STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KARL F. GEIGER, JR., Deceased.

KATHLEEN GEIGER,

Petitioner-Appellant,

v

KATHRYN WILCOX,

Respondent-Appellee.

UNPUBLISHED
March 14, 2000

No. 212692
Ionia Probate Court
LC No. 95-000223-SE

Before: Smolenski, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Appellant, a former co-personal representative of the decedent's estate, appeals as of right from the probate court's order denying her petition for costs and attorney fees from her defense of a petition for surcharge brought by appellee, the successor personal representative of the estate. We affirm.

Appellant and her two sisters were appointed co-personal representatives of their father's estate, which was admitted to independent probate. Sharp disagreements arose, and her sisters petitioned to remove appellant as a co-personal representative. Appellant also petitioned for the removal of her sisters as co-personal representatives, or, alternatively, for the appointment of a non-interested third-party personal representative. Although the probate court found no cause to remove any of the co-personal representatives, appellant and her sisters stipulated to being removed and having the court appoint a non-interested third-party personal representative. The probate court also ordered supervision of the estate.

Appellee was appointed successor personal representative of the estate. Appellee then brought a petition to surcharge all three former co-personal representatives for breach of their fiduciary duties in administering the estate. Appellee cited various examples of breach of fiduciary duty, including the failure to file estate tax and income tax returns, the failure to obtain an income tax refund for the estate, the use of estate funds for personal benefit, and the distribution of estate assets while leaving property

taxes, insurance premiums, and utility bills unpaid. Appellant and her sisters claimed that counsel had advised them that no estate tax return was required because the estate's value was below the threshold amount. The parties settled the estate tax issue by stipulating that any legal malpractice claim against the former co-personal representatives' counsel was assigned to appellee. Regarding the remainder of appellee's claims, the probate court found that appellant's sisters had breached their fiduciary duties and were subject to surcharge. However, the probate court also found that appellant was free from wrongdoing with respect to the claims actually litigated. Accordingly, appellant was not surcharged.

Appellant then petitioned the court for costs and attorney fees from having to defend herself against the surcharge petition. She argued that it was appropriate to allow costs and attorney fees because she successfully defended the performance of her duties as a co-personal representative. Appellant also argued that costs and fees were an appropriate sanction because the surcharge petition was frivolously brought against her. The probate court denied the petition, holding that the surcharge petition was not frivolous. The court also held that no authority existed to allow costs and fees to a former fiduciary and that, even if such an allowance was authorized, appellant was not absolved of all wrongdoing because the estate tax issue was still unresolved.

Appellant first argues that, under MCL 700.334(v); MSA 27.5334(v)[1], she was entitled to costs and attorney fees for successfully defending the surcharge petition. Michigan follows the so-called "American rule," under which attorney fees are not recoverable unless specifically authorized by statute, court rule, or a common-law exception. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994); *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Exceptions are narrowly construed. *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991). We review the lower court's decision whether to award attorney fees for an abuse of discretion. *Phinney*, *supra* at 560.

MCL 700.334; MSA 27.5334 sets forth various powers of a personal representative. A personal representative, acting reasonably for the benefit of the estate, may "[p]rosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the successful defense of the personal representative's performance of duties." MCL 700.334(v); MSA 27.5334(v). The personal representative may also hire counsel to perform necessary legal services on behalf of the estate, MCL 700.543; MSA 27.5543, and may be compensated for reasonable expenses incurred in administering the estate. MCL 700.541; MSA 27.5541. Attorney fees are compensable as a reasonable expense only where the attorney's services were on behalf of and benefited the estate. *In re Prichard Estate*, 164 Mich App 82, 86; 416 NW2d 331 (1987). Services benefit the estate only where they increase or preserve the estate's assets. *In re Sloan Estate*, 212 Mich App 357, 362; 538 NW2d 47 (1995); *Prichard*, *supra* at 87. However, where the attorney fees are incurred in defending an action challenging the personal representative's performance of duties, those fees "are properly chargeable against the estate where no wrongdoing is proved." *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996).

Thus, whether attorney fees may be allowed for a personal representative's defense to challenges to the performance of fiduciary duties depends on whether the defense is successful. In *In re Baldwin's Estate*, 311 Mich 288; 18 NW2d 827 (1945), an executor incurred attorney fees in

defending a challenge to his administration of the estate. Our Supreme Court held that, because the fees were not for the direct or indirect benefit of the estate, the trial court erred by not charging those fees to the executor. *Id*. at 314. However, the Court noted that, had the executor been exonerated of all wrongdoing, "a different conclusion might have been reached." *Id*. This case has been understood to allow, but not require, the award of attorney fees to a fiduciary who is fully exonerated of wrongdoing in the administration of the estate. See *Hammond*, *supra* at 387; *In re Gerber Trust*, 117 Mich App 1, 16; 323 NW2d 567 (1982).

In this case, the probate court concluded that appellant had not been completely exonerated of all wrongdoing because she had settled the portion of the surcharge petition alleging negligence for failing to file an estate tax return.[2] Appellee agreed to dismiss this allegation without prejudice, in exchange for an assignment from appellant and her sisters of any cause of action against their former counsel for legal malpractice. At the hearing on the surcharge petition, appellee specifically refused to release appellant and her sisters from liability for failing to file an estate tax return. However, although appellant's sisters were surcharged, the probate court found that, with respect to those allegations actually litigated, appellant was free from wrongdoing and was not subject to surcharge.

Appellant contends that this constitutes a successful defense and that she is therefore entitled to an allowance of attorney fees. Indeed, the probate court would likely have been within its discretion had it agreed with appellant and awarded costs and attorney fees to her. However, the court was also within its discretion to deny attorney fees because appellant was not completely exonerated of all wrongdoing, in light of her settlement of the estate tax issue. Our review of the trial court's decision is limited to determining whether that decision was an abuse of discretion, which exists only when the decision was so violative of fact and logic that it demonstrates, not the exercise of discretion, but rather of passion or bias. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959); *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). We will not reverse unless the lower court's decision constitutes a perversity of will or defiance of judgment. *Id*. We simply may not substitute our judgment for that of the lower court. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). Under the circumstances of this case, we conclude that "[o]ne could reasonably disagree with the determination of the lower court; however, one could not seriously contend that the court's actions were so violative of fact and logic as to constitute perversity of will or defiance of judgment." *Model Laundries & Dry Cleaners v Amoco Corp*, 216 Mich App 1, 5; 548 NW2d 242 (1996).

Appellant also argues that the trial court erred by refusing to award costs and attorney fees as a sanction against appellee for bringing a frivolous petition for surcharge. A lower court must impose sanctions where the court finds that a claim is frivolous. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997); *Carpenter v Consumers Power Co*, 230 Mich App 547, 555-556; 584 NW2d 375 (1998), lv gtd 461 Mich 880 (1999). The court's determination whether a claim is frivolous is reviewed for clear error. *Szymanski v Brown*, 221 Mich App 423, 426; 562 NW2d 212 (1997).

Under MCR 2.114, all pleadings filed with the court must bear the signature of the party's attorney, or the signature of the party if not represented by counsel. The signature certifies that a

reasonable inquiry has been made into the factual and legal validity of the pleading and that it is not brought for any improper purpose. MRE 2.114(D); *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). Sanctions must be imposed if the rule is violated, and those sanctions may include attorney fees. MRE 2.114(E). Additionally, a party may be subject to sanctions, including attorney fees, under MCL 600.2591; MSA 27A.2591 for bringing a frivolous claim. MCR 2.114(F); MCR 2.625(A)(2); *Cvengros*, *supra* at 266. Under the statute, a claim is frivolous if "(1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit." *Carpenter*, *supra* at 556; MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

A personal representative is a fiduciary who stands in the a position of confidence and trust with respect to the beneficiaries, and is held to a standard of reasonable care in administering the estate. MCL 700.501; MSA 27.5501; MCL 700.341; MSA 27.5341; *In re Green Charitable Trust*, 172 Mich App 298, 327; 431 NW2d 492 (1988). Accordingly, the personal representative is liable for any loss to the estate from his or her negligence, including misfeasance and nonfeasance. MCL 700.544(1); MSA 27.5544(1); *Green*, *supra* at 327. A petition for surcharge is an appropriate means to settle liability issues between the personal representative and the estate. MCL 700.726; MSA 27.5726. Therefore, a surcharge petition brought against negligent fiduciaries would not be frivolous.

Appellant contends that the surcharge petition was frivolously brought against her because appellee knew that appellant had acted properly in administering the estate. Appellant emphasizes that appellee's counsel had previously represented appellant in her disputes with her sisters and was therefore aware that she had done nothing wrong. Thus, appellant claims that appellee should have brought the surcharge petition against only her two sisters and that, as to her, the petition lacked a factual and legal basis. The trial court disagreed, holding that appellee proved that breaches of fiduciary duty had, in fact, occurred, and that appellee was required to bring the petition against all three co-personal representatives.

The trial court incorrectly believed that appellee was required to bring the surcharge petition against all three co-personal representatives. A personal representative is not liable for the actions of a co-personal representative, unless the personal representative assented to the actions of the co-personal representative. See *Cheever v Ellis*, 144 Mich 477, 484; 108 NW 390 (1906) (holding that it is well settled that one executor is not liable for the waste of a co-executor unless the executor assents to the co-executor's conduct). The appellee could have brought the surcharge petition against only the negligent fiduciaries.

However, the trial court did not clearly err in holding that the surcharge petition was not frivolously brought against appellant. Appellant did not prevail on the merits of every allegation in the surcharge petition. In fact, appellee dismissed the claim that appellant and her sisters were negligent by failing to file an estate tax return, in exchange for the assignment to appellee of any legal malpractice claim against the co-personal representatives' former counsel. Appellee specifically refused to release appellant from liability on this claim. It is possible that the court could have found appellant liable for failing to file an estate tax return, despite her reliance on the advice of counsel. While reliance on the

advice of counsel may be some evidence that the fiduciary exercised reasonable care, it does not in every instance excuse the fiduciary from liability. See *In re Tolfree Estate*, 347 Mich 272, 285; 79 NW2d 629 (1956), quoting *Gilbert's Appeal*, 78 Pa 266 (1875) ("The administrators may have acted in good faith, and under the advice of counsel . . . [b]ut neither good faith nor the advice of counsel can avail to sustain such a transaction as this."). Generally, ignorance of the law is no excuse. *People v Munn*, 198 Mich App 726, 727; 499 NW2d 459 (1993), citing 4 Blackstone, Commentaries, p 27. Moreover, whether a party has exercised reasonable care is a question of fact. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

Here, whether appellant exercised reasonable care in relying on the advice of counsel to not file an estate tax return was a question of fact. Therefore, the petition for surcharge against appellant, which alleged breach of the fiduciary duty to exercise reasonable care in administering the estate, had arguable merit. Under these circumstances, the probate court did not clearly err in finding that the petition was not frivolously brought against appellant. Clear error exists only where we are left with the definite and firm conviction that a mistake has been made. *Schadewald*, *supra* at 41. We are not firmly convinced that the probate court was mistaken to conclude that appellee's petition had arguable legal merit. Accordingly, the probate court correctly denied appellant's petition for costs and attorney fees as a sanction for bringing a frivolous claim.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[1] This case is governed by the revised probate code, which has been repealed by 1998 PA 386, § 8102, effective April 1, 2000.

[2] The probate court also expressed a belief that no authority existed to support the allowance of costs and attorney fees to a former fiduciary. However, in *Hammond*, *supra* at 381, 387, the personal representative was allowed attorney fees incurred in defending a challenge to his administration of the estate, after the estate had been closed. In any event, the probate court in the instant case specifically held that, even assuming that a former fiduciary could recover attorney fees, appellant had not been completely exonerated of all wrongdoing.