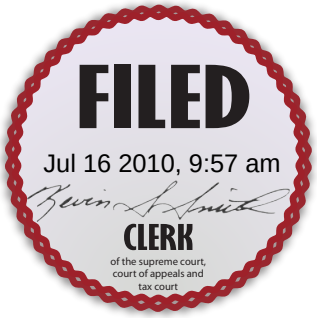

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IN THE
COURT OF APPEALS OF INDIANA

ESTATE OF MARY L. RILEY and MARJORIE R. POTTS,	)	
Appellants-Defendants,	)	
vs.	)	No. 08A02-1001-ES-33
JAMES RILEY,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-9601-ES-4

JULY 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

The Estate of Mary L. Riley ("the Estate") and executrix/personal representative Marjorie R. Potts ("Potts") appeal the trial court's decision in favor of Riley's son, James W. Riley, Jr. ("Riley"); the James W. Riley, Jr. Trust ("the Trust"); and Riley's grandchildren, James Todd Riley; Eric Tedd Riley; and Janell Sue Riley. We affirm.

ISSUES

The Estate and Potts raise two issues for review, which we restate as:

I. Whether the trial court erred when it denied Potts' request in the November 13, 2009 "Second Amended Final Report," that all the Estate's assets be awarded to her.

II. Whether the trial court erred in sustaining the objection of the Estate and Potts' offer to introduce Mary Riley's prior will as evidence.

FACTS AND PROCEDURAL HISTORY

Mary Riley, the mother of Potts and Riley, died testate on January 16, 1996. At the time of her death, Mary owned mineral rights in several parcels of Oklahoma real estate and in at least one Texas property. Mary's will, dated September 3, 1991, provided that her net assets would be distributed "one-half (1/2) thereof to [Potts, and] one-half (1/2) thereof to [Potts] as Trustee of the James W. Riley, Jr. Trust." (Appellants' App. at 29). The will directed Potts to "collect the income from the property comprising the Trust Estate, and remit the net income derived therefrom in quarterly or other convenient

installments to [Riley], or apply the same for his benefit, for so long as he shall live." *Id.* The will further directed that upon Riley's death, the Trustee should distribute the balance remaining in the Trust Estate to Mary's grandchildren.

On January 23, 1996, a supervised estate for Mary was opened in the circuit court of Carroll County, Indiana, and Potts was appointed personal representative. Potts opened an estate in Oklahoma in June of 1999, and the Oklahoma court recognized her status as the personal representative. On June 21, 1999, the Oklahoma court entered an "Order Allowing Final Account, Decree Determining Heirs, Devisees and Legatees," finding in relevant part that Mary's rights and interests in seventeen Oklahoma properties should be distributed one-half to Potts and one-half to the Trust under the provisions of Mary's will.

On August 7, 2008, Potts filed two documents in the Carroll Circuit Court: (1) "Personal Representative's Final Report and Account/Petition to Settle and Allow Account" and (2) "Personal Representative's Inventory of Property Subject to Her Control January 16, 1996." (Appellees' App. at 8, 12). On June 1, 2009, Potts filed (1) an "Amended Personal Representative's Final Report and Account/Petition to Settle Account" and (2) an "Amended Personal Representative's Inventory of Assets to be Distributed." (Appellees' App. at 59, 63).

Riley and the grandchildren (as remainder beneficiaries of the Trust) filed an action against Potts in the Carroll Circuit Court, alleging breach of her duties as trustee.

The Riley and Potts actions were consolidated, and a bench trial was held on June 2, 2009. The trial court approved Potts withdrawal as trustee and concluded that Potts had a conflict of interest as personal representative and claimant against the Estate.

Potts argued that she had a claim against the Estate because Riley had allegedly been advanced part of his inheritance when on March 12, 1981, Riley signed a six-month promissory note to Mary in the principal amount of $51,631.72. The trial court concluded that Potts' claim should not be allowed because the statute of limitations with regard to the note had passed in 1994. (Conclusion of Law #2; Appellees' App. at 70).

The trial court also concluded that Potts had failed to preserve trust income for the benefit of Riley and the grandchildren, "instead using funds to pay herself." (Conclusion of Law #9; Appellees' App. at 71). Citing Ind. Code § 30-4-5-3 (now Ind. Code § 30-2-14-20), the court concluded that the income and out-of-state mineral rights for the Oklahoma properties were distributed by the Oklahoma courts on July 21, 1999, and that the beneficiaries were "entitled to the income produced by the property once the property [was] distributed to the trust." (Conclusion of Law #12; Appellees' App. at 71). The court ultimately concluded that Potts breached her fiduciary duties as personal representative and "as trustee of the Trust in violation of Ind. Code § 30-4-3-6."[1] (Conclusions of Law ##13-14; Appellees' App. at 71). Among other things, the court ordered Potts to pay $112,224.32 to Riley and the grandchildren to compensate for her breach of duties. (Appellees' App. at 73).

[1] Ind. Code § 30-4-3-6(b) sets forth the numerous duties of the Trustee, including the duty to preserve trust property.

The trial court further found that Potts' final accounting filed on August 7, 2008 "indicated that the Indiana Estate was insolvent when opened…." (Finding of Fact #44; Appellees' App. at 69). Accordingly, the trial court ruled that Mary's estate was "ordered to be closed." (Appellees' App. at 73).

On November 13, 2009, three months after the August 2009 order was entered, Potts filed an "Amended Personal Representative's Final Account, Petition to Settle and Allow Account, and Petition for Authority to Distribute Assets Remaining and Close Estate." (Appellants' App. at 67). In an exhibit attached to this document, Potts again raised the issue of an advancement to Riley and requested a distribution of $121,104.05 to herself, with nothing to the Trust. The distribution requested was to come from the income generated from the Oklahoma Properties that had been awarded to the Trust. Riley and the grandchildren filed responses claiming that the issue had already been resolved by the trial court and that the Estate had been closed.

After a bench trial, the trial court made the following pertinent findings on January 11, 2010:

> 16. Potts did not appeal the August 2009 Order.
>
> 17. Potts now contends that she is entitled to a distribution in an amount equal to the full value of the Oklahoma leases for the reason that Mary allegedly made an advance to Riley in the amount of $51,631.72 pursuant to a Promissory Note dated March 12, 1981 ("Note").
>
> 18. Prior to her death, Mary filed a Complaint on Promissory Note against Riley in the Carroll Circuit Court …. Said Complaint demands judgment against Riley for default on the Note. The

Complaint on Promissory Note was dismissed on January 25, 2006, after Mary's death.

* * *

26. The Initial Inventory references the Note, but states that the "debt" was believed to be uncollectable and therefore no value was assigned to same.

27. The First Amended Report and Account and the Amended Inventory do not reference the Note.

28. Neither the Initial Report and Account, Initial Inventory, First Amended Report and Account, nor the Amended Inventory reference or include the alleged advancement to Riley. Furthermore, neither the Initial Report and Account, Initial Inventory, First Amended Report and Account, nor the Amended Inventory state that Potts is entitled to a distribution in the full amount of the Oklahoma leases as a result of the alleged advancement.

29. Potts testified that she has not received any new information that would account for the amendment to her Final Report that the full value of the Oklahoma leases be distributed to Potts rather than according to the plain language of Mary's Last Will and Testament.

(Appellants' App. at 82-83).

The trial court concluded in pertinent part:

10. Potts' distribution demand is based upon her allegation that the Note constituted an advancement to Riley. Potts' claim is without merit or basis in fact in that the Amended Final Account calculates the advancement as a debt to be repaid to the Indiana Estate rather than an advance on inheritance. This is evident from the fact that Potts has included $125,077.84 in interest as part of the amount allegedly advanced to Riley. Furthermore, the alleged advancement is based on the Note which, by its very terms, required repayment. Potts' own Initial Inventory refers to the amount allegedly owed on the Note as a "debt" rather than an advancement.

11. It is further clear that the Note is not evidence of an advance on inheritance for the reason that Mary filed the Complaint on Promissory Note against Riley to recover damages for his alleged

default on the Note. Potts subsequently dismissed the Complaint on Promissory note on behalf of the Indiana Estate. Potts cannot now attempt to use this same Note as the basis for her distribution claim.

12. The loan from Mary to Riley evidenced by the Note was an asset of the estate that Potts failed to preserve when she dismissed the Complaint on Promissory Note. Furthermore, said loan was not transformed into an advancement as a result of language in Item III of the deceased's Last Will and Testament. *See Duling v. Markun*, 231 F.2d 833, 837 (7th Cir. 1956) (holding that the following provision in a deceased's will was not sufficient to "show a change from a creditor-testator relationship to an advancement": 'I give and bequeath unto my nephew, Lewis R. Markun, one-third (1/3) of said residue, from which my Executors shall deduct the sum of Fifty Thousand Dollars ($50,000) each, due my estate from my nephew, Lewis R. Markun, together with any additional advancements made to him and evidenced by checks, which said sums so advanced are be considered as part of my estate').

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14. For all the foregoing reasons, the Court hereby denies the request that the amount of $121,104.05 be distributed to Potts. Any monies received under the leases shall be distributed in accordance with the August 2009 Order.

(Appellants' App. at 84-85). Potts now appeals.

DISCUSSION AND DECISION

I. PROPRIETY OF THE TRIAL COURT'S DENIAL

Potts and the Estate contend that Potts did not attempt to close the Estate pursuant to Ind. Code § 29-1-17-2 until she filed the "Amended Personal Representations Final Report and Accounting" on November 13, 2009.[2] Potts and the Estate further contend

[2] Ind. Code § 29-1-17-2(a) provides that after the expiration of the time limit for the filing of claims, "and after all claims against the state, including state and federal inheritance and estate taxes have been determined, paid, or provision made thereof, except contingent and unmatured claims which cannot be paid, the personal representative shall, if the estate is in a condition to be closed, render a final account

that this document properly raised the issue of the advancement made to Riley by Mary and was consistent with the term of the will that addressed the advancement. In support of these contentions, Potts and the Estate point out that in Mary's suit to collect on the promissory note, later dismissed by Potts, Riley characterized the note as an advancement in answers to discovery interrogatories. Potts and the Estate conclude that "[g]iven the amount of the advancement compared to the amount of the net assets remaining in the estate, [Potts] should receive the assets remaining in the estate, which include the Oklahoma leases, valued at the date of death by the court in Oklahoma." (Appellants' Brief at 5).

Potts and the Estate are asking this court to set aside the trial court's findings and conclusions in both its August 2009 and January 2010 orders. In cases tried in a bench trial, we will not set aside the findings or judgment of the trial court unless the findings and judgment are clearly erroneous. *Litzelswope v. Mitchell*, 451 N.E.2d 366, 369 (Ind. Ct. App. 1983). We look solely to the evidence most favorable to the judgment, together with all reasonable inferences therefrom, and it is only when the evidence is "without conflict and leads to but one conclusion and the trial court reached a contrary decision" that we will reverse the decision as being contrary to law. *Id*. Further we will affirm the decision of the trial court if it is sustainable upon any legal theory which the evidence supports. *Id*.

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and at the same time petition the court to decree the final distribution of the estate." The section further provides that notice of the hearing of the petition shall be given under Ind. Code 29-1-16-6, which provides the procedures for notice for final and certain intermediate proceedings.

In order to avoid their heavy burden, Potts and the Estate apparently want this court to overturn the trial court's orders as a matter of law on the basis that their November 13, 2009 filing is the only document that complies with Ind. Code § 29-1-17-2. In the view of Potts and the Estate, prior findings, conclusions, and orders are of no moment. We cannot agree.

On June 2, 2009, the trial court held a hearing on Potts' requests for certain determinations pursuant to her August 2008 "Personal Representative's Final Report and Account/Petition to Settle and Allow Account" and her June 2009 "Amended Personal Representative's Final Report and Account/Petition to Settle and Allow Account," which were consolidated with Riley and the grandchildren's action alleging breach of Potts' duties as trustee. As part of the consolidated hearing, Potts alleged that the promissory note constituted an advancement to Riley. However, the trial court found that no advancement had been made. Potts did not appeal the trial court's judgment by filing a notice of appeal within the thirty-day limit set forth in Ind. Appellate Rule 9, and the issue is therefore waived. See App.R. 9(A)(5); *Marlett v. State*, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007), *trans. denied.*

Waiver notwithstanding, Potts cannot prevail. An advancement is an irrevocable gift, passing title in the lifetime of the donor, and it cannot be part of the estate at the donor's death. *Herkimer v. McGregor*, 126 Ind. 247, 25 N.E. 145, 147 (1890); *Burkhart v. Lowery*, 115 Ind.App. 445, 59 N.E.2d 732, 734 (1945). Whether a particular transaction is an advancement or an irrevocable gift depends on the intention of the

testator. See 97 C.J.S. *Wills* § 1781 (and cases cited therein). To constitute an advancement, the evidence must show that the testator clearly intended to relinquish all present and future dominion over the property. *Id.* (citing *Samford v. First Alabama Bank of Montgomery*, 431 So.2d 146, 150 (Ala. 1983)).

Here, a provision of Mary's will provided that the principal and accrued interest upon the promissory note was part of her estate. However, the will further provided that it is an advancement "to the extent it has not been paid to me prior to my death." (Appellants' App. at 30). The language of the note provides that it is a debt with a "promise to pay." (Appellants' App. at 46). Further, and most importantly, the evidence shows that, just over a week after the execution of the will, Mary filed a lawsuit to collect on the note. The trial court did not err in determining that the principal and accrued interest were not an advancement, as the evidence clearly indicates that the property was not an irrevocable gift.[3] This is true, even though Riley indicated otherwise during discovery in the subsequently dismissed collection action.

II. THE TRIAL COURT'S RULING ON EVIDENCE

Potts and the Estate contend that the trial court erred in excluding a will executed by Mary prior to the execution of the probated will. In *State ex rel. Brown v. Crossley*, 69 Ind. 203, 1879 WL 5741 *4 (1879), our supreme court held that a prior will such as the one in issue is not "competent evidence for any purpose. Upon execution of the later

[3] In the original inventories, Potts characterizes the principal and accrued interest as property of the Estate. This is further evidence that they were not an advancement.

will, the former one was revoked and became invalid and mere waste paper." Although the objection at the hearing was not made on this basis, the trial court's exclusion is valid where it is supported by any valid reason. See *Lee v. Hamilton*, 841 N.E.2d 223, 227 (Ind. Ct. App. 2006).

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.