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2013 IL App (3d) 120269-U

Order filed December 3, 2013

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

PAMELA MANN, a/k/a PAMELA A. BAKER, individually and a beneficiary of the GLENN H. and MABEL M. MANN REVOCABLE LIVING TRUST dated March 1, 1992,	)	Appeal from the Circuit Court for the 21st Judicial Circuit, Kankakee County, Illinois,
	)	
Plaintiff-Appellee,	)	
	)	
CHUHAK & TECSON, P.C.,	)	
	)	
Fee-Petitioner-Appellee,	)	
	)	
v.	)	Appeal No. 3-12-0269
	)	Circuit No. 97 CH 88
ROY MANN, individually and as beneficiary and as Successor Trustee of the GLENN H. and MABEL M. MANN REVOCABLE LIVING TRUST dated March 1, 1992; UNKNOWN OWNERS; UNKNOWN BENEFICIARIES of the GLENN H. and MABEL M. MANN REVOCABLE LIVING TRUST dated March 1, 1992; JOHN MARTH; and NON-RECORD CLAIM HOLDERS,	)	
	)	
Defendants-Appellants.	)	The Honorable Michael J. Kick Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Wright and Justice Holdridge concurred in the judgment.

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### ORDER

¶ 1 Held: While the question of fees and costs in an action to construe a testamentary agreement rests within the sound discretion of the trial court, such fees are allowable from the trust estate only if an ambiguity exists.

¶ 2 Glenn H. and Mabel M. Mann, husband and wife, executed a 25-page trust instrument on March 1, 1992, entitled the Glenn H. and Mabel M. Mann Revocable Living Trust (the Trust). Glenn and Mabel had two children, plaintiff Pamela Baker (Pamela) and defendant Roy A. Mann (Roy). Following the death of both settlors, Pamela and Roy acted as co-trustees of the Trust. In 1995, Pamela resigned as co-trustee and Roy continued as the sole trustee until he was removed in 2005.

¶ 3 Over the last 15 years, plaintiff and defendant have engaged in substantial litigation regarding the Trust. The core of the litigation appears to revolve around two inter-related disputes: (1) In 1997, Pamela filed an accounting action against defendant in the circuit court (97-CH-88) regarding the administration of the Trust, (2) In 2000, Pamela filed a partition action against defendant in the circuit court (00-CH-112) seeking partition of farm property that was part of the Trust. The partition action overlapped with the accounting action.

¶ 4 The present appeal derives from the partition litigation. In 2010, we held that the circuit court erred in denying Pamela's request for partition. *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23). Both parties subsequently filed motions for fees and costs, which the circuit court granted. The present appeal is brought only by Roy from the court's order granting Pamela fees and costs.

¶ 5 Upon review, we reverse the award of fees and costs to both Roy and Pamela. Because the facts of this case are set forth adequately in our previous order (*Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23), we state here only those facts necessary to the disposition of the present appeal.

¶ 6 **FACTS**

¶ 7 In 1997, Pamela filed an action (97-CH-88) seeking an accounting of the trust. In 2000, while the accounting action was ongoing, Pamela filed an action (00-CH-112) requesting the court to partition the only remaining asset of the Trust, which consisted of four parcels of real estate that included a total of 222 acres.

¶ 8 In 2001, Pamela filed a motion for summary judgment in the partition action (00-CH-112). Roy filed a cross-motion for summary judgment (00-CH-112). On October 3, 2001, after hearing arguments on the cross-motions for summary judgment, the court reserved ruling "until such time as [the] accounting is resolved in 97-CH 88."

¶ 9 In 2005, the circuit court issued an order in the accounting action (97-CH-88) removing Roy as trustee and requiring him to submit a final accounting report. The court named Homestar Trust Company as successor trustee. Roy subsequently filed a final accounting report, which included a petition for fees and costs regarding his managing of the Trust (97-CH-88).

Ultimately, the trial court approved Roy's final report, but denied his petition for fees and costs as related to the accounting action (97-CH-88). With resolution of the accounting action, Pamela filed an amended petition for partition.

¶ 10 In 2007, Pamela filed a motion for summary judgment on the basis that no question of fact existed and "the four corners of the Trust" allowed for partition. Defendant filed a cross-

motion for summary judgment also alleging that no question of fact existed and the plain language of the trust did not allow for partition. Upon hearing argument, the circuit court denied Pamela's request for partition as contained in her summary judgment motion and granted Roy's request to deny Pamela's requested relief as contained in his summary judgment motion.

¶ 11 Pamela appealed, and in a split decision, we reversed the circuit court's judgment. *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23).

Specifically, the majority found that the "plain meaning of the language of the Trust" illustrated the "settlor's intent" that partition be allowed. *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 12 The dissent found the Trust was ambiguous and thus concluded an award of summary judgment, for either party, was improper. *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23). Specifically, the dissent stated: "[T]he trial court should have denied the motions and held a hearing, where extrinsic evidence would be presented as necessary to establish the true intent of the settlors as to the provisions of the Trust." *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 13 Subsequent to our decision, Roy filed a petition for fees and costs in the partition action (00-CH-112). The petition does not include any language found in the Trust or statutory language entitling Roy to fees and costs as a result of defending the Trust. Instead, Roy merely offers the unsupported conclusory statement that he is entitled to fees because he previously acted as trustee and the current trustee deferred to his defense.

¶ 14 Pamela subsequently filed her own petition for fees and costs in the partition action (00-CH-112), which she later amended. The amended petition alleged that Pamela had "expended

funds for costs and incurred fees for legal services for the prosecution of the underlying petition for partition and in part for the prosecution of the appeal."

¶ 15 While the above fee and cost petitions were originally filed in the partition action (00-CH-112), they were ultimately transferred to Judge Michael Kick who was hearing the accounting action (97-CH-88). The reason for this transfer is unknown. Thus, the trust accounting action (97-CH-88) became the forum for the fees and costs associated with the partition action (00-CH-112).

¶ 16 Upon hearing argument, the circuit court (Judge Kick) granted both Pamela and Roy's motions for fees and costs. Roy filed a notice of appeal challenging that portion of the court's judgment awarding Pamela fees and costs. Pamela did not file a notice of appeal.

¶ 17 ANALYSIS

¶ 18 At the outset, we note that a substantial amount of confusion exists with regard to the procedural posture of this case. On this Court's own motion, we remanded the matter back to the circuit court in an attempt to clarify this confusion. Specifically, our minute order stated:

"On the Court's own motion, we \*\*\* remand the cause to the circuit court for correction and clarification of the record. Once the circuit court has corrected the record, the parties shall file new briefs.

The problems with the record and briefs appear to have arisen from the fact that the same parties have been litigating two related cases: an accounting (97-CH-088) and a partition of property (00-CH-112). We find no indication in the record that the

cases were ever consolidated. Nonetheless, at some point the parties and the trial court began blurring the lines between the two cases. As a result, the fee petitions at issue in this appeal were filed in the partition action, but decided by order in the accounting action. The notice of appeal was filed in the accounting action, and, except for a very small supplement, the entire record on appeal is for the accounting action.

The circuit court is directed to hold a hearing with the attorneys present, examine the records of both cases, correct and clarify those records as necessary, and oversee preparation of a record on appeal appropriate to the appeal before us. Following that, the parties are ordered to file new briefs pursuant to a schedule which will be established by the clerk of this court once the record is ready."

¶ 19 The parties' newly-submitted briefs do not clarify the reason for the commingling of the two actions. However, the parties have provided us with the correct record (00-CH-112). Thus, the sole question before us is the propriety of the circuit court's award of fees and costs deriving from the partition action.

¶ 20 Both parties recognize that while the question of fees and costs in an action to construe a testamentary agreement rests within the sound discretion of the trial court, such fees are allowable from the trust estate only if an ambiguity exists. See *Northern Trust Co. v. Winona Lake School of Theology*, 61 Ill. App. 3d 966, 975 (1978). Significantly, when the partition

action was litigated in the circuit court, both parties argued that the trust was unambiguous as to the partition issue. Roy argued that the trust unambiguously barred partition and Pamela argued that the trust unambiguously allowed partition. On appeal, we agreed with Pamela. *Mann v. Mann*, No. 00-CH-112 (2010) (unpublished order pursuant to Supreme Court Rule 23). Because we previously found there was no ambiguity in the trust agreement, we hold the circuit court abused its discretion in awarding fees and costs.

¶ 21 We take a moment to note that Roy is the only party that has appealed the circuit court's judgment. Roy, initially, in his briefs, argued that he is entitled to fees and costs, but Pamela is not.<sup>1</sup> Roy changed course, however, at oral argument and conceded on numerous occasions that the award of fees and costs as to both himself and Pamela was improper due to our previous finding that there was not ambiguity. We accept Roy concession and therefore reverse the award of fees and costs with respect to both Pamela and Roy.

¶ 22 For the foregoing reasons, we reverse the judgment of the circuit court and remand the matter for further proceedings.

¶ 23 Reversed and remanded.

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<sup>1</sup> Pamela argues that Roy is estopped from making this argument. Specifically, she asserts that Roy "invited the circuit court to award attorney fees and now he is saying they should not have been awarded." We note that Roy moved for fees and costs as trustee and thus, on a different basis than Pamela. The doctrine of estoppel does not apply.