Third District Court of Appeal

State of Florida

Opinion filed June 3, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-423
Lower Tribunal No. 16-2767

Mark Wallace,
Appellant,

vs.

Comprehensive Personal Care Services, Inc., etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Mindy S. Glazer, Judge.

Stack Fernandez & Harris, P.A., and Brian J. Stack, for appellant.

Legon Fodiman, P.A., and Todd R. Legon and William F. Rhodes, for appellee Milton Wallace.

Before FERNANDEZ, LOGUE, and SCALES, JJ.

LOGUE, J.

Mark Wallace appeals entry of an order dismissing Count IX of his amended crossclaim which sought to remove his father, Milton, as the trustee of an irrevocable trust. We conclude the allegations are sufficient to state a cause of action to remove Milton as trustee and therefore reverse.

Background

Milton Wallace and his wife, Patricia, entered into a marital agreement and created an irrevocable trust regarding their assets. After Patricia died, one of Milton's sons, Hardy, represented by his guardian, Comprehensive Personal Care Services ("CPCS"), filed a petition to compel Milton to comply with the terms of the agreement and the trust. Milton's other son, Mark, joined in the action and asserted various crossclaims against Milton, one of which, Count IX, sought to remove Milton as trustee. Mark alleged Milton's mental condition rendered him unable to serve in that capacity, as evident from certain large and inappropriate gifts Milton made from trust assets to new friends who were not beneficiaries of the trust.

The Trust included provisions for removal of a trustee for disability or cause which read:

> 12.5 An individual Trustee will cease to serve immediately if he or she becomes disabled.
>
> 12.6 If no one is able to exercise the power to remove Trustee under clause 12.2. or 12.3 (due to incapacity, death, absence, or other reason), an individual trustee can be removed by the unanimous agreement of the Beneficiaries of that trust and each other Trustee then serving

(excluding any of them who is being removed) for any of the following reasons:

12.6(a) The willful or negligent mismanagement by that individual Trustee of the trust assets;

12.6(b) The abuse, abandonment of, or inattention to, the trust by that individual Trustee;

. . . .

12.6(d) An act of stealing, dishonesty, fraud, embezzlement, moral turpitude, or moral degeneration by that individual Trustee;

. . . .

17.4 For purposes of this trust agreement an individual is disabled if he or she is unable to manage his or her personal affairs or assets because of a mental or physical impairment (whether temporary or permanent in nature). The determination of whether an individual is disabled (or whether the individual has recovered from a disability) can be made by only one of the following two procedures.

17.4(a) Upon the written agreement of two-thirds of a group consisting of us, Becky, and Mark who are then living, and each other Trustee then serving (excluding any of us whose disability is being determined), a committee of medical doctors will be hired to examine the individual. The committee will consist of such of Dr. Arthur Shapiro and Dr. Bernard Herzberg as are willing and able to act and an additional medical doctor chosen by both of them jointly (or by the one of them who is acting if the other fails to act and is not replaced). [emphasis supplied]

17.4(a)(2) The committee's written findings of the examination will be binding if given to the individual and to each person who signed the notice, unless a court determines otherwise.

17.4(b) If a court with jurisdiction determines an individual's legal capacity, that determination will supersede any other determination made under this clause 17.4.

In his crossclaim, however, Mark did not attempt to remove Milton as trustee pursuant to these provisions. Instead, he proceeded under the provisions of sections 736.105(2)(e), 736.0706, and 736.1001(2), Florida Statutes.

Milton moved to dismiss Count IX and, citing section 17.4(b) of the trust, argued that he should not be removed as trustee unless and until it was established that his mental capacity was such that he could be declared a ward of a guardian under Florida guardianship law. The trial court agreed holding Count IX failed to state a cause of action because Mark "cannot, as a matter of law, seek relief in this case that is contrary to the terms of the Irrevocable Trust and contrary to the procedural safeguards [for establishing a guardianship of a ward] set forth in [s]ection 744.331, Florida Statutes."

This appeal followed.

Standard of Review

The "standard of review of a trial court's order granting a motion to dismiss is de novo." Cornfeld v. Plaza of the Americas Club, Inc., 273 So. 3d 1096, 1098 (Fla. 3d DCA 2019) (citing Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1088 (Fla. 3d DCA 2014)). "[Q]uestions of statutory interpretation" are also reviewed de novo. Liebman v. City of Miami, 279 So. 3d 747, 750 (Fla. 3d DCA 2019) (citing Matheson v. Miami-Dade Cty., 258 So. 3d 516, 519 (Fla. 3d DCA 2018)).

Analysis

We have jurisdiction because the order under review constitutes a final determination of "a right or obligation of an interested person as defined in the Florida Probate Code." Fla. R. App. P. 9.170. When "reviewing a motion to dismiss, the truth of the allegations is assumed." Sewell v. Racetrac Petroleum, Inc., 245 So. 3d 822, 825 (Fla. 3d DCA 2017). See Xavier v. Leviev Boymelgreen Marquis Devs., LLC, 117 So. 3d 773, 775 (Fla. 3d DCA 2012) ("In ruling on a motion to dismiss, all well-pled facts in the complaint are accepted as true.").

Generally, the terms of a trust prevail over the provisions of the Trust Code, except "as may be necessary in the interests of justice." In this regard, section 736.0105(2)(b) & (e), Florida Statutes, provides:

> (2) The terms of a trust prevail over any provision of this code except:
>
> . . . .
>
> (b) The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.
>
> . . . .
>
> (e) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

(Emphases added.)

Moreover, the Trust Code specifically acknowledges the court's power to remove a trustee. Section 736.0706(1), (2)(a) & (c), Florida Statutes states:

> (1) [A] beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.
>
> (2) The court may remove a trustee if:
>
> (a) The trustee has committed a serious breach of trust;
>
> . . . .
>
> (c) Due to the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(Emphases added.)

Finally, section 736.1001(2), Florida Statutes, which provides remedies for a breach of trust, states, expressly refers to removal of a trustee:

> (2) To remedy a breach of trust that has occurred or may occur, the court may:
>
> (a) Compel the trustee to perform the trustee's duties;
>
> (b) Enjoin the trustee from committing a breach of trust;
>
> . . . .
>
> (g) Remove the trustee as provided in s. 736.0706;

(Emphases added.)

Thus, while the trust document may contain other and supplemental methods to remove a trustee, it cannot eliminate or curtail the probate court's power and responsibility under the Trust Code to remove a trustee when necessary in the interests of justice to protect the interests of the beneficiaries. §§ 736.0706,

736.1001, and 736.0201, Fla. Stats.; see McCormick v. Cox, 118 So. 3d 980, 988 (Fla. 3d DCA 2013) ("The court's power to remove a trustee and to appoint a special trustee is well settled."); Aiello v. Hyland, 793 So. 2d 1150, 1151 (Fla. 4th DCA 2001) ("Section 737.201(1)(a) [now § 736.0202, Fla. Stat.] unequivocally confers upon this Court the discretion and authority to remove a trustee where appropriate.").

At oral argument, Milton acknowledged this principle of law but argued it should not apply in the unique facts of this case. Milton pointed out that he was the settlor who placed the assets in the trust; he is still the major beneficiary of the trust during his lifetime; and the attempt to remove him is based on his mental condition. In these circumstances, he argued, removing him as trustee is tantamount to declaring him a ward and depriving him of control over his own property and therefore should occur only if the standard for imposing a guardianship on him under section 744.331 of Florida Statutes could be met as he argues is the intent of the trustee removal provisions in the trust documents.

We do not agree. In the first place, Milton's argument improperly conflates the law of trusts with the law of guardianships. For good reason, the standard for removal of a trustee under section 736.0706 of the Trust Code is less exacting than the standard for imposing a guardianship under section 744.331 of the Guardianship Code. Persons may lack the accounting, business, legal, or mental acumen to serve

as trustees regarding the property of others even when their condition would not justify the imposition of a guardianship over them regarding their own property.

Secondly, removing Milton as trustee would not rise to the level of making Milton a ward. The assets in the trust, even if once owned by Milton, stopped being Milton's property when they became the res of an irrevocable trust. Removing Milton as trustee of the irrevocable trust, therefore, would not constitute an elimination of his control over his own property. Indeed, even if removed as trustee, Milton would still have control over any property he personally owned, including any distributions made to him under the provisions of the trust.

Reversed and remanded.