STATE OF MICHIGAN

COURT OF APPEALS

In re DON H BARDEN TRUST.

HELEN ROBINSON and DOUG BARDEN on behalf of the DON H. BARDEN Trust,

Petitioners-Appellants,

and

CARL V. BARDEN, VERNA J. MCDANIEL, YVONNE B. MURRAY PENN, LESLIE M. FAVOR, LOIS HAMBY, JOHN R. BARDEN, and PEARL BARDEN,

Petitioners,

and

DON BARDEN, JR.,

Petitioner-Appellee,

v

SHIRLEY A. KAIGLER, Personal Representative for the Estate of BELLA MARSHALL,

Respondent-Appellee,

and

ALANA MARSHALL BARDEN and JACQUELINE BARDEN,

Respondents,

and

JOHN CHASE, JR., Trustee, and MICHELLE SHERMAN, Trustee,

Appellees.

UNPUBLISHED
April 8, 2014

No. 312027
Wayne Probate Court
LC No. 11-768249-TV

In re DON H. BARDEN TRUST.

HELEN ROBINSON and DOUG BARDEN on behalf of the DON H. BARDEN Trust,

Petitioners-Appellants,

and

STEVEN G. COHEN,

Appellant,

and

CARL V. BARDEN, YVONNE B. MURRAY PEN, LESLIE M. FAVOR, LOIS HAMBY, JOHN R. BARDEN, PEARL BARDEN, FRED BARDEN, and VERNA J. MCDANIEL,

Petitioners,

and

DON BARDEN, JR.,

Petitioner-Appellee,

v

No. 314391
Wayne Probate Court
LC No. 2011-768249-TV

SHIRLEY A. KAIGLER, Personal Representative for the Estate of BELLA MARSHALL,

Respondent-Appellee,

and

ALANA MARSHALL BARDEN and JACQUELINE BARDEN,

Respondents,

and

JOHN R. CHASE, JR., Trustee, LIPSON, NEILSON, COLE, SELTZER & GARIN, PC, and MICHELLE SHERMAN, Trustee.

Appellees.

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Settlor Don H. Barden passed away on May 19, 2011. He executed a trust in 1994, which was amended in 2004 (hereinafter the "2004 Trust") and 2010 (hereinafter the "2010 Trust"). In Docket No. 312027, petitioners challenged the validity of the trust. The probate court granted motions to summarily dismiss petitioners' claims under MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). Petitioners appeal the dismissal in 312027. Attorney fees were awarded, which are appealed in Docket 314391. In both cases, we affirm.

The trust and amendments utilized a signature cover page with attached exhibits containing the substantive provisions of the trust. The 2010 Trust cover page indicates it was executed May 4, 2010, but the signature was not notarized until September 24, 2010. Additionally, a separate cover page without attachments was produced during the proceedings indicating it was executed on March 4, 2010 and acknowledged by a notary on May 4, 2010. Several parties interested in the trust as either heirs or beneficiaries under the trust moved to set aside the 2010 Trust. They alleged that the trust "makes an unnatural disposition of Mr. Barden's property, in contrast to his long-standing and well known wishes that his siblings and his son receive a substantial gift from his estate."

Bella Marshall Barden filed a motion for summary disposition under MCR 2.116(C)(8), arguing that the petitioners failed to allege a legal basis for setting aside a trust under the Michigan Trust Code, MCL 700.7101 *et seq.* The successor trustee filed a motion for summary disposition under MCR 2.116(C)(10), arguing that petitioners failed to recognize that the trust was in a standard format, that the 2010 Trust is in the same form as the 2004 Trust, that the notarization was proper, that an allegation of inconsistency is not an allegation of fraud, and that the 2010 Trust reflected the settlor's intent. In support of his motion he attached the affidavit of James M. Elsworth, the attorney who drafted the trust and amendments. Most of the petitioners eventually withdrew their support for the lawsuit. However, petitioners Helen Robinson and Douglas Barden (hereinafter "petitioners") responded that a legitimate claim was stated in their petition, arguing, in part, that there "is significant evidence that the document not only lacks authenticity but that it may have been the product of outright fraud."

The probate court granted both motions and dismissed the petition with prejudice in a written opinion and order. Subsequently, the probate court issued an opinion and order awarding the Marshall estate $25,110.64 in sanctions and $40,310.49 to the successor trustee.

First, petitioners argue they stated a cause of action sufficient to survive a motion for summary disposition under MCR 2.116(C)(8). A trial court's grant of summary disposition under MCR 2.116(C)(8) is reviewed de novo on appeal. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). A MCR 2.116(C)(8) motion tests the legal sufficiency of the pleading alone. *Id.* Such a motion is decided on the pleadings without the support or opposition of

affidavits. MCR 2.116(G)(5); *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 131; 839 NW2d 223 (2013). A court must "accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts." *Gorman*, 302 Mich App at 131. However, "only factual allegations, not legal conclusions, are to be taken as true" under MCR 2.116(C)(8). *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006). If a party makes a mere statement of "conclusions, unsupported by allegations of fact, [it] will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994).

MCL 700.7402 provides as follows:

> (1) A trust is created only if all of the following apply:
>
> (a) The settlor has capacity to create a trust.
>
> (b) The settlor indicates an intention to create the trust.
>
> (c) The trust has a definite beneficiary or is either of the following:
>
> (*i*) A charitable trust.
>
> (*ii*) A trust for a noncharitable purpose or for the care of an animal, as provided in section 2722.
>
> (d) The trustee has duties to perform.
>
> (e) The same person is not the sole trustee and sole beneficiary.
>
> (2) A trust beneficiary is definite if the trust beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
>
> (3) A power in a trustee to select a trust beneficiary from an indefinite class is valid only in a charitable trust.

MCL 700.7406 provides that a "trust is void to the extent its creation was induced by fraud, duress, or undue influence." In this case, petitioners alleged the dispositive exhibit A "is unsigned" and "makes an unnatural disposition" of property "in contrast to [settlor's] long-standing and well known wishes," and therefore the 2010 Trust "lacks authenticity . . . and should be set aside."

Petitioners fail to note that the Michigan Rules of Evidence do not require extrinsic evidence of authenticity for documents "accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public" or other authorized officer. MRE 902(8). While petitioners note the later date of the notary's acknowledgment, they did not argue any effect of this in their filings. Further, the Michigan Notary Public Act, MCL 55.261 *et seq.*, defines an "acknowledgment" as confirmation that a person "is placing *or has* placed his or her signature" on a record. MCL 55.263(a) (emphasis added). In sum, although the petitioners challenge the authenticity of the 2010 Trust, they do not address the admissibility of the

document under MRE 902 nor do they address the validity of the notary's post-dated acknowledgement. The acknowledgement appears valid and the 2010 Trust is self-authenticating.

Petitioners challenge whether the trust is in accord with the settlor's intent. Petitioners do not allege the trust is invalid for lack of capacity, definite beneficiary, trustee duties, or that the trustee is the only beneficiary. Rather, they challenge the "authenticity" of the trust amendment. However, they provide no factual support in the pleadings for the invalidity of the 2010 Trust. The assertion that the trust provides for an "unnatural disposition" is conclusory, not factual. Accepting arguendo that the settlor had long-standing wishes to make a substantial gift to his siblings, that does not sufficiently support the conclusion that the 2010 Trust makes an unnatural disposition, or, even if it did, that a change in long-settled estate planning indicates a lack of intent.

Further, the form of the 2010 Trust frustrates the intent argument. The 2004 Trust and 2010 Trust are drafted in similar form with a two page cover and attached exhibit A. The first page and the second signature page are both very similar and, under settlor's signature line, both read "Grantor and Trustee." By executing similar documents which acknowledge settlor's signatory capacity, both trusts indicate the intent to form a trust.

Finally, petitioners argue that the document "is a forgery or lacks authenticity." However, petitioners offer no facts in the pleadings to support their forgery claim. Petitioners must allege a "false making or alteration" of the 2010 Trust. *People v Kaczorowski*, 190 Mich App 165, 171; 475 NW2d 861 (1991).

Simply put, the pleadings fail to detail how the 2010 Trust is invalid under the Michigan Trust Code, and also fail to sufficiently establish a factual basis for its assumptions and conclusions. Petitioners' argument is mere conjecture, "unsupported by allegations of fact," and does not state a cause of action. *ETT Ambulance Serv Corp*, 204 Mich App at 395.

Because summary disposition was properly granted under MCR 2.116(C)(8), we need not address petitioners' challenge to the grant of summary disposition under MCR 2.116(C)(10). We note, however, that summary disposition was properly granted under (C)(10) because of the conclusory nature of the allegations. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (noting that because the burden of proof at trial would be on petitioners, they "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists").

Petitioners also challenge the sanction imposed by the probate court, arguing that their claim was not frivolous, that the court below erred in failing to grant an evidentiary hearing, and that the attorney fees imposed did not conform to the factors to determine those fees. A trial court's finding that an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. A trial court's attorney fee award is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Where a trial court's decision is outside the range of principled and reasonable outcomes, it abuses its discretion. *Id*.

The provisions of MCR 2.114 apply in probate proceedings. MCR 5.114(A)(1). MCR 2.114(D)(2) requires that a party signing a pleading affirms that "after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or good-faith argument" for the modification of law. If the court finds an action frivolous then it must award sanctions. MCL 600.2591(1).

> (a) "Frivolous" means that least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

However, "[n]ot every error in legal analysis constitutes a frivolous position," and failure to prevail does not render a complaint frivolous. *Kitchen*, 465 Mich at 663. In *Kitchen*, our Supreme Court reversed a sanction award based on the frivolous nature of the claim because the nature of real property law at issue was complex and the plaintiffs relied on legitimate persuasive authority including the Restatement of Property. *Id*. at 663. Although this authority failed to persuade the Court, the argument was sufficiently grounded in law and fact to reverse the sanction award. *Id*.

These petitioners failed to demonstrate any factual or legal basis for their claims. Although it is clear that they are challenging the legitimacy of the 2010 Trust, they failed to present such a challenge under any relevant portion of the Michigan Trust Code. To the extent petitioners hoped to establish a basis for forgery or fraud, they have failed to allege facts with particularity to support that claim.

Petitioners challenge the reasonableness of the fees awarded. Rule 1.5(a) of the MRPC provides in pertinent part as follows:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Our Supreme Court established six factors for consideration that mirror MRPC 1.5(a): "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). *Smith* held that "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services" and then multiply the "reasonable number of hours expended in the case" to produce a starting point for the fee award. *Smith*, 481 Mich at 530-531. The court "should consider" the other *Wood* factors to "determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors." *Id*. at 531.

Petitioners first allege they were entitled to an evidentiary hearing and that the court abused its discretion in not holding such a hearing. The party requesting attorney fees bears the burden of proving those fees and showing their reasonableness. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). Generally, where "attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Id*. at 166. However, "[i]f the trial court has sufficient evidence to determine the amount of attorney fees and costs, an evidentiary hearing is not required." *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). A court does not err "in awarding fees without having held an evidentiary hearing [where] the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). However, detailed billing is not sufficient alone to support an award of attorney fees. *Souden v Souden*, 303 Mich App 406; ___ NW2d ___ (Docket No. 2013), slip op at 6.

Each party submitted detailed records in support of their fee award. These included the voluminous billing statements, affidavits describing the attorney's professional qualifications, and the economics of law practice from the State Bar. The dates, times, amount of time, and total fees were listed on the billing statements. Additionally, the record, including well-reasoned opinions issued, speaks to the court's familiarity with the litigation. Unlike the court in *Souden*, the probate court did more than note the detailed nature of the billing. Thus, the probate court had sufficient evidence to determine costs and fees without conducting an evidentiary hearing.

Petitioners also allege that the court did not sufficiently follow the factors recognized to assess the reasonable nature of the fee requested. The probate court listed the eight factors from MRPC 1.5(a) and also the factors from *Wood v Detroit Auto Inter-Ins Exch*. Further, the probate court cited *Smith* throughout its discussion of the relevant factors. Ultimately, the court determined that

> reasonableness comes down to essentially two things: First, the results achieved must be weighed against the complexity of the case in light of the unique circumstances applicable to this case. Second, the relationship of the amount of fees and cost [sic] in question to the fee customarily charged, as supported by the Economics of the Law Practice Surveys that are published by the State Bar of Michigan, and the experience of the attorneys.

Of the six *Wood* factors, only three appear to have been analyzed with the results tending against the fee award. The probate court noted that petitioners' claim was without any legal or factual basis. The court considered the experience of the attorneys and the prevailing market rates. Further, the court considered the time reasonably necessary on the filings, in some cases considering the complexity of the motion.

Although all of the factors were not specifically discussed, the court appears to have boiled the matter down to the main factors at issue. We see no abuse of discretion in the probate court's handling of the fee award.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra