STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1715

In re: Estate of Perry Rosenbrook, Deceased

Filed May 28, 2013
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Jackson County District Court
File No. 32-PR-08-46

Matthew T. Nielsen, Krahmer & Nielsen, P.A., Fairmont, Minnesota (for appellant)

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

LARKIN, Judge

In this appeal from a probate order regarding the management of a trust established by a will, appellant argues that the district court erred by (1) refusing to remove respondent trustees; (2) determining that certain assets were properly merged into the trust; (3) refusing to order the trustees to reimburse the trust for mileage resulting

from their unauthorized use of a trust vehicle; and (4) refusing to require the trustees to personally pay the attorney fees in this matter. Because the district court erred by holding that certain assets were properly merged into the trust, we reverse and remand that portion of the district court's order. We affirm the remaining portions of the district court's order.

FACTS

Appellant Rosalyn Rosenbrook is the only child of Perry Rosenbrook, who died on November 17, 2008, and the sole beneficiary of the Perry Rosenbrook Family Trust (PRFT), which Perry Rosenbrook established in his will. Although it is somewhat unclear from the record, it appears that appellant was born in July 1988 and was 24 years old when the district court issued the order that is now before us for review. Perry Rosenbrook was one of five sons of Arthur Rosenbrook, who died on December 30, 2009. Perry Rosenbrook is survived by three of his brothers, respondents Lon, Dave, and Brent Rosenbrook, who are co-trustees of the PRFT; he was predeceased by his brother Steven Rosenbrook.

Following Perry Rosenbrook's death, Lon Rosenbrook initiated the informal probate of Perry Rosenbrook's will and was appointed personal representative of his brother's estate. In article III of his will, Perry Rosenbrook devised and bequeathed all of his assets to the PRFT, named his three surviving brothers as joint trustees, and designated appellant as the trust's sole beneficiary. According to the terms of the trust, the trustees were directed to use the assets of the trust for the proper care, support,

maintenance, and education of appellant until she reached the age of 30 and to distribute any remaining assets to appellant at that time.

During the administration of the Perry Rosenbrook estate, Arthur Rosenbrook died. Although Arthur Rosenbrook's will primarily named his five sons as equal beneficiaries of his estate, it also established the Arthur and Delores Rosenbrook Family Trust (ARFT) to provide for his grandchildren if any of his sons predeceased him. According to article VII of his will, the share of any son who predeceased him and left issue under the age of 24 was to be placed in trust to provide for the care, support, maintenance, and education of that son's children until they reached the age of 24, at which point the remaining assets would be distributed to the beneficiaries. Because Perry Rosenbrook predeceased his father and appellant was under the age of 24 at the time of her grandfather's death, Perry Rosenbrook's share of the Arthur Rosenbrook estate was to be distributed to the ARFT, with appellant as the beneficiary.

The PRFT's assets include cash, investments, a $25,000 promissory note, a house, a boat, a motorcycle, a truck, and a four wheeler. The trust also contains $178,667.21 in proceeds from the Arthur Rosenbrook estate, which was Perry Rosenbrook's share of his father's estate. The proceeds from the Arthur Rosenbrook estate were deposited into the PRFT—instead of the ARFT as provided in Arthur Rosenbrook's will—pursuant to an agreement executed in the summer of 2011. The agreement was signed by appellant, a daughter of Steven Rosenbrook, Brent Rosenbrook, Dave Rosenbrook, and Lon Rosenbrook acting individually and as trustee of the PRFT. The agreement, entitled

Agreement for Partial Distribution of Estate by Heirs (distribution agreement), provides in relevant part:

> The assets for distribution from the estate shall be divided into five equal shares, one share for each of the decedent's sons, namely: Steven Rosenbrook, Perry Rosenbrook, Brent Rosenbrook, Dave Rosenbrook and Lon Rosenbrook. The share for Steven Rosenbrook, now deceased, shall be divided between his two surviving daughters, Shannon Rosenbrook and Coral Rosenbrook. The share for Perry Rosenbrook, now deceased, shall be distributed to the Perry Rosenbrook Trust, in trust for the benefit of his sole surviving daughter and only child, Rosalyn Rosenbrook.

On December 23, 2011, appellant petitioned the district court for an inventory and order of complete settlement of her father's estate and decree of distribution. Appellant also sought an order prohibiting the trustees of the PRFT from using trust vehicles for personal purposes. Lon Rosenbrook filed an inventory and appraisal and a final account on March 5, 2012. By order dated March 7, 2012, the district court ordered Lon Rosenbrook to provide certain information and documents to appellant and placed the probate proceedings under court supervision.

Appellant petitioned the district court a second time on April 10, 2012, seeking (1) an inventory and accounting of PRFT assets, (2) removal of the proceeds of the Arthur Rosenbrook estate from the PRFT, (3) return of $10,000 in life insurance proceeds, and (4) removal of the PRFT trustees. She also requested that the trustees be ordered to reimburse the trust for their unauthorized use of trust vehicles and to personally pay the attorney fees resulting from her petition. Following an evidentiary hearing, the district court denied appellant's request to remove the trustees, to return the

funds from the Arthur Rosenbrook estate, and for mileage reimbursement and attorney fees. This appeal follows.

D E C I S I O N

I.

Appellant first challenges the denial of her petition to remove the trustees of the PRFT. Appellant petitioned for removal of the trustees under Minn. Stat. § 501B.16(9) (2012), which enumerates several grounds upon which removal may be requested. "[T]he determination of what constitutes sufficient grounds for the removal of a trustee is within the discretion of the [district] court." *In re Will of Gershcow*, 261 N.W.2d 335, 338 (Minn. 1977); *see also* Minn. Stat. § 501B.21 (2012) ("Upon hearing a petition filed under section 501B.16, the court shall make an order it considers appropriate."). We therefore review the district court's denial of appellant's request for removal for an abuse of discretion. *See In re Will of Comstock*, 219 Minn. 325, 340, 17 N.W.2d 656, 665 (1945).

Minnesota courts have held that it is not an abuse of discretion to deny removal when a trustee acts in good faith, does not prejudice the trust, and remedies any complained-of conduct. *See In re Will of Gershcow*, 261 N.W.2d at 339-40 (finding no abuse of discretion in failing to remove trustee for inconsequential deviations from requirements in the past where trustee corrected complained-of conduct and did not harm the trust); *In re Will of Comstock*, 219 Minn. at 340, 17 N.W.2d at 665 (finding no abuse of discretion when trustee administered trust in a "careful, prudent, honest, and intelligent manner," and any mistakes "were made in good faith"). It is also not an abuse of

discretion to deny removal on grounds of hostility between a trustee and the beneficiaries if the hostility does not interfere with the proper administration of the trust. *See In re Trust Created by Hill*, 499 N.W.2d 475, 485 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). Further, Minnesota courts are generally more reluctant to remove a trustee chosen by the settlor than one appointed by the court. *In re Will of Gershcow*, 261 N.W.2d at 338.

Appellant provided the following grounds for removal: (1) failure to demand satisfaction of a promissory note under its terms, (2) failure to provide timely and accurate accountings, (3) personal use of trust vehicles without permission or reimbursement, (4) acceptance of non-probate assets and assets from the Arthur Rosenbrook estate into the PRFT, and (5) the acrimonious relationship between the respondent-trustees and appellant. The district court considered each ground and concluded that removal was not appropriate, reasoning that the trustees did not act in bad faith, mismanage trust assets, breach any fiduciary duties owed to appellant as a beneficiary, personally gain or profit at the expense of the trust, or otherwise harm the trust. The district court also reasoned that the hostility between the parties did not threaten the proper administration of the trust.

For the reasons that follow, we conclude that the district court did not abuse its discretion by denying the petition to remove the trustee. First, although the trustees did not demand satisfaction of a promissory note that was due on demand after Perry Rosenbrook's death, the trust continued to collect interest on the loan at the rate of 7.5%. Thus, the value of the trust was not negatively impacted. *See In re Will of Gershcow*, 261

N.W.2d at 340 (finding no abuse of discretion in failing to remove a trustee because the complained-of conduct did not harm the trust). Second, although the trustees initially failed to timely and accurately comply with statutory accounting requirements, they have since complied. *See id.* (finding that a trustee's failure to file annual accountings in the past was inconsequential and not sufficient grounds for removal). Third, as to the trustees' improper use of a trust vehicle for personal purposes, the district court determined that the trustees did not act in bad faith because they believed the use was consistent with Perry Rosenbrook's intent. Moreover, the trustees stopped using the trust vehicle and appellant did not offer evidence to show the extent to which the additional mileage reduced the value of the vehicle. *See id.* (finding no abuse of discretion where trustee corrected complained-of conduct and did not harm trust assets).

Fourth, although the district court recognized that $10,000 in life-insurance proceeds were inappropriately deposited into the trust and, for reasons explained in section II of this opinion, we conclude that the proceeds from the Arthur Rosenbrook estate should not have been deposited in the PRFT, the receipt of those assets by the trustees was pursuant to either misunderstanding or appellant's consent, and thus was not grounds for removal. *See Kolles v. Ross*, 418 N.W.2d 733, 738 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988) (finding no abuse of discretion where trustee did not act willfully but rather as a result of a misunderstanding). And finally, although there is acrimony between appellant and the trustees, the record supports the district court's conclusion that removal is not necessary because the acrimony did not result in mismanagement of trust assets. *See In re Trust Created by Hill*, 499 N.W.2d at 485

(stating that hostility alone is insufficient to require removal unless it interferes with the proper administration of the trust).

At oral argument, appellant argued that the district court abused its discretion by not considering the cumulative effect of the trustees' failures. But appellant conceded that with the exception of the alleged reduction in value to one trust vehicle—the amount of which appellant did not establish—the trustees' failures did not reduce the value of the trust. Because there is no showing that the trustees acted in bad faith or reduced the value of the trust, and because the trustees adjusted their behavior in response to appellant's reasonable complaints regarding their management of the trust, we conclude that the district court did not abuse its discretion by denying appellant's request for removal of the trustees chosen by Perry Rosenbrook. *See In re Will of Gershcow*, 261 N.W.2d at 338 (stating that "courts are more reluctant to remove a trustee who has been chosen by the settlor than one who is court-appointed" (quotation omitted)).

II.

Appellant next challenges the district court's refusal to remove from the PRFT the assets that were to have been distributed to the ARFT. Appellant argues that the trusts were improperly merged under Minn. Stat. § 501B.15, subd. 2 (2012), and that the merger contradicts Arthur Rosenbrook's testamentary intent. The trustees argue that the merger was valid under section 501B.15 and 524.3-912 (2012). The trustees also argue that the "[a]ppellant's signed written agreement to merge the trusts was valid and ratified the [t]rustee's actions."

The wills of Perry Rosenbrook and Arthur Rosenbrook each established testamentary trusts to hold assets for the benefit of appellant. *See In re Trust of Bush*, 249 Minn. 36, 43, 81 N.W.2d 615, 620 (1957) ("In order to constitute an express trust there must be: (1) a designated trustee subject to enforceable duties, (2) a designated beneficiary vested with enforceable rights, and (3) a definite trust res wherein the trustee's title and estate is separated from the vested beneficial interest of the beneficiary."). Under the terms of the Arthur Rosenbrook will, because Perry Rosenbrook predeceased his father, his share of his father's estate was to be distributed to the ARFT and held for the benefit of appellant until she reached the age of 24. Instead, Perry Rosenbrook's share of his father's estate was distributed to the PRFT pursuant to the distribution agreement, essentially merging the ARFT and the PRFT.

Section 501B.15 allows for the unsupervised merger of two trusts as follows:

> A trustee may, without the approval of any court, merge two or more trusts having substantially similar terms and identical beneficiaries into a single trust if the trustee determines that merging the trusts is in the best interests of all persons interested in the trusts and will not substantially impair the accomplishment of the purposes of the trusts.

Minn. Stat. § 501B.15, subd. 2. The district court considered application of section 501B.15 and found that the trusts have "materially different terms in regard to administration and distribution of assets to designated beneficiaries." The district court specifically referenced the age of distribution of trust proceeds to appellant: the age of distribution under the ARFT is 24, whereas the age of distribution under the PRFT is 30.

The district court therefore recognized that the trusts did not satisfy the substantially similar terms prerequisite for merger under 501B.15, subd. 2.

Even though the district court recognized that the merger was not valid under section 501B.15, the district court nonetheless refused to remove the Arthur Rosenbrook estate assets from the PRFT because appellant agreed to the merger in writing. The district court stated, "[r]egardless of whether a trust was not set up pursuant to Arthur Rosenbrook's Will or whether the trusts of Arthur and Perry Rosenbrook had different terms for age of distribution, [appellant] agreed to have the proceeds from Arthur Rosenbrook's Estate transferred to the [PRFT]." But the district court did not cite legal authority for its conclusion that a beneficiary's written agreement to merge two trusts may override the statutory requirement of "substantially similar terms," and such a conclusion is at odds with trust jurisprudence.

A court's purpose in interpreting a trust agreement is to "ascertain and give effect to the grantor's intent." *In re Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012). The district court's allowance of the continued merger of the ARFT and the PRFT is inconsistent with Arthur Rosenbrook's intent as expressed in the plain language of his will, which clearly establishes his intent that appellant receive her share of the trust proceeds when she turned 24. The distribution agreement and resulting merger does not give effect to that expressly stated intent. Moreover, reliance on appellant's written consent to justify the merger is inconsistent with Arthur Rosenbrook's implicit intent that appellant should not have decision-making authority over the proceeds of the trust before

she reached the age of 24. We therefore conclude that the district court erred by continuing the merger based on appellant's written consent.

The trustees cite Minn. Stat. § 524.3-912 as an alternative ground to validate the merger. Section 524.3-912, which also was cited as statutory authority in the distribution agreement, provides that "competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions." A successor is a person who is "entitled to property of a decedent under the decedent's will." Minn. Stat. § 524.1-201(51) (2012). The trustees of a testamentary trust are also successors for the purposes of section 524.3-912. Minn. Stat. § 524.3-912. However, "[n]othing [in section 524.3-912] relieves trustees of any duties owed to beneficiaries of trusts." *Id.*

Because the district court's order does not indicate that it considered and determined that the merger was valid under section 524.3-912, the trustees' argument on this issue is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that an appellate court generally will not consider matters not argued to and considered by the district court). Regardless, the argument is not persuasive. Contrary to the trustees' argument, appellant was not a "successor" as that term is defined in statute because she was not "entitled to property" of Arthur Rosenbrook under his will. *See* Minn. Stat. § 524.1-201(51). Instead, she was an intended trust beneficiary who had no vested right to any property under the will. *See In re Trust of Bush*, 249 Minn. at 43-44, 81 N.W.2d at 620 (stating that a beneficiary of a

trust has no title or estate in the trust res but only a vested right to enforce in equity the performance of the trust for his benefit).

And even though a trustee is a "successor" for purposes of section 524.3-912, the distribution agreement does not indicate that any of the signatories was acting as trustee for the ARFT.[1] Lon Rosenbrook signed individually and as "Trustee of the Perry Rosenbrook Trust." Each of the other signatories signed in his or her individual capacity. Moreover, the resulting merger improperly relieved the trustee of the ARFT of an express duty owed to appellant as a beneficiary of the trust: distribution of trust proceeds to appellant when she reached the age of 24. In sum, the distribution agreement does not comply with the clear language of section 524.3-912. We therefore reject the argument that the merger was valid under section 524.3-912.

In summary, because the distribution agreement does not give effect to Arthur Rosenbrook's intent as expressed in the plain language of his will, and because the resulting merger is not valid under either of the statutory grounds cited by the trustees, the district court erred by allowing the merger to continue and by refusing to remove the Arthur Rosenbrook estate assets from the PRFT.

[1] Under the terms of the Arthur Rosenbrook will, Steven A. Rosenbrook was nominated and appointed as trustee of the ARFT. In the event that Steven was unable to serve for any reason, Arthur Rosenbrook nominated and appointed his "next oldest son, and each next oldest son thereafter in succession, until a son of mine qualifies and agrees to act as Trustee." Steven predeceased Arthur Rosenbrook, and there is no indication that any of his surviving siblings qualified or agreed to act as trustee.

III.

Appellant next argues that the district court erred by refusing to order the trustees to reimburse the trust for their unauthorized use of a trust vehicle. Appellant argues that the trustees had a fiduciary duty not to use trust property for personal use, the trustees breached that duty by putting 7,323 unauthorized miles on a trust motorcycle, and the trustees' breach of duty resulted in damages, the measure of which is the statutory reimbursement rate for mileage. "Damage awards are reviewed under an abuse-of-discretion standard." *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 407 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

Under Minnesota law, trustees owe trust beneficiaries several fiduciary duties, including the duty of loyalty. *In re Revocable Trust of Margolis*, 731 N.W.2d 539, 545 (Minn. App. 2007). A trustee's duty of loyalty is a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. *Schug v. Michael*, 310 Minn. 22, 29, 245 N.W.2d 587, 591 (1976). Although the district court found that the trustees' use of a motorcycle belonging to the trust was unauthorized, it concluded that the use was not a breach of the trustees' fiduciary duty. The district court denied appellant's request for mileage reimbursement because the trustees personally paid "all expenses for repairs and maintenance, including insurance, tires, batteries, and fuel injection system."

Even if the trustees' use of the motorcycle had been a breach of fiduciary duty, appellant bore the burden of proving damages caused by the breach. *See Canada v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997) ("In an ordinary civil action, the plaintiff has the burden of proving damages caused by the defendant by a fair preponderance of

the evidence."). The measure of damages for breach of fiduciary duty by a trustee is the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered—i.e., the depreciation in the value of the trust property. Restatement (Third) of Trusts: Prudent Investor Rule § 205(b) (1992). At the evidentiary hearing before the district court, appellant did not argue, much less prove, that the motorcycle depreciated in value as a result of the trustees' personal use. Rather, she merely established the number of miles that the trustees put on the motorcycle and argued, without legal support, that the proper measure of damages was the statutory reimbursement rate for mileage. Assuming that appellant is referring to the IRS's standard mileage rate for deducting the cost of operating an automobile for business, that rate is based on "an annual study of the fixed and variable costs of operating an automobile"—e.g., maintenance and gas—and is not the appropriate measure of damages for breach of fiduciary duty. *See Standard Mileage Rates for 2013*, IRS (Nov. 21, 2012), http://www.irs.gov/uac/2013-Standard-Mileage-Rates-Up-1-Cent-per-Mile-for-Business,-Medical-and-Moving. Because appellant failed to prove compensable damages under a recognized measure, the district court did not err by refusing to order the trustees to reimburse the trust for mileage resulting from unauthorized use of a trust vehicle.

IV.

Lastly, appellant challenges the district court's failure to require the trustees to personally pay the attorney fees incurred by the parties in this matter. Appellant's argument is twofold. First, appellant contends that the trustees should pay her attorney

fees as damages for their improper conduct. Second, appellant contends that the trust should not pay the trustees' attorney fees because the fees are the result of their improper conduct as trustees. We address each argument in turn.

This court will not reverse a district court's denial of attorney fees absent an abuse of discretion. *In re Margolis Revocable Trust*, 765 N.W.2d 919, 928 (Minn. App. 2009). "Moreover, it is well-settled that attorney fees are not recoverable in Minnesota unless there is a statutory authorization or a contractual agreement allowing them to be recovered." *Id.* The terms of the PRFT do not authorize attorney fees against the trustees in their individual capacities, and appellant has not pointed to any statute that explicitly authorizes them. Moreover, this court has observed that "there is no Minnesota case requiring a trustee whose management of a trust has been challenged to pay attorney fees incurred by the successor challenger." *Id.* (quotation omitted). Thus, the district court did not abuse its discretion in denying appellant's request that the trustees pay her attorney fees.

As to the district court's order that the trustees' attorney fees be paid out of the trust, "[a] trustee defending in good faith a challenge to his administration of the trust is entitled to reasonable attorney fees paid out of the trust." *Id.* Although "[a] district court may deny a trustee's claim for attorney fees paid out of the trust when the trustee has acted in bad faith or has been guilty of fraud," this court "will not reverse a district court's award of attorney fees absent an abuse of discretion." *Id.* The district court found that the trustees did not breach their fiduciary duties and that they acted in good faith. Appellant fails to show that the trustees acted in bad faith or committed fraud in their

administration of the PRFT. Thus, the district court did not abuse its discretion by refusing to require the trustees to personally pay their own attorney fees. *See id.*

In conclusion, we reverse and remand that portion of the district court's order that validates the merger of the ARFT and the PRFT. On remand, the assets from the Arthur Rosenbrook estate shall be removed from the PRFT and distributed in accordance with Arthur Rosenbrook's intent as stated in the plain language of his will. We affirm the remaining portions of the district court's order.

Affirmed in part, reversed in part, and remanded.