Cases:

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO. 502012CP004391XXXXSB
CP - Probate

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

_____/

TRUSTEE'S RESPONSE TO PETITIONS OF ELIOT BERNSTEIN TO REMOVE TED S. BERNSTEIN AS SUCCESSOR TRUSTEE OF THE SIMON BERNSTEIN REVOCABLE TRUST

Trustee, Ted S. Bernstein (the "Trustee") responds to Eliot Bernstein's Petition to Remove Ted S. Bernstein, as Successor Trustee of the Simon L. Bernstein Amended and Restated Trust (the "Petition"), and states:

1. There is no subject matter jurisdiction because there is no action filed in accordance with § 736.0201(1). Therefore, this is no jurisdiction to hear this matter.

2. Secondly, Eliot is not a beneficiary of the Trust – "for purposes of this Trust and the dispositions made hereunder . . . Eliot Bernstein . . . shall be deemed to have predeceased me." Eliot also is neither a beneficiary of Simon's Estate (everything is given to Simon's Trust); Shirley's Estate (everything given to Shirley's Trust); nor Shirley's Trust (Simon exercised his Power of Appointment to distribute equal shares to his grandchildren). Thus, for all intents and purposes, Eliot was disinherited entirely and also was not named in any fiduciary role in either estate or trust. Simply, he lacks individual standing. Pursuant to statute, only a "settlor, a cotrustee, or a beneficiary may request the court to remove a trustee." Fla. Stat. § 736.0706(1). Eliot is neither of these, which ends the analysis.

3. Third, Eliot is not qualified to act for his children because he admits there is a conflict between his position and theirs, as he may challenge the 2012 Will and Trust of Simon under which monies are left for grandchildren, and try to uphold (1) an earlier revoked will and (2) an earlier form of trust that has been fully amended and restated. Eliot is not a suitable representative for his children's interests based upon his stated conflict, as more fully explained in Oppenheimer's Motion to Appoint Guardian Ad Litem dated September 19, 2014 in Case No. 502014CP002815XXXXSB (IY)(incorporated herein by reference), which case is separate and unrelated to these estate and trust matters, but involves some of the same players. Oppenheimer stated:

> Courts are inclined to appoint a parent as a child's litigation representative ***unless "it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent."*** *1 Leg. Rts. Child. (Legal Rights of Children) Rev. 2d § 12:3 (2d ed. 2013), citing Mistretta v. Mistretta, 566 So. 2d 836, 837 (Fla. 5th DCA 1990)(other internal citations omitted).* In this case, Eliot Bernstein has confirmed, by the allegations of his Counter-Complaint that he has interests which conflict (or certainly which may conflict) with those of the Minors. For instance, in the Counter-Complaint:
>
> • Mr. Bernstein alleges that ***beneficiary designations were changed from him to his children based upon fraudulent documents and frauds on this Court.*** See Counter-Complaint, ¶ 253.
>
> • Mr. Bernstein alleges that "approximately 1/3 of all assets [are] ***either going to Eliot or his children or a combination of both depending on how this Court rules regarding the validity of the Wills and Trusts that have been challenged*** and already found fraught with fraud, fraudulent notarizations, improper notarizations, forgeries and more." See Counter-Complaint, ¶ 186.
>
> • Even though the Minors are clearly listed as the sole beneficiaries of the Grandchildren Trusts, Eliot Bernstein alleges that he himself is a beneficiary. Specifically, he alleges that "Simon and Shirley [Bernstein] set up [the Grandchildren Trusts and Bernstein Family Realty, LLC] while living, in order to fund all of their living

> expenses due to the fact that Eliot has had a bomb put in his car, death threats and is in the middle of a very intense RICO and ANTITRUST lawsuit where he and his family have been in grave danger for many years fighting corruption inside the very framework of the legal system." ***He alleges that the Grandchildren Trusts were "set up by Simon and Shirley [Bernstein] for the benefit of Eliot, Candice and their children."*** *See Counter-Complaint, ¶¶ 109-110*

Fourth, Eliot has not established a sufficient basis in law or fact to remove the Trustee as Successor Trustee of the Simon Trust. Such removal is governed by section 736.0706 Removal of trustee, which provides (the irrelevant/non-applicable parts are lined through)"

> 736.0706 Removal of Trustee
>
> (1) ~~The settlor, a cotrustee, or~~ a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.
>
> (2) The court may remove a trustee if:
>
> > (a) The trustee has committed a serious breach of trust;
> >
> > (b) ~~The lack of cooperation among cotrustees substantially impairs the administration of the trust~~;
> >
> > (c) Due to the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
> >
> > (d) There has been a substantial change of circumstances ~~or removal is requested by all of the qualified beneficiaries~~, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Removal of a trustee must be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust, not a personality issue by a beneficiary nor any potential

mismanagement of the trust. *Parr v. Cushing,* 507 So. 2d 1227, 1228 (Fla. 5th DCA 1987)(reversing removal due to abuse of discretion); *In Re Estate of Murphy*, 336 So. 2d 697 (Fla. 4th DCA 1976)(minimal mismanagement by fiduciary insufficient to warrant removal).

Hostility and/or tension between a trustee and potential beneficiaries of the trust does not by itself constitute a ground for such removal. *Parr,* 507 So. 2d at 1228.

In *Parr*, the court held:.

> Here, there was no showing that appellants had not administered the trust in anything but an efficient manner. To warrant their removal, a showing of *actual* not *potential* mismanagement must be made. A proper balance is thereby achieved between a settlor's right to appoint the person(s) of his choice as trustee(s), with the court's interest of ensuring its proper and efficient administration. Conditioning appellants' continuation as trustees upon the approval of contingent beneficiaries demonstrates that the *only* basis for removal was friction among the contingent beneficiaries. Removal for this reason was an abuse of discretion. Accordingly, the final declaratory judgment is REVERSED.

Id.

The Fourth DCA in *In Re Estate of Murphy*, 336 So.2d 697 (Fla. 4th DCA 1976), addressed similar issues of a beneficiary being unhappy with the fiduciary. The court rejected this, stating:

> With regard to appellant's disenchantment with Mr. Pace as a co-executor, at first blush it might seem that if the sole beneficiary wants a change in personal representatives, no one may complain. But that conclusion does not necessarily follow. It must be remembered we are dealing here with an executor appointed by the decedent in his will, not an administrator appointed by the court. As the court pointed out in *In re Estate of Beichner,* 432 Pa. 150, 247 A.2d 779, 781 (1968):
>
> > "`A testator has, as a property right, the privilege and power to place the management of his estate in a selected person as a condition of his bounty.'"

> ***The removal of a personal representative chosen by the deceased is a drastic action*** and should ***only be resorted to when the administration of the estate is endangered*** . . . . The mere fact that a certain hostility has arisen between a beneficiary and the executor absent some showing of wrongdoing on the part of the executor or other factors which will prejudice the administration does not warrant such drastic action as removal. . . . . Our close examination of the testimony in this case leads us to the conclusion that the trial court could well find that there was no showing that the administration would be prejudiced or endangered by Mr. Pace's continuing to act pursuant to his nomination by the decedent as a coexecutor. We must also keep in mind that the administration of this estate remains under the continuing jurisdiction of the court, and should reason arise for removal in the future the court may entertain another petition for removal.

Id. at 698-99.

"Potential conflict in and of itself is not necessarily improper. A trustee has wide discretion in the exercise of his power and a court will not interfere unless he abuses his discretion." *State of Del. Ex rel. Gebelein v. Belin,* 456 So. 2d 1237, 1241 (Fla. 1st DCA 1984).

Here, the major complaint against Ted S. Bernstein, as Successor PR of Shirley's Estate, and as Successor Trustee of the Shirley Trust and the Simon Trust, is that lawyers from the decedent's law firm engaged in misconduct and were forced to withdraw. These were the lawyers chosen by Simon to administer his Estate and his Trust; the misconduct occurred before Ted S. Bernstein was appointed by this Court to a role as Successor PR of Shirley's Estate; before Ted S. Bernstein was appointed as Successor Trustee of Simon's Trust; and to the extent Ted S. Bernstein was serving as Trustee of Shirley's Trust, he was unaware of and did not participate in such conduct, and has taken immediate steps to remedy the problem upon learning of it.

The Trustee is administering the trusts and estates properly, albeit that is difficult with the constant bombarding by Eliot, who complains about and challenges every action, and opposes the

Court hearing the only matter which must be decided before additional distributions can be made, the Trust Construction Action to decide the scope of Simon's power of appointment.

The reasons advanced by Eliot for the removal of the Trustee, which are denied, will be shown to lack factual or legal merit, and therefore, the Petitions all should be denied with prejudice.

WHEREFORE, for the foregoing reasons, the Trustee respectfully requests this Court deny the Petition with prejudice.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by: ☐ Facsimile **and** U.S. Mail; ☐ U.S. Mail; ■ E-mail Electronic Transmission; ☐ FedEx; ☐ Hand Delivery this 24th day of September, 2014.

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432 Pa. 150
Supreme Court of Pennsylvania.

In re ESTATE of William H. BEICHNER.
Appeal of Amanda GROOM, Executrix
of the Estate of William Beichner.

Nov. 12, 1968.

Petition by testator's widow for removal of executrices, two daughters of testate. The Orphans' Court, Beaver County, No. 401 of 1967, Frank E. Reed, J., entered decree removing executrices, one of which appealed. The Supreme Court, No. 219 March Term, 1968, Jones, J., held that removal without a hearing and solely on the pleadings simply because one executrix admitted that animosity existed between herself and testator's widow, a beneficiary, was abuse of discretion.

Reversed.

Attorneys and Law Firms

***151** ****779** Rex Downie, Jr., Beaver Falls, for appellant.

***152** Leonard L. Ewing, Peter O. Steege, Ewing, Evans & Steege, Beaver Falls, for appellee.

Before BELL, C.J., and MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

****780 OPINION**

JONES, Justice.

This appeal challenges the propriety of a decree of the Orphans' Court of Beaver County removing an executrix of an estate and revoking letters testamentary granted to her.

William H. Beichner, a resident of Beaver County, died testate on September 21, 1967. Surviving Beichner were four daughters by a first marriage and Millie Beichner, his wife by a second marriage.

Beichner's will-dated May 29, 1967-provided: first, for paymment of debts, last illness and funeral expenses; second, a specific devise of his realty, located at 2103 Eighth Street, Patterson Township, Beaver County, and all furniture therein to Mrs. Beichner; [1] third, the residuary estate is given to Beichner's four daughters; fourth, a direction that all taxes be paid out 'of the principal of (his) general estate' as if such taxes were expenses of administration; fifth, the appointment of two of his daughters-Amanda Groom and Joan Larson-as executrices of the estate.

On October 13, 1967, Beichner's will was probated and letters testamentary issued to the named executrices. On May 2, 1968, Mrs. Beichner petitioned the Orphans' Court of Beaver County for the removal of both Mrs. Groom and Mrs. Larson as executrices and the appointment of a corporate administrator in their stead. Her petition averred, inter alia: (a) that the executrices had not filed an inventory or a statement of debts and deductions and had not paid the transfer ***153** inheritance tax; (b) that the claims against the estate, to petitioner's knowledge, amount to approximately $5500 included in which are estimated fees for the executrices and attorneys of $1279 which it is claimed are excessive; (c) that executrices contracted an excessive funeral bill of $1,938.70; (d) that Beichner had told petitioner that he had a life insurance policy, wherein the named beneficiary was Mrs. Larson, earmarked for payment of funeral expenses which Mrs. Larson had agreed to pay out of the proceeds of the policy but which she now refuses to pay, contending the insurance proceeds were a gift from decedent; (e) that Mrs. Larson, a registered nurse, has presented two claims against the estate, one for $2,470 for private duty nursing plus medication and the other for $100 for injections for the petitioner, which claims 'are with the cooperation of' Mrs. Groom; (f) that the executrices have charged petitioner with concealing and disposing of estate assets and have disclosed 'a fixed enmity toward her'; (g) that an 'unfriendly friendly feeling exists between the (executrices) and (Mrs. Beichner) through no fault of' (the petitioner).

Upon issuance by the court of a citation on the executrices to show cause why they should not be removed from office, Mrs. Groom filed an answer wherein she averred, inter alia: (a) that no inventory had been filed because she had been unable to ascertain from petitioner the whereabouts of certain of Beichner's personal assets and filing of a statement of debts and deductions had been delayed in the hope petitioner would amicably disclose certain personal assets; (b) that the estimated fees for the executrices and attorney were not excessive; (c) that the funeral bill was not excessive and, moreover, petitioner, present when funeral arrangements were made, did not render any objection; (d) that, upon Mrs. Larson presenting ***154** claims against the estate, she was advised her interest was adverse to the estate and Mrs. Larson

then agreed to withdraw as executrix, has since employed her own counsel and that her claims will be adjudicated by the court at the time of audit; (e) that she has endeavored to require disclosure by the petitioner of personal assets **781 of Beichner but petitioner has refused to account for the items claimed to be 'concealed or disposed of' by petitioner; (f) that she admits 'the existence of animosity and ill feeling between the natural children of (Beichner) and their stepmother' but she has attempted to minimize such animosity; (g) that the primary estate problem has been the disposition of the realty and that she had agreed with the Patterson Township Joint School District, under threat of condemnation proceedings, on a price for such realty and to that end has had an executrix' deed prepared which is now in the hands of petitioner's counsel. Mrs. Groom thereafter filed a supplemental answer setting forth that Mrs. Grooms' counsel had now received the executor's deed and an agreement had been concluded providing for handling the proceeds of the real estate sale pending the decree of distribution thereof by the court and that arrangements had now been made for her to enter the premises occupied by petitioner to take an inventory of the personal assets and furniture therein.

While the record does not show that Mrs. Larson, the co-executrix, actually withdrew as a co-executrix of this estate, the fact is that she failed to file an answer to the citation for her removal and has not taken an appeal from the decree directing her removal as an executrix of this estate. Therefore, the propriety of her removal and any conflict of interests on Mrs. Larson's part are not before the Court.

*155 [1] A motion for judgment on the pleadings having been filed by Mrs. Beichner, the court below, Without a hearing and solely on the pleadings, directed the removal not only of Mrs. Larson but Mrs. Groom. From our reading of the opinion of the court below, the removal of Mrs. Groom was directed simply because of her admission that animosity existed between herself and Mrs. Beichner. In so ruling, we are of the opinion the court committed error.

We start out with the fact that Mr. Beichner, then married and living with the petitioner, in his last will chose his two daughters, Mrs. Groom and Mrs. Larson, as the persons in whom he reposed full trust and confidence for the proper management of his estate and for the fulfillment of his testamentary directions. These personal representatives were not selected by the Register of Wills but by the testato himself. In Mathues' Estate, 322 Pa. 358, 185 A. 768 (1936), this Court said: 'A testator has, as a property right, the privilege and power to place the management of his estate in a selected person as a condition of his bounty.' (p. 359, 185 A. p. 769). See also: Neafie's Estate, 199 Pa. 307, 310-313, 49 A. 129 (1901); Glessner's Estate, 343 Pa. 370, 373, 374, 22 A.2d 701 (1941); Corr Estate, 358 Pa. 591, 598, 599, 58 A.2d 347 (1948). In this connection, it is well to note that the status of a testamentary executor or trustee is not the same as that of a trustee or administrator appointed by the court. See: Crawford's Estate, 340 Pa. 187, 190, 16 A.2d 521 (1940); Corr Estate, supra, 358 Pa. 598, 58 A.2d 347. A testamentary executor or trustee is one whose choice was made by the person whose estate was to be administered and managed and represents an expression of trust and confidence in the person or persons so selected; an administrator appointed by the Register of Wills represents not the choice of the decedent nor are the person or *156 persons appointed those in whom, necessarily, the decedent placed trust and confidence.

[2] That an Orphans' Court possesses the power to remove an executor is clear beyond question. See: Fiduciaries Act of April 18, 1949, P.L. 512, art. III, s 331, 20 P.S. s 320.331. Insofar as presently pertinent, section 331 provides: 'The court shall have exclusive power to remove a personal representative when he-(1) * * * has failed to perform any duty imposed by law; or * * * (5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.' While, under that statutory provision, orphans' courts do have **782 the power of removal of personal representatives and such removal lies largely within the discretion of such courts, an abuse of such discretion renders its exercise subject to appellate review. Cf. Fraiman Estate, 408 Pa. 442, 449, 184 A.2d 494 (1962) and authorities therein cited. Our present inquiry is whether the court below abused its discretion in the removal of Mrs. Groom; our conclusion is that it did.

[3] [4] The removal of a personal representative chosen by the testator is a drastic action which should be undertaken only when the estate within the control of such personal representative is endangered. To justify the removal of a testamentary personal representative the proof of the cause for such removal must be clear. Glessner's Estate, 343 Pa. 370, 373, 374, 22 A.2d 701 (1941). In Parson's Estate, 82 Pa. 465, 467 (1876), Mr. Justice (later Chief Justice) Sharswood, speaking for this Court, stated: 'It is a * * * stringent and summary process to remove an executor, and it must clearly appear from the evidence that a case was made out under it, and that the discretion of the court was properly exercised. It must clearly appear that the executor

is 'wasting or mismanaging' the property or *157 estate under his charge, or that for any likely reason the interests of the estate or property are likely to be jeopardized by the continuance of such executor.'

[5] The only cause assigned for Mrs. Groom's removal by the court below was that animosity existed between Mrs. Groom and her stepmother, Mrs. Beichner, such cause being shown only by an admission in the pleadings. Such animosity may have arisen, as it too often and unfortunately does, because Mrs. Beichner was the second wife and Mrs. Groom a danghter of the first wife or it might have arisen through the fault of Mrs. Beichner or Mrs. Groom; nothing of record indicates Why the animosity existed. Moreover, there is not a scintilla of evidence on this record that indicates that, assuming this animosity to exist, the estate is being mismanaged or wasted or that such animosity has jeopardized the estate or the interest therein of Mrs. Beichner. Animosity Per se, absent any showing of any adverse effect on the estate or the rights of any beneficiary by reason of such animosity, does not constitute a ground for removal of an executor in whom the testator placed trust and confidence.

The court below, without a hearing and in reliance solely upon a pleaded admission of the existence of 'animosity and ill-feeling between' not only Mrs. Groom and Mrs. Beichner but also between all the children of Beichner's first marriage and Mrs. Beichner, removed Mrs. Groom. In reaching such conclusion the court below placed its reliance on Rafferty Estate, 377 Pa. 304, 105 A.2d 147 (1954) and Wogan's Estate, 8 Fid.Rep. 116. In Rafferty, the executor clearly had interests which conflicted with his fiduciary duties, i.e., personal claims to alleged estate assets, and the animosity between the beneficiaries and the executor was not Per se the ground for his removal. In Wogan, the court found as facts that the executor *158 had failed to account for a savings account, a stock account and had misrepresented certain doctor bills. Neither Rafferty nor Wogan are presently apposite.

Unfortunately, the court below removed the executor solely on a finding of the existence of animosity Per se without any showing that such animosity had resulted in any loss, present or future, to the estate or the stepmother's interest. We recognize that Mrs. Groom and her co-executrix had failed to file an inventory or a statement of debts and deductions or pay the transfer inheritance tax, failures which Mrs. Groom attempted to account for in her answer to the removal petition. Such failures could have been promptly rectified by action on the part of Mrs. Beichner's counsel had the executrices been cited to file an inventory, etc. For some unexplained reason such remedies were not resorted to.

On this record, absent a showing of any impact on the handling and management **783 of this estate arising from any ill-feeling existing between Mrs. Groom and her stepmother or that Mrs. Beichner's interest in this estate has been jeopardized by such animosity, the court below should not have removed Mrs. Groom.

Decree reversed. Costs on Mrs. Beichner.

ROBERTS, J., concurs in the result.

MUSMANNO, J., did not participate in the decision of this case.

Parallel Citations

247 A.2d 779

Footnotes

1 In Mrs. Beichner's petition for removal, she avers this realty is the principal asset of the estate and that, to her knowleged, the personal assets of the estate, other than life insurance, amount to approximately $1300.

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336 So.2d 697
District Court of Appeal of Florida, Fourth District.

In re the ESTATE of Francis P. MURPHY, Jr., Deceased.
Jessie Smith MURPHY, Appellant,
v.
Anthony V. PACE, Jr., and Broward National Bank of Fort Lauderdale, Co-Executors of the Estate of Francis P. Murphy, Jr., Deceased, Appellees.

Nos. 75—1146, 75—1315. | Aug. 27. 1976. | Rehearing Denied Sept. 27, 1976.

Sole beneficiary petitioned to vacate order allowing attorney for estate a partial attorney fee of $30,000 and to remove such attorney as a coexecutor of estate. The Circuit Court, Broward County, James M. Reasbeck, J., made a partial allowance of attorney fee of $45,000 and refused to remove attorney as coexecutor, and beneficiary took interlocutory appeals. The District Court of Appeal, Fourth District, Downey, J., held that evidence supported finding that certain services were rendered as an attorney for benefit of estate and that value of such services were $45,000 and that refusal to remove coexecutor on basis of fact that an accounting was not timely filed and that beneficiary was disenchanted with such coexecutor was not abuse of discretion.

Order affirmed.

Walden, J., dissented.

Attorneys and Law Firms

***698** J. Kaylor Young, Fort Lauderdale, for appellant, Jessie Smith Murphy.

Clifford B. Wentworth, Hollywood, for appellee, Anthony V. Pace, Jr., as co-executor of the Estate of Francis P. Murphy, Jr., deceased, and Anthony V. Pace, Jr., Fort Lauderdale, for the Estate of Francis P. Murphy, Jr., deceased, and for the co-executors thereof.

Opinion

DOWNEY, Judge.

Appellant, the sole beneficiary of the Estate of Francis P. Murphy, Jr., seeks review of an order of the circuit court awarding a partial allowance of attorney's fees to Anthony V. Pace, Jr., (attorney for the estate) and denying appellant's petition to remove Mr. Pace as one of the co-executors of the estate.

It appears that Mr. Pace had represented Doctor Francis P. Murphy, Jr., and appellant for some years prior to the doctor's death. At the doctor's request Mr. Pace had prepared the doctor's last will and testament, which included a provision naming Mr. Pace as one of the co-executors. Things went along smoothly for many months during the administration of the estate until Mr. Pace obtained an order allowing him a partial attorney's fee of $30,000. Appellant eventually filed a petition to vacate said order and to remove Mr. Pace as one of the co-executors. After a full blown trial of all the issues raised by said petition the court made a partial allowance of attorney's fees of $45,000 and refused to remove Mr. Pace as a co-executor.

[1] The value of the services to the estate was vigorously contested by appellant. However, the record contains adequate competent evidence to support the trial court's finding that the services rendered were services as an attorney for the benefit of the estate and that the value of said services based upon expert testimony was $45,000. Accordingly, we would be substituting our judgment for that of the trial court if we refused to accord that finding the presumption of correctness to which it is entitled.

The more difficult question is the validity of the order refusing to remove Mr. Pace as co-executor. The thrust of the petition vis a vis removal is that Mr. Pace failed to file accountings timely; Mr. Pace had obtained an order allowing a partial attorney's fee without notice; and that appellant had become disenchanted with Mr. Pace. All of these contentions were thoroughly aired before the trial judge.

[2] True the accounting in question was not timely filed. However the responsibility for the lack of timely filing must be shared by Pace's co-executor. Furthermore, the accountings were eventually filed and no prejudice or harm to the estate resulting from the late filing has been shown. Removal of a personal representative pursuant to Section 733.504 Florida Statutes (1975) (formerly Section 734.11) involves the exercise of the trial court's discretion. In re Estate of Anders, 209 So.2d 269 (Fla.1st DCA 1968), and Kolb v. Levy, 104 So.2d 874 (Fla.3d DCA 1958). As the court stated in the Anders case:

'. . . if the present petition sought the removal of a personal representative instead of the latter's attorney, we would feel constrained to hold that the county judge's court would have

a 'wide discretion' in such removal proceedings and is not obliged to order removal 'unless there is some tangible and substantial reason to believe that damage will otherwise accrue to the estate.''

[3] [4] [5] With regard to appellant's disenchantment with Mr. Pace as a co-executor, at first blush it might seem that if the sole beneficiary wants a change in personal representatives, no one may complain. But *699 that conclusion does not necessarily follow. It must be remember we are dealing here with an executor appointed by the decedent in his will, not an administrator appointed by the court. As the court pointed out in In re Estate of Beichner, 432 Pa. 150, 247 A.2d 779, 781 (1968):

> "A testator has, as a property right, the privilege and power to place the management of his estate in a selected person as a condition of his bounty."

The removal of a personal representative chosen by the deceased is a drastic action and should only be resorted to when the administration of the estate is endangered. In re Estate of Beichner, supra. The mere fact that a certain hostility has arisen between a beneficiary and the executor absent some showing of wrongdoing on the part of the executor or other factors which will prejudice the administration does not warrant such drastic action as removal. In re Estate of Beichner, supra; In re Hartt's Estate, 75 Wyo. 305, 295 P.2d 985 (1956). Our close examination of the testimony in this case leads us to the conclusion that the trial court could well find that there was no showing that the administration would be prejudiced or endangered by Mr. Pace's continuing to act pursuant to his nomination by the decedent as a coexecutor. We must also keep in mind that the administration of this estate remains under the continuing jurisdiction of the court, and should reason arise for removal in the future the court may entertain another petition for removal.

Accordingly, we find the issues on this appeal involved an exercise of the trial court's discretion and no abuse thereof has been shown. The order appealed from is affirmed.

MELVIN, WOODROW M., Sr., Associate Judge, concurs.

WALDEN, J., dissents, without opinion.

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507 So.2d 1227
District Court of Appeal of Florida,
Fifth District.

Dorothy L. PARR and Virgil A. Harrell, individually and as Trustees of the Property of Grace Harrell, a/k/a Grace Earl Harrell, Incompetent, Appellants,

v.

Peter CUSHING, etc., Appellee.

No. 86-1325. | June 4, 1987.

Guardian of trust settlor brought action for removal of trustees. The Circuit Court, Orange County, Claude R. Edwards, J., made continuation of trustees' status contingent upon approval of guardian, contingent beneficiaries, and probate judge, and trustees appealed. The District Court of Appeal, Sharp, J., held that removal of trustees was abuse of discretion absent showing of actual mismanagement.

Reversed.

Attorneys and Law Firms

*1227 James R. Lavigne and Kenneth R. Washburn, of James R. Lavigne, P.A., Maitland, for appellants.

Peter Cushing, Guardian of the Person and Property of Grace Harrell, Incompetent, Orlando, for appellee.

Opinion

SHARP, Judge.

Parr and Harrell appeal from a final declaratory judgment removing them as trustees under a "Contract for Care and Guardianship" of their mother, Grace Harrell. Under this agreement, Grace conveyed her home to the trustees and they agreed to provide for her care and support for the balance of her life, and upon her death, to divide the remainder of the property equally among her living children. [1] We reverse.

At the time of this litigation, Grace's home had been sold, and the trustees were holding and managing a purchase money mortgage and various funds generated by the mortgage of the property. The present litigation commenced after Grace was declared incompetent in 1985. Peter Cushing was appointed guardian of her person and property. He filed this suit against appellants, alleging:

1. breach of trust;

2. replevin of the trust res; and

3. declaratory judgment determining the rights of the parties.

A hearing was held and the court made the following determinations:

1. The agreement was both a contract and an express [2] trust for the primary *1228 benefit of the now incompetent Grace Harrell;

2. Grace Harrell's children were contingent beneficiaries (becoming vested upon her death);

3. Peter Cushing, Guardian, did not have power to revoke the agreement;

4. Grace Harrell, as beneficiary of the trust, had an equitable property interest pursuant to § 744.102(7);

5. All or some of the trust res was outside Florida, and directed the trustees to bring the res within Orange County to ensure efficient conduct of the trust pursuant to § 737.305.

With regard to removal of the trustees, the court found:

> [i]t is not efficient or in the best interest of Grace Harrell as Ward and as Beneficiary to have the funds of the Trust and Guardianship administered by different persons. Delays, double efforts, possible duplication of fees and expenses, and other disadvantages exist as to that arrangement.

On the basis of these findings, the court provided that appellants could continue to serve as trustees and guardians if they secured the approval of Peter Cushing, all contingent beneficiaries and the probate judge. The court also provided that if said agreement and approval had not been obtained by May 23, 1987, then appellants would be directed to turn over the trust res to Peter Cushing as successor trustee.

[1] Generally, removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust. *In Re Estate of Murphy,* 336

So.2d 697 (Fla. 4th DCA 1976) (minimal mismanagement of trust insufficient to warrant removal of trustee). Hostility and/or tension between a trustee and potential beneficiaries of the trust does not by itself constitute a ground for such removal. *Rand v. Giller,* 489 So.2d 796 (Fla. 3d DCA 1986) (unanimous accord of beneficiaries to remove a personal representative is not by itself a ground for such removal). [3]

[2] Here, there was no showing that appellants had not administered the trust in anything but an efficient manner. To warrant their removal, a showing of *actual* not *potential* mismanagement must be made. A proper balance is thereby achieved between a settlor's right to appoint the person(s) of his choice as trustee(s), with the court's interest of ensuring its proper and efficient administration. [4] Conditioning appellants' continuation as trustees upon the approval of contingent beneficiaries demonstrates that the *only* basis for removal was friction among the contingent beneficiaries. Removal for this reason was an abuse of discretion. Accordingly, the final declaratory judgment is

REVERSED.

UPCHURCH and COBB, JJ., concur.

Parallel Citations

12 Fla. L. Weekly 1408

Footnotes

1 Presently, her living children consist of six people, including appellants.

2 Although the final declaratory judgment uses the term "constructive" trust, it is obvious "express" trust was intended. Express trusts are intentionally created by the direct and positive acts of the settlor, e.g., by some writing, deed, will or declaration; whereas a constructive trust is created by a court of equity, where a fraud or wrongdoing will result in unjust enrichment, irrespective of the intention of the parties concerned. *See:* G. Bogert, *The Law of Trusts and Trustees,* §§ 1, 471 (rev. 2d ed. 1978); 76 Am.Jur.2d, *Trusts,* § 15 (1975).

3 For additional discussion on grounds for removal of a trustee, *see also:* G. Bogert, *The Law of Trusts and Trustees,* § 527 (rev.2d ed. 1978); 56 Fla.Jur.2d *Trusts,* § 29 at 49-51 (1985).

4 *See In Re Estate of Senz,* 417 So.2d 325 (Fla. 4th DCA 1982); *rev. denied,* 426 So.2d 28 (Fla.1983) (court's interest in assuring proper administration of trust was greater than testator's right to name her representative in light of malfeasance.)

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456 So.2d 1237
District Court of Appeal of Florida,
First District.

STATE OF DELAWARE, ex rel, Richard S. GEBELEIN, the Attorney General, and the State of Florida, ex rel, Jim Smith, Attorney General, Appellants,

v.

J. C. BELIN, T. S. Coldewey, W. L. Thornton, William B. Mills, Alfred duPont Dent, Jacksonville National Bank, and the Nemours Foundation, a non-profit Florida corporation, Appellees.

Nos. AS-119, AS-255. | Sept. 19, 1984. | Rehearing Denied Nov. 1, 1984.

States of Delaware and Florida appealed from a final judgment of the Circuit Court, Duval County, Lawrence D. Fay, J., in favor of trustees of a perpetual, charitable trust. The District Court of Appeal, Joanos, J., held that: (1) officers of corporation, whose controlling stock was held by the trust, were not prohibited from being trustees; (2) valuation of stock, done for tax purposes, was properly accepted as representing fair market value of trust's interest in the corporation; (3) evidence supported finding that trustees did not abuse their discretion in retaining corporation, which was the primary asset of trust and a holdiug company for the consolidated assets; and (4) trustees adhered to stipulated agreement that they would work to increase productivity of trust to higher than statutory minimum of three percent.

Affirmed.

Attorneys and Law Firms

***1238** John F. Corrigan of Ulmer, Murchison, Ashby, Taylor & Corrigan, Jacksouville; of counsel: Charles M. Oberly, III, Atty. Gen., Fred S. Silverman, State Sol., Regina M. Mullen, Deputy Atty. Gen., State of Del., Dept. of Justice, Wilmington, Del., for appellant State of Del.

Jim Smith, Atty. Gen., Mitchell D. Franks, Chief Trial Counsel, Tallahassee, T. Edwards Austin, State Atty., Sp. Asst. Atty. Gen., Jacksonville, Stephen R. White, Asst. State Atty., Sp. Asst. Atty. Gen., Jacksonville, for appellant State of Fla.

Fred H. Kent, Jr. of Kent, Watts, Durden, Kent, Nichols & Mickler, Jacksonville, for appellees.

Opinion

JOANOS, Judge.

The States of Delaware (Delaware) and Florida (Florida) appeal from a final judgment of the circuit court finding that the Trustees of the Alfred I. duPont testamentary trust (Trust) had not violated the provisions of the prudent person or prudent trustee rule and had not breached the Stipulation and Settlement Agreement between Delaware, Florida, the Trustees and the Nemours Foundation (Nemours), finding no detriment to the trust beneficiaries or cause for removal of the Trustees by their inherent or potential conflict in serving as officers and directors of corporations whose stock is owned by the Trust, and ordering additional payment of income to the income beneficiary based upon the court's determination of a greater valuation of trust assets than had been made previously. Also appealed is a final order clarifying the final judgment, ordering that payment of not less than 3 percent of $805,290,384.00, less any amounts already paid by the Trust, be made to Nemours for the year 1980. The appeals were consolidated for review. We affirm.

Alfred I. duPont's will provided for the creation of a perpetual, charitable trust which, after the death of his wife Jessie Ball duPont, would pay all of its net income to Nemours, "a charitable institution for the care and treatment of crippled children, but not of iucurables, or the care of old men and old women, and particularly old couples, first consideration, in each instance, being given to beneficiaries who are residents of Delaware, ..." Mr. duPont's express testamentary reason for establishing Nemours was his "firm conviction throughout life that it is the duty of everyone to do what is within his power to alleviate human suffering ...." His will specifically provided that the Trustees should "carry on any business enterprise in which I am interested in my lifetime, ..., or to enter into an incorporation of the same and accept corporate stock in lieu of any individual interest, at such valuation or valuations, or to sell out my paid interest at such price or prices, as in the judgment of my said Executors or Trustees shall seem fair and adequate." Additionally, the will directed the Trustees "[t]o do every and all things that they may deem best for the ***1239** conservation, protection and betterment of my estate, as fully and completely as I might do, personally, were I alive and able to act for myself." The initial Trustees were Mrs. duPont, Edward Ball (Mrs. duPout's

brother), Reginald Huidekoper (duPont's son-in-law) and The Florida National Bank of Jacksonville, as corporate trustee. The Trust initially was comprised of two companies, Gulf Coast Properties, Inc. and Panama Beach Development Co., consisting of: timberlands; fifty (50) percent interest in St. Joe Paper Co. (St. Joe); St. Joe Telephone and Telegraph Co.; Apalachicola Northern Railroad; Port St. Joe Dock and Terminal Railway Co.; and a substantial block of the common stock of E. I. duPont Co., and other small companies which in turn owned mortgages, notes and other securities. Upon receipt of these assets the Trustees purchased the outstanding interest in St. Joe, merged Gulf Coast Properties, Inc. and Panama Beach Development Co. into St. Joe and began to purchase Florida East Coast Railway bonds while the railway was in receivership, ultimately obtaining a 57 percent interest when the railway came out of receivership. Following the inception of the Trust in 1939, some Trustees died, were replaced, and additional trustees were elected, ultimately leading to Coldewey, Mills, Thoruton, Belin, Alfred duPont Dent (duPont's grandson), Ball and Mrs. duPont as Trustees. Mrs. duPont died in 1970. Ball died in 1981, with no successor Trustee appointed. Jacksonville National Bank, successor to Florida National Bank, resigned as corporate trustee in 1982. The present Trustees, Belin, Thornton, Coldewey and Dent, also serve as directors and officers of St. Joe or its subsidiaries. St. Joe, the primary asset of the Trust and a holding company for the consolidated assets, provides the Trustees a vehicle to regulate the Trust income, all of which by the terms of the Trust must be distributed to Nemours.

Delaware's initial complaint filed in 1977, seeking injunctive relief, removal of some of the Trustees and other relief, was dismissed without prejudice for failure to state a cause of action. The trial court dismissed Delaware's amended complaint with prejudice, holding that Delaware did not have standing to bring the suit. The dismissal was reversed in *State of Delaware v. Florida First National Bank of Jacksonville,* 381 So.2d 1075 (Fla. 1st DCA 1979). In 1980, the parties entered into a "Stipulation and Settlement Agreement" in which the valuation of the Trust assets was settled for 1978 and 1979. For years after 1979, it was agreed that the net income of the Trust or 3 percent of the fair market value of the Trust assets, whichever was greater, would be paid to Nemours. The Trustees would be bound to the prudent trustee's rule to try to raise the Trust income above 3 percent.

For 1980, the Trustees relied upon a $5,500.00 per share fair market value of the St. Joe stock made by an expert appraiser, First Research Corp. This per-share figure was based upon an appraisal requested by St. Joe to calculate the intangible tax due the State of Florida for 1980. First Research valued the St. Joe stock at $5,500.00 per share after applying a 30 percent discount due to non-marketability to the $7,700.00 per share value which was based upon an appraisal of St. Joe's assets.

Following execution of the Stipulation and Settlement Agreement and Ball's death, Delaware amended its complaint twice, with the third amended complaint forming the basis for this action. Delaware charged that the Trustees had not acted in the beneficiaries' best interests, nor had they carried out duPont's intent. Count I charged a breach of the Stipulation and Settlement Agreement by the Trustees' failure to make a fair market valuation of the St. Joe stock when they accepted the First Research appraisal, by the Trustees' retention of underproductive assets, St. Joe stock, and by the Trustees' failure to raise Trust income above 3 percent of the total value of the Trust corpus. Count II sought reimbursement of all funds due by the Trustees' failure to act as prudent trustees in retaining underproductive assets and sought removal of Belin, Coldewey, Thoruton and Jacksonville National ***1240** Bank as Trustees. Count III charged a conflict of interests in the Trustees' positions as corporate directors and officers and their fiduciary duties as Trustees, alleging specific incidents where corporate decisions were not in the beneficiaries' best interests.

The Trustees answered the third amended complaint, denying any failure to ascertain the fair market value of the St. Joe stock by using the First Research appraisal and alleging that they had paid in excess of three percent of the fair market value of the Trust assets. Previously, the Trustees had counterclaimed, asking the trial court to approve the 1980 appraisal of the Trust assets, to determine there was no duty to maximize trust income to appease Delaware and Florida, and to determine if the continued filing of statements of accounts needed to be made.

The trial that ensued was an extended one with conflicting expert testimonies offered by both sides showing the "proper" valuation of the Trust assets and reflecting the actions which prudent trustees would take. The interlocking relationships between the Trustees and the Trust assets were also shown.

In addressing Count I, the trial court found the First Research appraisal to be valid, proper and believable, with the exception of the application of the 30 percent discount due to non-marketability which was found to have no basis

in the evidence. The trial court stated that equally unfounded was the attachment of a premium to the St. Joe stock due to the Trust's controlling interest. No breach of the Stipulation and Settlement Agreement was found since the Trustees had used an expert appraiser and followed the given valuation in paying the 3 percent minimum required by Section 738.12, Florida Statutes (1979). The trial court found that there was no evidence to show that the Trustees had failed to exert good-faith efforts to raise the productivity of the Trust assets. In fact, testimony by the Trustees reflected proposed programs specifically to raise income, one such proposal being a joint-venture between the Trust and Florida East Coast Railroad which was approved by the trial court. In response to charges that the Trustees had failed to provide charitable benefits to the elderly residents of Delaware, the trial court pointed to several projects, including the Nemours Health Clinic, a pharmaceutical assistance program and proposed programs to provide dental care and eyeglasses, to show the Trustees' adherence to the agreement.

The trial court's resolution of Count II focused upon the conflicting philosophies of the opposing parties. Admittedly oversimplifying the issue, the trial court characterized Delaware and Florida as advocating high yields for present beneficiaries, while the Trustees believe duPont clearly intended investment in assets which would provide for beneficiaries in perpetuity. The trial court considered the unique nature of a perpetual trust, requiring that all income be distributed, with no reinvestment, and the testimony of Dr. Peter Williamson, a trustee of several trusts, consultant on matters of investment and trust assets and expert on the effects of inflation on trusts, to conclude that the Trustees' retention of St. Joe displayed asset management to preserve and conserve the Trust assets for the benefit of the beneficiaries, did not breach the Stipulation and Settlement Agreement, and is proper and lawful.

The trial court determined that the alleged conflicts of interests in Count III were no more than potential conflicts created by the Trustees' dual capacity. The trial court found no evidence to show that the Trustees used their status to secure corporate positions, rather the present Trustees were officers and directors long before becoming Trustees. Considering the positions held by the initial trustees and duPont's intention that individuals familiar with his business interests should or could serve as Trustees, the trial court concluded that identity between trustees and corporate directors could lawfully exist, with no basis for discharge unless there was an abuse of discretion. The trial court found that none of the specific acts alleged ***1241** by Delaware was a result of divided loyalties or shown to be improper or harmful to the beneficiaries.

Delaware raises three issues on appeal: I. Whether the trial court erred in holding the Trustees' conflicts of interest permissable; II. Whether the trial court erred in accepting the First Research appraisal as the basis for the fair market value of the Trust's interest in St. Joe; and III. Whether the trial court erred in allowing the Trust to retain its interest in St. Joe. Florida raises a fourth issue, IV: Whether the trial court erred in finding no breach of the Stipulation and Settlement Agreement.

[1] [2] [3] [4] I. We agree with the trial court's determination that potential conflict in and of itself is not necessarily improper. A trustee has wide discretion in the exercise of his power and a court will not interfere unless he abuses his discretion. *Scott on Trusts,* § 193.2 (1967 3rd ed.). Florida courts have followed the well settled rule that where a trustee places himself in a position antagonistic to the trust, he should retire from the trusteeship. *Smith v. Fleetwood Building Corp.,* 120 Fla. 481, 163 So. 293 (1935). The trustees here, however, were officers or employees of St. Joe and its subsidiaries long before they were appointed Trustees. There is no evidence that the Trustees took advantage of their positions and control of St. Joe to install themselves as officers or to benefit themselves personally. We also agree with the trial court's determination that duPont's will evidences an intent that there could or should be identity between Trustees and corporate directors. As shown by the appointment of the initial Trustees, Mr. duPont intended for those involved in his various businesses to be Trustees. Interestingly, as pointed out by the trial court, Delaware and Florida seek removal of only Belin, Coldewey and Thornton, while Alfred duPont Dent, who has the same potential conflict, but who testified favorably for Delaware and Florida, is deemed satisfactory to remain a Trustee. We have found no law, nor have Delaware and Florida cited authority, which prohibits an officer of a corporation whose controlling stock is held by a trust from being a trustee of that trust. *In re Flagg's Estate,* 365 Pa. 82, 73 A.2d 411 (1950), provides guidance in looking at the administration of the trust, not potential conflicts, to determine if the trustees have acted in the best interests of the trust beneficiaries.

[5] [6] II. While there was conflicting expert opinion as to the value of the St. Joe stock held by the Trust, we see no error in the circuit court's determination that the Trustees did not act other than as prudent persons and prudent trustees when they

accepted the First Research appraisal. Admittedly, the fact that First Research was initially hired by St. Joe to value the stock for intangible tax purposes would, at first glance, appear to make the valuation meaningful only for that purpose. The chairman of First Research, however, who was not told prior to the valuation that it would be used to value the Trust, testified that there would be no difference in the valuation for that purpose. Sitting as the trier of fact, the circuit court has the right to accept or reject testimony. *Grapes v. Mitchell,* 159 So.2d 465 (Fla.1963). The circuit court, here, accepted the First Research appraisal as valid, proper and believable. We will not disturb this determination on appeal. That the trial court disallowed the 30 percent discount due to non-marketability of the St. Joe stock does not require rejection of the ebasic valuation established by the appraisal. While the trial court rejected the $5,500.00 per share valuation, the appraisal was not found to be lacking. The per share value before applying the 30 percent discount was based upon an evaluation of all St. Joe assets and was properly accepted by the trial court as representing fair market value. The trial court correctly ruled out the 30 percent discount since this was an obviously arbitrary mathematical adjustment having no basis in the evidence.

[7] III. Considering the broad powers given to the Trustees and Mr. duPout's intent that his wealth be used to alleviate human suffering and his apparent underlying ***1242** expectation that his wealth would be sufficient or preserved to effectuate his intent in perpetuity, together with the expert testimony of Dr. Williamson, there is ample basis for the trial court's determination that the Trustees did not abuse their discretion in retaining St. Joe. The record further supports the trial court's favorable impression of and reliance upon Dr. Williamson's thorough knowledge of asset management of charitable trusts. His testimony supports a determination that St. Joe can be regarded as the proper vehicle to carry out Mr. duPont's intent and the terms of the Trust.

[8] IV. The major issue regarding the Trustees' adherence to the Stipulation and Settlement Agreement is the provision that the Trustees would work to increase the productivity of trust to higher than the statutory minimum of 3 percent. Since we have concluded that the trial court properly determined that there was no abuse of discretion in accepting the First Research appraisal and in retaining St. Joe, there has been no breach of the agreement in those respects. The record contains competent substantial evidence which supports the trial court's conclusion that the Trustees were working to raise the productivity of the Trust.

Accordingly, the trial court's final judgment and the order appealed are AFFIRMED.

SMITH and BOOTH, JJ., concur.

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