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STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20160045

In the Matter of Bradley K. Brakke
Trust dated November 11, 2013

Timothy A. Brakke,

Petitioner-Appellee

v.

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust; Vicki Brakke; Kari Headington,

Respondents

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust,

Appellant.

Appeal from the Judgment entered on December 17, 2015, and the Order issued on December 1, 2015, Cass County District Court, Case No. 09-2014-CV-02400

REPLY BRIEF OF APPELLANT

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I. LAW AND ARGUMENT

A. District Court Erred in Approving Settlement Agreement.

1. Standard of Review is De Novo.

[¶1] The district court's approval of a settlement agreement modifying a non-charitable irrevocable trust is a mixed question of law and fact which is reviewed de novo. See Burlington Northern R. Co. v. Fail, 2008 ND 114, ¶5, 751 N.W.2d 188. Timothy Brakke's ("Timothy")[1] argument that the standard of review is abuse of discretion is not supported by any on-point authority.

[¶2] Approval of a settlement modifying a Trust or settling a probate case is only valid if within the statutory prescriptions permitting such settlement. See N.D.C.C. § 59-12-11; N.D.C.C. § 30.1-22-02. As such, the issue before the Court, at least in part, is one of law and should be reviewed de novo. "The interpretation and application of a statute is a question of law, fully reviewable on appeal." Estate of Gleeson, 2002 N.D. 211, ¶7, 655 N.W.2d 69. The Court "may review the district court's decision de novo where an appellant's challenge to the authority of the district court to approve the settlement raises novel issues of law." Denney v. Deutsche Bank AG, 443 F.3d 253, 273 (2nd Cir. 2006) (citations omitted). "[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are . . . discretionary in nature," and the Court can determine de novo if conclusions of law are incorrect. In re Estate of Sorrell, 2016 WL 853899, *12 (Md. Ct. App. 2016).

[1] Appellee Brief indicates Petitioner's counsel is attorney for *Appellees* Timothy and Alanna Rerick ("Alanna"). Alanna is not a Petitioner and did not seek to be in Timothy's Motion to Amend.

2. Timothy Fails to Address N.D.C.C. § 59-12-11.

[¶3] Timothy never acknowledges N.D.C.C. § 59-12-11, which is directly on-point. "A noncharitable irrevocable trust may be modified upon consent of all the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust." N.D.C.C. § 59-12-11. There is no dispute that the 2014 Trust is a noncharitable trust which became irrevocable upon Bradley Brakke's ("Bradley") death. Moreover, Timothy does not and cannot dispute that the identity of the beneficiaries is a material purpose of the 2014 Trust. In fact, Bradley was clear that the material purpose of the 2014 Trust was to provide assets to certain family members and to exclude others from receiving assets.

[¶4] It is telling that Timothy does not discuss N.D.C.C. § 59-12-11, or attempt to distinguish the statute from the case at hand. No argument has been presented before the Court as to why this statute is not applicable. Moreover, there is no discussion by Timothy addressing the public policy concerns that arise if settlors cannot rely on the law and courts of North Dakota to carry out their intent, substituting potential beneficiaries' preferences instead. Respectfully, N.D.C.C. § 59-12-11 prohibits the district court from modifying the non-charitable irrevocable 2014 Trust as it violates the trust's material purpose.

3. N.D.C.C. § 30.1-22-02 is Not Applicable.

[¶5] Instead of analyzing the present matter under the trust code, Timothy continues to rely on a probate statute, despite this case involving a trust. Nevertheless, the probate statute, N.D.C.C. § 30.1-22-02, would similarly not provide for settlement approval in this case.

[¶6] The comment to N.D.C.C. § 30.1-22-02 provides that the statute "does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of a good faith controversy." N.D.C.C. § 30.1-22-02; see also Estate of Allmaras, 2007 ND 130, ¶30, 737 N.W.2d 612 ("When interpreting and applying provisions in the [U.P.C.], we may look to the Code's Editorial Board Comments."). There is no dispute that the 2014 Trust does not contain any ambiguities lending itself to a good faith controversy. As such, N.D.C.C. § 30.1-22-02 is not applicable even if this matter concerned a will.

[¶7] Additionally, under N.D.C.C. § 30.1-22-02, a court may approve a settlement only when the contest or controversy is in good faith and the agreement is just and reasonable. As thoroughly explained in Bell's principal brief, this is not the case at hand.

B. Motion to Amend.

[¶8] Timothy argues that a motion to amend can only be appealed after a decision on the merits. Timothy misconstrues Barth v. Schmidt, 472 N.W.2d 473 (N.D. 1991), to come to this conclusion. In Barth, the Court found the order permitting amendment of pleadings could not be appealed because there was no final order on any matter as required by N.D.R.Civ.P. 54(b) and N.D.C.C. § 28-27-02, which defines a final order more broadly than a judgment on the merits. Id. In this matter, a final order has been entered, and therefore the motion to amend, *and* the motion for summary judgment, are appealable.

[¶9] Timothy does not dispute it was an intentional decision to challenge the 2013 Trust rather than the 2014 Trust, and continues to argue the 2014 Trust cannot stand without the 2013 Trust. However, even absent the 2013 Trust, the 2014 Trust would

continue to stand as it fully restated the 2013 Trust. Were a capacity claim regarding when the 2013 Trust was signed successful, if capacity existed when the 2014 Trust was entered into, fully restating the 2013 Trust, it would continue to stand on its own.

[¶10] Timothy misstates that the 2013 Trust and 2014 Trust bear the same name; while similar, they are different. (See App. 8 and 57). Additionally, Bell's letter sent on May 6, 2014, explicitly states "The Amendment and Restatement supersedes, in its entirety, the original Trust Agreement of November 11, 2013." (App. 73). Timothy made a distinct choice to challenge only the non-controlling 2013 Trust.

[¶11] Timothy cites to Conservatorship of Sickles to claim Bell cannot execute a trust as a fiduciary, and that Bell's power comes from the 2013 Trust. Timothy misinterprets the case, which states a conservator cannot "effectively defeat a protected person's estate plan . . . through the creation of a revocable living trust" to prevent the estate from passing to intended beneficiaries. Conservatorship of Sickles, 518 N.W.2d 673, 679 (ND 1994). Sickles does not regard any fiduciary, but rather a conservator – here, it is an Attorney-in-Fact, with powers specifically provided by the settlor. Additionally, Sickles is about defeating an entire estate plan, not the modification of a provision at the settlor's request. Finally, while Timothy claims Bell's power to amend came from the 2013 Trust, this is incorrect; Bell's power came from the Power of Attorney.

[¶12] Timothy further argues, and the Court Order erroneously stated, that Bell never claimed prejudice. Timothy cites to Galloway v. Forum Pub. Co., that "leave to amend should be granted when justice so requires and when the adverse party will not be prejudiced thereby." Galloway, 138 N.W.2d 798, 801 (N.D. 1965) (emphasis added).

However, the claim that Bell never previously raised the issue is *false*. In the September 3, 2015, Brief in Opposition to Petitioner's Motion to Amend Petition, Bell argued prejudice. Doc. ID #57, ¶15.

[¶13] Timothy finally argues that a party must only "commence a judicial proceeding" under N.D.C.C. § 59-14-04, implying that it can be any judicial proceeding challenging any instrument. In making this claim, Timothy intentionally uses ellipses to avoid important language: "A person shall commence a judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death within the [statute of limitations]." N.D.C.C. § 59-14-04(1) (emphasis added). The 2014 Trust that was in effect needed to be challenged within the statute of limitations, not a previous instrument. The Court has recently interpreted N.D.C.C. § 59-14-04 to provide that the doctrine of equitable tolling does not apply to actions commenced after the statute of limitations. Oakland v. Bowman, 2013 ND 217, ¶11, 840 N.W.2d 88.

C. District Court Erred in Denying Summary Judgment.

1. Statute of Limitations Prevents Challenge.

[¶14] The statute of limitations under N.D.C.C. § 59-14-04 precludes a challenge to the 2014 Trust after the 120-day period. Any challenge would have been barred after approximately September 4, 2014. Timothy did not challenge the 2014 Trust, and did not move to amend the petition to include such challenge until August 17, 2015, well after the statute of limitations.

[¶15] Timothy's claim that this argument is about pleading requirements under N.D.R.Civ.P. 8(a) is misplaced. N.D.C.C. § 59-14-04 required a challenge to the trust that was in effect. Timothy purposefully challenged a previous trust he knew was not in

effect. As the 2014 Trust controls the selection of beneficiaries and distribution of assets, summary judgment is appropriate.

2. Petitioner Lacked Standing at Petition's Filing.

[¶16] Timothy does not dispute if a person commences a lawsuit without standing, the lawsuit must be dismissed. B.H. v. K.D., 506 N.W.2d 368, 375 (N.D. 1993). Here, Timothy did not have standing when the petition was filed on August 26, 2014.

[¶17] Timothy argues standing exists because there was an oral contract between Bradley and Timothy that Bradley would distribute his assets in a certain way. Timothy does not deny that he has never made such a claim previously, nor that such an agreement would be invalid.

[¶18] Timothy claims Bell's notice to Timothy of the 120 days to contest the trust somehow gives him standing; there is no authority for this. Timothy further argues that N.D.C.C. § 59-09-09 (providing methods for notice under the U.T.C.) and N.D.R.Civ.P. 81 (regarding special statutory proceedings) results in anyone receiving notice of a trust becoming a party if subsequent litigation is filed. This is untrue, and was addressed thoroughly in Bell's Post-Hearing Response. Doc. ID #78, fn. 3. Moreover, even if it did make one a party, it would not make them a Petitioner.

[¶19] Timothy argues that the spendthrift clauses should not apply because there is a trust challenge. Arguably, the spendthrift clause would continue to apply until the trust is found invalid; this does not preclude any challenges to a trust, it simply precludes challenges by individuals who do not have an interest. More importantly, a spendthrift clause exists in each trust, but also in the 2009 Will that Timothy seeks to uphold. As no one argues the 2009 Will is invalid, the spendthrift clause unquestionably exists.

[¶20] Finally, Timothy's argument that spendthrift clauses only apply to creditors is untrue. The law provides "a creditor or assignee of the beneficiary may not reach the interest . . . before its receipt by the beneficiary." N.D.C.C. § 59-13-02(3) (emphasis added). "[T]he fact that the assignment . . . went to co-beneficiaries and not a third party creditor does not affect the spendthrift clause's prohibition on any voluntary assignment. . . . [S]uch a rule would undermine the spendthrift clause's goal of 'protect[ing] the beneficiary from himself' and would consequently frustrate the trustor's intent." In re Indenture of Trust Dated January 13, 1964, 326 P.3d 307, 313 (Ariz. App.2014).

[¶21] Ultimately, Bell was entitled to summary judgment as the statute of limitations had already run before the motion to amend the petition was filed. Similarly, Timothy did not have standing to challenge the trust, therefore, the petition should have been dismissed.

II. CONCLUSION

[¶22] For the aforementioned reasons, Bell respectfully requests the Court find that the district court erred in denying Bell's Motion for Summary Judgment and granting Timothy's Motion to Amend and Motion to Approve Settlement. As such, Bell respectfully requests that the Court reverse the district court's Order and Judgment.

Dated this *23rd* day of June, 2016.

/s/ Berly Nelson

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CERTIFICATE OF COMPLIANCE

[¶23] The undersigned, as attorney for the Appellant, Bell State Bank & Trust, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(a) of the North Dakota Rules of Appellant Procedure, that the above Brief of Appellant was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals **1,986**.

Dated this *23rd* day of June, 2016.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned certifies that he served the attached:

REPLY BRIEF OF APPELLANT BELL STATE BANK & TRUST

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