

STATE OF MICHIGAN
COURT OF APPEALS

In re DONALD R. BERG TRUST.

LARRY A. COOPER and MERRI B.
RICHARDSON, Successor Cotrustees, DONALD
SCOTT BERG, SARAH MCKEOUGH REED,
Individually and as Guardian for SEAN THOMAS
BERG MCKEOUGH, KARA MCKEOUGH,
JENNIFER MCKEOUGH, and MACATAWA
BANK CORPORATION,

Appellees,

v

SUZANNE BERG,

Appellant.

UNPUBLISHED

June 21, 2012

No. 302820

Kent Probate Court

LC No. 07-183268-TV

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Appellant Suzanne Berg (Suzanne) appeals as of right the probate court's order denying her petition for instructions with respect to her role as trustee of a coin collection belonging to the Donald R. Berg Trust. Because the probate court did not clearly err by determining that Suzanne failed to act as trustee, the court did not abuse its discretion by removing her as trustee, the trust designated her as sole trustee rather than a cotrustee, and the grandchildren-beneficiaries were not equitably estopped from challenging her actions or inactions with respect to her trustee duties, we affirm.

This appeal involves a coin collection that appraised for nearly \$800,000. The collection was part of the Donald R. Berg Trust, which provided as follows with respect to the coins:

I leave my entire coin collection in equal shares to each of my grandchildren who are living at my death and to Suzanne Berg [Donald R. Berg's daughter] if she acts as trustee of these coins, but not to my grandchildren's descendants if a grandchild predeceases me leaving issue and not to Suzanne Berg if she does not act as trustee. The coin collection is to be held by Suzanne Berg,

or another person as selected by a majority of the grandchildren if Suzanne declines to act as trustee of these coins, for a period of not less than five years after my death. The coins are not to be sold or divided between the grandchildren and Suzanne prior to that date. It is not my intention to prohibit “trades” in coins. Trades shall be conducted by majority agreement of the grandchildren and Suzanne, if she is acting as trustee. Each beneficiary shall have one vote. After five years, the collection shall be divided equally between each of my grandchildren and Suzanne. If a beneficiary dies prior to division of the coins, his or her share be [sic] divided equally between the other surviving beneficiaries and not pass to the deceased beneficiaries¹ heirs.

Donald R. Berg initially acted as trustee of the trust. In January 2006, he amended the trust to provide as follows regarding trustee succession:

I may resign as Trustee at any time by written notice to Larry A. Cooper and Merri A. Richardson. After my resignation, death or inability to manage my affairs, Larry A. Cooper and Merri A. Richardson shall be successor co-trustees. The term ‘trustee’ in this agreement shall mean the acting trustee or co-trustees.

Appellees Larry A. Cooper and Merri B. Richardson were appointed successor cotrustees on or about April 24, 2007. On September 30, 2007, Donald R. Berg died. The trust has been the subject of ongoing litigation since his death.

Some of the litigation pertaining to the trust has involved the coin collection. On October 8, 2009, the cotrustees filed an inventory of the trust’s assets, including the coin collection. Donald Scott Berg (Scott), Donald R. Berg’s son and Suzanne’s brother, objected to the inventory and claimed that the coin collection belonged to the Sally Berg Trust. Sally Berg was Scott and Suzanne’s mother, who died in 2008. If the coin collection was part of the Sally Berg Trust, Scott would have been entitled to a portion of it because it would have been divided evenly between Sally’s children. If the coin collection belonged to the Donald R. Berg trust, however, Scott was not a beneficiary. Suzanne also objected to the cotrustees’ inventory, claiming that certain coins in Sally Berg’s possession at the time of her death may have erroneously been turned over to the cotrustees and should be returned to the Sally Berg Trust.

Sarah Reed, Kara McKeough, and Sean McKeough, grandchildren of Donald R. Berg and beneficiaries of the coin collection, moved for partial summary disposition and for sanctions. The cotrustees also defended the trust and filed a motion for partial summary disposition and for sanctions. The probate court dismissed with prejudice both Scott’s and Suzanne’s objections to the inventory. The court also ordered Scott to pay the costs and attorney fees of all parties

involved except Suzanne. Scott appealed to this Court, but ultimately settled the dispute and dismissed his appeal.¹

On September 17, 2010, Suzanne filed a petition for instructions, asserting that she had been appointed special trustee of the coin collection and had accepted the appointment. She attached an “Acceptance of Trust” dated February 6, 2008, which provided:

Suzanne M. Berg, being appointed Trustee of the Donald R. Berg coin collection, a part of the Donald R. Berg Trust, under agreement dated December 10, 2003, as amended June 3, 2004; July 19, 2004; and January 31, 2006, hereby accepts the trust according to the appointment and agrees to perform all duties required by law.

In her petition, Suzanne alleged that the cotrustees were preventing her from taking custody and control of the coin collection. She asserted that Scott’s appeal, which was pending in this Court at that time, did not have any legal affect on her right to act as trustee of the coin collection. She claimed that she was entitled to reasonable compensation for her service as trustee under the terms of the trust and requested the probate court to order the cotrustees to turn over the coin collection to her.

In response, two of the grandchildren-beneficiaries, Sarah Reed and Sean McKeough, argued that Suzanne failed to defend the trust against Scott’s attacks and even joined some of Scott’s litigation. They argued that Suzanne should not be permitted to serve as trustee of the coin collection and requested that the court order that the cotrustees retain possession of the coins pending the resolution of Scott’s appeal.

The probate court denied Suzanne’s petition following a hearing. The court determined that Suzanne “never in any way” attempted to serve as trustee of the coin collection except to execute the acceptance of trust. The court reasoned that Suzanne had taken no responsibility for the coins, did not participate in inventorying them, and did not manage or preserve them in any way. The court further stated that possession of the coins would remain with the cotrustees because they had acted to preserve and protect the coins since Donald R. Berg’s death. The court declined to award Suzanne any costs or fees because of her failure to do “anything to protect or preserve the asset[.]”

Thereafter, Suzanne moved for reconsideration, which the probate court denied. The court explained that it remained convinced that Suzanne had not taken any action to “fulfill her fiduciary obligations.” The court removed Suzanne as trustee of the coin collection and ordered that the cotrustees continue to serve as trustees of the coins.

On appeal, Suzanne primarily asserts that the probate court erred by determining that she failed to act as trustee and abused its discretion by removing her as trustee. We review for clear

¹ *In re Donald R. Berg Trust*, unpublished order of the Court of Appeals, entered December 14, 2010 (Docket No. 299077).

error a probate court's findings of fact. *In re Estate of Bennett*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* We review for an abuse of discretion a probate court's decision to remove a trustee. *In re Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007), *aff'd* 480 Mich 915 (2007). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Id.* at 397.

The Michigan Trust Code, MCL 700.7101 *et seq.*, effective April 1, 2010, is applicable in this case. Pursuant to MCL 700.8206:

(1) Except as otherwise provided in article VII [i.e., the Michigan Trust Code], all of the following apply on the effective date of the amendatory act that added this section:

(a) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all trusts created before, on, or after that effective date.

* * *

(c) The amendments and additions to article VII enacted by the amendatory act that added this section apply to judicial proceedings concerning trusts commenced before that effective date unless the court finds that application of a particular provision of the amendments and additions would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the amendments and additions does not apply and the superseded provisions apply.

In this case, the trust was created before April 1, 2010, the effective date of the Code, and judicial proceedings were commenced before that date. Because application of the Code provisions would not substantially interfere with the conduct of the judicial proceedings or prejudice the parties' rights, the Code is applicable.²

Pursuant to MCL 700.7701(1), a person designated as a trustee may accept a trusteeship "by doing either of the following:"

(a) Substantially complying with a method of acceptance provided in the terms of the trust.

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, accepting delivery of the

² We note that Suzanne does not contest the applicability of the Code and relies on several Code provisions in support of her arguments.

trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

Donald R. Berg died in September 2007. Although Suzanne did not take any action to accept the trusteeship until February 6, 2008, when she signed the acceptance of trust, Suzanne's execution of that document was sufficient to accept the trusteeship under MCL 700.7701(1)(b).

After Suzanne accepted the trusteeship, she was required to perform certain duties as trustee. "[O]ne must look to the trust instrument to determine the powers and duties of the trustees and the settlor's intent regarding the purpose of the trust's creation and its operation." *Matter of Estate of Butterfield*, 418 Mich 241, 259; 341 NW2d 453 (1983). Here, the trust required Suzanne to hold the coins for a five-year period after Donald R. Berg's death. In addition to this duty enumerated in the trust, the Code sets forth several duties that Suzanne was required to perform, including:

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article. [MCL 700.7801]

* * *

A trustee shall administer the trust solely in the interests of the trust beneficiaries. [MCL 700.7802(1).]

* * *

A trustee shall take reasonable steps to take control of and protect the trust property. [MCL 700.7810.]

* * *

(1) A trustee shall keep adequate records of the administration of the trust.

(2) A trustee shall keep trust property separate from the trustee's own property.

(3) [T]o the extent that property is held by someone other than the trustee, the trustee shall cause the trust's interest in the trust's property to appear in records maintained by the party holding the trust property. [MCL 700.7811.]

* * *

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust. [MCL 700.7812.]

* * *

A trustee shall take reasonable steps to locate trust property and to compel a former trustee or other person to deliver trust property to the trustee. [MCL 700.7813(1).]

* * *

A trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust. [MCL 700.7814(1).]

Further, in dispensing with these duties, a trustee must avoid conflicts of interest and remain loyal to the trust beneficiaries:

“Many forms of conduct permissible in the workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.” [In re Culhane's Estate, 269 Mich 68, 76; 256 NW 807 (1934), quoting *Meinhard v Salmon*, 249 NY 458, 464; 164 NE 545 (1928) (internal citation omitted).]

A review of the record shows that the probate court did not clearly err by determining that Suzanne failed to act as trustee of the coin collection because she did not perform any of the duties required of her by the Code or the trust itself. After she accepted the trusteeship, Suzanne did not take any action showing that she was acting as trustee of the coin collection. She did not take any steps to acquire possession of the coins or preserve the collection and did not otherwise attempt to administer the trust in good faith for the beneficiaries' benefit. She could have petitioned the probate court to compel the cotrustees to transfer the coin collection to her, but she waited nearly three years after Donald R. Berg's death, and nearly the entire pendency of Scott's litigation, before she petitioned the probate court for instructions. Suzanne also failed to keep records of the coin collection, appraise the collection, or arrange to have the coins placed in a safe storage place. Instead, the cotrustees performed those duties. Moreover, nothing in the record shows that Suzanne attempted to keep the beneficiaries reasonably informed.

Further, Suzanne did not take action to defend the coin collection against Scott's claim that it belonged to the Sally Berg Trust. Scott also argued that many of the sets of coins at issue were given to him and Suzanne as gifts for Christmas and other occasions and that, accordingly, they belong to him and Suzanne rather than the trust. Suzanne did not oppose Scott's arguments, but rather filed her own objection to the cotrustees' accounting of the trust assets. She also failed to file an appearance in this Court when Scott appealed the probate court's ruling.

Thus, a review of the record shows that while Suzanne participated in this litigation, she did not participate as trustee of the coin collection. She never held herself out as trustee and did nothing to assist the grandchildren-beneficiaries in defending the coin collection against Scott's claims. Accordingly, it cannot be said that Suzanne's participation in this litigation fulfilled her obligation to act for the benefit of the trust beneficiaries. Because Suzanne did not perform any of the duties required of her by the trust or the Code, the probate court did not clearly err when it determined that she failed to act as trustee of the coin collection.

Suzanne argues that the probate court erred by focusing exclusively on her actions, and not on those of the cotrustees, in determining whether she acted as trustee of the coin collection. Specifically, she contends that she, Larry A. Cooper, and Merri A. Richardson were all cotrustees of the coin collection and that she was unable to act as trustee because, in multiple-trustee situations, a decision by the majority of the cotrustees controls over a decision of a minority cotrustee. Suzanne cites MCL 700.7703(1), which provides that "[c]otrustees shall act by majority decision." Because Suzanne failed to preserve this argument by raising it in the probate court, our review is limited to plain error affecting her substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The language of the trust belies Suzanne's argument that she was to serve as a cotrustee of the coin collection along with Cooper and Richardson. The trust designates Suzanne only as trustee of the coin collection. In addition, nothing indicates that Suzanne and the cotrustees worked together as trustees of the coin collection. Rather, as discussed above, Suzanne failed to fulfill any of her duties as trustee of the coins while the cotrustees shouldered the burden of those duties by preserving and defending the coin collection for the grandchildren-beneficiaries. Therefore, the record fails to support Suzanne's argument, and she has failed to establish plain error.

Suzanne next argues that the probate court erred by removing her as trustee when she acted reasonably and in good faith. MCL 700.7706, which governs the removal of a trustee under the Code, provides:

(1) The settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(2) The court may remove a trustee if 1 or more of the following occur:

(a) The trustee *commits a serious breach of trust*.

(b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.

(c) *Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.*

(d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is

not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available. [Emphasis added.]

Here, the probate court did not specify the subsection on which it relied in removing Suzanne as trustee. The court simply ordered that, “Suzanne Berg is removed as trustee of the Donald R. Berg coin collection.” Because the court removed Suzanne after concluding that she failed to perform her duties as trustee and failed to defend against Scott’s challenges, however, it appears that the court acted under subsections (a) and (c).

The probate court’s decision did not constitute an abuse of discretion. As previously discussed, Suzanne failed to perform the duties required of her by the trust and the Code and failed to administer the trust solely in the interest of the trust beneficiaries by defending against Scott’s challenges. Suzanne claims that she did not defend the coin collection because she was a minority cotrustee and did not want to duplicate the majority cotrustees’ efforts and waste trust resources. This argument fails because the trust named Suzanne as the sole trustee of the coin collection. Suzanne also fails to acknowledge that she did participate in the litigation by filing numerous motions and other pleadings, she simply failed to participate *on behalf of the trust beneficiaries*. Considering Suzanne’s failure to perform the duties required of her, including her failure to act in good faith on behalf of the grandchildren-beneficiaries, the probate court did not abuse its discretion by removing her as trustee.

Suzanne next argues that the probate court erred when it “attempted to rewrite the trust” by asking both Scott and the cotrustees’ attorney at the October 20, 2010, hearing who they thought should act as trustee of the coin collection. Suzanne contends that this questioning amounted to rewriting the trust because the trust provided that the coin collection was to be held by Suzanne “or another person as selected by a majority of the grandchildren if Suzanne declines to act as trustee[.]” Although the probate court failed to follow the terms of the trust by appointing a trustee selected by a majority of the grandchildren, the error was harmless. The probate court’s determination regarding the appointment of a trustee had no bearing on Suzanne’s failure to act as trustee or the court’s decision to remove her as trustee. Further, Sarah Reed and Sean McKeough, the only two grandchildren present at the hearing through their attorney, favored the cotrustees continuing to serve as trustees of the coin collection given that they had been acting as defacto trustees since Donald R. Berg’s death. Therefore, although the probate court failed to follow the terms of the trust, the error was harmless.

Suzanne next contends that the grandchildren-beneficiaries are equitably estopped from attacking her actions or inactions in connection with her trustee duties because they failed to do so for three years before she filed her petition for instructions. “Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact.” *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). Equitable estoppel may apply “where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.” *Id.* at 141.

Suzanne's argument fails because "[s]ilence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action." *Id.* Suzanne fails to show that the grandchildren-beneficiaries had a duty to speak or take action with respect to her failure to act as trustee of the coins. In fact, it appears that the beneficiaries were content with the cotrustees serving as defacto trustees of the coin collection given Suzanne's failure to perform her duties. They had no duty or obligation to insist that Suzanne perform the duties that the cotrustees were already performing to their satisfaction. Thus, the grandchildren-beneficiaries were not equitably estopped from challenging Suzanne's actions or inactions regarding the coin collection.

Finally, Suzanne argues that the probate court erred by denying her request for reimbursement of trustee expenses. MCL 700.7709 provides that a trustee is entitled to reimbursement for expenses properly incurred in the administration of a trust. Here, as previously discussed, Suzanne did not act as trustee and administer the trust. Therefore, she was not entitled to reimbursement.

Affirmed. Appellees, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens