STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ALBERT F. WALL, Deceased.

MARILYN WALL OBOLENSKY,

Petitioner-Appellant,

v

JOHN M. CHASE, JR., ALBERT BREER, and WILLIAM E. CARROLL,

Respondents-Appellees.

UNPUBLISHED
September 29, 2000

Nos. 208963; 213577
Wayne Probate Court
LC No. 0-477461

JOHN M. CHASE, JR.,

Petitioner-Appellee,

v

ALBERT BREER,

Respondent-Appellant,

and

MARILYN WALL OBOLENSKY and WILLIAM E. CARROLL,

Respondents-Appellees.

No. 219774
Wayne Probate Court
LC No. 0-477461

Before: Whitbeck, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

These are consolidated appeals as of right filed by the daughter of the testator, Marilyn Wall Obolensky (Obolensky), from certain orders of the probate court concerning the management of a trust by the trustee, John M. Chase, Jr. (Docket Nos. 208963 and 213577), and by Albert F. Breer, III (Breer), who is Obolensky's son from her first marriage and is a remainder beneficiary under the trust (Docket No. 219774).

In Docket No. 208963, Obolensky appeals the December 12, 1997, order directing the testamentary trustee to place trust real estate on the market for sale. In Docket No. 213577, Obolensky appeals the July 14, 1998, order allowing the trustee's eleventh annual account (covering 1997), authorizing compensation for the trustee and the guardian ad litem, authorizing retention of trust assets, and renewing the trustee's appointment. In Docket No. 219774, Breer appeals the April 30, 1999, order allowing the twelfth annual account (covering 1998), allowing compensation for fiduciary and legal services and to guardian ad litem, authorizing retention of trust assets, and renewing the trustee's appointment. We affirm. Further, we assess costs in the amount of $5,000 against petitioner.

In Docket No. 208963, Obolensky first argues that she had an option to purchase real property from the trust and that the probate court's refusal to allow her to exercise her option was a violation of her property rights. We disagree. An option is a mere offer or right that may ripen into a binding bilateral contract upon a seasonal acceptance of the terms recited therein. *Bowkus v Lange*, 196 Mich App 455, 460; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993). Under the probate court's January 29, 1987, order, Obolensky was not given the right to purchase the trust's interest in the property. Rather, she was given the right to seek court approval to purchase the property for a sum certain under certain circumstances. Under these circumstances, the language of the order did not constitute an option to purchase. Accordingly, we also reject Obolensky's argument that the probate court's decision to compel trustee Chase to sell the property on the open market was erroneous because she had an option to purchase.

Obolensky further argues that the probate court erred by concluding that the trust owns the equity in the real estate. Again, we disagree. It is undisputed that Obolensky defaulted on the mortgage. Standard Federal Bank foreclosed on the property and, after waiting the statutory time period, MCL 600.3115; MSA 27A.3115, bought it at a sheriff's sale. Obolensky failed to redeem the property within the period for redemption. MCL 600;3140; MSA 27A.3140. Consequently, Standard Federal owned the property and Obolensky forfeited the equity she had in the property. When the trust purchased the property, it became the owner of the property as well as the owner of any equity in the property. MCL 600.3130(1); MSA 27A.3130(1).

Obolensky also asserts that the probate court led her to believe that she had an option to purchase the property and therefore should be estopped from denying her the equity value in the residence. We disagree. Obolensky's failure to understand the provisions of the order does not prevent the court from enforcing the order as written.

In Docket Number 213577, Obolensky argues that the probate court erred by allowing the trustee to file the eleventh annual account "in the form submitted."

The probate code provides that "[a] fiduciary shall file at least once a year, or oftener if the court directs, a complete itemized accounting of all his doings in the estate, showing in detail all of the receipts and disbursements and the property remaining in his hands, and in what form." MCL 700.563(1); MSA 27.5663(1), repealed by 1998 PA 386, effective 4/12/00; see also MCL 700.564; MSA 27.5564, repealed by 1998 PA 386, effective 4/12/00. The fiduciary has the burden of proving "the correctness of his account and the propriety of his charges," that is, "'the absence of any irregularity or of any personal benefit' to the trustee." *In re Green Charitable Trust*, 172 Mich App 298, 311-312; 431 NW2d 492 (1988). The trustee is required to exercise the same care as "a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of his special skills or expertise, he is under a duty to use those skills." *Id.* at 312-313. A "prudent" person is one who acts with "care, diligence, integrity, fidelity and sound business judgment;" a fiduciary must also act with "honesty, loyalty, restraint from self-interest[,] and good faith." *Id.* at 313.

Here, the probate court overruled all of Obolensky's objections and approved the trustee's eleventh annual account. First, Obolensky objected on the ground that the trustee failed to accurately report principal and interest distributions by the trust. However, a review of the account shows that it clearly identifies whether the distributions to Obolensky or for her expenses are from principal or income.

Second, Obolensky objected on the ground that the trustee did not report trust assets at market value, but rather reported trust assets at their inventory value. Obolensky has failed to cite any pertinent authority in support of her position. Nonetheless, a review of the eleventh account reveals that the trust consists of two primary types of assets – money invested in Smith Barney Shearson Brokerage accounts and the residence. With regard to the brokerage accounts, the trustee attached all of the monthly statements issued by Smith Barney that identify, in detail, all activities on those accounts and their market valuations and incorporated them into the petition. With regard to the residence, the eleventh account lists the property at the price the trust purchased it. The petition for approval of the account specifically notes that the values recorded do not necessarily represent the present market value of the inventory. Obolensky's argument that the account is defective because it fails to report the fair market value of the trust is without merit.

Third, Obolensky contends that the form of the account is not sufficient because the trustee did not adequately itemize all doings of the trust as required under § 563(1). A review of the eleventh annual account shows that the account contains great detail regarding individual transactions and several summaries that collect the detailed information into an easily reviewable form. The probate judge noted that the account was very detailed and contained all of the information Obolensky appeared to be requesting. The probate court's findings are not clearly erroneous. *In re Green, supra* at 311.

Next, Obolensky contends that the probate court erred by refusing to allow her to "examine all of the books, records, notes, ledgers, check books, etc., which Mr. Chase is relying upon in support of his petition." However, Obolensky has failed to list a single type of record to which she has been denied access. Further, the account contains numerous supporting attachments that meet the trustee's duty to keep Obolensky "reasonably informed of the trust and its administration." See MCL

700.814(1) and (3); MSA 27.5814(1) and (3), repealed by 1998 PA 386, effective 4/1/00. Hence, we conclude that the probate court's decision was not an abuse of discretion. *In re Hammond Estate*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996).

Obolensky next argues that the probate court erred by approving trustee Chase's request for attorney fees where there was no written agreement with the trust as required by MCR 8.303. This Court rejected Obolensky's identical argument in *In re Wall Estate*, unpublished opinion per curiam of the Court of Appeals (Docket numbers 204563, 205619, issued February 19, 1999). This Court held that "the rule explicitly states that it applies only to a trustee appointed after its effective date of March 1, 1985. MCR 8.303(I). Because the co-trustees were appointed in 1968, the rule is not applicable." *Id.* at slip op p 3. Consequently, res judicata bars reconsideration of this issue.

Obolensky further argues that the probate court erred by allowing the payment of attorney fees to trustee Chase "without her review of the itemized bills." Obolensky did not attend the hearing on the account, and failed to raise this objection below. Hence, this argument is not preserved for appeal. *People v Carter*, ___ Mich ___; ___ NW2d ___ (Docket No. 113817, decided 6/27/00) slip op p 8; *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987). Further, she has failed to cite any authority in support of her argument. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Next, Obolensky asserts that the probate court erred by allowing the payment of "excessive fiduciary fees" to trustee Chase because Chase never filed a petition seeking payment of these fees pursuant to MCL 700.542; MSA 27.5542. This statute, however, was repealed by 1979 PA 51, effective July 7, 1979. Further, a review of the record reveals that the fiduciary fees claimed were for the typical work of a trustee to benefit the trust. Hence, the probate court did not abuse its discretion in approving the payment of $4,000 for services rendered by trustee Chase. *In re Baldwin's Estate*, 311 Mich 288, 311; 18 NW2d 827 (1945).

Obolensky also argues that the probate court erred in refusing to allow her to litigate the quality of the investments chosen by trustee Chase. In *In re Wall, supra* at slip op p 4, this Court considered this identical argument and held that:

> This issue was litigated a few months earlier in connection with Obolensky's petition to compel certain investments. Thus, the court did not err in finding that this issue was barred by res judicata.

Because Obolensky offered no new evidence indicating that trustee Chase violated his fiduciary duty to the trust, *In re Butterfield Estate,* 418 Mich 241, 257; 341 NW2d 453 (1983), or that the trust investments were imprudent, the probate court did not err by refusing to allow her to once again litigate the quality of the investments chosen by the trustee.

Last, Obolensky argues that the probate court erred in approving payment for the guardian ad litem where, at her age, she was not likely to have any more children. However, this Court rejected this same argument in *In re Wall, supra* at slip op p 4:

> This argument is disingenuous, given that appellant was informed at the hearing that the guardian ad litem was appointed to protect the rights of the remainderperson's minor children. Further, the trust document provides that, upon Obolensky's death, the corpus is to be distributed to her children and, if they are deceased, to her grandchildren. Thus, Obolensky's son's minor children had a protectable interest. There was no error.

Thus, this issue is barred by res judicata.

We conclude that the present appeal is vexatious because it was taken without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a). See also Cvengros v Farm Bureau Ins, 216 Mich App 261; 548 NW2d 698 (1996). Accordingly, we assess costs in the amount of $5,000 against petitioner.

In docket number 219774, Breer argues with regard to the twelfth annual account that, even though trustee Chase is entitled to receive reimbursement for monies expended to defend Obolensky's repeated challenges to his work as trustee, Chase is entitled only to reimbursement of his malpractice insurance deductible. Breer has cited no authority in support of his argument that a trustee's reimbursement for legal fees is limited only to his insurance deductible. Hence, this issue is not properly presented for appellate review. *Kelly, supra* at 640-641.

Nonetheless, a trustee may defend actions, claims, or proceedings for the protection of trust assets and of the trustee in performance of his duties. MCL 700.826(f); MSA 27.5826(f), repealed by 1998 PA 386, effective April 1, 2000.[1] Attorneys that are retained to defend a trustee's actions are performing services on behalf of the trust and their fees are also recoverable pursuant to MCL 700.541; MSA 27.5541, repealed by 1998 PA 386, effective April 1, 2000. *In re Gerber Trust*, 117 Mich App 1, 15; 323 NW2d 567 (1982). These statutory provisions do not make an exception for fiduciaries that have insurance coverage. Thus, according to the plain language of the statute, the trustee is entitled to recover all of his fees. Accordingly, the probate court did not abuse its discretion by approving payment of the attorney fees requested by trustee Chase in the twelfth annual account.[2]

Affirmed. Petitioner is assessed $5,000 as sanctions for this appeal.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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[1] Now MCL 700.7401; MSA 27.17401.

[2] Breer also suggests that the probate court should have held an evidentiary hearing before approving the payment of attorney fees. However, a review of the transcript reveals that Breer objected to the payment of fees over $10,000 (the deductible) and did not make a specific objection to the total amount of attorney fees. Further, Breer received a fee statement before the hearing and the probate court reviewed the itemized bills in camera before approving them. Under these circumstances, we cannot conclude that the court erred by failing to hold an evidentiary hearing regarding attorney fees.