

2011 IL App (2d) 100715-U
No. 2-10-0715
Order filed December 8, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> THE LIVING TRUSTS)	Appeal from the Circuit Court
OF GEORGE C. MILLER AND ELEANOR)	of Du Page County.
J. MILLER,)	
)	
)	No. 03-P-1005
)	
(Todd Shepherd, <i>et al.</i> , Plaintiffs-Appellees)	Honorable
and Cross Appellants v. Melodee S.)	Kenneth L. Popejoy and
Miller-Hanson, Defendant-Appellant and)	Patrick J. Leston,
Cross Appellee).)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in: (1) reducing trustee's claimed compensation, as the court found the hours and rate of compensation inflated; (2) assessing some costs against trustee and denying compensation for unnecessary transportation and storage of worthless personal property; (3) denying trustee attorney fees for litigation, as litigation benefitted trustee, not the trust; (4) denying certain expenses in trustee's final accounts, as the denial was not against the manifest weight of the evidence; (5) dismissing trustee's counterclaim, as suit did not challenge the status of the trusts or attempt to change their terms in violation of *in terrorem* clause.

On cross-appeal, the trial court did not err in: (1) finding that trustee did not unduly delay the distribution of trust assets; (2) awarding trustee some portion of her claimed trustee compensation, as court did not find a breach of a fiduciary duty by trustee; and (3) ordering plaintiffs beneficiaries to pay their own attorney fees.

¶ 1 Defendant, Melodee S. Miller-Hanson, appeals from various trial court orders: (1) denying, in part, her request for trustee compensation; (2) sanctioning her for incurring various expenses as trustee; (3) denying, in part, her petitions for attorney fees and other expenses; and (4) denying the declaratory relief that she sought in her counterclaim. Plaintiffs, Noreen R. Malone, Todd Shepherd, and Scott Shepherd (plaintiff beneficiaries) cross-appeal from the trial court's orders: (1) regarding the distribution of trust assets; (2) granting fees to the trustee; and (3) denying their request for attorney fees. We affirm.

¶ 2 In August 1992, George and Eleanor Miller made living trusts. George died in 1995, and all of his property moved into Eleanor's trust. Upon Eleanor's death on January 17, 2002, the trusts terminated, and Melodee assumed the duties of successor trustee of the Eleanor Miller trust. In October 2003, Noreen, Melodee's sister, filed a complaint alleging that Melodee "breached her duties and obligations as trustee and subjected the trust estates to waste and mismanagement." Melodee filed a counterclaim seeking to disinherit the plaintiff beneficiaries. A trial was eventually held on the plaintiff beneficiaries' fourth-amended complaint and Melodee's counterclaim. The trial court directed a finding in favor of the plaintiff beneficiaries on the counterclaim and entered an order that, with specific exceptions that were to be assessed against Melodee's final distribution share, found against the plaintiff beneficiaries on the fourth-amended complaint. The court also ordered that the parties were responsible for their own attorney fees.

¶ 3 Shortly thereafter, Melodee filed a petition for trustee fees, attorney fees, and expenses. The trial court granted fees of \$20,700, which was about one-third of the requested fees. The court also reiterated its ruling that the parties bear their own litigation expenses.

¶ 4 On July 13, 2007, Melodee filed her final accounts, and the court continued the case for the

plaintiff beneficiaries to file exceptions. However, Melodee filed a notice of appeal before the exceptions were filed, and the plaintiff beneficiaries followed with a notice of cross-appeal. This court dismissed the parties' appeal and cross-appeal as premature in *In re the Living Trust of Miller*, 396 Ill. App. 3d 910 (2009).

¶ 5 Upon remand, Melodee filed her amended final account and a supplemental petition for attorney fees and litigation expenses. On June 11, 2010, the trial court entered an order, *nunc pro tunc* to June 8, allowing all but approximately \$9400 of the proposed expenses in the final account and ordering the distribution of trust funds. The court also denied Melodee's supplemental petition for fees and expenses. The court labeled its order "the final judgment of the court" and ruled that "all pending motions, requests, and claims for relief are hereby denied." The court also found "no just cause to delay the enforcement or appeal from this order" pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)). On June 21, the plaintiff beneficiaries filed a petition for seeking attorney fees of approximately \$247,400. On July 8, Melodee filed her notice of appeal. The trial court denied the petition for fees on July 16 and entered an "Amended Final Judgment" substituting the children of plaintiff Noreen Malone for her as plaintiffs and amending the previously-ordered distributions to reflect the substitutions and the taxation of costs against Melodee as trustee ordered by this court on December 14, 2009. Melodee filed an amended notice of appeal on August 6, and plaintiff beneficiaries filed a notice of cross appeal on August 16.

¶ 6

APPEAL

¶ 7 Melodee first contends that the trial court erred in denying her a "full measure of trustee compensation." A trust may be lawfully required to bear the necessary expenses of its own administration. *Fifth Third Bank, N.A. v. Rosen*, 2011 IL App (1st) 093533, ¶ 44. Pursuant to section

7 of the Trusts and Trustees Act, a trustee “shall be reimbursed for all proper expenses incurred in the management and protection of the trust and shall be entitled to reasonable compensation for services rendered.” 760 ILCS 5/7 (West 2006). In addition, the trusts herein provided that the trustee “shall be entitled to fair and reasonable compensation for the services it renders as a fiduciary” and “shall pay itself reasonable compensation” for those services. What constitutes reasonable compensation depends on the facts and circumstances and rests in the sound discretion of the trial court. *Price v. State*, 79 Ill. App. 3d 143, 150 (1979). A trial court abuses its discretion when it acts arbitrarily without employing conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice results. *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶ 51 (subject to revision or withdrawal).

¶ 8 Melodee submitted a petition seeking compensation for 1806 hours of her time from January 2002 through December 2004. These hours were backed up by 35 pages of time sheets attached as an exhibit. Claiming a “fair hourly rate” of \$35, she sought recompense of \$63,210. The trial court awarded \$20,700 in trustee compensation.

¶ 9 In its June 6, 2007 letter of opinion, the trial court noted that it had performed “a point by point review and analysis” of the 35 pages of time sheets and found “the *vast* majority of those entries to be inflated to levels that simply cannot be justified in the minutes/hours charged for same.” (Emphasis in original.) The court specifically analyzed several examples from the exhibit and then noted that it could cite “example after example of billing that is *overly* inflated and *far* exceeds a reasonable time frame for what is necessary in regard to the performance of the trustee duties.” (Emphasis added.) After “reviewing every single time entry” of Melodee’s exhibit, the court concluded that half of the time that Melodee claimed “was clearly unnecessary” for her duties as

trustee. The court also concluded that, in its experience “handling all probate and trust matters within Du Page County and in reviewing the various petitions for *non* professional trustee services” that a fair hourly rate of \$25 was appropriate. Further, the court sanctioned Melodee 75 hours of compensation for the unnecessary moving and storage of some of the decedent’s personal effects. Thus, the court awarded \$20,700, based on 828 hours at \$25 per hour.

¶ 10 We can find no abuse of discretion in this compensation award. The trial court clearly employed conscientious judgment in analyzing “every single time entry” submitted by Melodee before finding the hours submitted to be inflated and unnecessary. In addition, the court employed its experience in probate and trust matters in determining an appropriate hourly rate. The trial court’s judgment did not exceed the bounds of reason, and we find no abuse of discretion or error here.

¶ 11 Melodee next contends that the court erred in imposing sanctions against her. The trial court found that Melodee

“did not exercise her appropriate trustee duties by incurring storage expenses for the period of time that she did on items of little or no value. Her final distribution of worthless everyday items i.e., a fly swatter, a suit hanger and other items of no family sentimental value was mean spirited and unnecessary.”

While these actions did not rise to the level of a breach of fiduciary duty, the court sanctioned Melodee “for the unnecessary storage of those personal effects and moving of same” by assessing the costs for such moving and storage against Melodee’s share of the trust distribution. Further, the court deducted 75 hours from Melodee’s submission of hours for trustee fees for the time spent in dealing with that personal property.

¶ 12 Eleanor Miller's house was sold in December 2002, so all personal property had to be removed; Melodee had the effects placed into storage. When Melodee distributed to Noreen much of what Noreen would ultimately receive of her mother's personal property in January 2005, she sent 27 boxes including much that could be described as "junk": a fly swatter, bubble wrap, coat hangers, and empty cottage cheese containers. In addition, as Noreen testified, each of the items was wrapped multiple times in paper and wrapping tape. As we have already stated, a trustee "shall be reimbursed for all *proper* expenses incurred in the management and protection of the trust." (Emphasis added.) 760 ILCS 5/7 (West 2006). Here, the trial court found Melodee's transportation and storage, for approximately two years, of worthless personal property to be unnecessary. Further, wrapping the items multiple times in paper and tape was part of the time for which Melodee sought compensation as trustee. We can find no error in the trial court's conclusion that these expenses and usage of time were unnecessary and improper and, thus, not worthy of reimbursement or compensation.

¶ 13 Melodee next contends that the trial court erred in denying her reimbursement for attorney fees generated in defending the trust. The trial court did approve fees for legal services rendered before the plaintiff beneficiaries filed suit. However, the court ordered both sides to bear their own litigation expenses.

¶ 14 A trustee may be entitled to reimbursement for reasonable attorney fees that are related to the administration and preservation of the trust. *Fifth Third Bank*, 2011 IL App (1st) 093533, ¶ 44; *In re Trusts of Strange*, 324 Ill. App. 3d 37, 42 (2001). However, when the legal services rendered are not in the interest of the trust, a claim for fees must be rejected. *Fifth Third Bank*, 2011 IL App (1st) 093533, ¶ 44; *In re Estate of Riordan*, 351 Ill. App. 3d 594, 598 (2004). A trial court has broad discretion in deciding whether to award attorney fees, and such a decision will not be reversed unless

the court abused that discretion. *Strange*, 324 Ill. App. 3d at 42.

¶ 15 Plaintiff beneficiaries' initial complaint alleged that Melodee "has breached her duties and obligations as trustee and subjected the trust estates to waste and mismanagement" and sought the removal of Melodee as trustee "to prevent the future waste and mismanagement of the assets of the trust." The fourth-amended complaint reiterated those allegations and specifically stated that it was "intended to be 'an action against the trustee' " and that nothing within it "is intended to contest or oppose the validity of the trusts, or to set them aside." The litigation did not involve a contest of the trust; it involved allegations of mismanagement of the trust and waste of the trust estate by Melodee, the trustee. The trial court found some of Melodee's actions regarding the storage of minutia wasteful. Legal fees incurred by Melodee to defend this litigation did not benefit the trust; they benefitted Melodee. Thus, the trial court did not err in denying Melodee's claim for reimbursement of attorney fees for the litigation.

¶ 16 Melodee next contends that the trial court erred in denying sundry expenses that she claimed in her final account, including, among other things costs for grave flowers, gifts to tenants in trust-owned buildings, copying and mailing, security, and further litigation costs. This court will not substitute its judgment for that of the trial court sustaining objections to a final report unless an examination of the record as a whole reveals that the decision was against the manifest weight of the evidence. *In re Estate of Berger*, 166 Ill. App. 3d 1045, 1057 (1987) (involving the conservator of an incompetent's estate). Without addressing each of these items individually, we note that our review of the record discloses that the trial court specifically addressed each of the expenses raised in this contention and that the court's decisions regarding each expense was not against the manifest weight of the evidence. Therefore, we find no error here.

¶ 17 Melodee next contends that the plaintiff beneficiaries should have been estopped from objecting to her final accounts. This appears to be a three-pronged contention, with arguments that: (1) plaintiff beneficiaries failed to object to payments that she made as trustee when she first notified them of the payments in her current accounts supplied beginning in December 2002; (2) the objections to the final accounts were an attempt to retry the same issues raised during the trial on the fourth-amended complaint; and (3) by accepting partial distributions from the trust, plaintiff beneficiaries acquiesced in the transactions involving the trust and are estopped from challenging the facts and circumstances giving rise to the distribution. However, Melodee fails to cite to any portion of the record wherein she raises the issue of estoppel in the trial court. The record in this case is almost 5000 pages long. This court is not a repository into which an appellant may dump thousands of pages of record pages and place the burden upon the court to search through the record for relevant information. *TTC Illinois, Inc./Tom Via Trucking v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 344, 353 (2009). If Melodee or her attorney ever said any form of the word “estoppel” below, she has not pointed us to that utterance, and we will not search the record for such information. If the lack of citation is based on her failure to raise it below, we note that an issue raised for the first time on appeal is forfeited. See *Helping Others Maintain Environmental Standards v. A.J. Bos*, 406 Ill. App. 3d 669, 695 (2010). In either case, we will not consider this issue.

¶ 18 Melodee finally contends that the trial court erred in dismissing her counterclaim. Each of the trusts at issue contained a provision entitled “Section 7 of Article Eighteen,” which provided:

“Contest Clause. If any person, including a beneficiary other than me, shall in any manner, directly or indirectly attempt to contest or oppose the validity of this agreement,

including any amendments thereto, or commences or prosecutes any legal proceedings to set this agreement aside, then in such event such person shall forfeit his or her share, cease or have any right or interest in the trust property, and shall be deemed to have predeceased me.”

Melodee sought a declaratory judgment that the plaintiff beneficiaries’ lawsuit violated the Contest Clause of the trusts and should cause them to relinquish their rights to any distribution from the trust. In addition, Melodee argued that Noreen interfered with the trustee’s duties such that her actions were a usurpation of the trustee’s duties without the requisite appointment. We disagree.

¶ 19 Melodee correctly cites to *In re Estate of Mank*, 298 Ill. App. 3d 821, 835 (1998) for the proposition that, in general, conditions in a clause against contesting a will or attempting to set it aside (an *in terrorem* clause) are valid. However, Melodee fails to continue reading the paragraph in *Mank* to note that, “though they may be valid, such clauses are disfavored and are strictly construed to avoid forfeiture.” *Mank*, 298 Ill. App. 3d at 826. Further, Illinois courts are guided by “the well-established rule that equity does not favor forfeitures, and in construing conditions, both precedent and subsequent, a reasonable construction must be given in favor of the beneficiary.” [Citation.]” *Mank*, 298 Ill. App. 3d at 826. Our consideration must be whether, under the particular facts and circumstances of the case, application of the clause to the conduct would be contrary to the law or to the public policy of Illinois. *Mank*, 298 Ill. App. 3d at 826.

¶ 20 Here, the clause at issue sought to prevent a beneficiary from contesting or opposing “the validity of this agreement” or commencing or prosecuting any legal proceedings “to set this agreement aside.” Clearly, the plaintiff beneficiaries’ suit was not an attack on the validity of the trust agreements or an attempt to set them aside. The suit did not challenge the status of the trusts or attempt to change their terms; the suit alleged that Melodee “breached her duties and obligations

as trustee and subjected the trust estates to waste and mismanagement.” The plaintiff beneficiaries specifically alleged that nothing in their fourth-amended complaint “is intended to contest or oppose the validity of the trusts, or to set them aside, nor should anything in this *** complaint be interpreted” to do so. The filing of the lawsuit was not a violation of the contest clauses of the trusts, and application of the clauses would be contrary to the law of this State.

¶ 21 Further, the plaintiff beneficiaries’ actions involving themselves in the management of the trust assets were insufficient to warrant forfeiture. Melodee alleged that various actions taken by the plaintiff beneficiaries (mostly Noreen) involving themselves in the management and distribution of trust assets “amounts to a direct attempt to contest the validity of this trust agreement and subverts the very purpose and intention of the settlors which was to extend vast powers of control and discretion” to Melodee as trustee. The trial court found that Noreen attempted to “overly inject herself into the decisions and discretionary powers of the trustee.” However, the trial court also noted the “extremely high level of family angst” and “the animosity between Noreen and Melodee,” which included some “mean spirited actions by Melodee.” We cannot conclude that the powers of control and discretion given to Melodee as trustee were so “vast” that any attempt to influence the management and distribution of trust assets is an attack on the validity of the trust documents. Melodee was appointed trustee, not the "Kwisatz Haderach." Our review of the alleged improper actions leads us to conclude that the trial court did not err in dismissing Melodee’s counterclaim.

¶ 22 CROSS-APPEAL

¶ 23 In their cross-appeal, the plaintiff beneficiaries first contend that the trial court erred in not finding that Melodee unduly delayed the distribution of trust assets, specifically the proceeds from the sale of an apartment building. The parties agree that this is a question of fact and that the trial

court's judgment on this issue will be reversed only if it is against the manifest weight of the evidence. See *In re Estate of Ferguson*, 313 Ill. App. 3d 931, 938 (2000).

¶ 24 The trial court specifically cited to testimony and exhibits to support its finding that Noreen intended to refurbish the apartments and hoped that all the beneficiaries, including Melodee, could exercise “joint family ownership” of the building into the future. Plaintiff beneficiaries argue that this was not necessarily the view of the other beneficiaries. However, they fail to cite to any specific testimony or exhibits to support this argument. At most, there was one letter admitted as an exhibit that manifested hope for a “swift decision” on the matter of the sale of the apartment building. Plaintiff beneficiaries have not demonstrated that the trial court's decision was against the manifest weight of the evidence.

¶ 25 Plaintiff beneficiaries next argue that the trial court erred in granting Melodee any compensation for her service as trustee. This argument rests on the vague accusation that Melodee forfeited her compensation because she breached her fiduciary duty. However, the trial court specifically did “not find a breach of a fiduciary duty by Melodee” and could not conclude that Melodee wasted or mismanaged assets or failed to properly and effectively maintain the assets. Plaintiff beneficiaries' scant argument does not show that the trial court's decision was against the manifest weight of the evidence, and we find no error here.

¶ 26 Plaintiff beneficiaries finally contend that the trial court erred in denying their request for attorney fees from Melodee. When a court with authority to award attorney fees exercises its authority, we review the decision under an abuse of discretion standard. *In re Estate of Elias*, 408 Ill. App. 3d 301, 322 (2011). First, we note that this argument rests on the argument that Melodee breached her duties as trustee, a conclusion that the trial court refused to make and one that plaintiff

beneficiaries' argument fails to show was against the manifest weight of the evidence. Further, the trial court denied attorney fees to both sides. Given the rancor and the "family angst" that the trial court found throughout the administration of the trust and the court proceedings, which the court noted came from both sides, we can find no abuse of discretion in the court's ruling that each side was to pay its own attorney fees.

¶ 27 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 28 Affirmed.