

**STATE OF MICHIGAN
COURT OF APPEALS**

In re LAUREEN M. GORDON REVOCABLE
TRUST.

MICHAEL G. GORDON, SR.,

Appellant,

v

KATHLEEN L. GORDON-BEATTY,

Petitioner-Appellee,

and

JUSTIN A. GORDON, and KELSEY A. GORDON,

Appellees,

and

FAIRLANE TOOL COMPANY, INC., DOUGLAS
DOLD, DOLD SPATH & KIRIAZIS, P.C., PHILIP
E. BERTELSEN, NICOLE M. GORDON, STACY
L. DAVIS, MELISSA J. HESSELL, THERESA L.
HUNRATH, JOHN R. GORDON, JULIE
GORDON, HUNTINGTON BANK, and J.
RUSSELL LABARGE, JR.,

Other Parties.

Before: LETICA, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

In this litigious case involving the distribution of trust assets, appellant, Michael G. Gordon, Sr., appeals as of right the probate court's August 8, 2022 order denying his objections to

the treatment of assets and ordering the trustee to pay monies from Michael's beneficial interest to the Lauren M. Gordon Trust, of which appellees Justin Gordon and Kelsey Gordon were beneficiaries. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This action arises from the disbursement of assets from two trusts, one created by Richard T. Gordon ("Richard") and another created by his wife, Lauren Gordon ("Lauren"). The couple also had a family business, Fairlane Tool Company, Inc. Richard died in 2008 and Lauren died in 2014. Over the years, a dispute arose regarding the family business, which ultimately pitted Michael against his niece and nephew, appellees Justin Gordon and Kelsey Gordon ("Justin/Kelsey"). In *In re Richard T Gordon Revocable Trust Agreement*, unpublished per curiam opinion of the Michigan Court of Appeals, issued March 27, 2014 (Docket No. 312884) ("*Gordon I*"), this Court affirmed the probate court's determination that the parties reached an enforceable agreement to settle their disputes over the two trusts by submitting their claims to binding arbitration.

In May of 2017, the arbitrator issued his final decision dividing the trust assets between Michael and Justin/Kelsey. A principal subject of dispute was the operation of the family business. The resolution of the dispute included spinning off a new corporation, Fairlane Products, which Justin/Kelsey controlled, from Fairlane Tool Company, which was controlled by Michael. The arbitrator's role was to divide the assets equally between the two companies from Michael's and Justin/Kelsey's shares of the trusts. In *In re Estate of Richard T Gordon*, unpublished per curiam opinion of the Michigan Court of Appeals, issued November 8, 2018 (Docket Nos. 339296, 339297, 339299, 339320) ("*Gordon II*"),¹ this Court rejected Michael's challenges to the arbitrator's rulings and affirmed that decision.

Following this Court's decision in *Gordon II*, the successor trustee, J. Russell LaBarge, Jr. ("Trustee"), filed a petition for guidance from the probate court on how to resolve disputes that prevented him from finally distributing the trust assets and closing the trust estates. By that time, many of the assets had been distributed, but there were unresolved accounting disputes between the two companies involving inter-entity transactions that affected Michael's and Justin/Kelsey's respective shares. Plante Moran, accountants hired by the Trustee, prepared an accounting of all assets as divided on behalf of Michael and Justin/Kelsey, which it referred to as the "Roll Forward." Because Michael was unwilling to agree to Plante Moran's plan for a final resolution, the Trustee sought guidance from the probate court to (1) approve the Roll Forward as the final and complete accounting of the trusts, and (2) approve the distribution of assets to Michael and Justin/Kelsey to ultimately resolve and terminate the trusts.

Michael raised multiple objections to the Trustee's petition, most of which were resolved. However, as relevant to this appeal, Michael sought to invalidate the parties' earlier settlement, arguing that under MCL 700.7411(2) no changes could be made to the terms of Richard's trust because he died in 2008 and his trust became irrevocable at that time. Consequently, he claimed

¹ *Gordon II* involved consolidated appeals in proceedings related to Richard's and Lauren's trusts and their probate estates.

that none of the assets in Richard’s trust could be included in the Final Roll Forward. The probate court rejected Michael’s argument.

Michael was successful in raising some objections to the proposed final accounting between the two companies. It was originally proposed that Fairlane Tool (Michael’s business) would be required to pay \$4,098,213 to Fairlane Products (Justin/Kelsey’s business) in order to equalize assets and debts between them. However, after Michael raised objections and the parties met to discuss their differences, that amount was reduced to \$1,914,023. Nonetheless, Michael continued to maintain that the amount owed to Fairlane Products should be further reduced by \$436,509, which represented an accounting adjustment for professional fees paid by the trusts, resulting in a tax benefit to Fairlane Tool. This adjustment was first proposed by Plante Moran in 2019. Michael objected because he believed that the proposed adjustment was foreclosed by the arbitrator’s final decision in 2017, in which the Final Roll Forward was accepted, and therefore, neither the Trustee nor the probate court could change this item on the final accounting.

Following a hearing at which the probate court heard testimony on this issue from both Plante Moran’s accountant and from Michael’s financial expert, the court ruled that Plante Moran’s treatment of the matter was appropriate and approved the proposed adjustment. The court also denied Michael’s motion for reconsideration of this issue. Michael now appeals as of right.

II. JURISDICTION

As an initial matter, Justin and Kelsey argue that this Court lacks jurisdiction in this appeal because the probate court’s August 8, 2022 order is not a final order appealable as of right. We disagree.

A. STANDARD OF REVIEW

“Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court’s review.” *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Jurisdiction is a question of law that this Court reviews de novo. *Id.*

B. LAW AND ANALYSIS

This Court has jurisdiction as of right from either “[a] final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6),” MCR 7.203(A)(1), or from “[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule,” MCR 7.203(A)(2). In contrast, MCR 5.801 lists the different types of probate court orders that are appealable as of right. MCR 5.801 provides, in relevant part:

(A) Appeal of Right. A party or an interested person aggrieved by a final order of the probate court may appeal as a matter of right as provided by this rule.

Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order, as defined in MCR 7.202(6)(a), affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:

* * *

(x) allowing or disallowing an account, fees, or administration expenses;

* * *

(cc) granting or denying a petition for instructions;

Justin and Kelsey argue that there can be only one final order in a case, and because the prior appeals in this case were filed by right, the August 8, 2022 order must be characterized as a postjudgment order, which is appealable only by leave. This argument is misplaced because it relies on MCR 7.203(A)(1) as authority for this Court’s jurisdiction and ignores MCR 7.203(A)(2), which provides this Court with jurisdiction as of right where an appeal by right is “established by law or court rule.” Clearly, MCR 5.801 provides that there are many types of orders in probate proceedings that are appealable by right.

Here, Michael is contesting the probate court’s August 8, 2022 order that resolved the Trustee’s petition for instructions, which sought the court’s guidance and approval of the Trustee’s final accounting of the trust estates. This order is appealable as of right under both MCR 5.801(2)(x) (an order “allowing or disallowing an account, fees, or administration expenses”) and MCR 5.801(2)(cc) (an order “granting or denying a petition for instructions”).

This Court also has jurisdiction to review the probate court’s ruling regarding the applicability of MCL 700.7411, even though the court decided that issue before it entered its August 8, 2022 order. When pursuing an appeal by right, an appellant is permitted to raise issues on appeal related to prior, nonfinal orders. *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009). The only limitation is that the challenged interlocutory order be one leading to the final order. *Tomkiw v Saucedo*, 374 Mich 381, 385; 132 NW2d 125 (1965). Because the probate court’s ruling regarding MCL 700.7411 was made in response to the Trustee’s petition for instructions, which was resolved in full by the probate court’s August 8, 2022 order, that issue is within the scope of Michael’s appeal by right from the probate court’s August 8, 2022 order.

III. THE ARBITRATOR'S DECISION

Michael first argues that Plante Moran did not have the authority to make the proposed accounting adjustment in the amount of \$436,509 between the two companies with regard to the tax effect of professional fees in the subsequent Roll Forward. In his view, the arbitrator accepted the Final Roll Forward report in 2017 and permitted Plante Moran to only prepare a limited Roll Forward report. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a lower court's decision to enforce, vacate, or modify an arbitration award. *City of Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

B. LAW AND ANALYSIS

The arbitrator's decision provided, in relevant part:

During the hearing on May 1, 2017, the following final issues were presented for resolution:

1. December 31, 2016 Roll Forward. Representatives of Plante Moran participated in the hearing and presented their December 31, 2016 Roll Forward Report allocating all incomes, debts, credits and assets between the various entities at issue in this matter.

* * *

FINAL AWARD

The undersigned hereby issues the following as his **Full and Final Award**, incorporating herein by reference all prior Awards previously issued by the undersigned and which the parties should attach and make a part hereof at the time of filing for confirmation before the Court:

1. Final Roll Forward Report. Based upon the testimony presented by agents of Plante Moran, as well as the detailed Plante Moran final Roll Forward Report, the undersigned accepts the Roll Forward Report in toto. A copy of that Report is to be attached by counsel as an Exhibit to this Award.

2. Asset Allocation and Distribution. Pursuant to the prior Orders of the undersigned and the Plante Moran December 31, 2016 Roll Forward Report, J. Russell LaBarge, Jr., Trustee and Personal Representative, is ordered to immediately commence distribution of the assets to the Michael Gordon, Sr. Basket, on the one hand, and the Justin and Kelsey Gordon Basket, on the other. In making these distributions, the Laureen M. Gordon Trust shall be utilized to receive the assets allocated by the undersigned's prior Orders to Justin and Kelsey Gordon. The Richard T. Gordon Family Trust shall be utilized to receive the assets allocated

by the undersigned to Michael Gordon, Sr. The distribution of assets between the two Trusts (successors to “the Baskets”) shall be completed on or before May 31, 2017.

* * *

4. Roll Forward Report. Plante Moran will prepare a limited roll forward report covering the period from January 1, 2017 thru May 31, 2017, when the assets will have been fully and finally distributed between the parties via the Trusts. Plante Moran shall utilize the net cash positions established on line 36 of its’ Cash Position Bucket Summary dated December 31, 2016, as its’ opening position. All inter-entity transactions occurring between January 1, 2017 and May 31, 2017 shall be accounted for in this limited roll forward report. Thereafter, counsel for the respective parties shall meet and attempt to reconcile any inter-entity transactions. If the parties are unable to fully reconcile the inter-entity transactions based upon the Limited Roll Forward Report of Plante Moran dated May 31, 2017, any remaining disputes shall be referred for final resolution by the undersigned through binding arbitration. The undersigned shall have authority to re-engage Plante Moran to the extent necessary to clarify any disputes on the inter-entity transactions that are being contested by the parties.

* * *

The undersigned does hereby confirm that the foregoing is his **FULL AND FINAL ORDER** in the above-referenced Arbitrations, provided, however, that all previously issued Orders are a part of and specifically incorporated in this Final Order. The undersigned does not retain jurisdiction over this matter, excepting only motions for clarification and reconsideration, and provided that if a dispute arises as to the May 31, 2017 Plante Moran roll forward that cannot be resolved between the parties, the same will be resolved by the undersigned in a subsequent Arbitration proceeding.

It is Michael’s position that the arbitrator did not allow Plante Moran to make the accounting change to the Roll Forward that resulted in the adjustment of \$436,509 between the companies. According to Michael, the probate court did not enforce the arbitrator’s award, but instead exceeded its authority by improperly modifying it. In *City of Ann Arbor, id.* at 144-145, this Court explained:

Judicial review of an arbitrator’s decision is narrowly circumscribed. A court may not review an arbitrator’s factual findings or decision on the merits. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. Nor may a court substitute its judgment for that of the arbitrator. Hence courts are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators’ power in some way. The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator. If, in granting the award, the arbitrator did not disregard the terms of his or her employment and the scope of his or her

authority as expressly circumscribed in the contract, judicial review effectively ceases. Thus, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error. [Quotation marks, alterations, and citations omitted].

The crux of Michael's argument is that the arbitrator resolved all issues involving the distribution of trust assets in his May 3, 2017 order and accepted the Roll Forward Report prepared by Plante Moran at that time, and that the subsequent treatment of the tax effect of professional fees improperly modified the arbitrator's final order.

Reading the arbitrator's decision as a whole, it is apparent the arbitrator anticipated that Plante Moran needed to do more to finalize an allocation of assets between the parties and ordered it to prepare a limited roll forward report up through May 31, 2017, "when the assets will have been fully and finally distributed between the parties via the Trusts." The arbitrator provided that the distribution of assets was to be completed by May 31, 2017, but also allowed the parties to attempt to reconcile any inter-entity transactions.

The parties did not comply with the deadlines set by the arbitrator in his final order, largely because Michael pursued an appeal in *Gordon II*, which delayed implementing the arbitrator's decision. Michael's multiple objections to the subsequent Roll Forward Reports prepared by Plante Moran also prevented the matter from being timely resolved. The failure to follow the arbitrator's timeline did not involve any substantive modifications to his final decision. Further, the dates set by the arbitrator were not critical to the overall distribution plan.

The arbitrator recognized that disputes could arise between the parties that could be resolved short of referring the matter back to arbitration. The probate court was asked to rule on Michael's objection to a proposed adjustment by the Trustee involving the treatment of professional fees, on Plante Moran's recommendation, as inter-entity transactions. The court found that Plante Moran's proposed treatment of the tax effect of the professional fees involved an inter-entity transaction or reconciliation of the value of the professional fees paid on behalf of the two companies, Fairlane Tool and Fairlane Products. Because the arbitrator recognized that such reconciliations may be necessary, the probate court did not err by considering and approving the proposed accounting from Plante Moran. This did not modify the arbitrator's original division of assets.

In sum, the probate court's role after the arbitrator issued his final order in 2017 was to review the final accounting and division of the assets conducted in accordance with the arbitrator's final decision, which meant that the court was also required to rule on the parties' objections, most of which were made by Michael. Michael has failed to show that the Trustee did not have the authority to make necessary accounting adjustments to the final settlement of these estates as required by the arbitrator's decision. It is clear that the arbitrator anticipated that accounting adjustments might be necessary when reconciling the multiple items and issues involved in a final equitable division of the trust assets, and the treatment of the tax effect of professional fees was one such adjustment. Accordingly, the probate court did not err by rejecting Michael's objection regarding the Trustee's treatment of the tax effect of professional fees. This adjustment made as part of the final accounting of the trusts did not modify the arbitrator's final order.

IV. MCL 700.7411

Michael also argues that the probate court erred by rejecting his argument that the Trustee's proposed distribution of trust assets in accordance with the arbitrator's decision violated MCL 700.7411. We disagree.

A. STANDARD OF REVIEW

Whether the Trustee's proposed final accounting and distribution of assets violated MCL 700.7411(2) involves a question of law, which is reviewed de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

B. LAW AND ANALYSIS

MCL 700.7411 provides, in relevant part:

(1) Subject to subsection (2), a noncharitable irrevocable trust may be modified or terminated in any of the following ways:

(a) By the court on the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) On the consent of the qualified trust beneficiaries and a person or committee that is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.

(c) By a trustee or other person or committee that is given a power by the terms of the trust to direct the termination or modification of the trust.

(2) Subsection (1) does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before April 1, 2010.

The purpose of the probate court proceedings after the arbitrator issued his final order were to resolve outstanding accounting disputes arising from the arbitrator's award, including a final division and accounting of the trust assets. The proposed adjustments to the Final Roll Forward did not substantively change the trusts' distribution of assets. Moreover, the parties had agreed to submit their disputes regarding how to divide the assets under the terms of the trusts to arbitration. Thus, Michael waived any claim that the terms of Richard's trust were improperly modified under MCL 700.7411.

"A waiver is an intentional relinquishment or abandonment of a known right." *Nexteer Auto Corp v Mando America Corp*, 314 Mich App 391, 395; 886 NW2d 906 (2016). By entering into the settlement agreement to resolve the parties' differences over how the trusts should be distributed, Michael cannot now claim that MCL 700.7411(2) prevented the Trustee from dividing the remaining trust assets by dividing the family corporation into two entities, Fairlane Tool and

Fairlane Products, and equitably distributing the assets between Michael and Justin/Kelsey as determined by the arbitrator.

Affirmed.

/s/ Anica Letica

/s/ Colleen A. O'Brien

/s/ Thomas C. Cameron