

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN BILLINGTON, a/k/a SUSAN
CEDERQUIST, ROBERT J. CEDERQUIST,
REBEKA LEWIS, a/k/a REBEKA
CEDERQUIST, and MICHELE H. ROSS, a/k/a
MICHELE H. CEDERQUIST,

UNPUBLISHED
October 15, 2013

Plaintiffs-Appellants,

v

BONNIE K. ROWAN and RANDAL T. LEWIS,

No. 311196
Montcalm Circuit Court
LC No. 2012-015816-AV

Defendants-Appellees.

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the circuit court's order denying their application for leave to appeal the probate court's preliminary injunction enjoining defendants from disposing of the proceeds of decedent Robert W. Cederquist's retirement accounts, with the exception that such proceeds may be used to pay defendants' reasonable attorney fees. Because the probate court did not abuse its discretion by allowing defendants to use the proceeds of the retirement accounts to pay their attorneys fees in this action, but abused its discretion by allowing defendants to use the retirement account proceeds to pay their attorney fees in the related probate proceedings, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case presents a unique set of circumstances. Plaintiffs, the decedent's four children, filed this action alleging that defendants exerted undue influence over the decedent, resulting in the decedent naming defendant Bonnie K. Rowan the primary beneficiary of his retirement account proceeds and naming defendant Randal T. Lewis the contingent beneficiary of the proceeds. Rowan is the ex-wife of plaintiff Robert J. Cederquist (Robert), and Lewis is the ex-husband of plaintiff Rebeka Lewis, a/k/a Rebeka Cederquist. When Rowan and Robert separated and commenced divorce proceedings in 2004, the decedent supported Rowan's efforts to obtain custody over the couple's daughter. The decedent submitted an affidavit in the divorce proceeding supporting Rowan and criticizing Robert's character and parenting skills. In response, plaintiff Michele H. Ross and Rebeka submitted letters to the court that favored

Robert, criticized the decedent, and indicated that the decedent had an inappropriately intimate relationship with Rowan. Plaintiffs were estranged from the decedent from the time that Rowan and Robert divorced until the decedent's death in August 2011.¹

Although the decedent designated plaintiffs as the beneficiaries of his individual retirement account (IRA) before he became estranged from them, he thereafter designated Rowan as the sole beneficiary of his IRA. The decedent expressed with his financial advisor his intent to disinherit plaintiffs in favor of Rowan because he was estranged from plaintiffs and Rowan was more of a child to him than they were. The decedent also designated Rowan as the sole primary beneficiary on an annuity account, into which he rolled over \$444,000 from his IRA. In January 2008, the decedent applied for a managed allocation portfolio retirement account (MAP) and rolled over \$188,000 into the MAP from his IRA. He designated Rowan as the sole beneficiary of the MAP proceeds. Thus, at that point, the decedent had three investment accounts that designated Rowan as the sole beneficiary: (1) his original IRA, which had approximately \$27,000 left in it; (2) his annuity; and (3) his MAP. In September 2008, the decedent executed a new or updated MAP, again designating Rowan as the sole beneficiary.

In May 2011 the decedent suffered a heart attack and was hospitalized. While hospitalized, he changed his beneficiaries on his IRA, annuity, and MAP—designating Rowan as the 100 percent primary beneficiary and designating Lewis as the 100 percent contingent beneficiary. After the decedent's release from the hospital on May 27, 2011, he hired an attorney to complete his estate planning. To that end, the decedent's financial planner sent an e-mail to the attorney's law firm indicating that he had changed the decedent's beneficiaries on his three accounts "so that they line up with what he [i.e., the decedent] wants[.]" The decedent's financial planner also stated:

I was reminded of how vindictive his [i.e., the decedent's] son is and that he has the resources to legally fight long and hard, so documents need to be as "bullet-proof" as possible. [The decedent's] heart was damaged critically from his heart attack, so we're not certain how much time he has.

Thereafter, attorney Fred Mackraz began working with the decedent to draft a will and trust. According to Mackraz, the decedent was adamant that he wanted to disinherit plaintiffs in favor of Rowan and Lewis. Mackraz testified that the decedent stated more than once, "I expect someone's going to challenge this. I don't want this to be challenged. I want this to be airtight." On June 4, 2011, the decedent executed a will, a revocable living trust, and a quitclaim deed conveying his 80-acre farm to the trust. The decedent's will stated, "[i]t is my express wish that my children do not receive any gift, devise, or benefit from my estate under this will or the trust that I have created on like date." The decedent nominated "first, [Rowan]" and "second, [Lewis]" as the personal representatives of his estate. The will further provided that the decedent's residuary estate would transfer to his trust. The decedent designated himself as the trustee of the trust and designated Rowan and Lewis as joint successor trustees. The trust provided that after the decedent's death, the trustees shall pay all expenses related to his last

¹ Rebeka and Lewis divorced in 2010.

illness, funeral expenses, and inheritance, estate and succession taxes. Regarding the remaining assets, it provided:

2.2A: I give all my tangible personal property not otherwise disposed of . . . equally to Bonnie Rowan and Randall [sic] Lewis as they agree. . . .

2.2B: Trustee(s) shall divide the remaining trust property . . . into separate trusts, equal in value, one for Bonnie Rowan and one for Randall [sic] Lewis.

By the time that the decedent died on August 18, 2011, he had transferred all the remaining funds in his IRA into other accounts so that no funds remained in his IRA. The annuity and MAP, i.e., the two retirement accounts at issue in this appeal, contained a total of approximately \$500,000, which was distributed to Rowan following the decedent's death. On August 30, 2011, the probate court admitted the decedent's will to informal probate and appointed Rowan as the personal representative of the decedent's estate.

Thereafter, plaintiffs filed three separate petitions with the probate court: one seeking to invalidate the decedent's will and quitclaim deed, one seeking to invalidate the trust, and one seeking to remove defendants as the estate's personal representatives and the trust's cotrustees based on undue influence (collectively, "the probate proceedings"). Plaintiffs also sought a preliminary injunction to enjoin defendants from dissipating the assets of the decedent's estate and the trust. The probate court declined to remove defendants as the personal representatives and cotrustees, but enjoined them from disposing of or dissipating the assets of the estate or the trust with the exception of paying their attorney fees.

On or about November 23, 2011, plaintiffs filed the instant civil action against defendants seeking to invalidate the decedent's beneficiary designations on his retirement accounts on the basis of undue influence ("the civil action"). Plaintiffs sought a constructive trust on the retirement account proceeds that had been distributed to Rowan. Plaintiffs also moved for a temporary restraining order and a preliminary injunction preventing Rowan from disposing of or dissipating the retirement account proceeds. Ultimately, the probate court entered a preliminary injunction enjoining defendants from dissipating any of the proceeds of the retirement accounts with the exception of paying attorney fees related to both the civil action and the probate proceedings. Plaintiffs unsuccessfully sought to appeal the probate court's decision to the circuit court, which denied leave to appeal. Thereafter, this Court granted plaintiffs' application for leave to appeal and stayed defendants' use of the retirement account proceeds to pay their attorney fees pending the resolution of this appeal.²

II. STANDARD OF REVIEW

² *Billington v Rowan*, unpublished order of the Court of Appeals, entered January 22, 2013 (Docket No. 311196).

We review for an abuse of discretion a trial court's decision to grant injunctive relief. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). "The trial court abuses its discretion when its decision falls outside [the] range of principled outcomes." *Id.*

III. LEGAL ANALYSIS

The estates and protected individuals code (EPIC), MCL 700.1101 *et seq.*, applies to "[t]he affairs and estate of a decedent" MCL 700.1301(a). Plaintiffs sought to enjoin defendants from dissipating the retirement account proceeds in reliance on MCL 700.1309, which provides, in relevant part:

Upon reliable information received from an interested person, . . . including the court's files, the court *may* enter an order in a proceeding to do either or both of the following:

* * *

(b) Enjoin a person subject to the court's jurisdiction from conduct that presents an immediate risk of waste, unnecessary dissipation of an estate's or trust's property, or jeopardy to an interested person's interest. . . . [Emphasis added.]

The Legislature's use of the word "may" indicates the court's permissive or discretionary authority rather than a mandatory requirement. *Haring Charter Twp v City of Cadillac*, 290 Mich App 728, 749; 811 NW2d 74 (2010).

The probate court granted plaintiffs' motion for a preliminary injunction enjoining defendants from dissipating the retirement account proceeds with the exception of attorney fees incurred in the instant civil action and in the probate proceedings. The probate court abused its discretion to the extent that it allowed defendants to use retirement account proceeds to pay their attorney fees incurred in the probate proceedings. Pursuant to MCL 700.3715(x), a personal representative may "defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties." MCL 700.3720 provides that

[i]f a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred.

Similarly, MCL 700.7904(2) provides, in relevant part, that

if a trustee participates in a civil action or proceeding in good faith, whether successful or not, the trustee is entitled to receive from trust property all expenses and disbursements including reasonable attorney fees that the trustee incurs in connection with its participation.

Thus, defendants were statutorily entitled to use estate and trust assets to pay their reasonable attorney fees incurred in defending plaintiff's probate proceedings against them. In fact, the probate court specifically enjoined defendants from disposing of or dissipating the assets of the estate or the trust *with the exception of paying their attorney fees*. Because defendants were entitled to pay their attorney fees related to the probate proceedings with estate and trust assets, the trial court abused its discretion by allowing defendants to use retirement account proceeds to pay such fees.

Plaintiffs contend that the probate court also abused its discretion by allowing defendants to use retirement account proceeds to pay their attorney fees in the instant civil action. As previously recognized, MCL 700.1309 grants a probate court discretion to enjoin a party from dissipating an asset, but does not require the court to do so. In this case, defendants stipulated to a preliminary injunction enjoining them from dissipating the retirement account proceeds as long as they were able to use such proceeds to pay their attorney fees. The record reveals that plaintiffs were responsible for generating a substantial portion of defendants' attorney fees, and that that was a key factor for the attorney fee exception from the injunction. The following colloquy occurred on the record:

THE COURT: But I want to make sure that the plaintiffs, excuse me, the respondents [sic, defendants] have the ability to access funds to defend this law suit. I want to make sure that that happens and want to make sure that occurs.

* * *

MR. KUIPER [Defendants' Attorney]: I do want to argue that because I want to give you a couple of facts. And I have to give the plaintiffs credit for being very hard workers. This file is larger and has grown faster, than I think any file that I can remember. We have had 159 interrogatories thus far, 39 requests to produce, 50 third party document subpoenas and 40 deposition notices and re-notices. Your Honor, this keeps a little firm like Kuiper Orlebeke busy, almost to the exclusion for (inaudible) lawyers and a paralegal to any other case. And so I appreciate what you are saying, but how hard we work is directly in response to how—

THE COURT: Mr.—Mr. Kuiper, I think your fees will be justified. I mean, I would agree that the amount of paper that has been in this court with in [sic] this case in this case [sic] is a lot. But if you are getting the work, you are going to get paid for it.

MR. KUIPER: And the clients obviously need to have counsel to defend that—

THE COURT: Right.

MR. KUIPER: And it's hard to have counsel if don't get [sic] counsel that is getting paid.

Thus, the record demonstrates that plaintiffs were responsible for generating a substantial portion of defendants' attorney fees, and the probate court considered that factor when it excepted attorney fees from the preliminary injunction. Under the unique circumstances presented in this case, the probate court's decision did not fall outside the range of principled outcomes. *Pontiac Fire Fighters Union Local 376*, 482 Mich at 8.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello