COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP318 **Cir. Ct. No. 2013CV129**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE ELIZABETH C. MASSIE TRUST:

SUZANNE MULLANY,

APPELLANT,

V.

MICHAEL MASSIE AND LOREN MASSIE,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 HAGEDORN, J. The respondents, brothers Michael and Loren Massie, and the appellant, Suzanne Mullany, are all beneficiaries of their mother's

trust. Mullany was the co-trustee of that trust. The Massies brought various claims related to Mullany's purported mishandling of the trust and sought to remove her. The circuit court granted the request, found that the Massies were acting for the benefit of the estate, and found that Mullany had acted in bad faith. On the basis of Mullany's bad faith, the circuit court charged Mullany personally for the Massies' attorneys' fees, leaving her with no remaining share of the trust and a bill to boot. Mullany appeals and argues that WIS. STAT. § 879.37 (2013-14)[1] precludes an award of fees for a prevailing party out of a particular share of a trust—here, hers. While Mullany is correct as far as it goes, we hold that the circuit court permissibly charged Mullany personally with fees on the basis of its equitable powers and Mullany's bad faith, and not under § 879.37. Accordingly, we affirm.

Background

¶2 Mullany was co-trustee for the Elizabeth Massie Amended and Restated Trust (the "Trust") created by her mother, Elizabeth Massie. All three children—Mullany, Michael, and Loren—were beneficiaries of the Trust. Mullany filed a petition seeking a determination "that all tangible personal property has been distributed in accordance with the terms of the Trust," and additionally sought compensation from the Trust for various services she rendered for the benefit of her mother and the Trust. The Massies objected and filed their own petition demanding an accounting of the Trust's assets, Mullany's removal as trustee, and other relief. Relevant here, the Massies also sought their "reasonable

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

attorneys' fees, costs and expenses" incurred in bringing the petition, arguing that they were benefitting the Trust and should therefore have their fees paid by the Trust under the prevailing party language in WIS. STAT. § 879.37.

¶3 The circuit court granted judgment in the Massies' favor. The court also granted the Massies' claim for attorneys' fees. In its oral ruling, the court stated that the Massies' actions benefited the trust, and therefore they were entitled to their reasonable attorneys' fees as requested. In its written decision, however, though still citing WIS. STAT. § 879.37 among other authorities, the court ordered the fees to be paid out of Mullany's share of the Trust alone—as opposed to the entire Trust—because Mullany "acted in bad faith and grossly mismanaged the Trust."[2] As support for surcharging Mullany's share, the court cited ***Richards v. Barry***, 39 Wis. 2d 437, 446, 159 N.W.2d 660 (1968), where our supreme court indicated that there may be cases where it would be equitable to surcharge attorneys' fees to a trustee in cases of misconduct. The court further ordered that Mullany would be personally responsible for any attorneys' fees exceeding the amount of her share in the Trust, effectively leaving her with no remaining inheritance from the estate, along with a $33,185.83 judgment to be paid out-of-pocket. Mullany appeals the fee award.

Discussion

¶4 This case concerns the interplay between the equitable authority of the court in the administration of a trust and WIS. STAT. § 879.37. The sole issue

[2] Mullany disagrees with the circuit court's findings that she acted in bad faith and mismanaged the Trust. She does, however, concede that "her disagreement will not carry the day in light of the applicable standards of review."

on appeal is whether the circuit court erred by surcharging the fees to Mullany's share of the Trust.[3] The answer to this question depends in part on what the court actually did here. The answer also depends on whether a circuit court retains equitable authority to personally assess a party for fees in the event it finds bad faith in the administration of a trust. The parties disagree on both questions.

¶5 Wisconsin, like most jurisdictions, has adopted the American Rule when it comes to attorney fees. ***Watkins v. LIRC***, 117 Wis. 2d 753, 758, 345 N.W.2d 482 (1984). Under this general rule, parties pay their own attorney fees unless they fall within a recognized exception to the rule or are entitled to fees by contract or statute. ***Id.***; *see also* ***Elliott v. Donahue***, 169 Wis. 2d 310, 324, 485 N.W.2d 403 (1992).

¶6 The common law has recognized various exceptions to the American Rule, including in trust litigation where the court has equitable authority. *See* ***Laughlin v. Griswold***, 169 Wis. 50, 56, 171 N.W. 755 (1919) ("Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust…."). For example, the common law early on recognized the "common fund" exception, which provides that when one party is litigating for the benefit of a common fund, the fund should ordinarily bear those costs. *See, e.g.*, ***Haggart v. Woodley***, 809 F.3d 1336, 1352 (Fed. Cir. 2016) ("Under the common fund doctrine, a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to []

[3] The Massies contend that Mullany waived any argument on this issue by failing to object to the circuit court's decision. They are mistaken. Mullany raised her objection to surcharging—citing our decision in ***Bloom v. Grawoig***, 2008 WI App 28, 308 Wis. 2d 349, 746 N.W.2d 532—in a May 1, 2014 letter, well before the court's final judgment.

reasonable attorney[] fees from the fund as a whole.") (citations omitted; alteration in original). Though the doctrine now applies more broadly, its primary use historically was in the context of trusts. *See* ***id.*** at 1352. Along these lines, the Wisconsin Supreme Court explained in ***Irving v. Sheldon***, 249 Wis. 430, 431-32, 24 N.W.2d 875 (1946), that a court may, within its equitable authority, award attorneys' fees and expenses from the estate to those who litigate for the benefit of the estate. WISCONSIN STAT. § 879.37, which was enacted in 1969,[4] is consistent with this common law heritage. The statute provides that "[r]easonable attorney fees may be awarded out of the estate to the prevailing party in all appealable contested matters." ***Id.*** The circuit court explicitly cited this statute as one of its authorities for its award of attorneys' fees. This statute was also the basis for the Massies' fee request in the first place.

¶7 The meaning of "out of the estate" in WIS. STAT. § 879.37 is answered by our case law. In ***Bloom v. Grawoig***, 2008 WI App 28, 308 Wis. 2d 349, 746 N.W.2d 532, we addressed "whether § 879.37 limits a prevailing party to recovery from the estate only, or … from the portion of the estate that is distributed to particular heirs." ***Bloom***, 308 Wis. 2d 349, ¶8. We concluded that "the plain meaning of 'out of the estate' [in § 879.37] references the estate as a whole, rather than a subset of the estate." ***Bloom***, 308 Wis. 2d 349, ¶10.[5]

[4] The substance of WIS. STAT. § 879.37 was previously contained in WIS. STAT. § 324.13 (1967). The section was renumbered in 1969 to § 879.37 and expanded to cover "all contests in administration, not just will contests." 1969 Wis. Laws, ch. 339, § 26 comment to § 879.37.

[5] This is not the first time a Wisconsin court has construed the phrase "out of the estate." Our supreme court has held that the phrase "out of the estate" in WIS. STAT. § 324.13 did not allow attorney fees to be surcharged against a particular share. ***Fehlhaber v. Mitchell***, 272 Wis. 327, 332-33, 75 N.W.2d 444 (1956).

Therefore, when the court awards attorney fees to the prevailing party based on § 879.37, it must do so out of the entire estate. ***Bloom***, 308 Wis. 2d 349, ¶¶10-11.

¶8 The common law, however, also recognized a court's general equitable authority to assess fees directly against a party—though such powers were not unlimited. We have held that something more than a poor job carrying out fiduciary responsibilities is needed; a court must find bad faith or misconduct. ***Western Surety Co. v. P.A.H.***, 115 Wis. 2d 670, 675, 340 N.W.2d 577 (Ct. App. 1983) ("It would appear that there must be something extra, something shocking, something of bad faith, fraud or deliberate dishonesty before the exception permitting personal charging of a trustee or guardian with expenses caused by mismanagement replaces the general rule that such expenses are chargeable to the estate.").

¶9 The Wisconsin Supreme Court suggested similarly in ***Richards***. That case involved a trust dispute and an award of fees and costs where there was no bad faith or misconduct. ***Richards***, 39 Wis. 2d at 445. At the time of ***Richards***, no statute governed the award of attorney's fees in such situations; it was solely an equitable decision rendered in the absence of express statutory guidance. The ***Richards*** court held that fees were not warranted as an equitable matter in that case and commented that "[t]here may be cases within the equitable power of the court when a trustee should be charged personally with expenses he needlessly causes through his conduct." ***Id.*** at 446. Thus, it is fair to say that ***Richards*** both confirmed and limited the general equitable authority of courts in the trust context. While the court's powers are not plenary, it may personally charge a party who acts in bad faith. ***Richards*** has been widely cited to stand for this proposition. *See, e.g.*, ALAN NEWMAN, ET. AL., THE LAW OF TRUSTS AND TRUSTEES § 970 n.24, Westlaw (database updated Sept. 2016) (recognizing that

the legal fees of a beneficiary may be payable by the trustee who commits a breach, and citing ***Richards***).

¶10 Mullany contends that the court here ordered fees under WIS. STAT. § 879.37; the Massies say the court's decision was equitable under ***Richards*** and not in reliance on § 879.37. The circuit court's decision was mildly confusing on this point because it cited both the statute and ***Richards***. If it was basing its decision on ***Richards***, it is unclear what relevance § 879.37 had, which—per ***Bloom***—does not allow surcharging a portion of the estate. But ***Richards*** is the explicit authority the circuit court relied upon for its conclusion that "a trustee may be charged personally with expenses" caused by misconduct. We think the best reading of the circuit court's otherwise clear and comprehensive decision is that it relied on the court's equitable powers to personally assess a trustee who engages in misconduct, not that it awarded the Massies their fees as simply the "prevailing party." And the finding of misconduct by Mullany remains unchallenged on appeal.

¶11 The remaining question, then, is whether WIS. STAT. § 879.37 precludes the application of the ***Richards*** principle. This is a question of law we review de novo. ***Bloom***, 308 Wis. 2d 349, ¶7.

¶12 There were no applicable statutory restrictions on the awarding of attorneys' fees in trust disputes at the time of ***Richards***, meaning it was grounded

solely in equity.[6] And our cases have clearly held that statutes may supplant equitable powers. We explained in ***Bloom***:

> Although equity gives the court power to achieve a fair result in the absence of or in conjunction with a statute, equity does not allow a court to ignore a statutory mandate. Even when sitting in equity, a court must nonetheless follow the law.

Bloom, 308 Wis. 2d 349, ¶11 (citations omitted); *see also* ***Wheeler v. Franco***, 2002 WI App 190, ¶12, 256 Wis. 2d 757, 649 N.W.2d 711 (holding that WIS. STAT. § 879.37 superseded the equitable extraordinary circumstances doctrine).

¶13 We do not read ***Bloom***, however, as stating a broad holding that WIS. STAT. § 879.37 supersedes all equitable principles in the administration of a trust. ***Bloom*** addressed only the award of fees "out of the estate" to a "prevailing party," not—as is the case here—an assessment against a trustee personally for misconduct. *See* ***Bloom***, 308 Wis. 2d 349, ¶¶8, 16. The question here is whether § 879.37 preempts the personal surcharging of a trustee who engages in misconduct.

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[6] ***Richards*** did not in any way discuss or analyze the interaction between statutory authority and the equitable powers of the court. At the time of ***Richards***, the predecessor to WIS. STAT. § 879.37 applied only to will contests, not the trust dispute in that case. WISCONSIN STAT. § 324.13 (1967) applied to "a contest upon the probate of any will, or in relation to any trust created therein." Nothing in ***Richards*** suggests that the trust at issue in that case was created by a will and, therefore, § 324.13 did not apply. *See* ***Richards v. Barry***, 39 Wis. 2d 437, 441-46, 159 N.W.2d 660 (1968). The fact that the court resorted to equity and never cited § 324.13 reinforces this conclusion. ***Richards***, 39 Wis. 2d at 445-46.

The only statute cited in ***Richards*** was WIS. STAT. § 271.14 (1967). ***Richards***, 39 Wis. 2d 437, 445-46. Section 271.14 provided that the court may award costs, but such costs must be awarded out of the estate unless the court finds "mismanagement or bad faith." ***Id.*** The issue in ***Richards*** was an award of attorney fees, not costs and, therefore, § 271.14 was not directly applicable. The court relied upon § 271.14 only by analogy for the proposition that surcharging attorney fees would not be equitable absent misconduct. ***Richards***, 39 Wis. 2d at 445.

¶14 The text of WIS. STAT. § 879.37 does not read as an all-encompassing fee shifting provision preempting equity in cases involving administration of a trust. Rather, it gives a court permission to award fees when one party prevails over another, and prescribes that the fees must (per ***Bloom***) come from the entire estate. Had the court awarded the Massies their fees as the "prevailing party," we would have a different result. But the statute does not address fee awards outside the context of prevailing parties, and equity has long recognized that attorney fees may be awarded when a trustee engages in bad faith in the administration of a trust. While the Massies may have initially requested fees as prevailing parties, the court took a different route—having found bad faith—and assessed the Massies' fees against Mullany personally under its equitable authority. Said another way, we do not read the text of § 879.37 as circumscribing the court's otherwise remaining equitable power to assess fees against a trustee personally upon a finding of bad faith.

¶15 Though neither party briefs the issue, it is worth noting that the newly enacted Trust Code appears to expand and clarify any confusion as to the court's authority to award fees. In 2013, Wisconsin enacted WIS. STAT. § 701.1004(1), which provides:

> In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Under this new law, a court has broad authority to personally surcharge a party "as justice and equity may require." ***Id***. It appears that this statute provides all the authority this court needed to do exactly what it did here.[7]

¶16 We conclude that the circuit court permissibly relied on its equitable powers to personally charge Mullany for the Massies' reasonable attorneys' fees.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] The statute became effective on July 1, 2014, and applies to actions commenced before the effective date unless such application would "prejudice the rights of the parties." WIS. STAT. § 701.1205. Because we conclude that the circuit court was justified under the law existing prior to July 1, 2014, we need not decide whether applying the statute to Mullany would prejudice her rights.