COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2767 **Cir. Ct. No. 2003PR24**

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

IN RE THE ESTATE OF BERNADETHA MONROE:

RICHARD BRAMEN,

APPELLANT,

V.

RENEE ANGELOPULOS AND ESTATE OF BERNADETHA MONROE,

RESPONDENTS.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 HIGGINBOTHAM, P.J. Richard Bramen appeals an order of the circuit court finding him unsuitable to serve as the trustee of the Estate of

Bernadetha Monroe. Bramen contends that the circuit court failed to give proper consideration to Monroe's wishes in appointing a trustee; failed to follow the statutory framework of a removal proceeding, thereby denying him the opportunity to challenge the allegations against him; and failed to articulate sufficient reasons for its finding that Bramen was unsuitable. Bramen further contends that the record does not support the court's finding of unsuitability. We reject these arguments and affirm.

Background

¶2 Bernadetha Monroe executed a will in 1996. The will made specific bequests to her sister Delia Grayson, nephew Richard Bramen, niece Lavonne McKeehan and great nieces Michelle Mostert and Renee Angelopulos. The will established a trust to distribute the remainder of her estate to these same relatives over time. It named Grayson trustee of the trust. The will specified that if Grayson were to die or otherwise be unable to act as trustee, nephew Richard Bramen would become the trustee, and, subsequently, if Bramen were unable to act as trustee, her great niece Danielle Mostert would become trustee.

¶3 Monroe died on April 13, 2003. Grayson, for reasons of her own ill health, requested that Bramen be appointed co-personal representative of the Monroe Estate and co-trustee of the Monroe Trust. All of the named beneficiaries of the will signed letters consenting to the informal administration of the will and to the appointment of Bramen as co-personal representative and co-trustee. On May 6, 2003, the will was admitted into informal administration and the probate court issued letters recognizing the status of Grayson and Bramen as co-personal representatives and co-trustees.

¶4 Grayson died on July 2, 2003, leaving Bramen as the sole personal representative and trustee of the Monroe Estate. By the terms of Grayson's will, Bramen assumed the responsibilities of personal representative of Grayson's estate and trustee of a trust created by the will.

¶5 In November 2004, Monroe's great niece, Renee Angelopulos, filed a motion to remove Bramen as personal representative, alleging several grounds for removal, which are discussed later in this opinion. Angelopulos filed a demand seeking formal proceedings to address her motion. No immediate action was taken on Angelopulos's November 2004 motion for removal.

¶6 On June 9, 2006, Bramen filed a demand for formal proceedings in the Monroe Estate, which was approved by the probate court. Bramen also filed a final account of the Estate that day, and petitioned for approval of the final account, for entry of final judgment and for his appointment as trustee of the Estate. Bramen also submitted to the court a request for reimbursement of certain expenses and fees.

¶7 On June 28, 2006, Angelopulos filed a second motion to remove Bramen as personal representative, the grounds for which are discussed later in this opinion. Angelopulos also submitted a separate filing detailing her objections to Bramen's request for reimbursement of expenses and fees.

¶8 On August 2, 2006, the circuit court held a hearing to take evidence on the motion to remove Bramen as personal representative, and to review the petition for final judgment on the Estate. After hearing the evidence, the court, in a bench ruling, approved the final account with certain amendments, and found that Bramen was unsuitable to serve as trustee. The court ordered the Estate and

Bramen's lawyer to find an appropriate institutional trustee to manage the trust. North Central Trust Company was later appointed as trustee.

¶9 Bramen moved for reconsideration of the court's judgment. Bramen argued that the court's findings were insufficient to support the conclusion that he was unsuitable to serve as trustee, and were contrary to the wishes of the testator. Angelopulos also filed a motion for reconsideration, asking the court to issue a written order elaborating on its finding of unsuitability. The court denied Bramen's motion and granted Angelopulos's motion, issuing a written order giving the reasons for its decision. Bramen appeals. Additional facts are provided in the discussion section.

Discussion

¶10 As a preliminary matter, the parties dispute whether the circuit court's order removed Bramen as trustee or instead declined to appoint him as trustee. Bramen argues that the circuit court's order was one of removal because the probate court had already appointed him co-trustee of the Monroe Estate in May 2003. Angelopulos and the Estate (hereinafter, "Angelopulos") argue that the order should be treated as one declining to appoint Bramen as trustee because Bramen never assumed the duties of the position. We agree with Bramen.

¶11 As noted, Bramen was appointed co-trustee in May 2003, and later became the sole trustee upon Grayson's death. Bramen's appointment as trustee was made pursuant to WIS. STAT. §§ 701.16(1) and 856.29 (2005-06).[1] Together,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

these statutes provide for the appointment of a trustee named in a will when the estate is admitted into probate by issuance of letters of trust, before the trust takes effect.[2] Thus, regardless of whether Bramen had ever assumed the responsibility of managing the trust, he already held the office of trustee pursuant to §§ 701.16(1) and 856.29, and the court's action should therefore be considered an order removing Bramen from that office.[3]

¶12 With the foregoing discussion in mind, we address briefly Bramen's argument that the circuit court's order failed to give sufficient weight to Monroe's testamentary wishes. We agree with Bramen that in Wisconsin a testator retains the right to appoint whomever he or she wishes as trustee. *See* ***Svacina v. East Wis. Tr. Co.***, 239 Wis. 436, 443-44, 1 N.W.2d 780 (1942). "[N]o discretion is

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[2] WISCONSIN STAT. § 701.16 provides, as pertinent:

> (1) APPOINTMENT OF ORIGINAL TRUSTEE. (a) *Trustee named in will*. A trustee who is named or whose appointment is provided for in a will derives the authority to carry out the trust from the will and assumes the office of trustee upon the issuance of letters of trust by the court as provided in s. 856.29....

WISCONSIN STAT. § 856.29 provides, in full:

> If the will of the decedent provides for a testamentary trust, letters of trust shall be issued to the trustee upon admission of the will to probate at the same time that letters are granted to the personal representative, unless the court otherwise directs. Upon issuance of letters of trust, the trustee shall continue to be interested in the estate, and beneficiaries in the testamentary trust shall cease to be interested in the estate except under s. 851.21(3). This section shall apply to wills admitted to informal probate and letters issued in informal administrations.

[3] We recognize that Bramen himself requested that the court appoint him trustee of the Estate when he moved to admit the Estate into formal administration, perhaps suggesting that he did not believe at the time that he was the trustee. Regardless, Bramen in fact held the office of trustee at that time by virtue of the court's issuance of letters of trust in May 2003.

vested in courts with respect to refusing to grant letters testamentary [appointing a trustee or personal representative] to the persons nominated in a will, unless such persons are expressly disqualified, or unless such discretion is vested by law." ***Id.*** at 446.

¶13 However, once a trustee is appointed, the trustee has certain duties to the estate and its beneficiaries and the manner by which the trustee executes those duties is subject to the supervision of the court. *See* WIS. STAT. § 701.18(2); *see also* ***Klauser v. Schmitz***, 2003 WI App 157, ¶7, 265 Wis. 2d 860, 667 N.W.2d 862. The testator's designated trustee may be removed only for violating the terms of the will, the provisions of Chapter 701 of the Wisconsin statutes, a court order, or for being "otherwise unsuitable to continue in office." Sec. 701.18(2).[4] Thus, the statutory scheme evinces a strong presumption in favor of the testator's designated trustee, permitting removal of the trustee only upon proof of a ground specified under § 701.18(2). The focus of our review is therefore not on whether the court granted "sufficient weight" to Monroe's wish to appoint Bramen as trustee, but on whether the court correctly determined that grounds existed for Bramen's removal. Thus, we turn our attention to the question of whether statutory grounds existed for Bramen's removal as trustee.

[4] As pertinent, WIS. STAT. § 701.18(2) provides:

> A trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or cotrustee, and upon notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office….

Standard of Review

¶14 The decision to remove a testamentary trustee is addressed to the sound discretion of the circuit court. *See* ***First Wis. Nat'l Bank of Oshkosh v. Circuit Court for Fond du Lac County***, 167 Wis. 2d 196, 201, 482 N.W.2d 118 (Ct. App. 1992). We may not disturb a decision addressed to the circuit court's discretion absent an erroneous exercise of that discretion. ***Connor v. Connor***, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182. A circuit court erroneously exercises its discretion "if the record indicates that the circuit court failed to exercise its discretion, if the facts of record fail to support the circuit court's decision, or if this court's review of the record indicates that the circuit court applied the wrong legal standard." ***Id.*** (citation omitted).

Removal Procedure and Opportunity to Challenge Grounds for Removal

¶15 Bramen contends that the court committed reversible error by proceeding under the incorrect removal statute and by denying him sufficient opportunity to refute the grounds for his removal. Bramen argues that the court erred in citing as authority for its action the removal of personal representative statute, WIS. STAT. § 857.15,[5] instead of the removal of trustee statute, WIS. STAT.

[5] As pertinent, WIS. STAT. § 857.15 provides as follows:

> When a personal representative is adjudicated incompetent, disqualified, unsuitable [or] incapable of discharging the personal representative's duties … the court shall remove the personal representative. When any personal representative has failed to perform any duty imposed by law or by any lawful order of the court or has ceased to be a resident of the state, the court may remove the personal representative. When grounds for removal appear to exist, the court on its own motion or on the petition of any person interested shall order the personal representative to appear and show cause why the personal representative should not be removed.

§ 701.18(2). Bramen then confusingly argues that the circuit court failed to follow the procedure set forth *under the removal of personal representative statute*, § 857.15, which requires that the court hold a hearing at which the personal representative may "show cause why the personal representative should not be removed." Finally, Bramen appears to contend that, even if the "show cause" procedure in § 857.15 does not apply, the circuit court nonetheless denied him the opportunity to contest the allegations that formed the basis for his removal. We reject these arguments.

¶16 We acknowledge that the circuit court erred in citing the removal of personal representative statute, WIS. STAT. § 857.15,[6] when the order was one removing Bramen as trustee, an action authorized by WIS. STAT. § 701.18(2). It is clear that the court correctly proceeded under the removal of trustee statute, demonstrated by the language of the order, which plainly states that Bramen is being removed as trustee, and by its timing, which came at the closing of the Estate when a personal representative was no longer needed and responsibility for managing the assets of the Estate was about to pass to the trustee.

¶17 In any event, we reject Bramen's argument that the court's citation to the wrong statute is reversible error because the court's analysis was consistent with the legal standard set forth in WIS. STAT. § 701.18(2). Moreover, his apparent suggestion that once the court cited the wrong statute, WIS. STAT. § 857.15, it was obligated to follow the "show cause" procedure set forth in this statute is also mistaken. The court's order, while incorrectly citing § 857.15, was

[6] Actually, the statute cited in the court's order is WIS. STAT. "§ 875.15," an apparent typographical error. As Bramen notes, no such section exists in the Wisconsin statutes.

issued pursuant to the removal of trustee statute, § 701.18(2), not § 857.15, and thus any specific procedural requirements of § 857.15 do not apply.

¶18 We also reject Bramen's argument that, even if the court was not required to follow the "show cause" procedure, he was denied a meaningful chance to challenge the allegations against him. The hearing transcript shows that Bramen was given a full opportunity to contest the alleged grounds for removal. Both Angelopulos's motions for removal and Bramen's request for appointment had put the issue of Bramen's status as trustee before the court prior to the hearing. Among the allegations made in Angelopulos's motions for removal were that Bramen had submitted excessive reimbursement requests, an issue that was explored at the hearing, as our later discussion demonstrates, and about which Bramen himself gave testimony.

Sufficiency of Grounds to Support Removal

¶19 Wisconsin courts have long adhered to the rule "'that every citizen making a will has the right to select according to his own judgment the person or persons whom he would have execute it.'" ***Schmitz***, 265 Wis. 2d 860, ¶8 (*quoting* ***Svacina***, 239 Wis. at 442). Thus, courts have "'no discretion … with respect to refusing to grant letters testamentary to the persons nominated in a will'" as personal representative or trustee "'unless such persons are expressly disqualified, or unless such discretion is vested by law.'" ***Id.*** However, courts may remove a personal representative or a trustee for grounds provided by statute. ***Schmitz***, 265 Wis. 2d 860, ¶7 (*citing* ***Holzhauer v. Zartner***, 183 Wis. 506, 509, 198 N.W. 363 (1924)).

¶20 As noted, WIS. STAT. § 701.18(2) sets forth the grounds upon which a trustee may be removed from his or her position. The statute provides that, upon

the motion of a beneficiary or co-trustee, a court may remove a trustee who fails to comply with the requirements of the trust statutes or a court order, "or who is otherwise unsuitable to continue in office." Sec. 701.18(2). The ground upon which the circuit court removed Bramen was that he was "otherwise unsuitable to continue in office." The question of whether to remove a trustee is ultimately addressed to the discretion of the circuit court. *See* ***Schmitz***, 265 Wis. 2d 860, ¶7.

¶21 The circuit court's written order, which restated many of the court's oral findings, provided the following explanation for its conclusion that Bramen was unsuitable to serve as trustee:

> In this case by virtue of the terms of the will/trust there is a potential conflict between Mr. Bramen as potential trustee and also as the recipient of interest income from the trust. That potential conflict in and of itself does not disqualify Mr. Bramen or make him unsuitable, but it is a contentious factor in this particular estate. This potential conflict of interest was a factor in my decision finding Mr. Bramen unsuitable.
>
> While Mr. Bramen has more than the average man's expertise in investing, he has less than an expert's expertise such as a bank trust department investing in a trust which is long-term and which has to balance the need for income to some beneficiaries with increasing the assets or principal for the remaindermen. Taking into account Mr. Bramen's acts as personal representative, the Court finds that this trust could be run more efficiently and expertly with a commercial trust department from a suitable banking institution rather than Mr. Bramen personally.
>
> Mr. Bramen filed claims against the estate for reimbursement for various charges he had incurred. These included having one of his employees clean the Bernadetha Monroe house; another claim for reimbursement was for cell phone charges that he claimed were made in the course of his capacity as personal representative for the estate. I find those fees to be improper and based on the totality of the circumstances I find that Richard Bramen is unsuitable to serve as trustee.

> Therefore, the Court finds Mr. Bramen is unsuitable to serve as trustee under all of the evidence introduced at this hearing. The Court further finds that a commercial trust department would be better suited to balance the equities involved between the interest income heirs and the remaindermen who will inherit the balance of the trust once the interest income heirs are deceased.

¶22 Bramen contends that these findings are insufficient to support the circuit court's determination that he is unsuitable to serve as trustee. He further maintains that the record as a whole does not contain sufficient evidence for the court's unsuitability determination. We assume without deciding that the circuit court's explicit findings in this case do not provide a sufficient basis for a determination of unsuitability. However, this fact does not necessitate reversal. "An erroneous exercise of discretion exists if the trial court failed to exercise its discretion or if there was no reasonable basis for its decision." ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶28, __ Wis. 2d __, 753 N.W.2d 496 (citation omitted). When the court fails to provide an adequate explanation for a discretionary decision, we may nonetheless uphold the circuit court's decision if, upon examination of the record, the facts support the court's exercise of discretion. ***Franke v. Franke***, 2004 WI 8, ¶55, 268 Wis. 2d 360, 674 N.W.2d 832. In reviewing the circuit court's decision to remove Bramen as trustee, we therefore examine the record as a whole in addition to the circuit court's explicit findings to determine whether the court committed reversible error.

¶23 We observe that some of the circuit court's reasons for removal stated in its written decision are not relevant to the matter of unsuitability or to any other ground for removal provided by statute. For example, the court listed as grounds for the determination a "potential conflict of interest" arising from the testator's naming of Bramen as both trustee and beneficiary of the trust. However, the supreme court in ***Gehl v. Hansen***, 5 Wis. 2d 91, 97, 92 N.W.2d 372 (1958),

rejected an argument that a conflict of interest established by the testator's choice to name a beneficiary of a trust as the trustee was grounds for unsuitability. The ***Gehl*** court reasoned that the conflict "was created by the testator," and therefore was presumed to have been within the contemplation of the testator. *See* ***id.***

¶24 We also question the court's suggestion that Bramen's level of expertise in investing is legitimate grounds for its determination of unsuitability. And the fact that the commercial trust department of a bank would, in the court's view, run the trust "more efficiently and expertly" than Bramen is irrelevant to whether Bramen is unsuitable to serve as trustee. However, based on other findings the circuit court made in its written and oral rulings and on the evidence of record, we conclude that Bramen's conduct as personal representative provided sufficient grounds for the court to determine that Bramen was unsuitable to serve as trustee.

¶25 Bramen submitted a reimbursement request of $2,194.22 to the Estate for the compensation he paid his secretary, Ruby Crozier, to clean Bernadetha Monroe's house. Bramen's request claimed that Crozier worked ten to fourteen hours a day for twenty-three days cleaning the house. Bramen sought reimbursement at Crozier's weekly secretarial salary for the days Crozier spent cleaning the house. At the hearing, Bramen justified the expense, explaining that the house was in "deplorable" condition.

¶26 Bramen also submitted a reimbursement request to the Estate for charges on a cell phone purchased to conduct the business of the Monroe and Grayson Estates. Bramen bought a monthly plan for the phone that included 250 minutes of airtime for $29 per month. Additional airtime beyond the allotted 250 minutes was subject to additional charges. From April 2003 to December 2004,

Bramen ran up approximately $4,745 in charges for excess minutes. Bramen testified that the excess minutes were used "talking to people about unclaimed … property" and other matters related to the Monroe and Grayson Estates. The court in the Grayson matter awarded Bramen $1,639 toward the cell phone charges. Bramen submitted copies of his phone bills to the Monroe Estate, but did not provide an itemized report detailing all incoming and outgoing calls. Bramen testified that such a report was not available from his wireless provider.

¶27 The circuit court found that Bramen's assertion that Crozier spent twenty-three days of ten- to fourteen-hour days cleaning the house to be "incredible," and that the reimbursement request was "improper." The court noted that Monroe's house was only 1,300 square feet in area, and that Bramen's wife helped Crozier with the cleaning. The court found the amount requested to be "unreasonable and unjustified" and determined that $800 was a reasonable figure for cleaning Monroe's house. The court then subtracted $500 already paid by the Grayson Estate to clean Monroe's house,[7] and awarded Bramen $300.

¶28 The court also questioned Bramen's claim that the business of the Estate required the amount of cell phone time used, and asked why Bramen did not change his plan to one with more minutes instead of paying thousands of dollars in overage fees. We observe that during one month, July 5, 2003, through

[7] Bramen first submitted the cleaning bill to the Grayson Estate. The amount paid by the Grayson Estate is disputed by the parties. Angelopulos contends that Bramen misrepresented the amount in cleaning expenses reimbursed by the Grayson Estate when he testified that the Grayson Estate paid $500. Angelopulos claims that this is evidence of Bramen's unsuitability to serve as trustee. However, Bramen correctly observes that the circuit court found that the court overseeing the Grayson Estate awarded Bramen $500, not $1,500, and the record does not disclose that this finding was clearly erroneous.

August 4, 2003, Bramen used 3,451 extra minutes, or approximately 57 hours, of airtime over his monthly plan minutes.

¶29 Bramen does not challenge these findings, and we conclude that they support a reasonable view that Bramen was unsuitable to serve as trustee. The court's findings that Bramen made excessive reimbursement requests as personal representative support a reasonable inference that Bramen would use his position as trustee to benefit personally from the trust, and otherwise would not protect the corpus of the trust for all of its beneficiaries.[8]

¶30 In sum, we therefore conclude that the circuit court's order was one removing Bramen as trustee, and that the circuit court afforded Bramen a sufficient opportunity to challenge the basis for the motion to remove him as trustee. We also conclude that excessive reimbursement requests submitted by Bramen to the Estate provided sufficient grounds for the circuit court to conclude within its discretion that Bramen was unsuitable to serve as trustee. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[8] Because we have concluded that the excessive reimbursement requests submitted to the Estate were sufficient grounds for the court's discretionary determination that Bramen was unsuitable to serve as trustee, we need not address Angelopulos's arguments that other alleged conduct by Bramen also supported the court's determination of unsuitability. These arguments center on disputed allegations that Bramen claimed that a $35,000 loan from Monroe was, in fact, a gift; that he took $20,000 in jewelry and cash from the Monroe house without disclosing this fact to the Estate for a time; and that he geared the Estate's investment portfolio toward high-risk investments, contrary to Monroe's testamentary wishes.