Third District Court of Appeal

State of Florida

Opinion filed May 20, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-2054 & 3D18-1684
Lower Tribunal Nos. 17-27997 & 18-1273

Genna Demircan, etc., et al.,
Appellants,

vs.

Igor Mikhaylov, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Pedro P. Echarte, Jr. and Yvonne Colodny, Judges.

Scott Alan Orth (Hollywood), for appellants.

Holland & Knight LLP, and Rebecca M. Plasencia and Israel J. Encinosa and Brett A. Barfield, for appellees.

Before LOGUE, SCALES and LOBREE, JJ.

LOBREE, J.

In this consolidated appeal, Genna Demircan (the "former trustee") and Nelson Rincon (the "current trustee"), successive trustees of the Igor Mikhaylov

2015 Irrevocable Trust (the "trust"), challenge a probate division final order modifying the business trust, as well as a civil division order denying attorney's fees to one of the trustees in the initial action for modification brought by Igor Mikhaylov (the "settlor") and Sergei Mikhaylov, Alexandra Mikhaylov, Anastasia Mikhaylov, and Audrey Mikhaylov (the "beneficiaries"). Because the trustees' charges of procedural and evidentiary error in the modification proceedings were either unpreserved or invited, and the remaining arguments before us are unavailing, we affirm the modification order. However, we find the denial of attorney's fees for the former trustee erroneous and, therefore, reverse the order of denial.

Factual and Procedural Background

Seeking to invest in a complex business venture involving the development of a shopping mall, the settlor created the trust, initially consisting of $25,000,000. Its purpose was both to fund the venture and benefit the settlor's children, only one of whom has been an adult at all material times. Originally, the trust designated and appointed the former trustee as well as named Anatoly Zinoviev ("Zinoviev") as the only person with power to remove the trustee (or appoint additional trustees to her).

After a series of disagreements over the scale of the development between the settlor, Zinoviev, and the former trustee, the settlor halted all funding by the trust. This saddled the business entities carrying out the development with debt and liens by contractors and vendors. Deciding to modify the trust by stripping Zinoviev of

his powers and removing the former trustee, the settlor and beneficiaries filed suit in the civil division, naming both as defendants. Zinoviev and the former trustee successfully moved to dismiss the initial complaint and, shortly after the filing of an amended one, the settlor and beneficiaries voluntarily dismissed the civil division suit without prejudice. The former trustee unsuccessfully moved for attorney's fees in this action.

The same day that they voluntarily dismissed their complaint in the civil division, the settlor and beneficiaries refiled suit in the probate division, seeking identical relief, but this time not naming Zinoviev as a defendant. Becoming aware that Zinoviev had recently appointed the current trustee, the settlor and beneficiaries amended their complaint to name him as a defendant and sought his removal as well. Well before the final hearing, the former trustee agreed to resign as trustee and sought to be dismissed from the suit.

Because motions to dismiss and to stay had not been disposed of and the parties agreed, the trial court carried them with the final hearing to adjudicate the merits of the complaint. At the hearing, the current trustee argued that Zinoviev was an indispensable party who had not been joined, that the beneficiaries' consent was not sufficiently shown, and that common law modification required consideration of factors other than consent, as reflected in chapter 736, Florida Statutes. Despite these contentions, the trial court granted relief as a matter of law, allowed the

modification of the trust, denied the removal of the former trustee as moot, and denied the current trustee's removal for lack of authority to order such. On the issue of modification, noting the settlor and all beneficiaries' consent, the trial court granted the requested relief pursuant to the common law rule expressed in Preston v. City National Bank of Miami, 294 So. 2d 11, 14 (Fla. 3d DCA 1974). These consolidated appeals follow.

Standards of Review

We review de novo a trial court's construction of trust provisions, as well as its interpretation or application of controlling statutes, common law rules, or other legal principles. See Brigham v. Brigham, 11 So. 3d 374, 381-82 (Fla. 3d DCA 2009) (reviewing de novo interpretation, application and misapplication of trust statutes, other controlling Florida law, and trust provisions); Credo LLC v. Speyside Invs. Corp., 259 So. 3d 893, 898 (Fla. 3d DCA 2018) ("If a legal principle is involved, the standard of review is *de novo*."). We also review de novo the determination of whether a party has standing. Herbits v. City of Miami, 207 So. 3d 274, 281 (Fla. 3d DCA 2016). While a trial court's denial of attorney's fees is generally reviewed for abuse of discretion, its determination of legal entitlement under statute or contract is reviewed de novo. Radosevich v. Bank of New York Mellon, 245 So. 3d 877, 880 (Fla. 3d DCA 2018).

Analysis

1. The current trustee has standing to appeal the trust's modification.[1]

"In its broadest sense, standing is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d, 1178, 1182 (Fla. 3d DCA 1985) (quoting Sierra v. Morton, 405 U.S. 727, 731 (1972)). The trust here gave the trustees "all powers given to [them] by applicable law." Such trust provisions confer upon the trustee the standing recognized by statute or the common law. Reid v. Temple Judea, 994 So. 2d 1146, 1150-51 (Fla. 3d DCA 2008) (construing clause "the Trustee has the powers now or hereafter provided by law" as giving trustee standing to seek modification of trust). In Florida, a trustee shall not only "take reasonable steps to enforce claims of the trust and to defend claims against the trust," section 736.0811, Florida Statutes (2016), but "[a]ny person interested as . . . trustee" may also have a declaration of rights to "determine any question relating to the administration of the . . . trust, including questions of construction . . . ." § 86.041(3), Fla. Stat (2016). As we noted in Reid, "it is clear to us that in cases involving a determination of the settlor's true intent, a trustee is an 'interested person,' and an 'interested person' has standing to seek reformation of a trust." 994

[1] We agree that, upon her voluntary resignation, the former trustee lost standing to challenge or appeal from the modification of the trust.

So. 2d at 1151; see also Wells v. Wells, 24 So. 3d 579, 583 (Fla. 4th DCA 2009) (holding that pursuant to section 86.041 potentially wrongfully removed co-trustee had standing as interested person to bring cause of action for declaratory judgment). Here, where the trust conferred upon the trustee standing to seek its modification or sue for a declaration that he cannot be removed, it necessarily conferred standing to oppose modification on appeal, despite the current trustee's success below in the matter of his removal.

2. The trial court did not err by failing to join an indispensable party.

An indispensable party is "one whose interest will be substantially and directly affected by the outcome of the case," where "the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible." Dep't of Revenue ex rel. Preston v. Cummings, 871 So. 2d 1055, 1058 (Fla. 2d DCA 2004). Generally, the only indispensable parties to a trust action—including a modification—are the trustee, the settlor and the beneficiaries. See, e.g., Sylvester v. Sylvester, 557 So. 2d 599, 600 (Fla. 4th DCA 1990). Here, a "complete and efficient determination of the equities and rights between the other parties" was indeed possible without joining Zinoviev, and the equities only militate in favor of the settlor and beneficiaries'

proposed modification.[2] As such, the trial court did not err by failing to join Zinoviev as an indispensable party.

3. The trial court did not err as a matter of law in modifying the trust.

Contrary to the current trustee's primary argument, the trial court did not err in its application of Preston, 294 So. 2d at 11. The current trustee argues that common law modification has been either abrogated or qualified by the legislature's enactment of chapter 736, which allows judicial modification of trusts *only* upon certain evidentiary findings regarding, among other things, the impracticability or materiality of the trust's purpose. See § 736.04113(1), Fla. Stat. (2016). Because the trial court here failed to make such findings, the trustees contend the modification was invalid. The settlor and beneficiaries, however, correctly note that a common law trust modification under Preston is neither abrogated, nor controlled by section 736.04113's requisite findings. Judicial modifications at common law are different from—and have so far survived—judicial modifications under chapter 736.

At common law, neither settlors nor beneficiaries have, *by themselves*, a right to modify an irrevocable trust, except pursuant to a power identified in the trust.

[2] A modification at common law under Preston does not recognize any "interest that would preclude the court from permitting termination [or modification]." Scott and Ascher on Trusts § 34.2 (5th ed. 2008). If even a trustee, who is an indispensable party, does not have an interest, legal or equitable, sufficient to oppose joint modification, necessarily a person merely designated to appoint trustees cannot have a greater interest than those whom he or she appoints. Zinoviev's interest, therefore, was not necessary for a resolution of this matter, let alone indispensable.

MacFarlane v. First Nat'l Bank of Miami, 203 So. 2d 57, 60 (Fla. 3d DCA 1967) ("[A] valid trust once created, cannot be revoked or altered except by the exercise of a reserved power to do so."); Bogert's Trusts and Trustees § 992 (2d ed. 1962) ("[A] settlor ha[s] no power to modify the trust . . . if the settlor did not expressly reserve such power in the trust instrument . . . [and] neither some nor all of the beneficiaries have an implied power to modify the trust [either].").

However, in Preston, this Court noted:

> The terms of a trust may be modified if the settlor and all the beneficiaries consent. Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old. In Florida, this principle has long been recognized.

Preston, 294 So. 2d at 14. Thus, once a court is presented with a complaint seeking modification through the joint agreement of the settlor and all beneficiaries, it may allow it without need to make findings pursuant to chapter 736, as the parties' agreement is the only finding compelling the result.[3]

[3] See Preston, 294 So. 2d at 14 (holding modification proper when done "with the consent of those affected" and "[t]his is all that the law requires"); see also Nelson v. Nelson, 206 So. 3d 818, 821 (Fla. 2d DCA 2016) (holding modification improper where there existed "no record evidence that . . . [one of the beneficiaries] consented to modification"); Scott and Ascher on Trusts § 35.2.1 (5th ed. 2008) ("[For a] settlor who has the power to revoke [but wishes, instead, to modify the trust]. . . it is . . . ordinarily enough that the settlor, by an instrument sufficient to revoke the trust, direct[] the trustee to hold the property on different terms."); Perosi v. LiGreci, 98 A.D.3d 230, 235 (N.Y. App. Div. 2012) (observing that all beneficiaries "provided signed, written consents to the amendment executed by the attorney-in-fact").

In Preston, we adopted the rule from the Restatement (Second) of Trusts § 338(1):

> If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished.

294 So. 2d at 14 n.6. This rule was recognized long ago in Smith v. Massachusetts Mutual Life Insurance Co., 156 So. 498, 509 (Fla. 1934) (observing that, "as a general rule, a trust is not terminated, except with the consent of all which have an interest, or until the purposes of the trust are accomplished"). Treatises have recognized that the logic of this exception is simple:

> The argument in favor of permitting the beneficiaries and settlor to terminate the trust, even though the purposes for which it was created have not yet been accomplished, is that there is no reason to keep the trust in existence if all those beneficially interested in it desire its termination . . . [I]f the settlor has had a change of heart and no longer wants [the trust's original] instructions to be carried out, and all the beneficiaries agree, there is no good reason for a court to insist on doing so . . . [They] may compel termination of the trust, whether or not doing so would defeat a material trust purpose . . .
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> [T]he settlor and all of the beneficiaries may together modify the terms of the trust. This proposition follows logically . . . from the proposition that the settlor and all of the beneficiaries may together compel termination . . . There is plainly no reason to require them to terminate the trust, accept a transfer of the property from the trustee, and then reconvey it on a new trust. Instead, [they] can, in a single transaction, direct the trustee to hold the property on different terms.

Scott and Ascher on Trusts § 34.2 (5th ed. 2008).

The Florida Trust Code (the "code") was first enacted in 2007. Ch. 2007-217, § 1, Laws of Fla. It applies to express trusts such as the one on appeal, section 736.0102, Florida Statutes (2016), and "all trusts created . . . [and] all judicial proceedings concerning trusts commenced on or after July 1, 2007." 55A Fla. Jur. 2d Trusts § 1 (2d ed. 2013). The code requires that "judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure," and allows courts to intervene in the administration of a trust, among other things, to "[d]etermine any . . . matters involving trustees and beneficiaries." § 736.0201(1), (4)(g), Fla. Stat. (2016). It relevantly allows the judicial modification of irrevocable trusts where not inconsistent with the settlor's intent, and upon required findings on the present practicability, materiality, and substantial impairment of the trust's purpose. § 736.04113(1), Fla. Stat. (2016). Such modifications require the court to "consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification." § 736.04113(3)(a), Fla. Stat. (2016).

However, the code recognizes that "[t]he common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state." § 736.0106, Fla. Stat. (2016). More specifically, the very section

purporting to authorize judicial modifications only upon requisite findings also notes that "[t]he provisions of this section are *in addition to, and not in derogation of, rights under the common law* to modify, amend, terminate, or revoke trusts." § 736.04113(4), Fla. Stat. (2016) (emphasis added). Nothing in chapter 736 modifies or abrogates the common law modification rule adopted in Preston. This is because, while "[s]ections 736.0410–736.04115 and 736.0412, Florida Statutes, provide means of modifying a trust under the Florida Trust Code . . . the sections on modifying trusts do not provide the exclusive means to do so." Minassian v. Rachins, 152 So. 3d 719, 724 (Fla. 4th DCA 2014).

Although it substantially represented a "major shift from the common law regarding judicial modification, under which the intent of the settlor was paramount," the code also authorizes a court to "give greater consideration to the interest of the beneficiaries as long as the modification conforms to the extent possible with the intention of the settlor." Brian J. Felcoski & Jon Scuderi, The Administration of Trusts in Florida § 8.3 (10th ed. 2019). The Preston exception is in clear harmony with such a purpose, since it provides for the actual and joint intent of settlors and beneficiaries to be presently realized. The code's enactment has not altered the idea that "[t]he settlor and beneficiaries of a trust can consent to its

modification." Id. The exception in Preston, therefore, continues to be part of Florida's common law *despite* its subsequent enactment of the code.[4]

The cases on which the current trustee relies for the proposition that factual findings pursuant to chapter 736 must be made before modification is allowed under Preston are inapposite. As the Second District noted in Peck, responding to an identical challenge, these cases are distinguishable because they do not involve modifications jointly agreed to by settlors and beneficiaries. 133 So. 3d at 591. In Bellamy v. Langfitt, 86 So. 3d 1170, 1171 (Fla. 3d DCA 2012), Horgan v. Cosden, 249 So. 3d 683, 687 (Fla. 2d DCA 2018), and Featherston v. Tompkins, 339 So. 2d 306, 307 (Fla. 3d DCA 1976), the settlors were deceased, and modification was sought by other parties. Moreover, Bellamy and Horgan involved only statutory modifications. Bellamy, 86 So. 3d at 1174; Horgan, 249 So. 3d at 685, 687.

The current trustee also argues that the trust's provisions include a waiver by the settlor of his right to revoke or amend the trust and, therefore, either the Preston rule cannot operate, or it requires the assent of the current trustee. However, such waiver provisions can have the effect alleged only where the settlor waives the right expressly conditioning it on the trustee's assent. See Scott and Ascher on Trusts §

[4] See Nelson, 206 So. 3d at 821 ("[S]ection 736.04113 does not abrogate the trial court's common law authority to modify or terminate an irremovable trust."); Peck v. Peck, 133 So. 3d 587, 591 (Fla. 2d DCA 2014) ("The trial court correctly relied on Preston [finding that] section 736.04113 does not abrogate the common law.").

34.2 (5th ed. 2008) ("[I]f the terms of the trust provide that [it] is not to be terminated without the trustee's consent, the trust cannot be terminated, although the settlor and all of the beneficiaries wish to do so, if the trustee refuses to consent."). Here, the provision does not include such a condition. Thus, the Preston rule may still operate, because where a settlor and all beneficiaries consent, the trustee has no reason in law or equity to successfully oppose modification. Id.

4. The trial court erred as a matter of law in denying attorney's fees.

We agree that pursuant to sections 736.1004 and 736.1005, Florida Statutes (2016), the lower court had discretion to deny attorney's fees to the former trustee. However, it wrongly denied attorney's fees and costs mandated by the trust's terms. Paragraph 10.14(c) of the trust provides that it is the settlor's intent to hold trustees harmless and indemnify them for "attorney's fees, expenses, and costs incurred as a result of its service as Trustee." The trust "direct[s] that no fees or costs that have been incurred by any individual Trustee be disallowed" or denied in court, "unless it is determined in a final order that the individual Trustee acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the . . . beneficiaries." The trust further provides that attorney's fees and costs are due to a trustee not acting in bad faith, not only where incurred as a result of his or her service, but also as a result of being "sued for any reason." The trust's provisions also make clear that the fees and costs intended are to be "reasonable." Here, the

former trustee was sued to be removed and joined in an action seeking modification. As a result, the trust entitled her to indemnification for attorney's fees and costs, unless the trial court made factual findings of bad faith or reckless indifference on the former trustee's part. Therefore, the lower court erroneously denied fees and costs without considering evidence related thereto and making such a finding.

The settlor and beneficiaries' arguments to the contrary are unpersuasive. Paragraph 10.14(c) provides that the trustee's right to be indemnified for litigation expenses is enforceable. It does not require that the former trustee first resort to the trust's funds for the expense, as paragraph 10.14(d) provides that the trustee "can" hire and pay counsel from such funds, not that she must.

However, the settlor and beneficiaries are correct that the settlor did not intend to be personally liable for the trustee's attorney's fees and expenses. According to the trust, the former trustee "may enforce these provisions for indemnification against the current trustee or against any assets held in the trust estate, or if the former trustee is an individual, against any beneficiary to the extent of distributions received by that beneficiary." As such, the trust permitted the former trustee to recover attorney's fees and costs from the trust's assets or beneficiary distributions, but not from the settlor's personal assets.

Conclusion

Absent a finding of bad faith or reckless indifference on the former trustee's part, the trial court erred in denying her reasonable attorney's fees pursuant to the terms of the trust. We reverse and remand the order denying her attorney's fees. We affirm the final order modifying the trust.