STATE OF MICHIGAN

COURT OF APPEALS

In re SAMUEL GENTILE TRUST.

JOHN CARLESIMO, Successor Trustee,

Appellant,

v

JOHN GRAYBILL,

Appellee.

UNPUBLISHED
October 21, 2010

No. 288690
Livingston Probate Court
LC No. 2008-009868-TT

In re Estate of SAMUEL GENTILE.

JOHN GRAYBILL, Second Successor Personal Representative,

Appellee,

v

JOHN CARLESIMO,

Appellant,

and

PETER B. VAN WINKLE,

Appellee.

No. 289809
Livingston Probate Court
LC No. 2008-009856-DE

In re SAMUEL GENTILE TRUST.

JOHN CARLESIMO,

Appellee,

v

JOHN GRAYBILL,

Appellant.

No. 291938
Livingston Probate Court
LC No. 2008-009868-TT

In re Estate of SAMUEL GENTILE.

JOHN CARLESIMO,

Appellant,

v

JOHN GRAYBILL, Second Successor Personal Representative, PETER B. VAN WINKLE, and JOYCE GENTILE,

Appellees.

No. 292188
Livingston Probate Court
LC No. 2008-009856-DE

In re SAMUEL GENTILE TRUST.

JOHN CARLESIMO,

Appellant,

v

JOHN GRAYBILL and JOYCE GENTILE,

Appellees.

No. 292189
Livingston Probate Court
LC No. 2008-009868-TT

In re SAMUEL GENTILE TRUST.

JOHN CARLESIMO,

Appellant,

v

JOHN GRAYBILL,

Appellee.

No. 294015
Livingston Probate Court
LC No. 2008-009868-TT

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

These consolidated appeals arise from two related probate court cases, one involving the administration of the Samuel Gentile Trust (LC No. 2008-009868-TT), and the other involving the administration of Samuel Gentile's probate court estate (LC No. 2008-009856-DE).

Samuel Gentile (hereinafter "the decedent") established a revocable trust agreement in 1994. In January 2007, he executed a first amendment to the trust to name John Carlesimo as the beneficiary of the trust and a successor trustee upon the decedent's death. On January 1, 2008, the decedent executed a second amendment to the trust that removed Carlesimo as beneficiary and successor trustee, and named John Graybill as the sole beneficiary of the trust. The decedent died three days later on January 4, 2008. Although the decedent also had a will that named Carlesimo as the beneficiary of his estate, the will was never amended or revoked before the decedent's death.

After the decedent's death, Carlesimo challenged the validity of the second amendment to the trust in LC No. 2008-009868-TT, arguing that it was the product of undue influence or fraud, and that the decedent was not competent to execute the amendment. Following a trial, a jury determined that the amendment was valid. The probate court subsequently entered an order on June 27, 2008, upholding the validity of the amendment.[1] On January 23, 2009, the probate court issued an order allowing Graybill to recover his costs as the prevailing party, but directing that the costs be recovered from the trust, rather than from Carlesimo personally. Carlesimo subsequently filed a motion to recover his attorney fees and costs from the trust. The probate court denied the motion in an order dated August 10, 2009. In Docket No. 288690, Carlesimo appeals as of right from the June 27, 2008, order upholding the validity of the second amendment to the trust. In Docket No. 291938, Graybill appeals as of right from the probate court's January

[1] The probate court later entered a similar judgment dated July 2, 2008.

23, 2009, order directing that Graybill's costs be recovered from the trust. In Docket No. 294015, Carlesimo appeals as of right from the probate court's August 10, 2009, order denying his request to recover his attorney fees and costs from the trust.

After the trial in the trust case, Graybill filed a petition in LC No. 2008-009856-DE to partially revoke the decedent's will to the extent that it named Carlesimo as the beneficiary of the decedent's remaining estate. Following an evidentiary hearing, the probate court determined that there was clear and convincing evidence that the decedent intended to leave his entire estate to Graybill and that the second amendment of his trust was intended to effectuate that intent and to revoke "any bequests, gifts and appointments in favor of John Carlesimo." In Docket No. 289809, Carlesimo appeals as of right from the probate court's December 17, 2008, order declaring that the second amendment to the trust partially revoked the decedent's will.

In Docket Nos. 292188 and 292189, Carlesimo appeals as of right from the probate court's May 4, 2009, order entered in both the trust and estate cases that denied his request for a stay in the estate case, denied his request for supervision of the trust, denied his request to set aside an order appointing Graybill as personal representative of the decedent's estate, and awarded Graybill attorney fees of $1,000 to be paid by Carlesimo as a sanction for filing frivolous petitions.

We partially reverse the probate court's January 23, 2009, order in LC No. 2008-009868-TT to the extent that it requires John Graybill to recover his prevailing party costs from the trust rather than from John Carlesimo personally and affirm in all other respects.

I. DOCKET NO. 288690

Carlesimo argues that misconduct by both Graybill's attorney and a witness at the jury trial in the trust case requires reversal of the decision upholding the validity of the second amendment to the decedent's trust. We disagree.

This Court's role in reviewing claims of attorney misconduct is summarized in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Footnotes omitted.]

As explained in *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996):

> An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [Citations omitted.]

In this case, Carlesimo argues that Graybill's attorney engaged in misconduct by improperly eliciting and relying on inadmissible hearsay that an unnamed doctor had advised the decedent's attorney, Neal Nielsen, that Carlesimo's girlfriend, Mary Ellen Parks, had asked the doctor to write a letter stating that the decedent was not competent. Carlesimo further argues that Nielsen himself engaged in misconduct by repeatedly violating the probate court's order prohibiting Nielsen from testifying to what he was told by the doctor. We disagree.

The record discloses that it was Carlesimo's attorney who first asked Nielsen on direct examination if he had told the decedent that Parks was trying to have the decedent "committed." Nielsen admitted having such a discussion with the decedent. On cross-examination, Nielsen was again asked about this conversation and explained that he told the decedent that he had received a telephone call from an unnamed doctor who asked Nielsen if he should write a letter stating that the decedent was incompetent. The probate court sustained Carlesimo's hearsay objection to what Nielsen was told by the unnamed doctor. When questioning resumed, Nielsen was asked why he told the decedent that Parks was attempting to obtain a determination of the decedent's competency. Nielsen informed the court that he was hesitant about responding in light of the court's prior ruling. After the jury was excused, Nielsen explained that the reason for his conversation with the decedent about Parks was that a doctor had told him that Parks had asked for a letter declaring the decedent incompetent, but that the doctor did not believe the decedent was incompetent. The probate court again ruled that Nielsen could not testify about what he was told by the unnamed doctor. When the jury was recalled, Nielsen was questioned about other matters.

Contrary to what Carlesimo argues, Nielsen's brief reference to the doctor did not involve a deliberate attempt to interject prejudicial information into the trial. The reference occurred in the context of attempting to explain the reason for Nielsen's conversation with the decedent about Parks, an issue that Carlesimo first raised on direct examination. We also disagree with Carlesimo's argument that Nielsen's testimony violated the probate court's ruling. After the probate court initially sustained Carlesimo's hearsay objection to what Nielsen was told by the unnamed doctor, Nielsen appropriately asked for guidance from the probate court before offering testimony that he believed might contravene the probate court's previous ruling. The court excused the jury, considered the proposed testimony, and stood by its previous ruling. When the jury returned, Nielsen was questioned about another subject. Thus, there was no violation of the probate court's evidentiary ruling.

Carlesimo also argues that Graybill's attorney improperly referred to the excluded hearsay testimony in the following comment during closing argument:

> It's undisputed that Neal Nielsen called Sam around December 20th or 21st and relayed the information that he understood that Ms. Parks was trying to have a declaration of incapacity obtained from a physician regarding Sam.

There was no objection to this comment at trial. The comment did not refer to the content of any conversation between Nielsen and the unnamed doctor and, therefore, did not involve a reference to inadmissible evidence. As previously indicated, it was Carlesimo who first elicited from Nielsen that he told the decedent that Parks was trying to get the decedent "committed." Further, Parks had previously testified that she had tried to get a letter from a doctor while the decedent was in the hospital to excuse him from appearing at his divorce trial. Given this testimony, the comment does not amount to any clear type of intentional misconduct.

Accordingly, Carlesimo is not entitled to a new trial because of the alleged misconduct by Graybill's attorney or witness Nielsen.

Carlesimo next argues that the probate court erred in denying his motion for judgment notwithstanding the verdict or a new trial on the ground that the jury's verdict was against the great weight of the evidence. When reviewing a motion for judgment notwithstanding the verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If reasonable minds could differ regarding the evidence, the issue is for the jury and judgment notwithstanding the verdict is improper. *McPeak v McPeak (On Remand),* 233 Mich App 483, 490; 593 NW2d 180 (1999). A trial court's decision denying a motion for a new trial is reviewed for an abuse of discretion. *Id.* As explained in *Allard v State Farm Ins Co,* 271 Mich App 394, 406-407; 722 NW2d 268 (2006):

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [Footnotes omitted.]

Carlesimo first challenges the jury's determination that the decedent was competent to execute the second amendment to his trust. In *In re Sprenger's Estate,* 337 Mich 514, 521; 60 NW2d 436 (1953), the Court explained:

> To have testamentary capacity, an individual must be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make. The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn.
>
> Illiteracy or lack of education has little, if any, bearing upon mental capacity to make a will and the appointment of a guardian to protect the property of a person does not constitute probative evidence of mental incompetency. Nor should the lack of wisdom in the disposition of the property nor the fairness of the

> provisions of the will influence the court in a determination of mental competency. Weakness of mind and forgetfulness are likewise insufficient of themselves to invalidate a will. [Citations omitted.]

Although there was testimony that the decedent was sometimes confused or disoriented near the end of his life, several witnesses testified that he was alert and oriented when he signed the trust amendment. In addition, the nurse who was caring for the decedent when he executed the documents testified that she had been trained to look for signs of competency in her patients, that she had evaluated the decedent's mental faculties throughout the evening based on her training, that his mental condition had improved that day, and that she had no doubt that he was competent and aware of his surroundings from a medical standpoint. The testimony also indicated that the decedent had arranged for the changes to be made to his trust before he was hospitalized, and that he was anticipating signing the documents, thereby indicating that he was able to understand what he was doing. The fact that the decedent initially asked if the documents were related to his divorce does not indicate that he lacked competency, especially considering that he was also awaiting a divorce judgment so that his former wife would not receive his estate.

Carlesimo gives weight to testimony that the decedent's doctor had directed that he be notified before the decedent signed any documents, so that he could evaluate the decedent's competency, but was never notified. However, the doctor also conceded that the decedent's mental state was such that he could have been competent when he signed the documents. Further, the doctor testified that the decedent later confirmed to him that he had changed his medical power of attorney and explained that he had wanted to make that change for some time, but had not gotten around to do it. This testimony indicates that the decedent was able to comprehend and understand what he was doing.

Because there is competent evidence to support the jury's determination that the decedent was competent when he executed the second amendment to his trust, the probate court did not err in denying Carlesimo's motion for a new trial or judgment notwithstanding the verdict with respect to this issue.

Carlesimo also argues that he was entitled to a new trial or judgment notwithstanding the verdict with respect to the issue of undue influence. We again disagree.

Undue influence is established by showing "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). However, "[m]otive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient." *Id.* See also *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003). A presumption of undue influence can arise

> upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson*, 202 Mich App at 331.]

The benefit received by the fiduciary must arise from the specific transaction claimed to have been the subject of undue influence. *Id*. at 332. Where the presumption is established, it

> creates a "mandatory inference" of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion. [*In re Peterson Estate,* 193 Mich App 257, 260; 483 NW2d 624 (1991), quoting *In re Mikeska Estate,* 140 Mich App 116, 120-121; 362 NW2d 906 (1985).]

The fact that a testator was advised, persuaded, or solicited does not prove undue influence so long as he was capable of acting on his own motives and so long as he remained free to make his own decision. *In re Hannan's Estate,* 315 Mich 102, 123; 23 NW2d 222 (1946). Undue influence will only vitiate a will where the testator's free agency is overcome so that the will represents not the testator's desires, but those of someone else. *Id.*

Carlesimo argues that the evidence showed that Nielsen exerted undue influence upon the decedent and convinced him to amend both his trust and power of attorney. Although Nielsen did not benefit directly by the amendment, Carlesimo contends that Nielsen had a motive to have the decedent change his trust and power of attorney to prevent Carlesimo from intervening in the decedent's affairs, such as by hiring another attorney to intervene in the decedent's divorce case that Nielsen was handling. However, the testimony showed that Nielsen's involvement in helping the decedent change his estate plan did not occur until late December 2007, shortly before the decedent died. Further, there was testimony that during the preceding year, the decedent made statements to several different individuals expressing his intention to leave his estate to Graybill. The evidence showed that Nielsen became involved only because the decedent asked him to review his estate plan documents, at which time Nielsen informed the decedent that the documents did not dispose of the decedent's estate in the manner the decedent had expressed. Nielsen thereafter prepared new documents at the decedent's request that disposed of the decedent's estate in a manner consistent with the decedent's previously expressed intentions. Thus, the evidence supports the jury's determination that the decedent's decision to amend his trust was the product of his own free will, not any undue influence by Nielsen. Therefore, the probate court did not err in denying Carlesimo's motion for a new trial or judgment notwithstanding the verdict with respect to this issue.

Lastly, we find no merit to Carlesimo's argument that the probate court's July 2, 2008, judgment was not properly entered. The record discloses that the judgment was properly entered in accordance with the seven-day rule in MCR 2.602(b)(3), notice of which was timely served on Carlesimo.

II. DOCKET NO. 289809

Carlesimo challenges the probate court's December 17, 2008, order entered after an evidentiary hearing, holding that clear and convincing evidence showed that the decedent intended for the second amendment of his trust to accomplish the goal of leaving all of the decedent's assets, whether held in trust or not, to Graybill, and to revoke the decedent's prior will to the extent that it named Carlesimo as a beneficiary.

The probate court's factual findings related to the decedent's intent are reviewed for clear error. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). The probate court's ruling regarding the legal effect of the decedent's second amendment to his trust on his will is a question of law that is reviewed de novo. *Id.*

The probate court relied on MCL 700.2503, which provides:

> Although a document or writing added upon a document was not executed in compliance with section 2502 [MCL 700.2502], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:
>
> (a) The decedent's will.
>
> (b) A partial or complete revocation of the decedent's will.
>
> (c) An addition to or an alteration of the decedent's will.
>
> (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

The second amendment to the decedent's trust provides that, upon his death,

> all the rest residue and remainder of Trust property and estate, including any accumulations and any estate outright of Grantor Samuel Gentile, shall be awarded to John Graybel [sic] of Alaska, and any right, claim or interest that John Carlesimo may have to any of the assets, estate, residue, Trust or accumulations of any kind attributable to Samuel Gentile, shall be terminated and held for naught, and all of said property right, title and interest shall be distributed to John Graybel [sic] of Alaska.

Although this amendment purportedly applied only to the trust, the probate court found that it was the decedent's understanding and intent that it applied to all property held by his estate, whether held in trust or not. This finding is not clearly erroneous. The language of the trust amendment broadly refers to any "assets, estate, residue, Trust or accumulations of any kind attributable to Samuel Gentile." Contrary to what Carlesimo argues, the evidence did not show that the decedent did not intend to change his will. Rather, it appears that the decedent was unaware that Carlesimo was also the named beneficiary in his will, or did not understand the difference between his trust and his will. When the decedent first raised the matter with Nielsen, he only presented his trust to Nielsen to review. Further, the evidence clearly showed that it was the decedent's understanding and intent that when he died, all of his property was to go to Graybill, whether held in trust or not, and that Carlesimo was not to receive anything. The evidence showed that the decedent had expressed this intent to Nielsen and to several others during the previous year and had similarly testified to this understanding and intent in his divorce proceeding. There was clear evidence of the decedent's intent to make Graybill the sole beneficiary of his estate.

Carlesimo relies on testimony by Nielson that the second amendment to the trust was not intended to amend or change the decedent's will. However, Nielsen was referring to his own understanding of the purpose of the trust amendment, not the decedent's intent or understanding of the document. As the probate court properly determined, the critical inquiry under MCL 700.2503 is the decedent's intent regarding the purpose of the document. The probate court did not clearly err in finding that the decedent intended for the second amendment of his trust to change his will, consistent with his prior clearly expressed intent to leave all of his property to Graybill and for Carlesimo to not receive anything. See *In re Smith Estate*, 252 Mich App 120, 125; 651 NW2d 153 (2002) (extrinsic evidence is permitted to establish the testamentary intent of a document).

Carlesimo also argues that the probate court erred in relying on MCL 700.2503 because it is a "will-saving statute" and, therefore, does not apply to the amendment of the trust. The plain language of the statute provides that it applies to "a document or writing added upon a document." Although we agree that the statute does not apply to a document that is intended to amend or revoke a trust, the trust amendment qualifies as a "document or writing" that the probate court properly could rely on to the extent that it was intended by the decedent to alter or partially revoke the decedent's will.

For these reasons, we affirm the probate court's decision holding that the decedent's second amendment to his trust was intended by the decedent to alter his prior will by replacing Carlesimo with Graybill as the sole beneficiary of the decedent's estate.

Carlesimo also argues that the probate court's December 17, 2008, order was improperly entered, because it was not entered in accordance with one of the methods prescribed in MCR 2.602(B)(1) – (3). It is undisputed that the order was not approved by the parties as permitted by MCR 2.602(B)(2), or entered under the seven-day rule in MCR 2.602(B)(3). Further, although the order is dated the same day as the evidentiary hearing, the record discloses that the order had not been prepared at the time the court granted the relief provided by the order. Thus, it appears the order was not entered in accordance with MCR 2.602(B)(1). However, MCR 2.613(A) provides that "[a]n error in . . . anything done or omitted by the court or by the parties is not ground for . . . disturbing a judgment or order, unless refusal to take this action is inconsistent with substantial justice." Carlesimo has not shown that the order did not comport with the probate court's ruling or that he was otherwise prejudiced by the lack of proper notice in entering the order. Because there is no basis for concluding that any procedural error in entering the order affected Carlesimo's substantial rights, appellate relief is not warranted.

III. DOCKET NO. 291938

Graybill challenges the probate court's January 23, 2009, order directing that he recover his taxable costs from the trust, rather than from Carlesimo personally.

Matters of procedure in the probate court are governed by the rules applicable to civil proceedings in general, except as modified in the chapter of the court rules governing probate courts. MCR 5.001(A). In civil cases, the prevailing party is entitled to recover his costs, unless prohibited by statute or court rule, or the trial court directs otherwise. MCR 2.625(A)(1). "The taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the

affected party." *North Pointe Ins Co v Steward (On Remand)*, 265 Mich App 603, 611; 697 NW2d 173 (2005).

The parties do not dispute that Graybill is entitled to costs under MCR 2.625(A), as the prevailing party in the trust case. However, Graybill argues that the probate court erroneously directed that the costs be recovered from the trust, rather than from Carlesimo, the nonprevailing party in the trust case. We agree.

The probate court determined that although Graybill's costs would ordinarily be recoverable from Carlesimo under MCR 2.625, this Court's decision in *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122; 748 NW2d 265 (2008), permitted Carlesimo to avoid personal liability for Graybill's costs and instead required that Graybill recover his costs from the trust. In *In re Temple Marital Trust*, this Court considered a request for attorney fees that were incurred in a dispute between three brothers who were each beneficiaries of their parents' trust. Wallace filed a petition challenging an amendment to the trust. Wallace's siblings, Ralph and Dean, were both named as respondents. The parties' father had also attempted to change the trust by naming Ralph, rather than Dean, as successor trustee. *Id*. at 124-125, 133. Although Wallace successfully challenged the trust amendment, he was not permitted to recover his attorney fees because his actions did not benefit the trust. *Id*. at 126. However, relying on MCL 700.7401(1) and (2),[2] this Court held that Ralph and Dean's attorney

[2] MCL 700.7401(1) and (2) provide:

> (1) A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries' best interest.
>
> (2) Subject to the standards described in subsection (1) and except as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:
>
> * * *
>
> (w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.
>
> (x) To prosecute, defend, arbitrate, settle, release, compromise, or agree to indemnify a claim or proceeding in any jurisdiction or under an alternative dispute resolution procedure. The trustee may act under this subsection for the trustee's protection in the performance of the trustee's duties.

fees were recoverable from the trust because one or the other would have been the successor trustee under either version of the trust and, therefore, one or the other had a fiduciary duty to defend the trust. Furthermore, because Ralph and Dean had used the same attorney to defend the trust and there was no duplication of legal expenses, there was no concern that attorney fees were incurred by a non-fiduciary. *Id.* at 129-137.

We conclude that this case is distinguishable from *In re Temple Marital Trust*.[3] In that case, this Court determined that the attorney fees in question were incurred by a party acting in a fiduciary capacity pursuant to MCL 700.7401(1) and (2). Here, however, Carlesimo was never an acting fiduciary under MCL 700.7401(1) and (2). Although Carlesimo had been named a successor trustee under the decedent's first amendment to the trust, the second amendment removed that designation. Further, although Carlesimo brought this action to challenge the validity of the second amendment, he was unsuccessful in that challenge. In addition, although the second amendment to the trust did not name a successor trustee, that omission did not provide Carlesimo with authority to act as trustee in filing his action. In sum, because Carlesimo was never an acting trustee, he was not acting pursuant to the authority prescribed in MCL 700.7401(1) and (2). Therefore, MCL 700.7401(1) and (2) did not permit Carlesimo to avoid personal liability for Graybill's costs. Accordingly, we partially reverse the probate court's January 23, 2009, order to the extent it provides that Graybill's costs are to be recovered from the trust. Instead, those costs are recoverable from Carlesimo, as the nonprevailing party.

Graybill also challenges the probate court's inclusion of language in its April 22, 2009, order denying Graybill's motion for reconsideration in which the court suggested that Carlesimo could recover his own attorney fees and costs from the trust. Graybill contends that it was inappropriate to include this language in the order because the issue of Carlesimo's attorney fees and costs had not been raised by any party, and further, Carlesimo was not legally entitled to recover his attorney fees and costs from the trust. However, because the probate court later ruled that Carlesimo was not entitled to recover his attorney fees and costs from the trust, Graybill was not prejudiced by the probate court's injection of the issue in its earlier order.[4] Thus, any error was harmless. MCR 2.613(A) ("[a]n error in . . . anything done . . . by the court . . . is not ground for . . . disturbing a judgment or order, unless refusal to take this action is inconsistent with substantial justice").

IV. DOCKET NOS. 292188 AND 292189

Carlesimo argues that the probate court erred in denying his petition to stay the trust and estate proceedings while these appeals were pending. A trial court's decision whether to grant a

[3] We note that the probate court later expressed that it had erred in relying on *In re Temple Marital Trust* to find that Graybill was required to recover his costs from the trust. But because a claim of appeal had already been filed from the prior order, the court concluded that MCR 7.208(A) precluded it from modifying its prior order to correct the error.

[4] In section V, *infra*, we conclude that the probate court did not err in finding that Carlesimo was not entitled to recover his attorney fees and costs from the trust.

motion for a stay is discretionary and, accordingly, is reviewed for an abuse of discretion.[5] See generally MCR 5.802 and *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988). In this case, the probate court determined that good cause for a stay under MCR 5.802(C) was not established because the estate proceeding was already subject to court supervision, thereby requiring court approval before any estate assets could be transferred, and further, the trust was already subject to a stay that had been issued in the decedent's divorce case. Given these circumstances, there was no risk of irreparable harm without a stay. Thus, the probate court did not abuse its discretion in denying Carlesimo's motion for a stay.[6]

Next, Carlesimo argues that the probate court erred by refusing to set aside its February 27, 2009, order appointing Graybill as personal representative of the decedent's estate. Carlesimo contends that the order was not entered in accordance with MCR 5.107(A) because he did not receive notice of the order before it was entered. "This Court reviews for an abuse of discretion a trial court's decision to grant relief from an order." *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005).

Carlesimo challenged the entry of the February 27, 2009, order in a motion in the probate court, arguing that, contrary to Graybill's contention, he was still an interested party entitled to notice because he had filed an appeal from the order partially revoking the decedent's will. The probate court ruled that Carlesimo was to be provided with notice of all future proceedings, but declined to set aside the February 27, 2009, order. Even if Carlesimo was entitled to notice of the February 27, 2009, order before it was entered, because he later received notice of the order and had an opportunity to challenge its entry, and because he did not offer a valid reason for why Graybill was not qualified to serve as personal representative,[7] we conclude that the probate court did not abuse its discretion by declining to set aside the order.

Carlesimo also argues that the probate court erred by awarding Graybill attorney fees of $1,000 as a sanction for Carlesimo's filing of frivolous petitions. We review the probate court's decision for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128.

---

[5] Carlesimo's reliance on *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997), to argue that a de novo standard of review applies is misplaced. In *Szymanski*, this Court applied the de novo standard only to the interpretation of a court rule.

[6] Carlesimo also requests that this Court order a stay of the proceedings pending appeal. However, he did not file a motion for a stay pursuant to MCR 7.209(A), and we are denying his present request as moot.

[7] On appeal, Carlesimo inaccurately states that Robert Parker was appointed personal representative of the estate. Robert Parker was named a successor trustee of the trust. That appointment had nothing to do with the February 27, 2009, order appointing Graybill as personal representative of the decedent's estate. Accordingly, any alleged conflict of interest with respect to Parker is not a basis for concluding that the February 27, 2009, order should not have been entered.

The general rule in Michigan is that attorney fees are not recoverable unless authorized by statute, court rule, contract, or judicial exception. *Id*. at 129, 139. Probate courts may impose sanctions under MCR 2.114. See MCR 5.114 and *In re Pitre,* 202 Mich App 241, 243; 508 NW2d 140 (1993). MCR 2.114(D) and (E) allow sanctions to be imposed if a document is filed for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(F) also provides that

> [i]n addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Carlesimo argues that it was inappropriate to impose a sanction against him because the probate court awarded him relief when it ruled that he was entitled to notice of future proceedings. Although the probate court recognized the validity of that request, it noted that Carlesimo had filed several different petitions, most of which were without merit, resulting in unnecessary proceedings. In particular, the court stated that the requests for a stay in the estate case and supervision in the trust case were unnecessary because of the protections that were already in place. But because the court had granted Carlesimo relief on his request for notice of future proceedings, it declined to award the full amount of Graybill's requested costs of $2,000 and instead awarded only $1,000. Under the circumstances, the probate court's decision reflects an appropriate exercise of its discretion. Accordingly, we find no error.

V. DOCKET NO. 294015

In this last issue, Carlesimo challenges the probate court's denial of his petition to recover his attorney fees and costs from the trust. Carlesimo contends that this Court's decision in *In re Temple Marital Trust*, 278 Mich App 129-137, establishes that he may obtain reimbursement of his attorney fees and costs from the trust. We disagree. As previously discussed in section III, *supra*, Carlesimo's entitlement to reimbursement of his attorney fees and costs depends on whether he was acting in accordance with the authority prescribed to a trustee under MCL 700.7401(1) and (2). Because Carlesimo was never an acting trustee, this case is distinguishable from *In re Temple Marital Trust* and Carlesimo did not have a right to recover his attorney fees and costs from the trust. Accordingly, the probate court properly denied Carlesimo's petition for attorney fees and costs.

On appeal, Carlesimo also relies on MCL 700.7904 in support of this argument, but that statute was added by 2009 PA 46, effective April 1, 2010. Because the statute did not become effective until after this matter was decided, it is not applicable. Even if the statute applied, however, it does not aid Carlesimo's argument. MCL 700.7904(1) permits a court to allow any party who "enhances, preserves, or protects trust property" to recover costs and expenses from the trust. MCL 700.7904(2) also permits a trustee who participates in a civil action in good faith to recover his expenses, including attorney fees, from the trust, whether successful or not. Here, Carlesimo was not an acting trustee and he did not enhance, preserve, or protect trust property.

VI. CONCLUSION

In light of the foregoing analysis, we affirm the probate court's judgment upholding the validity of the trust amendment in Docket No. 288690, we affirm the probate court's December

17, 2008, order partially revoking the decedent's will in Docket No. 289809, we partially reverse the probate court's January 23, 2009, order to the extent that it allowed Graybill to recover his costs from the trust rather than from Carlesimo in Docket No. 291938, we affirm the probate court's May 4, 2009, order denying a stay, refusing to set aside a stipulated order, and requiring Carlesimo to pay sanctions of $1,000 in Docket Nos. 292188 and 292189, and we affirm the probate court's August 10, 2009, order denying Carlesimo's request to have the trust pay his attorney fees and costs in Docket No. 294015.

Affirmed in part and reversed in part.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad