STATE OF MICHIGAN

COURT OF APPEALS

In re the Matter of Constantine Trued Living Trust.

PAUL T. PETERSON,

Petitioner-Appellant,

V

KATHLEEN TRUED, Successor Trustee of the CONSTANTINE TRUED LIVING TRUST

Respondent-Appellee.

UNPUBLISHED
January 29, 2002

Nos. 223867, 226665
Macomb Probate Court
LC No. 97-153354-TI

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, petitioner appeals by right in Docket No. 223867 the order of the Macomb probate court dismissing objections and allowing account of respondent successor trustee and in Docket No. 226665 petitioner appeals by right the probate court's order denying his petition to surcharge respondent for his legal fees in obtaining and objecting to respondent's account. We affirm in both cases.

The successor trustee did not waive the affirmative defenses of estoppel and laches under MCR 2.111(F)(2) and MCR 2.111(F)(3)(a), as applied to probate proceedings by MCR 5.001(A). Estoppel and laches, although affirmative defenses, were not waived because the original petition for an accounting and subsequent objections to the account of respondent were not pleadings to which a responsive pleading is required by applicable statutes or court rules.

The probate court did not clearly err in dismissing petitioner's objections based on laches and thus did not abuse its discretion allowing respondent's account.[1] *In Re Rice Estate*, 138

[1] We reject petitioner's claim that the probate court erred by sua sponte applying estoppel and laches. The record indicates petitioner was on notice concerning the application of these equitable doctrines and was given adequate opportunity to be heard. Moreover, the issue has not been preserved for appeal by briefing in compliance with the court rules and citation to authority. MCR 7.212(C)(7); *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

Mich App 261; 360 NW2d 587 (1984); *In re Ach Estate*, 7 Mich App 228; 151 NW2d 363 (1967). Evidence clearly established that respondent trustee "freely spent from trust funds, family funds, and personal funds not only for the continued educational expenses of the beneficiaries but also for their general welfare." Further, it is undisputed that successor trustee, beneficiary-petitioner, and the prime-mover and sole witness supporting the petition and objections to the account (the father of the beneficiaries and former spouse of respondent) lived together as a family unit from the appointment of the successor trustee after settlor's death in April 1990 through at least the end of 1992. Respondent testified that after her February 1993 divorce from petitioner's father she continued to live in the marital home through the summer of 1993. Thus, the probate court correctly found that "all parties were aware of expenditures made during the experience years, both to the educational facilities and for personal expenses incurred by the beneficiaries."

Respondent's testimony that petitioner never objected to any distributions from the trust estate to him or on his behalf was unrebutted. Further, the probate court specifically noted the void in the testimony created because petitioner failed to testify and the only other beneficiary, petitioner's brother, failed to appear in these proceedings. Thus, the probate court did not clearly err in finding that "no formal request for an accounting was made until the petition was filed at this Court in March of 1997." Moreover, the probate court noted that the beneficiaries had long since reached the age of legal responsibility before the date of the petition for an accounting.

Not only was petitioner aware for several years of respondent's expenditures, he waited over six years to take formal action to seek an accounting. Moreover, petitioner waited over two years after he knew the trust corpus was exhausted before petitioning for an accounting in probate court. In the meantime, respondent continued to fund petitioner's extended education from her own funds.[2] Furthermore, the probate court did not clearly err in applying laches and its application of laches to reach a just and equitable result was not an abuse of discretion. *City of Jackson v Thompson-McCully Co*, 239 Mich App 482, 492; 608 NW2d 531 (2000); *In re Ach Estate*, *supra*.

The probate court did not err by denying petitioner's request to personally assess his attorney fees against respondent because attorney fees were not expressly authorized by statute or court rule. *In Re Thomas Estate*, 211 Mich App 594, 536 NW2d 579 (1995). Here, no trust fund remained against which to assess attorney fees. Further, petitioner simply provides no precedential authority or meritorious argument that an exception to the American rule applies in this case. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 152; 610 NW2d 272 (2000).

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell

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[2] Indeed, it appears to this Court that respondent acted with prudence and in good faith while executing her duties as successor trustee.