn. R. Civ. P. 41.01; *see, e.g.*, *Chisholm v. Foley*, 427 N.W.2d 278 (Minn. App. 1988) (finding that a rule 41.02 motion may not be granted ex parte). Therefore, the district court erred by not holding a hearing on the motion. Larkin makes general statements that the lack of hearing deprived him of his due process rights, but fails to argue or demonstrate that he was prejudiced by this

error. Thus, the district court's error in failing to hold a hearing is harmless. *See Bloom*, 499 N.W.2d at 845.

Affirmed in part and reversed in part.