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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) 1 CA-CV 09-0499
)
THERESE SCHALLAMAYR,) DEPARTMENT D
)
Deceased.) **MEMORANDUM DECISION**
) (Not for Publication -
DONALD C. GALBASINI, as former) Rule 28, Arizona Rules of
Personal Representative of the) Civil Appellate Procedure)
Estate of Therese Schallamayr,)
Deceased,)
)
Appellant/Cross-Appellee,)
)
v.)
)
JOHANN SEBASTIAN BAUER and)
THERESE SOBOTTA, as Successor)
Co-Personal Representatives of)
the Estate of Therese)
Schallamayr, Deceased,)
)
Appellees/Cross-Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2006-001918

The Honorable Lindsay Ellis, Retired Judge Pro Tempore

VACATED; REMANDED WITH INSTRUCTIONS

Murphy Law Firm, Inc.
by Thomas J. Murphy
Attorneys for Appellant/Cross-Appellee

Phoenix

N O R R I S, Judge

¶1 Donald C. Galbasini appeals from the probate court's denial of all fees and costs (collectively, "fees") he incurred for his service as personal representative, court-appointed counsel, and private attorney for Therese Schallamayr. Further, the two beneficiaries under Schallamayr's will, Johann Sebastian Bauer and Therese Sobotta (collectively, "the beneficiaries"), cross-appeal the court's denial of their request for an award of attorneys' fees and costs against Galbasini. Because the probate court abused its discretion in denying the parties' fee requests, we vacate those orders and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 In May 2003, Galbasini began to provide certain legal and non-legal services for Schallamayr. These services included preparing her will, which she executed in August 2003, and representing her in unsuccessfully opposing the December 2003 appointment of Southwest Fiduciary, Inc., as her guardian and conservator.

¶3 Southwest continued to serve as Schallamayr's guardian and conservator until her death in July 2006. Pursuant to her

will, Schallamayr left an estate worth approximately \$520,796 to the beneficiaries, her cousins living in Germany.

¶14 In August 2006, at Galbasini's request, the probate court admitted Schallamayr's will to informal probate and appointed Galbasini as personal representative of Schallamayr's estate, as Schallamayr had specified in her will. Over a period of months, Southwest transferred Schallamayr's assets in its control to Galbasini as personal representative of the estate. According to the beneficiaries, in May 2007, Galbasini acknowledged he had received from Southwest all of the assets of Schallamayr's conservatorship estate.

¶15 In March 2009, the beneficiaries petitioned the probate court to remove Galbasini as personal representative, to appoint them as successor co-personal representatives of the estate, and to review the reasonableness of Galbasini's fees for legal and fiduciary services. In their petition, the beneficiaries alleged Galbasini had breached his fiduciary duties by failing or delaying to, *inter alia*, perform certain duties imposed on a personal representative by statute, collect funds in an account Schallamayr had maintained in a German bank, invest estate assets, account for his administration of the estate, and distribute and settle the estate. Relying on an affidavit Galbasini had executed and provided to the beneficiaries' counsel in July 2008 ("original fee claim"), the

beneficiaries also alleged Galbasini was claiming he had incurred fees and costs of \$45,071.96 between May 4, 2003, and June 16, 2008, for services rendered to Schallamayr and, after her death, to the estate. The beneficiaries argued Galbasini's original fee claim should be limited to \$22,000, the amount Galbasini claimed he had paid himself,¹ contending his hourly rate for fiduciary-type work (\$225 per hour) was unreasonable and his total fees were excessive given his mismanagement of the estate.

¶6 Galbasini failed to attend the March 26, 2009 hearing on the beneficiaries' petition. Thus, presented with no opposition to the petition, at the conclusion of the hearing (which lasted 18 minutes), the probate court entered an order (prepared by the beneficiaries' counsel) granting the relief requested in the petition ("original order"). In addition to capping Galbasini's fees at \$22,000 ("fee cap"), the court also ordered Galbasini to return to the beneficiaries (through their counsel) any amount he had paid himself in excess of the fee cap.

¹In his affidavit, Galbasini stated:

That the total amount of fees requested is \$45071.96, covering 196.1 hours or \$40042.50, direct legal services of \$4175.00 and costs of \$854.46 [f]or a total of \$45071.96. Of this amount, \$22,000.00 has been paid.

¶17 A day later, on March 27, 2009, Galbasini moved to set aside the original order and reconsider "amounts approved for attorney fees" ("set-aside motion"), asserting he had miscalendared the date of the hearing. Galbasini also filed an affidavit "in support [of] motion for attorney's fees and reimbursement of costs," along with an itemization of his work and time charges for Schallamayr and then her estate. In his affidavit ("amended fee claim"), Galbasini asserted the services he had rendered to Schallamayr and then to her estate from May 4, 2003, through March 27, 2009, totaled \$52,344.45 of which \$46,000 had "been paid."² Four days later, Galbasini filed a supplement to his set-aside motion and, for the first time, responded to the beneficiaries' allegations and arguments that he had mismanaged the estate. He also argued the fee cap was unfair.

¶18 Responding, the beneficiaries asserted Galbasini had failed to show excusable neglect that would entitle him to relief under Arizona Rule of Civil Procedure 60(c), and reiterated their arguments that Galbasini had mismanaged the

²Galbasini asserted \$16,292.50 related to the probate matter whereas the balance related to other services (\$18,140 for the guardianship and conservatorship, \$15,175 for initial legal assistance, \$1200 for tax returns, and other charges of \$951.95).

estate.³ Given what subsequently happened at the hearing, see *infra* ¶ 10, notably missing from the beneficiaries' response was any discussion of Galbasini's fee itemization or argument that the court should grant Galbasini's set-aside motion and then deny his amended fee claim in its entirety.

¶19 At a May 20, 2009 hearing on Galbasini's set-aside motion, Galbasini testified concerning his services and fees. He suggested any delay in his administration of the estate had been caused by Southwest or circumstances outside of his control. Galbasini confirmed he had, in fact, paid himself some \$46,000, and explained the only relief he was requesting was to be awarded all of his fees.

¶10 Despite having initially opposed Galbasini's set-aside motion, the beneficiaries, through counsel, verbally joined in Galbasini's request that the court set aside the original order regarding the fee cap. Their counsel then went further and

³Along with their response to the set-aside motion, the beneficiaries moved for an order to show cause as to why Galbasini should not be held in contempt for failing to abide by those portions of the original order requiring him to transfer to the beneficiaries all estate assets in his possession, to remit any fees he had paid himself in excess of the \$22,000 sum, and to provide them with certain additional documents pertaining to the estate. Arguing his failure to obey the original order was "just the latest in a string of" delay tactics, the beneficiaries asked the court to enter sanction under Arizona Revised Statutes ("A.R.S.") section 12-349(A) (2003), requiring Galbasini to pay their "attorneys' fees and costs incurred in connection with this application and motion."

asked the court to require Galbasini to forfeit all of his fees and return to the estate the \$46,000 he had been paid. In support of his oral forfeiture motion, counsel detailed a host of deficiencies, discrepancies, redundancies, and questionable charges in Galbasini's fee itemization (collectively, "fee deficiencies"). By way of example, counsel explained Galbasini had charged "at his attorney rate" to take Schallamayr to the doctor, run errands for her, visit her on her birthday, and perform clerical work. Outraged over Galbasini's amended fee claim, the beneficiaries' counsel also requested the court, without citation to any authority, "hold [Galbasini] liable and responsible for my fees for getting us where we are"

¶11 The probate court granted Galbasini's set-aside motion and, as requested by the beneficiaries, denied his amended fee claim "in its entirety." The probate court explained:

I have absolutely no doubt that you did many of the things that are set forth in your chronology of activities as set forth in your affidavit, but when you submit an affidavit to the Court that covers 2003 to 2009, you do so at your detriment.

. . . .

Your affidavit really does not appear to comply fully with the standards of a China Doll affidavit. The dates are variable. The work sometimes is not described well. It might be duplicative. It might be inconsistent. I have no way of gauging the appropriate amount, if any, that you should have been awarded in the context

of the guardian and the conservatorship period because -- well, more than three years, in excess of three years have gone by since that was even terminated, much less your work commenced in 2003.

. . . .

You have a duty as a personal representative, not to mention an attorney, to treat and handle the funds of another entrusted to you at a very high level of detail and professionalism. That did not take place here. Your duties as a trustee were not complied with. Although I have no doubt that you did work, I can't for the life of me figure out how I determine a reasonable fee, and if I could determine a reasonable fee, whether [I] would even be authorized to [award] fees under the facts as I've heard them presented today.

¶12 The court also denied the beneficiaries' request that it assess their fees "for getting us where we are" against Galbasini, reasoning as follows:

Because I know you [Galbasini] had expenses, because I know that you did undertake some of these activities, I don't know when, where, or what you did, I think that the way that I can at least balance the scales a little bit on your behalf, Mr. Galbasini, is to deny the request for Mr. Polk's attorney's fees, and that is not because it's an improper or unreasonable request, but because I think that if I added on the attorney's fees and the successor personal representative's fees and costs to this, that I would be unfairly treating you for the appropriate things that you did during the course of your representation as personal representative, which would include the filing of the necessary documents to get the estate under way.

This is extremely difficult, and I'm sure I could issue a minute entry with 922 findings if I took it under advisement, and then you all would have to wait 60 days for a ruling, but that would just be totally unfair to the heirs of the estate to delay a ruling any further just so it was more artfully framed.

¶13 After the beneficiaries clarified in writing the legal theories supporting their fee request against Galbasini, the court entered an order denying their competing fee requests ("amended order"). This appeal and cross-appeal followed.

DISCUSSION

I. Galbasini's Appeal

¶14 Galbasini argues the probate court should not have denied his amended fee claim in its entirety because, in moving to set aside the original order, he sought only limited relief - - an increased fee award equal to the difference between the fee cap and what he had actually paid himself, some \$46,000. He contends, given the limited nature of his set-aside motion, the court exceeded its authority in requiring him to forfeit all of his fees.⁴ Galbasini additionally argues the court abused its discretion in denying all of his fees. Although we reject his

⁴Galbasini did not waive his right to raise this argument on appeal, as the beneficiaries contend. Although Galbasini did not specifically question the court's authority to deny all his fees at the hearing, he clearly questioned the court's order requiring him to forfeit all his fees.

first argument, we agree with his second argument because of procedural irregularities.

¶15 In moving to set aside the original order, Galbasini challenged the fee cap. Although he quite clearly wanted additional fees, by asking the court to reconsider the fee cap and vacate it, he opened the door for the court to reconsider the totality of his requested fees. Thus, the probate court did not exceed its authority in reconsidering his fee request.

¶16 Having decided to reconsider what fees it should approve, the court then should have implemented and followed Arizona Rule of Probate Procedure 33, which sets out general requirements for all "petitions requesting approval for payment of compensation to personal representatives," and Rule 17, which sets out the general requirements for obtaining relief by way of a petition. Under these rules, the court either could have required Galbasini to file a petition in compliance with the Rule 33 requirements or could have treated his amended fee claim and supplement to his set-aside motion as a Rule 33 petition. Either way, the beneficiaries would have been entitled -- and indeed, obligated -- to set forth "all specific objections in writing" to Galbasini's petition, see Rule 33(C), and Galbasini as the petitioning party would have been in a position to respond to their objections.

¶17 The probate court did not, however, require the beneficiaries to comply with Rule 33(C). Instead, relying in large part on what the beneficiaries' counsel said at the hearing about the fee deficiencies, it rejected Galbasini's amended fee petition in its entirety. It did so even though the beneficiaries had not given Galbasini (or the court) any prior notice of the fee deficiencies. Indeed, although many of the fee deficiencies the beneficiaries' counsel mentioned at the hearing were in Galbasini's original fee claim, the beneficiaries in their petition had taken the position Galbasini was entitled to \$22,000 for his services. Although the beneficiaries were rightfully concerned over Galbasini's fees, he was nevertheless entitled to a fair and meaningful opportunity to respond to their specifically enumerated concerns and objections.

¶18 Therefore, we vacate the portions of the amended order denying Galbasini's fees in their entirety and remand this matter to the probate court for further proceedings consistent with this decision. In so doing, we direct the probate court to require the parties to comply with the requirements of Arizona Rule of Probate Procedure 33, as supplemented by Rule 17. We also direct the probate court to scrutinize all fees requested by Galbasini pursuant to this court's decision in *Sleeth v. Sleeth*, 1 CA-CV 10-0093, 2010 WL 5014350 (Ariz. App. Dec. 9,

2010), and pursuant to Arizona case law construing and applying Arizona Revised Statutes ("A.R.S.") section 14-3719 (2005).

II. *The Beneficiaries' Cross-Appeal*

¶19 The beneficiaries argue the probate court abused its discretion in denying their request for an award of attorneys' fees against Galbasini either as damages for his mismanagement of the estate or as sanctions under A.R.S. § 12-349(A)(3) (2003). Although we reject the beneficiaries' fees-as-damages argument, we agree the probate court should have considered the beneficiaries' fee request under the statute.

¶20 In Arizona, the general rule is that courts may award attorneys' fees only when specifically authorized by statute or agreement of the parties. *In re Balke's Estate*, 68 Ariz. 373, 379, 206 P.2d 732, 736 (1949); *In re Estate of Groves*, 163 Ariz. 394, 395, 788 P.2d 127, 128 (App. 1990). There is no statutory basis for a beneficiary to recover fees as damages in an action asserting breach-of-fiduciary-duty claims against a personal representative. Although A.R.S. § 14-3712 (2005) states a "personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust," neither the former Trust Code, repealed and rewritten effective January 1, 2009, see 2008 Ariz. Sess. Laws, ch. 247, § 16 (2d Reg. Sess.), nor its replacement authorizes an award of attorneys' fees

against a trustee as damages. Under A.R.S. § 14-7306(B) (2005) (repealed 2009), although a trustee could be held personally liable for torts, such personal liability was generally imposed for loss of trust assets. See *Shriners Hosps. for Crippled Children v. Gardiner*, 152 Ariz. 527, 528, 733 P.2d 1110, 1111 (1987) (citing Restatement (Second) of Trusts §§ 201, 205(a) (1959)). Similarly, the revised Trust Code does not authorize an award of attorneys' fees as damages for a trustee's breach of trust. A.R.S. § 14-11002 (Supp. 2010).

¶21 We recognize courts in other jurisdictions have allowed a beneficiary to obtain an award of attorneys' fees against a trustee when the trustee breached fiduciary duties. See, e.g., *Heller v. First Nat'l Bank of Denver*, 657 P.2d 992, 999 (Colo. App. 1982) (award of attorneys' fees in breach of trust action is an exception to general rule prohibiting awards of such fees "absent statutory or contractual provisions"). Such courts have recognized this exception as a matter of equity. See, e.g., *Allard v. First Interstate Bank of Wash., N.A.*, 768 P.2d 998, 1001 (Wash. 1989). In our view, this reasoning would essentially eviscerate Arizona's long-standing rule that attorneys' fees cannot be awarded absent a statutory or contractual provision.

¶22 A personal representative can, however, be sanctioned and assessed fees under A.R.S. § 12-349(A)(3), a statute that

authorizes a court to assess reasonable attorneys' fees and, at its discretion, double damages not to exceed \$5000 against an attorney or party who "[u]nreasonably expands or delays the proceeding." We agree with the beneficiaries that the probate court should have considered their request for fees as sanctions against Galbasini under this statute. Therefore, on remand, the probate court shall consider any fee application submitted by the beneficiaries under A.R.S. § 12-349(A)(3) or any other provision that would authorize it to assess fees against Galbasini as sanctions.

III. Attorneys' Fees and Costs on Appeal

¶23 The beneficiaries have requested an award of attorneys' fees on appeal, asserting Galbasini's appeal was frivolous. See generally A.R.S. §§ 12-341.01(C) (2003), -349(A)(1)-(3), -2106 (2003). Galbasini's appeal, however, was not frivolous. The beneficiaries have also requested an award of fees on appeal as damages, but we have already rejected that argument. Finally, the beneficiaries have requested fees pursuant to A.R.S. § 12-341.01(A). That claim is not well taken. See, e.g., *In re Naarden Trust*, 195 Ariz. 526, 530, ¶ 18, 990 P.2d 1085, 1089 (App. 1999) (trustee who successfully defended against breach-of-fiduciary-duties claim not entitled to fees under A.R.S. § 12-341.01(A)); cf. *Ariz. Tile L.L.C. v. Berger*, 223 Ariz. 491, 499, ¶ 39, 224 P.3d 988, 996 (App. 2010)

(company not entitled to fees from corporate directors under A.R.S. § 12-341.01(A) for breach of statutory trust relationship because claim did not "arise out of contract").

¶24 Galbasini has requested costs on appeal. We grant his request, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶25 For the foregoing reasons, we vacate those portions of the probate court's amended order denying Galbasini all compensation and expenses incurred in connection with his services (both fiduciary and legal) to Schallamayr or to her estate. We also vacate that portion of the amended order denying the beneficiaries' request for an award of attorneys' fees and expenses against Galbasini. We remand this matter for further proceedings consistent with this decision. See *supra* ¶¶ 18, 22.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICK IRVINE, Judge