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DISTRICT II

July 18, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1061

In re the Matter of the Edwin A. Schwarzkopf and Cathleen
Schwarzkopf Revocable Trust: Michael Schwarzkopf v. Cathleen
Schwarzkopf (L.C. # 2015PR595)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Schwarzkopf appeals from a circuit court order dismissing his claims against Cathleen Schwarzkopf and Robert Taves, trustees of the Edwin A. Schwarzkopf and Cathleen Schwarzkopf Revocable Trust and other trusts funded by assets from the Revocable Trust.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

The circuit court decided the case on summary judgment. We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not “repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 496-97.

In April 1996, Edwin, Michael’s father, and Cathleen, Michael’s mother, entered into a Marital Property Agreement by which they classified their property. As relevant to this appeal, the Marital Property Agreement classified Edwin’s deferred employment benefits account as his individual property along with “the ownership interest and proceeds of life insurance policies owned by a party.” It is undisputed that in documents bearing the same date as the Marital Property Agreement and the creation of the Revocable Trust, discussed below, Edwin designated Cathleen as the beneficiary of the deferred employment benefits account and a Midwest Security insurance policy.² Edwin died in 1997. Edwin’s estate tax return, which was accepted by the relevant taxing authorities, reflected these beneficiary designations and associated distributions.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² It is also undisputed and Michael has not challenged in this court that Edwin designated Cathleen as the beneficiary of a Schwab IRA account and an insurance policy on the life of another child. The Family Trust was the designated beneficiary of seven other life insurance policies, and the proceeds of those policies were paid to the Family Trust.

In April 1996, Edwin and Cathleen also created a Revocable Trust which, upon Edwin's death, was to be used to fund a Family Trust and a Survivor's Trust, the latter solely for the benefit of Cathleen as the surviving grantor of the Revocable Trust.³ Robert Taves was named as successor trustee for Edwin for all trusts.⁴ For approximately seventeen years after Edwin's death, Michael did not pursue concerns with Cathleen regarding Edwin's estate or the disposition of assets following Edwin's death. However, Michael now claims that Cathleen and Taves misdirected assets other than to the Family Trust and have engaged in other forms of misconduct necessitating either their replacement as Trustees or the addition of Michael as a co-Trustee.

The parties filed summary judgment motions. Based on the summary judgment record, the circuit court concluded that there were no factual disputes relating to the disposition of the deferred employment benefits account or the Midwest Security policy. The court concluded that the relevant documents were clear and controlling and provided that the account and the policy were Edwin's individual property and passed to Cathleen by beneficiary designation outside of the Revocable Trust. The court also declined to make any changes in Trustees and affirmed the Family Trust's payment of the legal fees incurred by Cathleen and Taves in responding to Michael's claims.

Underlying certain of Michael's appellate challenges is his claim that the deferred employment benefits account and the Midwest Security insurance policy should have been

³ The Survivor's Trust received Cathleen's marital property interests and any of her nonmarital, individual property. The Family Trust received Edwin's marital property interests and any of his individual property that named the Family Trust as beneficiary. *See supra* n.2.

⁴ Taves ultimately resigned as a co-trustee of the Survivor's Trust, but he remained as a co-Trustee with Cathleen of the Family Trust.

transferred to the Family Trust rather than to Cathleen individually. Michael argues that Edwin's beneficiary designations for these assets did not supersede the terms of the Revocable Trust, which Michael claims required these assets to be transferred to the Family Trust.

Michael's appellate briefs do not persuade us. Michael cites no authority for the proposition that Edwin's beneficiary designations to Cathleen could not be given effect. The facts are undisputed that the Marital Property Agreement and Edwin's beneficiary designations excluded the deferred employment benefits account and the Midwest Security policy from the Revocable Trust and therefore from the ensuing Family Trust. Accordingly, we do not address any issues premised upon Michael's mistaken expectations regarding the treatment of these assets.⁵

Michael next argues that Cathleen breached her fiduciary duty as a co-Trustee of the Family Trust by failing to provide an annual accounting. The facts relating to this issue are undisputed in the record: the Family Trust did not undertake an annual accounting, and in this proceeding, the Trust agreed to provide an accounting in the future. The circuit court was aware of this deficiency and of the Trust's stated intention to provide annual accountings in the future. *Estate of Gehl*, 5 Wis. 2d 91, 96, 92 N.W.2d 372 (1958), places the decision to remove a trustee within the circuit court's discretion. The failure to file an annual accounting without additional evidence showing mismanagement of the trust or a scheme to obscure fraud does not warrant removal of the trustee if the trustee acknowledges the necessity of filing annual accountings in

⁵ For example, we do not address Michael's complaints about Cathleen's management of the Family Trust as it relates to these excluded assets or that Cathleen had trustee-type duties in relation to assets that were bequeathed to her directly via beneficiary designations.

the future. *Id.* at 99. Other than baldly asserting on appeal that Cathleen breached her fiduciary duty, Michael does not establish a genuine factual dispute precluding summary judgment. The circuit court did not err in granting summary judgment on this claim.

Michael next argues that the Family Trust should not have paid the legal fees incurred by Cathleen and Taves as they responded to his claims. Michael's position is contradicted by the relevant documents. The trust documents authorize the Trustees to "[e]mploy ... attorneys... to advise or assist [them] in the performance of [their] administrative duties." The trust documents further state that "[n]o Trustee need incur personal liability for any trust indebtedness or other obligation of any kind." Michael brought claims against Cathleen and Taves in their capacity as Trustee or co-Trustees, and he challenged the assets of the Family Trust. The documents creating the Family Trust contemplate the trust's liability for legal fees under these circumstances. Summary judgment was appropriate.

Finally, we conclude that Michael's claims in relation to Cathleen's Survivor's Trust were properly dismissed on summary judgment. Cathleen, as the trustee of the Survivor's Trust, has wide discretion and authority to act in relation to the Survivor's Trust. Michael does not show the existence of a genuine factual dispute precluding summary judgment.⁶

Upon the foregoing reasons,

⁶ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals