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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0213**

In re the Estate of: Mary Catherine Giebel, Deceased

**Filed December 2, 2013
Affirmed; motions granted
Worke, Judge**

Goodhue County District Court
File No. 25-PR-11-2525

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Mary Elizabeth Giebel, Long Lake, Minnesota (attorney pro se)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this probate matter, appellant argues that the district court erred by removing him as personal representative and by denying his contempt and discovery motions. We affirm.

FACTS

Decedent Mary Catherine Giebel died on September 1, 2011, and was survived by her four children: appellant personal representative Kevin Giebel, respondent Mary Elizabeth Giebel, Ann Marie Fisher, and Mary Carol Sucher. Decedent's will left the

residue of her estate to her four children in equal shares and nominated appellant to act as personal representative. Appellant petitioned for informal probate and received letters testamentary on November 29, 2011.

Appellant, who is an attorney, handled various estate matters and sold decedent's home in July 2012, but relations between appellant and his sisters soured. Appellant accused Sucher of taking decedent's 2007 Honda and failing to make promised payments. He accused Sucher and Fisher of mishandling decedent's bank accounts and commingling funds while acting as decedent's attorneys-in-fact, and of removing personal property from the estate. Appellant accused respondent of receiving \$6,500 per month, totaling over \$100,000, for care services while decedent lived with respondent, without paying taxes on the funds. Respondent, Fisher, and Sucher accused appellant of various improprieties, such as removing personal property from decedent's house, and failing to timely file decedent's income tax returns, open an estate bank account, or wind up the estate's affairs.

Appellant refused to share information about the status of the probate action and threatened to charge his sisters fees for each request for information. Appellant informed his sisters that he changed his email settings to automatically delete any emails from them. Appellant accused his sisters of being disrespectful for using the word "grave" in emails when referring to his actions. Appellant scheduled depositions of his sisters so that he could uncover their alleged improprieties; his sisters refused to attend the depositions, claiming they were improperly notified or served. Respondent, who is also an attorney, stated that appellant had represented her in her divorce and had access to her

financial records and that he committed improprieties and violated professional rules by now accusing her of financial impropriety.

Ultimately, in November 2012, appellant petitioned for formal probate of the will and a formal confirmation of his appointment as personal representative, and moved to have respondent held in contempt. Respondent filed objections to the petition for appointment and the contempt motion, and requested immediate removal of appellant as personal representative.

At the motion hearing, the district court permitted both appellant and respondent to argue, although no sworn testimony was taken. Both parties submitted affidavits and memoranda, which the district court agreed to review. The district court subsequently issued its order denying all motions. In particular, the district court denied appellant's petition for appointment as personal representative "based upon an irreconcilable conflict between [appellant] and his siblings which requires the appointment of an alternate Personal Representative." The district court made no further findings. This appeal followed.

D E C I S I O N

Appointment/removal of personal representative

A district court may remove a personal representative for cause at any time during probate proceedings. Minn. Stat. § 524.3-611(a) (2012). After giving notice, an interested party may petition the district court for removal of the personal representative. *Id.* "Cause for removal exists when removal is in the best interests of the estate" *Id.* at (b) (2012). We review the district court's removal decision for an abuse of discretion.

In re Estate of Martignacco, 689 N.W.2d 262, 269 (Minn. App. 2004), *review denied* (Minn. Jan. 26, 2005).

Appellant argues that the district court abused its discretion because it rejected his petition for formal appointment as personal representative and removed him as personal representative without making findings. Appellant asserts that Minn. R. Civ. P. 52.01 obligates the district court to make findings on its appointment or removal decision and that the district court did not follow the procedural requirements for removal because respondent filed a motion, not a petition, there was no evidentiary hearing, and appellant was not properly notified.

A district court must find facts, either in writing or on the record, when an action is “tried upon the facts” to the court. Minn. R. Civ. P. 52.01. The purpose of the rule is “to aid the appellate court by affording it a clear understanding of the ground or basis of the trial court’s decision.” *Transit Team, Inc. v. Metro. Council*, 679 N.W.2d 390, 398 (Minn. App. 2004). The rule “prescribes no specific format.” *Id.* By its language, the rule’s requirement for factual findings is limited to actions tried upon the facts; it does not apply to motions to dismiss, summary-judgment motions, or other motions, except for motions for attorney fees or in the case of involuntary dismissal of an action. Minn. R. Civ. P. 52.01. Thus, formal written findings were not required.

Appellant’s contention that the district court failed to follow proper procedural requirements is without merit. Respondent moved the district court to remove appellant as personal representative. Although appellant states that this is improper because the statute requires a petition, there is little to distinguish between a “motion” and a

“petition.” A “motion” is “[a] written or oral application requesting a court to make a specified ruling or order.” *Black’s Law Dictionary* 1106 (9th ed. 2009). A “petition” is “[a] formal written request presented to a court or other official body.” *Id.* at 1261. Respondent’s motion was made in written form and in substance is no different than a petition. Respondent’s motion was served on appellant and was heard at the same time as appellant’s petition for formal appointment.

This court has agreed to review a decision to remove a personal representative even when a district court did not adhere to the formal requirements for removal. *Martignacco*, 689 N.W.2d at 270-71. In that case, the district court sua sponte removed a personal representative without a hearing. *Id.* at 271. This court noted that both parties had notice of the district court’s intention and concluded that the district court did not abuse its discretion in the peculiar circumstances of the case. *Id.* at 270-71. Here, both parties had notice, there was a hearing, and the district court was provided with a number of affidavits fully setting forth the parties’ positions. These materials amply support the district court’s findings that there was an irreconcilable conflict between the parties.

The district court may remove a personal representative “when removal is in the best interests of the estate.” Minn. Stat. § 524.3-611(b). This court has affirmed the removal of a personal representative based on the “considerable animosity between the [personal representative] and his brothers, and considerable disagreement as to what constitutes property of the estate, and how the estate should be divided.” *In re Estate of Michaelson*, 383 N.W.2d 353, 356 (Minn. App. 1986). Here, the parties have clearly demonstrated that there is “considerable animosity” and disagreement between them; it is

in the best interests of the estate to have a neutral party conclude the estate administration, as the parties are already incurring mediation and attorney fees because of their disputes. On this record, despite the lack of findings, the district court did not abuse its discretion either by refusing to formally appoint appellant as personal representative or by removing him.

Discovery motion and contempt motions

Appellant argues that the district court abused its discretion by denying his motions for discovery and for contempt. We review the district court's discovery rulings for an abuse of discretion. *Nelson v. Comm'r of Revenue*, 822 N.W.2d 654, 660 (Minn. 2012). A party generally has a right “to obtain discovery of any matter relevant to the subject matter of a dispute as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *In re Estate of Smith*, 444 N.W.2d 566, 568 (Minn. App. 1989) (quotation omitted).

The subpoena duces tecum served on respondent seeks any documents concerning decedent that are in the possession of respondent or her ex-husband. In general, these matters should be subject to discovery. Minn. R. Civ. P. 26.02(a); *Smith*, 444 N.W.2d at 568. But in light of our decision to affirm the order removing appellant as personal representative, the district court did not abuse its discretion by refusing to order discovery. A subsequent personal representative must decide what discovery to pursue.

Appellant argues that the district court abused its discretion by denying his motion to hold respondent in contempt. Deponents may be held in contempt if they refuse to be “sworn or to answer a question after being directed to do so by the court in the county in

which the deposition is being taken.” Minn. R. Civ. P. 37.02(a). But in order to invoke the contempt sanction, a party must first move for an order compelling the deponent to answer questions or provide other discovery. Minn. R. Civ. P. 37.01(b). The district court file does not contain a motion to compel discovery; therefore, appellant’s motion for contempt was premature.

Appellant’s motions

Appellant filed two motions with this court. In the first, he asks to correct the date stamp on a responsive affidavit that he filed with the district court; appellant states that he filed the response on January 14, 2013, but that it was date-stamped March 4, 2013. Appellant asks this court to correct the date stamp to read January 14, 2013, pursuant to Minn. R. Civ. App. P. 110.05. This rule permits a party to move the appellate court to correct the district court record so that it accurately reflects what occurred in the trial court. This court has permitted a party to amend the district court record when a document was omitted from the record because of a filing technicality. *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 831-32 (Minn. App. 1991), *review denied* (Minn. Oct. 31, 1991). The parties concede that appellant’s motion to correct is appropriate, and we therefore grant the motion.

Appellant also moves to strike pages 1-3 of respondent’s addendum and any references to those pages in respondent’s brief. These documents are not part of the record on appeal, because they were not filed in the district court. Minn. R. Civ. App. P. 110.01. We therefore grant this motion as well.

Affirmed; motions granted.