

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 22, 2023 Session

FILED 10/16/2023 Clerk of the Appellate Courts
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IN RE LIESELOTTE H. ROGOISH REVOCABLE LIVING TRUST

**Appeal from the Chancery Court for Montgomery County
No. MC-CH-CV-TT-21-2 Ben Dean, Chancellor**

No. M2022-01464-COA-R3-CV

This appeal arises from a petition filed by a beneficiary of a trust seeking an accounting and removal of the trustee. The trustee asserted the affirmative defense that the beneficiary violated the no-contest clause in the settlor’s trust. The trustee served the beneficiary with requests for admissions, to which the beneficiary responded with objections to the majority of the requests. After the trial court granted his motion for the requests for admissions to be admitted, the trustee filed a motion for partial summary judgment based on the no-contest clauses in the trust and will of the settlor. The trial court granted the motion and dismissed the beneficiary’s petition with prejudice. The beneficiary appealed. We reverse and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed
and Remanded**

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KENNY W. ARMSTRONG, JJ., joined.

Roger A. Maness, Clarksville, Tennessee, for the appellant, Julie Ann Rogoish.

Gregory D. Smith, Clarksville, Tennessee, for the appellee, John Victor Daniel, Trustee of the Lieselotte H. Rogoish Revocable Living Trust.¹

OPINION

I. FACTS AND PROCEDURAL HISTORY

¹ Susan Rudolph, Thomas Rogoish, Richard Rogoish, Heidi Erby, and Rosemarie Rogoish have joined the brief filed by John Victor Daniel.

In 2000, Lieselotte H. Rogoish (“Settlor”) established “The Lieselotte H. Rogoish Revocable Living Trust” (“the Trust”). An amendment to the Trust named Settlor’s friend John Victor Daniel (“Trustee”) as successor trustee in the event of Settlor’s incapacity or death. The Trust document contained a lengthy no-contest provision that read, in relevant part:

Section 13.03 Contest Provision

If any beneficiary of this trust or any trust created under this trust agreement, alone or in conjunction with any other person engages in any of the following actions, the right of the beneficiary to take any interest given to the beneficiary under this trust or any trust created under this trust agreement must be determined as it would have been determined had the beneficiary predeceased me without surviving descendants.

Contests by a claim of undue influence, fraud, menace, duress or lack of testamentary capacity, or otherwise objects in any court to the validity of (a) this trust, (b) any trust created under the terms of this agreement, (c) my will, or (d) any beneficiary designation of an annuity, retirement plan, IRA, Keogh, pension or profit sharing plan or insurance policy signed by me, (collectively referred to hereafter in this Section as “Document” or “Documents”) or any amendments or codicils to any Document; or

Seeks to obtain an adjudication in any court proceeding that a Document or any of its provisions is void, or otherwise seeks to void, nullify or set aside a Document or any of its provisions; or

...

...

Participates in any of the above actions in a manner adverse to the trust estate, such as conspiring with or assisting any person who takes any of the above actions;

My Trustee is hereby authorized to defend, at the expense of the trust estate, any violation of this Section. A “contest” shall include any action described above in an arbitration proceeding and shall not include any action described above solely in a mediation not preceded by a filing of a contest with a court, notwithstanding the foregoing.

This Section may not be applied so as to cause a forfeiture of any distribution otherwise qualifying for the federal estate tax charitable

deduction.

Following Settlor's incapacity in 2018, the Trust became irrevocable. In 2020, Settlor died. Pursuant to the terms of the Trust, it continued to operate as an administrative trust "for a reasonable period of time necessary to complete the administrative tasks set forth," before the property of the Trust would be distributed.

In September 2021, Settlor's daughter and one of the beneficiaries of the Trust, Julie Ann Rogoish, filed a petition for an accounting of the Trust and removal of Trustee. In the petition, Ms. Rogoish alleged, among other things, that Trustee had failed to provide an adequate accounting of the trust and had breached his duty of "upmost good faith and loyalty to all beneficiaries by his writings and actions." Subsequently, Ms. Rogoish moved for an ex parte restraining order to prevent Trustee from selling Settlor's house and from depleting, distributing, or encumbering any property in the Trust. The trial court granted a temporary restraining order and ordered Ms. Rogoish to post a \$20,000.00 bond.

In October 2021, Trustee filed his answer. Trustee appeared to admit that an accounting should be filed, requesting that "the pending complaint be dismissed upon Respondent filing a sworn accounting." Trustee further raised the affirmative defenses that Ms. Rogoish had violated the Trust's no-contest clause and that her petition failed to state a claim upon which relief can be granted under Tennessee Rule of Civil Procedure 12.06. Trustee also served Ms. Rogoish with a set of requests for admissions. The requests referred to past litigation where Ms. Rogoish was a party, Ms. Rogoish's failure to attend scheduled viewings of the home owned by the Trust, and the no-contest provisions of both the Trust and Last Will and Testament of Lieselotte H. Rogoish. Ms. Rogoish answered and objected to the majority of the admissions on the grounds that the admissions were irrelevant or that the admissions asked for a legal conclusion. Trustee subsequently filed a motion to compel discovery.

In March 2022, Ms. Rogoish filed a motion for contempt, alleging that Trustee had used assets of the Trust to finance the litigation in violation of the restraining order. She requested that Trustee be held in both civil and criminal contempt for his alleged violations of the previously issued restraining order. Ms. Rogoish also filed a motion to appoint a corporate fiduciary and a motion to release bond. Trustee then filed a renewed motion to compel discovery and motions to sell the personal property and former home of Settlor. In April 2022, Trustee filed an accounting of the Trust and the trial court ordered that the restraining order be extended. In April 2022, the trial court granted Trustee's motion to compel discovery and ordered Ms. Rogoish to answer the requests for admissions. The trial court deemed Trustee's motions to sell Settlor's personal property and home premature and reserved a ruling on them until after the trial court determined who would act as trustee. The trial court denied Ms. Rogoish's motion to release bond and scheduled hearings on the motion for contempt and the motion to appoint a corporate fiduciary. These hearings were continued after Ms. Rogoish's counsel withdrew. Trustee subsequently filed

a supplemental accounting.

In July 2022, Trustee filed a motion to declare the requests for admissions admitted, which the trial court granted. In its order granting the motion, the trial court made several findings of fact and one conclusion of law. In August 2022, Trustee filed a motion for partial summary judgment based on the no-contest clauses in the Trust and Settlor's will.² Along with the motion, Trustee filed a statement of undisputed facts, an affidavit, and a memorandum of law supporting his motion. In the affidavit, Trustee stated that Ms. Rogoish's "ex parte injunctions, lawsuits, berating [Trustee] and actively attempting to recruit other beneficiaries of [the Trust] to oppose [] Trustee have caused repeated delays" Ms. Rogoish did not respond to the motion or the statement of undisputed facts. After a hearing in September 2022, the trial court entered an order granting Trustee's motion for partial summary judgment and dismissing Ms. Rogoish's petition with prejudice.³ In the order, the trial court listed several findings of fact and conclusions of law:

I. FINDINGS OF FACT

1.1) Respondent, John V. Daniel, is the Trustee of the Lieselotte H. Rogoish Revocable Living Trust. Lieselotte H. Rogoish's Last Will and Testament placed all assets not already in the Trust was placed [sic] in said Trust. The Court finds this as fact.

1.2) Petitioner, Julie Ann Rogoish, was an heir of Lieselotte H. Rogoish and a beneficiary of the ("Trust"). The Court finds this as fact.

1.3) On September 10, 2021, Petitioner filed a lawsuit contesting the Trust. This order is part of said Trust contest. The Court finds this as fact.

1.4) Clause 13.03 of the Trust is a no-contest clause that disinherits any beneficiary that challenges or "Contests [the Trust] or otherwise objects in any court to the validity of...any amendments or codicils to [the Trust]...or seeks to obtain an adjudication in any court proceeding...seeks to void, nullify or set aside...any of its [the Trust's] provision." The Court finds this provision of the Trust, § 13.03, to be fact. Clause 5 of the Lieselotte H. Rogoish's Last Will and Testament has a similar "no contest" provision. The Court finds this as Fact.

² Trustee sought dismissal of Ms. Rogoish's petition and a finding that she is no longer a beneficiary of the Trust, which would be dispositive of all of Ms. Rogoish's claims for relief. It is therefore unclear from the record why Trustee moved for *partial* summary judgment rather than summary judgment.

³ The transcript of the hearing on the motion for partial summary judgment is absent from the record.

1.5) This Court finds as fact that the designation of John V. Daniel as Trustee of the Lieselotte H. Rogoish Revocable Living Trust was a clause of the Trust that Petitioner contested.

1.6) The Court further hereby finds as fact, that Petitioner, Julie Ann Rogoish has deliberately and intentionally undermined the intent and spirit of the Lieselotte H. Rogoish Revocable Living Trust.

1.7) A motion for partial summary judgment, which included proposed undisputed facts, was filed by Respondent on August 4, 2022. Petitioner admitted in open court that she has not filed any response to the August 4, 2022 motion for partial summary judgment and that more than thirty (30) days have passed since the filing of Respondent's motion for partial summary judgment. The Court finds this and the proposed undisputed facts offered by Respondent as fact.

1.8) As of 9:30 a.m. on September 30, 2022, Petitioner has not responded to either Respondent's Motion for Partial Summary Judgment nor the Respondent's list of Undisputed Material Facts. The Court deems this now to be fact.

1.9) Petitioner's credibility, truthfulness and veracity has been questioned by several prior courts. The Court now accepts and finds this as fact.

1.10) The Court adopts by reference and finds as fact the Request for Admissions answers deemed admitted on August 3, 2022 and the Respondent's proposed Undisputed Facts as if restated fully herein.

II. CONCLUSIONS OF LAW

2.1) The Court concludes, as a matter of law, that Petitioner, Julie Ann Rogoish has intentionally attacked and violated the "no contest" clause of the Lieselotte H. Rogoish Revocable Living Trust.

2.2) The Court concludes, as a matter of law, that Clause 13.03 of the Lieselotte H. Rogoish Revocable Living Trust, (the "no contest" clause), disinherited/forfeits any potential beneficiary of said Trust if the Trust is challenged. The Court further concludes that the Last Will and Testament of Lieselotte H. Rogoish has a similar "no contest" clause which Petitioner likewise violated.

2.3) The Court concludes, as a matter of law, that Julie Ann Rogoish, Petitioner, undermined, violated and contested the Trust and that Julie Ann

Rogoish is not a credible witness.

2.4) The Court finds, as a matter of law, that Julie Ann Rogoish intentionally challenged the Lieselotte H. Rogoish Revocable Living Trust and therefore waived and forfeited any and all rights and interest Julie Ann Rogoish had as a beneficiary in the Lieselotte H. Rogoish Revocable Living Trust due to her intentional acts discussed in the pleadings and arguments set out at Court. Likewise, Julie Ann Rogoish has waived and forfeited any and all rights and interest she had as an heir of the Law Will and Testament of Lieselotte H. Rogoish due to her intentional acts discussed in the pleadings and arguments set out at Court.

2.5) The Court finds, as a matter of law, that no genuine issue of material fact in dispute and a judgment of law in favor of Respondent and against Petitioner [sic].

The trial court certified its order as final pursuant to Tennessee Rule of Civil Procedure 54.02.⁴ Ms. Rogoish subsequently appealed.

II. ISSUES PRESENTED

Ms. Rogoish presents the following issue for review on appeal:

1. Whether the trial court abused its discretion by failing to apply a correct legal standard in evaluating the Trustee's Motion for Partial Summary Judgment;

Trustee presents the following issues for review on appeal, which we have slightly restated:

1. Whether the Trial Court correctly granted a partial summary judgment;
2. Whether this Court should award Appellee costs and appellate attorney fees for frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122 and to order said appellate attorney fees and all appellate costs taken from the \$20,000.00 cash bond filed by Appellant with the Montgomery County Chancery Court Clerk.

⁴ We cannot determine from the record why this certification was necessary. Pursuant to Tennessee Rule of Civil Procedure 54.02, a trial court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment." We recognize an unresolved motion for civil contempt is in the record. However, this does not render certification under Rule 54.02 necessary. Unresolved contempt proceedings are sui generis, and a motion for civil contempt is "not among the issues that must be resolved before an otherwise final order in the underlying case will be considered final for the purposes of Tenn. R.App. P. 3(a)." *Salvucci v. Salvucci*, No. W2013-01967-COA-R3-CV, 2014 WL 4201441, at *6, n.3 (Tenn. Ct. App. Aug. 26, 2014).

For the following reasons, we reverse the trial court's order granting partial summary judgment and remand to the trial court for further proceedings.

III. STANDARD OF REVIEW

A trial court's grant or denial of a motion for summary judgment is a matter of law, and therefore, on appeal, the standard of review is de novo without a presumption of correctness. *Allstate Prop. & Cas. Ins. Co. v. Sevier Cnty. Electric Sys.*, 666 S.W.3d 401, 411 (Tenn. Ct. App. 2022) (citing *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Board Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013)). This standard of review requires a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Rye*, 395 S.W.3d at 250 (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)). A trial court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

IV. DISCUSSION

Summary Judgment

Ms. Rogoish argues that the trial court erred in failing to analyze her petition in accordance with Tennessee Code Annotated section 35-15-1014, which provides:

- (a) For the purposes of this section, "no-contest provision" includes a "no-contest provision," "in terrorem provision" or "forfeiture provision" of a trust instrument. A "no-contest provision" means a provision that, if given effect, would reduce or eliminate the interest of any beneficiary of such trust who, directly or indirectly, initiates or otherwise pursues:
- (1) Any action to contest the validity of the trust or the terms of the trust;
 - (2) Any action to set aside or vary the terms of the trust;
 - (3) Any action to challenge the acts of the trustee or other fiduciary of the trust in the performance of the trustee's or other fiduciary's duties as described in the terms of the trust; or
 - (4) Any other act or proceedings to frustrate or defeat the settlor's intent as expressed in the terms of the trust.

(b) Regardless of whether or not the beneficiary sought, received or relied upon legal counsel, a no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of:

- (1) Fraud;
- (2) Duress;
- (3) Revocation;
- (4) Lack of testamentary capacity;
- (5) Undue influence;
- (6) Mistake;
- (7) Forgery; or
- (8) Irregularity in the execution of the trust instrument.

(c) Subsection (b) shall not apply to:

- (1) Any action brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust;
- (2) Any action brought by the trustee or any other fiduciary serving under the terms of the trust, unless the trustee or other fiduciary is a beneficiary against whom the no-contest provision is otherwise enforceable;
- (3) Any agreement among the beneficiaries and any other interested persons in settlement of a dispute or resolution of any other matter relating to the trust, including without limitation any nonjudicial settlement agreement;
- (4) Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision;
- (5) Any action brought by a beneficiary or on behalf of any such beneficiary

for a construction or interpretation of the terms of the trust; or

(6) Any action brought by the attorney general and reporter for a construction or interpretation of a charitable trust or a trust containing a charitable interest if a provision exists in a trust purporting to penalize a charity or charitable interest for contesting the trust if probable cause exists for instituting proceedings.

(d) Pursuant to this section, courts shall enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible.⁵

This statute “was included in the Tennessee Uniform Trust Code in furtherance of its overriding policy and goal of carrying out a settlor's intent, as well as providing settlors with the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable.” *Williams v. Lewis Pres. Tr.*, No. E2022-01034-COA-R3-CV, 2023 WL 4542621, at *13 (Tenn. Ct. App. July 14, 2023) (quoting Tenn. Code Annotated § 35-15-1014, 2013 Restated Comments).

As a threshold matter, it is undisputed that the Trust contained a “no-contest provision” within the meaning of subsection (a). Tenn. Code Ann. § 35-15-1014(a). As such, pursuant to subsection (b), the provision “is enforceable according to its express terms, without regard to whether a beneficiary is acting in good or bad faith in taking the action triggering the provisions of the no-contest provision unless probable cause exists for such beneficiary taking such action on eight specific grounds.” Tenn. Code Ann. § 35-15-1014 (2013 Restated Comments). Subsection (c) then provides an “explicit list of actions that if taken will not trigger enforceability of the no contest provision.” *Id.*

Trustee argues that Ms. Rogoish has violated the Trust's no-contest provision by filing her petition seeking an accounting and a replacement of the Trustee. Trustee also points to Ms. Rogoish's ex parte injunction and states that she “repeatedly interfered and undermined [Trustee's] efforts to administer the Trust.” However, we cannot agree with Trustee's characterizations of Ms. Rogoish's actions. In her initial petition, Ms. Rogoish specifically requested:

1. That proper process issue and be served on John Daniels as Trustee of the Lieselotte H. Rogoish Revocable Living Trust.
2. That the Court Order the trustee to provide a sworn accounting to the beneficiaries from July 2018 forward.

⁵ Although Ms. Rogoish did not cite Tennessee Code Annotated section 35-15-1014 in the trial court, “[i]t is the duty of this Court to apply the controlling law, for which there is a basis in the record, whether or not cited or relied upon by the parties.” *Kocher v. Bearden*, 546 S.W.3d 78, 85 n.8 (Tenn. Ct. App. 2017) (quoting *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W.2d 656, 658 n.1 (Tenn. 1990)).

3. That the Court remove John Daniels as Trustee and appoint an independent corporate trustee.
4. For any other relief the Court finds appropriate.

The Trust sets out specific actions that, if taken, will trigger the penalties imposed in the no-contest provision. The initial petition does not violate the express terms of the Trust’s no-contest provision as it does not “[c]ontest[] by a claim of undue influence, fraud, menace, duress or lack of testamentary capacity, or otherwise object[] . . . to the *validity* of [the Trust]” (emphasis added). It also does not “[s]eek[] to obtain an adjudication in any court proceeding that a Document or any of its provisions is void, or otherwise seek[] to *void, nullify or set aside* a Document or any of its provisions[.]” (emphasis added). Ms. Rogoish’s initial petition was based on her allegations that Trustee had breached his fiduciary duties and failed to provide an adequate accounting. Specifically, Ms. Rogoish’s petition did not challenge the validity of the Trust’s provisions regarding accounting or the designation of trustee. Ms. Rogoish was not attacking the trust itself or its existence by requesting that it be set aside or declared invalid. She was not objecting to the initial appointment of Mr. Daniel as Trustee. She was complaining of the actions that Trustee had taken which she believed to be in violation of his duties required by the Trust. The petition for an ex parte injunction, the motion for civil contempt, and the motion to appoint corporate fiduciary also do not make any such claim regarding the initial appointment of Trustee or the validity of the Trust. Nor do they seek to set aside any provisions of the Trust. Thus, there is no evidence that Ms. Rogoish’s actions ran afoul of the “express terms of the no-contest provision” in the Trust. *See* Tenn. Code Ann. § 35-15-1014(b).

Trustee also argues that Ms. Rogoish has “violated” Tennessee Code Annotated section 35-15-1014(a)(1)-(4). We disagree. Per the restated comments, subsection (a) “defines no-contest provisions” Subsection (b), however, clearly states that no-contest provisions are “enforceable according to the express terms of the no-contest provision” within the trust. Tenn. Code Ann. § 35-15-1014(b). *See* Lauren E. Bellaflores, *In Tennessee We Trust? An Overview of the 2013 Amendments to the Tennessee Uniform Trust Code*, 18 Transactions: Tenn. J. Bus. L. 273, 286 (2016) (“[A] no-contest clause will be enforced in accordance with its explicit terms”). Thus, subsection (a) is not a list of actions that, if “violated,” would necessarily disqualify a beneficiary. Instead, for a no-contest provision to be enforced and a beneficiary to be disqualified, the beneficiary would necessarily have to take an action that violates the terms of the no-contest provision in the trust. *See id.* at 276 (“[T]erms of the trust will be administered in accordance with their precise meaning”).⁶

⁶ Since this statute was enacted in 2013, this Court has analyzed its provisions only once, and that was in regard to Tennessee Code Annotated section 35-15-1014(c), which is known as the “safe harbor” provision. As the restated comments describe, section (c) contains a list of actions that “will not trigger enforceability of the no contest provision,” including: “[a]ny action brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust[.]” In *Williams*, the trial court, at the summary judgment stage,

In the “findings of fact” section of the trial court’s order granting partial summary judgment, the court quotes specific language from the no-contest clause and states that Ms. Rogoish filed a lawsuit contesting the trust and contested the Trust’s designation of trustee. The order later concludes as a matter of law that Ms. Rogoish “undermined, violated[,] and contested the Trust,” and that Ms. Rogoish “intentionally challenged [the Trust].” However, the trial court did not state any basis for these findings or point out any specific action or pleading taken by Ms. Rogoish that challenged the validity of the Trust or challenged the validity of the Trust’s designation of trustee. Instead, the trial court relied on what it deemed to be an undisputed finding of fact that Rogoish contested the Trust. This finding of fact, however, is not a true finding of fact but rather a conclusion of law. A finding of fact is “a determination by a judge . . . of a fact supported by the evidence in the record . . .” *Finding of Fact*, Black’s Law Dictionary (11th ed. 2019). A conclusion of law, however, is “an inference on a question of law, made as a result of a factual showing, no further evidence being required.” *Conclusion of Law*, Black’s Law Dictionary (11th ed. 2019). Further, the construction of a trust and applicable statutes presents questions of law. *Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 252 (Tenn. 2017). Here, the trial court’s determination that Ms. Rogoish violated the no-contest clause of the Trust required legal analysis of her pleadings and actions. Further, the statement “The Court finds this as fact” does not automatically transform a conclusion of law into a finding of fact. *See In Re K.N.R.*, M2003-01301-COA-R3-PT, 2003 WL 22999427 at *4 (Tenn. Ct. App. Dec. 23, 2003).

For the same reasons, we cannot agree with Trustee’s arguments regarding alleged admissions by Ms. Rogoish. Trustee argues that unanswered and admitted requests for admissions and the uncontested statements of undisputed facts conclusively establish that Ms. Rogoish had contested the trust and was therefore not a beneficiary of the Trust. As we explained, whether Ms. Rogoish contested the trust and violated the no-contest provision are legal conclusions. Parties are not ordinarily bound by an admission of a legal conclusion. *Old Hickory Coaches, LLC v. Star Coach Rentals, Inc.*, 652 S.W.3d 802, 815 (Tenn. Ct. App. 2021). *See Howe v. Haslam*, No. M2013-01790-COA-R3-CV, 2014 WL 5698877, at *25 (Tenn. Ct. App. Nov. 4, 2014) (McBrayer, J., concurring in part) (recognizing that “[A] request for admission asking a party to admit or deny a purely legal issue is improper, and a deemed admission involving a purely legal issue is of no effect.”) (quoting *Cedyco Corp. v. Whitehead*, 253 S.W.3d 877, 880 (Tex.App.2008)). *Cf. Mast Advert. & Pub., Inc. v. Moyers*, 865 S.W.2d 900, 902 (Tenn. 1993) (“The law is clear that questions of law are not subject to stipulation by the parties to a lawsuit and that a stipulation purporting to state a proposition of law is a nullity.”). Therefore, even if Ms.

enforced a no-contest provision of a trust and found that none of the “safe harbor” provisions applied under the circumstances. *Id.* at *6. We vacated the trial court’s decision regarding the no-contest provision because “a genuine dispute of material fact exist[ed] regarding whether [the trustee] ‘ha[d] committed a breach of fiduciary duties or breach of trust.’” *Id.* at *14 (quoting Tenn. Code Ann. § 35-15-1014(c)(1)).

Rogoish had admitted to contesting the Trust, she would not be bound by the admission because it is a legal conclusion, “the determination of which properly rests with the court.” *Old Hickory*, 652 S.W.3d at 815. Nevertheless, the admissions by Ms. Rogoish do not establish that she contested the Trust. The requests for admissions regarding the no-contest provision of the Trust merely established that the no-contest clause is in the Trust, which is not in dispute. Further, many of the factual admissions that were deemed admitted are irrelevant to the determination of whether Ms. Rogoish had contested the Trust, as they did not establish that she had made any claim regarding the execution of the Trust, the existence of the Trust, or validity of the Trust or that she was violating any provision of the no-contest clause in the Trust.

Trustee further argues that Ms. Rogoish’s failure to produce a transcript of the hearing on the motion for summary judgment creates a conclusive presumption that the factual findings by the trial court are supported by evidence and correct. Although Trustee states in his brief that admissions were made in open court and that there were “multiple open-court hearings that included both arguments and testimony,” there is nothing in the record to confirm this. Tennessee Rule of Civil Procedure 56 “certainly contemplates that the proof in support of a motion for summary judgment will be filed with the [t]rial [c]ourt rather than received orally.” *Svacha v. Waldens Creek Saddle Club*, 60 S.W.3d 851, 856 (Tenn. Ct. App. 2001). Thus, a transcript from a hearing on summary judgment is normally not necessary but may be necessary when “the record lacks other documents that show the basis for the decision.” *Vaughn v. DMC-Memphis, LLC*, No. W2019-00886-COA-R3-CV, 2021 WL 274761, at *4 (Tenn. Ct. App. Jan. 27, 2021) (citing *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 712 (Tenn. 2005)). “If,” however, “a trial court relies upon oral testimony of a witness, the Rule 56 movant bears the responsibility of seeing that a transcript of that oral testimony is ‘on file.’” *Svacha*, 60 S.W.3d at 856. “While Rule 24(a) of the Tenn. R. App. P. does place the primary burden on the appellant to prepare a proper record on appeal, the appellee shares some of the responsibility to make sure the record is complete.” *Id.* at 855.

In *Svacha*, defendant’s motion for summary judgment was granted partially due to testimony from the plaintiff at the hearing on a motion in limine which occurred immediately before the trial was set to commence. *Svacha*, 60 S.W.3d at 853. The plaintiff appealed the court’s order but did not include as part of the record a transcript of her testimony that the court relied upon. *Id.* We vacated the trial court’s order and stated that without the “potentially crucial evidence” from the testimony in the record, “we cannot determine if the Trial Court properly granted Defendants’ motion.” *Id.* at 856. We further stated that it was “incumbent on Defendants to file with the [t]rial [c]ourt and furnish to this Court [Plaintiff’s] testimony since this testimony was relied on by the Trial Court to grant their motion for summary judgment. *Id.* However, in the present case, there is no indication from the findings of fact or conclusions of law in the trial court’s order granting partial summary judgment that it relied on any admission or pleading outside of the record to make its determination that Ms. Rogoish contested the Trust. Therefore, the transcript

from the summary judgment motion hearing or other hearings is not necessary for this appeal.

Finally, we note that the trial court erred when it concluded that Ms. Rogoish was “not a credible witness.” At the summary judgment stage, the trial court may not weigh evidence or determine the credibility of a witness. *Citizens Sav. Bank and Trust Co. v. Hardaway*, 724 S.W.2d 352, 355 (Tenn. Ct. App. 1986) (citing *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476, 485 (Tenn. Ct. App. 1978)). Further, determinations of credibility arise from a trial judge or jury seeing witnesses face to face, hearing the witness’s testimony, and observing the witness’s demeanor on the stand. *Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1966). Here, the trial court determined Ms. Rogoish’s credibility based, at least partially, on her testimony and actions in past, unrelated litigation before a different court. Therefore, the trial court erred by concluding that Ms. Rogoish was not a credible witness in the order granting partial summary judgment.

For the foregoing reasons, the trial court erred in determining that Ms. Rogoish had contested the Trust and was therefore disqualified as a beneficiary.

Frivolous Appeal

Trustee has requested that this Court award him attorney’s fees incurred in this appeal pursuant to Tennessee Code Annotation section 27-1-122, which allows an appellate court to award attorney’s fees when an appeal is deemed frivolous. A frivolous appeal is “one that is devoid of merit, or one that has no reasonable chance of succeeding.” *Young v. Barrow*, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003) (internal citations omitted). Having determined that the judgment of the trial court should be reversed, we cannot find this appeal devoid of merit or perceive that it was taken solely for delay. Thus, we respectfully decline to exercise our discretion to award Trustee attorney’s fees pursuant to this statute.

V. CONCLUSION

The order of the trial court is reversed and remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellee, John Victor Daniel, Trustee of the Lieselotte H. Rogoish Revocable Living Trust, for which execution may issue if necessary.

CARMA DENNIS MCGEE, JUDGE