2015 IL App (1st) 141070-U

SIXTH DIVISION
October 30, 2015

No. 1-14-1070

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re ESTATE OF EMMANUEL K. SIAW, Deceased (Colleen A. Chinlund, Special Adm'r of the Estate of Emmanuel Siaw, Deceased, and Margaret O. Siaw, Independent Ex'r of the Estate of Emmanuel Siaw, Deceased, Petitioners-Appellees, v. BMO Harris Bank, N.A., as Trustee of the Emmanuel Siaw Trust, Respondent –Appellant).	)	Appeal from the Circuit Court of Cook County. No. 2010 P 6270 Honorable Susan Coleman, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court's order approving the Family Settlement Agreement was reversed. There was no evidence from which the circuit court could conclude that a *bona fide* dispute existed among the daughter-beneficiaries, which was required for them to invoke the family settlement doctrine.

¶ 2 The respondent, BMO Harris Bank, N.A., trustee of the Emmanuel Siaw Trust (the Trustee), appeals from an order of the circuit court of Cook County approving a family settlement agreement (FSA), which terminated the Emmanuel Siaw Trust (the Siaw Trust). On appeal, the Trustee contends that as a matter of law, the circuit court erred in approving the FSA. For reasons explained below, we agree with the Trustee and reverse the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 I. Facts

¶ 5 On September 28, 1993, Emmanuel K. Siaw (Mr. Siaw) created the Siaw Trust. On December 5, 2007, Mr. Siaw amended and restated the Siaw Trust in its entirety. The Siaw Trust set forth that Mr. Siaw was not married[1] and that he had three living daughters, Beatrice O. Siaw, Margaret O. Siaw, and Theresa K. Siaw (collectively, the daughters). The Siaw Trust named Mr. Siaw as the trustee during his lifetime, and upon his death or incapacity, named Harris Bank as the trustee. The Siaw Trust provided for the distribution of the income and principal from the Siaw Trust to Mr. Siaw, as he from time to time requested. Upon his death and after the payment of related expenses, the residue of the Siaw Trust was

[1]Earnestine Siaw, Mr. Siaw's wife, predeceased him.

allocated to a separate, residuary trust designated as the "Emmanuel Siaw Family Trust" (Family Trust).

¶ 6 According to the pertinent provisions of the Family Trust, the income and principal of the Siaw Estate was to be disposed of as follows: (1) the Family Trust was to be divided into equal shares for his daughters, and subject to the specified guidelines, Trustee was to pay the income and discretionary principal to each daughter until age 50. After age 50, the trustee would continue the payments until the share had been completely distributed or until the death of the daughter; (2) a descendant's trust was to be created for distribution of income and principal to the daughters' children; and (3) in the absence of descendants, the remaining funds were to be distributed to the Ghana Government Orphanage.

¶ 7 The Siaw Trust contained spendthrift and no-contest provisions. It further provided that none of the trusts created therein was subject to the rule against perpetuities. The Siaw Trust contained a direction to the Trustee to avoid federal tax consequences, and to "vigorously" defend any contest or attack against Mr. Siaw's estate plan or estate and directed the Trustee to seek court approval of any settlement agreement. In addition, Mr. Siaw directed that "no settlement should be approved by the Court unless it is proved by clear and convincing evidence that such settlement is in the best interest of my trust estate and Estate Plan."

¶ 8 On December 6, 2007, Mr. Siaw revoked all prior wills and codicils and executed his Last Will and Testament (the Illinois Will). After the payment of expenses and taxes, the terms of the Illinois Will provided that the residue of Mr. Siaw's estate was to be added to the Siaw Trust.[2]

[2]According to the court file, on December 13, 2007, a temporary guardian was appointed for Mr. Siaw. On April 10, 2008, the Trustee was appointed the limited guardian of Mr. Siaw, a disabled person. The parties have not challenged the wills or the Siaw Trust on the grounds that Mr. Siaw was incompetent.

¶ 9 On January 25, 2010, while on a trip to the Republic of Ghana, Mr. Siaw executed another will (the Ghana Will). Under the terms of the Ghana Will, Mr. Siaw revoked all prior wills and codicils and appointed Beatrice sole executor of the Ghana Will. The Ghana Will provided that Beatrice was to receive certain real property in Illinois and a leasehold interest in certain property in Ghana. Beatrice was directed to sell Mr. Siaw's house in Koforidua and to create a trust fund with the proceeds to aid the people of his village, Old Mangoase. The remaining real and personal property was to be divided equally among or sold and the proceeds equally divided among his three daughters. The Ghana Will made no mention of the Siaw Trust.

¶ 10 Mr. Siaw died in Ghana on October 3, 2010. On November 5, 2010, the Illinois Will was admitted to probate in the circuit court of Cook County, and Margaret was appointed independent executor of his estate. On January 18, 2011, the Ghana Will was proved and registered in the high court of Ghana, and Beatrice was appointed the sole executor. On March 9, 2012, the circuit court appointed attorney Colleen A. Chinlund (attorney Chinlund) the special administrator of the Siaw Estate solely for the purpose of representing the estate in a 2007 lawsuit filed by Mr. Siaw that remained pending against his daughters, Theresa and Margaret, at the time of his death.[3]

¶ 11 On March 7, 2013, Margaret, individually and as the independent executor of the Illinois Will, filed a "Petition for Approval of Family Settlement Agreement" (FSA). In pertinent part, Margaret alleged that Beatrice, as executor of the Ghana Will, and she had been litigating in the Ghana court to determine which of the two wills controlled the distribution of Mr. Siaw's assets. The litigation required both Margaret and Beatrice to retain local counsel

[3]The lawsuit alleged that the daughters breached their fiduciary relationship with Mr. Siaw in connection with the purchase of real property and demanded the imposition of a constructive trust and an accounting. A default judgment was entered against Beatrice.

in Ghana, resulting in substantial attorney fees. As Mr. Siaw's heirs, the daughters recognized that the dispute would result in costly and protracted litigation. With the assistance of attorney Chinlund, the daughters reached a settlement and requested that the circuit court approve the settlement and authorize the execution of the FSA.

¶ 12 The salient parts of the FSA provided as follows: (1) Beatrice would receive all of the Siaw Estate's interest in the real estate and personal property situated in Ghana, including the 1998 Mercedes Benz automobile; (2) Margaret and Theresa would receive all the remaining personal property in the United States and the Siaw Estate's interest in the San Antonio, LLC; (3) the remainder of the Siaw Estate would be distributed in equal shares to the daughters; (4) Beatrice would assign her interest in the Ernestine Siaw Trust[4] which consisted of the Burr Ridge house and the San Antonio, LLC, equally to Theresa and Margaret; and (6) upon execution of the FSA, Mr. Siaw's lawsuit would be dismissed with prejudice as to Margaret and Theresa.

¶ 13 On March 28, 2013, the Trustee, as a legatee under the Illinois Will, filed a response opposing the proposed FSA. The Trustee alleged that Margaret, as the independent administrator, lacked standing to bring the petition on behalf of the daughters since the assets of the estate bypassed them and went directly into the Siaw Trust. The Trustee further alleged that Margaret's personal interest in the FSA conflicted with the interests of the other beneficiaries of the Siaw Estate. It further alleged that none of the daughters had standing as heirs to enter into the FSA because they had no interest in the Siaw Estate; and even if they had standing as heirs, conflicts of interest precluded them from representing other beneficiaries. The Trustee further alleged that the FSA did not bind all the necessary parties

[4] The daughters' deceased mother's trust.

and it did not resolve all of the pending or potential claims against the Siaw Estate. Finally, the FSA's proposed assignment of interests in certain trusts was prohibited by the provisions of the Siaw Trust.

¶ 14 In her reply, Margaret alleged that the daughters had standing because, as heirs, they were beneficiaries under the Siaw Trust. She further alleged that no adverse interests existed between the daughters and contingent or absent beneficiaries because the FSA would save time and put an end to the expensive litigation that threatened to drain the assets of the Siaw Estate. While acknowledging that the Siaw Trust prohibited the assigning of interests, Margaret alleged that the assignability provision was "boiler plate" language and nonmaterial. In light of the consent of all the beneficiaries to the FSA and balanced against the cost of litigation, Margaret maintained that under the "family settlement doctrine," a modification of the trust should be permitted.

¶ 15 On November 4, 2013, attorney Chinlund filed a "Petition for Approval of Proposed Virtual Representation Agreement." Attorney Chinlund argued that the FSA should be approved because it carried out the material purpose of Mr. Siaw's estate planning and would save expenses thus preserving the assets of the Siaw Estate. She further argued that the FSA was in the best interests of the daughters as beneficiaries, since the Siaw Trust provided for the creation of equal but separate trusts for each of the daughters to provide for their respective needs and best interests. While the daughters' children[5] were potential beneficiaries, the Siaw Trust provided that needs of the remainder beneficiaries were subordinate to those of the current beneficiaries, *i.e.*, the daughters. Finally, attorney Chinlund maintained that the FSA was allowable under the "Virtual Representation" statute

[5]At the time of these proceedings, Margaret and Theresa each had one child.

(the VRS) (760 ILCS 5/16.1 (West 2012)). She pointed out that the VRS allowed the daughters to represent the interests of their descendants, the contingent and absent beneficiaries (760 ILCS 5/16.1(a)(1)(2) (West 2012)) and permitted the termination of a trust with court approval (760 ILCS 5/16.1(d)(4) (L) (West 2012)).

¶ 16 In response to attorney Chinlund's petition, the Trustee reiterated its arguments against the FSA. It further argued that the VRS did not apply in what it termed was a dispute over two wills. Even if the VRS applied, the daughters' interests are not "substantially identical" to the remainder beneficiaries as required by the VRS. The Trustee further argued that the FSA did not provide for dismissal of the Ghana proceedings. Finally, the Trustee requested that the circuit court appoint an independent *guardian ad litem* to represent the interests of the daughters' descendants and appoint the Illinois Attorney General or other proper party to represent the interest of the Ghana Government Orphanage in determining which of the two wills governed the distribution of Mr. Siaw's estate assets.

¶ 17 Following a hearing on February 25, 2014, the circuit court entered an order approving the FSA. The parties were ordered to execute the FSA by March 27, 2014, and thereafter to do whatever was necessary to accomplish the transfer of assets according to the terms of the FSA. The case was continued to April 17, 2014, for status.

¶ 18 On March 24, 2014, the Trustee filed a notice of appeal from the circuit court's February 25, 2014 order.

¶ 19 ANALYSIS

¶ 20 The Trustee contends that the circuit court erred as a matter of law when it approved the FSA. We agree with the Trustee.

¶ 21 I. Standard of Review

¶ 22 The parties disagree as to the applicable standard of review. The Trustee maintains that since the issue presented involves the application of the law to undisputed facts, our review is *de novo*. Margaret and attorney Chinlund maintain that the issue presents a mixed question of law and fact. They argue that the circuit court made critical factual determinations as to Mr. Siaw's testamentary intent, that there existed a *bona fide* dispute among the daughters that was depleting the estate's assets and that the interests of the daughters and their descendants did not conflict. Margaret and attorney Chinlund assert that the clearly erroneous standard of review applies in this case.

¶ 23 Our supreme court has limited the clearly erroneous standard of review to decisions of administrative agencies. *Samour v. Board of Election Commissioners*, 224 Ill. 2d 530, 542 (2007). In all other civil cases, legal issues are reviewed *de novo* and factual issues are reviewed under the manifest weight of the evidence standard. *Samour*, 224 Ill. 2d at 542.

¶ 24 In the present case, the circuit court did not hold an evidentiary hearing. The court's ruling was based on the VRS, the FSA and other documentary evidence before it. "Where the evidence before a trial court consists of depositions, transcripts, or evidence otherwise documentary in nature, a reviewing court is not bound by the trial court's findings and may review the record *de novo*." *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009) (a more deferential standard of review was not warranted where there was no live testimony, since the circuit court and the reviewing court occupied the same position for making factual findings); see *Madison Miracle Productions, LLC, v. MGM Distribution Co.*, 2012 IL App (1st) 112334, ¶ 34.

¶ 25 We conclude that the applicable standard of review is *de novo*.

¶ 26 II. Discussion

¶ 27 Our supreme court has held that "members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator." *Wolf v. Uhlemann*, 325 Ill. 165, 183 (1927). Under the appropriate circumstances, Illinois courts have encouraged the use of family settlement agreements. *Fleisch v. First American Bank*, 305 Ill. App. 3d 105, 108 (1999). "A *bona fide* dispute between rival beneficiaries that would give rise to prolonged, estate-depleting litigation may constitute adequate consideration for the parties' mutual concessions in a settlement agreement." *Fleisch*, 305 Ill. App. 3d at 108. A trust may be terminated by agreement only where the design and object of the trust have been practically accomplished and all interests created by it have become vested. *Fleisch*, 305 Ill. App. 3d at 108. "Accordingly, family settlement agreements are subject to strict scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor's intent." *Fleisch*, 305 Ill. App. 3d at 108.

¶ 28 The Trustee contends that the family settlement doctrine does not apply to this case because there is no *bona fide* dispute that would deplete the Siaw Estate through expensive and prolonged litigation and disrupt the family relationships. He points out that none of the daughters contested the Illinois Will or the Ghana Will, that in the FSA Beatrice expressed her willingness to file the Ghana Will in the circuit court of Cook County and that the termination of the Siaw Trust violated Mr. Siaw's estate plan.

¶ 29 In response, Margaret and attorney Chinlund maintain that a *bona fide* dispute exists. They point out that the Illinois Will poured all of the Siaw Estate into the Siaw Trust and then into the Siaw Family Trust, which provides that the daughters receive equal shares.

However, under the Ghana Will, Beatrice received a larger share of Mr. Siaw's assets with the remainder of the assets divided equally among the daughters. They assert that litigation over the validity of the Ghana Will has been ongoing for years and as such threatens to deplete the assets of the Siaw Estate and divide the family.

¶ 30 Margaret and attorney Chinlund rely on *Uhlemann*. In that case, the grandchildren-beneficiaries of the testator sought approval of a family settlement agreement to resolve a dispute with their father and aunt, the primary beneficiaries, who had threatened to contest the validity of the testator's will. The circuit court referred the matter to a master in chancery who heard evidence and recommended to the circuit court that the family settlement agreement be approved. The supreme court upheld the circuit court's approval of the family settlement agreement over the objections of the trustee, who was administering the proceeds of the estate. The court rejected the trustee's argument that the testator's will was unambiguous and was not subject to an interpretation detrimental to either the plaintiffs- or the defendants-beneficiaries. The court noted that the testator's will made a complicated and restrictive disposition of the estate over a long period of time and found that the terms of the will were so ambiguous that an attack on the validity of the will would be justified. *Uhlemann*, 325 Ill. at 172-73. There was no evidence of fraud, and the court determined that in order for the trust to be administered properly, "the determination of the validity or proper construction of the will, by a decree of a court of equity, [was] desirable if not absolutely necessary." *Uhlemann*, 325 Ill. at 185.

¶ 31 In *Uhlemann*, the supreme court upheld the circuit court's approval of the family settlement agreement because the evidence established that a *bona fide* dispute existed among the beneficiaries. Margaret and attorney Chinlund's reliance on *Uhlemann* is

misplaced because in the present case, there was no evidence or uncontested allegation from which to conclude that a *bona fide* dispute existed among the daughters.

¶ 32 In her petition for approval of the FSA, Margaret alleged that Beatrice and she had retained counsel in Ghana and were litigating which of the two wills should control the disposition of Mr. Siaw's assets. Other than the order of the Ghanaian court admitting the Ghana Will to probate and appointing Beatrice the executor, the circuit court was not presented with evidence of any litigation taking place over the two wills, either in Ghana or Illinois. Beatrice did not file the Ghana Will in the circuit court of Cook County and did not contest the Illinois Will within the six-month period for initiating such proceedings. See 755 ILCS 5/8-1 (West 2012); *In re Estate of Ellis*, 236 Ill. 2d 45 (2009) (the six-month period is jurisdictional, and absent a direct challenge to the will during that time period, the validity of the will is established for all time). There is no evidence that Margaret filed the Illinois Will in Ghana or brought the existence of the Illinois Will to the attention of the Ghanaian court. No proof was submitted to support the allegations that there was ongoing litigation over the Ghana Will: there were no copies of retainer agreements with Ghana counsel, bills for legal fees or copies of pleadings. The relevant allegations contained in the pleadings were for the most part contested by the Trustee. While the Trustee acknowledged that the daughters had conflicts, it submitted that they were in the nature of sibling rivalry. In the absence of an evidentiary hearing, the circuit court had no basis for its conclusion that a *bona fide* dispute existed among the daughters.

¶ 33 *Altemeier v. Harris*, 403 Ill. 345 (1949) is instructive. In that case, the appellate court reversed a circuit court order approving a family settlement agreement. In affirming the appellate court's decision, the supreme court observed that it was not "proper, even though it

would be highly beneficial to all of the beneficiaries, to make provision with respect to the termination of a trust where a family may be benefited thereby, without any substantial basis other than the supposed benefit to the persons immediately favored." *Altemeier*, 403 Ill. at 356. In *Altemeier*, prior litigation had decided the proper construction of the will creating the trust, and thus, there was no basis to terminate the trust other than the material benefits to the beneficiaries which "presents no ground for unsettling the established principles of equity jurisdiction." *Altemeier*, 403 Ill. at 357; see *Fleisch*, 305 Ill. App. 3d at 109 (the refusal to approve a family settlement agreement was upheld where there was no dispute between the beneficiaries, and there was no basis for finding that the language of trust instrument would result in prolonged litigation).

¶ 34 The record before us provides no reasonable or substantial basis for finding the existence of a *bona fide* family dispute in this case. Moreover, similar to the family settlement agreement in *Altemeier*, the record indicates that the only reason for bypassing Mr. Siaw's estate plan was to accelerate the passage of his assets to the daughters. Such an acceleration of the distribution of the principal and income of the Siaw Trust was contrary to Mr. Siaw's intent as expressed in the provisions of the Siaw Trust.

¶ 35 We conclude that the circuit court erred by approving the FSA.

¶ 36 The judgment of the circuit court is reversed.

¶ 37 Reversed.