

STATE OF MICHIGAN
COURT OF APPEALS

In re LOUIS G. BASSO, JR. REVOCABLE TRUST.

MARY ANGELA BASSO,

Appellant,

v

THOMAS BRENNAN FRASER, Successor Trustee,

Appellee.

UNPUBLISHED

July 30, 2020

No. 349986

Oakland Circuit Court

Family Division

LC No. 15-363780-TV

Before: MARKEY, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Appellant Mary Angela Basso (Mary) appeals by right the order of the probate court allowing the second annual accounting filed by Thomas Brennan Fraser (Fraser), successor trustee of the Louis G. Basso, Jr., Revocable Trust (the trust), denying Basso’s objections to the accounting, and awarding sanctions to Fraser and the trust to be paid by Basso personally. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The administration and disposition of the trust at issue in this case has been the subject of extensive litigation initiated by Basso against both Fraser and his predecessor. The trust settlor, Louis G. Basso (the decedent), executed a “pour-over” will in which the residuary of his estate was to be held, managed, and distributed according to the trust, which was created in March 2006, restated in its entirety in November 2014, and amended in December 2014. The decedent died in December 2014, and was survived by his four adult children, Mary, Louis, Marjory Ann, and Marie, who are the beneficiaries of the trust.

The trust instrument contains the following relevant provision concerning the distribution of the estate:

2.2 DISTRIBUTION OF ASSETS

A. Upon and subsequent to death of the Settlor, the Trustee is instructed to divide and distribute the entire Trust Estate as follows:

1. MARY ANGELA BASSO shall have the right to continue to reside in the house at 6939 Alderly Way, West Bloomfield, Michigan from the date of Settlor's passing for a period of two (2) years or until such time as she completes her education and obtains employment, whichever comes first. She shall reside in the property rent free during such time. The Trust shall pay taxes, insurance, upkeep, maintenance and repairs. Upon completing her education and attaining employment or upon the expiration of the two (2) year period, the house shall be sold.

a. The Trustee shall set aside from the rest, residue and remainder of the estate an estimated sufficient amount to fund the taxes, insurance, upkeep, maintenance and repairs for the home for the above mentioned two (2) year period.

b. Upon the sale of the home, the Trustee shall use any portion of the proceeds from said sale, at Trustee's sole discretion, to purchase for MARY ANGELA BASSO the appropriate one bedroom condominium for MARY ANGELA BASSO to reside. The Trust shall pay all real estate taxes or condominium fees from the sale proceeds for a period of six (6) months. Said condominium purchase shall be titled in the name of MARY ANGELA BASSO.

c. MARY ANGELA BASSO shall have the right to choose any household furnishings, furniture and kitchenware as necessary from the Alderly Way home after the purchase of the condominium for MARY ANGELA BASSO to furnish her condominium.

d. The balance of the proceeds from the sale of the house, if any, shall be used to pay for MARY ANGELA BASSO's school tuition and fees for a period of one (1) year.

e. Further, after all of the aforementioned expenses have been paid, the balance of any proceeds from the sale of the West Bloomfield house shall be divided equally between my the [sic] living daughters, MARY ANGELA BASSO, MARJORY ANN BASSO WEST and MARIE GABRIEL ROEDER. I understand that I have not included my son, LOUIS J. BASSO in this distribution.

f. In the event that MARY ANGELA BASSO should predecease Settlor or die before receiving the entire amount this [sic] specific distribution, then, under such circumstances, this provision shall lapse and be of no

force and effect and any proceeds from the sale of the home shall become part of the rest, residue and remainder of the Trust estate.

2. The Trustee shall distribute the sum of Forty Thousand (\$40,000.00) Dollars to MARY ANGELA BASSO, outright, free and discharged from this Trust, without restriction.

a. In the event that MARY ANGELA BASSO should predecease Settlor or die before receiving the entire amount this [sic] distribution, then, under such circumstances, this provision shall lapse and be of no force and effect and any proceeds from the sale of the home shall become part of the rest, residue and remainder of the Trust estate.

3. All the rest, residue and remainder of the Trust Estate shall be divided into four (4) equal shares and one (1) share each shall be distributed to my children, MARY ANGELA BASSO, LOUIS J. BASSO, MARJORY ANNE BASSO WEST and MARIE GABRIEL ROEDER, outright, free and discharged from this Trust, without restriction.

Ronald Barron (Barron) was the trust's initial trustee. Barron filed a petition in November 2016 requesting that the probate court approve his first (and final) accounting of trust assets, as well as permit him to resign as trustee and appoint a successor trustee. After a contested hearing, the probate court granted his petition. Mary appealed, and this Court affirmed, stating in relevant part:

Because of disagreements between Barron and Basso and between Basso and her siblings, Barron found the trust difficult to administer, so he sent Basso and her siblings a 30-day-notice of his intent to resign as trustee. Although the trust provided a mechanism for appointment of a successor trustee, each of the named potential successor trustees declined appointment. Accordingly, Barron petitioned the probate court seeking limited supervision of the trust for the purpose of allowing him to resign, approving his final accounting, and appointing a successor trustee under the Michigan Trust Code, specifically MCL 700.7704(3). Representing herself, Basso objected to Barron's resignation and asserted that a successor trustee was required to be appointed from among the principals of Barron's law firm. Basso also listed several expenses to which she objected, but she offered no explanation as to why she felt they were improper. In contrast, Basso's siblings filed a response concurring with Barron's petition.

The record reflects that at an initial hearing, the probate court entered a scheduling order setting deadlines and dates for discovery, witness lists, exhibit lists, trial briefs, and a contested hearing date. It is undisputed that Basso refused to sign the scheduling order, and she failed to comply with nearly all of the deadlines. As a sanction for Basso's failure to comply with the scheduling order, the probate court dismissed her objections to the petition.

In February 2017, at the contested hearing, Barron testified that the accounting submitted accurately reflected all income, expenses, and disbursements of the Trust. He confirmed that he served all interested parties with an accounting and only Basso objected. In response to Basso's question about whether she was provided with receipts or other documentation, he testified that he provided whatever information Basso requested whenever she requested it. Upon conclusion of the testimony, the probate court noted the vacancy in the trustee position created by Barron's resignation and the fact that all possible successor trustees named in the trust declined to act. Acknowledging that "the Court can't compel someone to serve, and it's not in the interests of the beneficiaries for someone to be forced to serve against their will," the probate court found that it could appoint a successor, and it appointed Fraser as successor trustee. The court also found that the accounting was proper, stating:

Also with respect to the account, I will allow the account. I've heard the testimony. I did not hear specific objections to the account. I've reviewed the account. It certainly appears to be appropriate. Mr. Barron has testified that he served the accounting, as well as receipts, on all of the beneficiaries. No specific objections were received to those, so they are allowable.

[*In re Louis G. Basso, Jr., Revocable Living Trust*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 20, 2018 (Docket No. 337321), lv den 503 Mich 949 (2019).]

The initial accounting filed by Barron showed the trust's remaining assets as consisting of the Alderly Way home, valued at \$277,700,¹ some shares of stock worth ten dollars, and cash on hand of \$29,061.98.

By her own admission, Mary lived in the Alderly Way home from the time of the decedent's death in December 18, 2014 until she was evicted on April 6, 2018. This period of occupancy was discussed by this Court in another prior appeal, this time from the probate court's order removing Mary as personal representative of the decedent's estate:

On January 4, 2018, Fraser filed a petition to remove Mary as personal representative of the decedent's estate, asserting that she disregarded a court order, is incapable of discharging the duties of office, and mismanaged the estate. The record shows that Mary disregarded the probate court's April 26, 2017 order requiring her to vacate the trust residence 30 days after entry of the order. The terms of the trust permitted Mary to occupy the trust residence for up to two years after the decedent died, "or until such time as she completes her education and obtains employment, whichever comes first." The decedent died on December 18,

¹ It appears, for all accountings filed with the probate court by both Barron and Fraser, that the estimated value of the home was calculated simply by doubling the most recent State Equalized Value (SEV) of the home.

2014. However, Mary continued to live in the trust residence after the probate court's April 26, 2017 order; after Fraser filed his January 4, 2018 petition to remove her as personal representative of the decedent's estate; and, by her own admission, as late as April 3, 2018—well beyond the two years permitted by the trust. Mary's continued occupancy of the trust residence prevented Fraser from selling the trust residence, which was supposed to be sold after Mary's two-year occupancy period expired. Therefore, her violation of the probate court's April 26, 2017 order constituted sufficient grounds to remove her as personal representative. MCL 700.3611(2)(c)(i).

* * *

Incredibly, Mary argues on appeal that she “has competently discharged the duties of her office and the Estate is not under any legal distress.” Not only did the probate court find otherwise, but Mary herself stated at the January 24, 2018 hearing for Fraser's petition to remove her as personal representative that the trust residence was “in shambles.” Mary alleged that Fraser's abandonment and neglect of the trust residence caused severe damages to the trust residence—including, among other issues, severe water damage, collapsed ceilings and floors, and mold and insect infestations. However, Mary has been the sole occupant of the trust residence since the decedent's death, and Fraser was appointed as the successor trustee in February of 2017, well after Mary was supposed to vacate the home in December of 2016. Also, while Mary first cites issues related to the trust residence occurring in December of 2017, the terms of the trust only required the trustee to use trust funds to pay for the trust residence's taxes, insurance, upkeep, and maintenance for the same two-year period that Mary was allowed to occupy the trust residence—until December of 2016. The money from the trust that was set aside for the trust residence's maintenance and upkeep had depleted by December of 2017, resulting in the trust residence sustaining severe damages, something that would not have occurred had Mary vacated the trust residence in December of 2016 and allowed Fraser access to the trust residence. Therefore, Mary's claims are, to say the least, inaccurate. [*In re Estate of Basso*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 30, 2019 (Docket No. 342370), lv den ___ Mich ___; 941 NW2d 52 (2020), pp 2-3.]

In May 2018, Fraser filed a petition with the probate court to allow a first annual accounting reflecting the changes in trust assets between February 15, 2017 and February 15, 2018. This accounting listed as trust assets the Alderly Way home, valued at \$237,560.00, and cash on hand in the amount of \$453.31. Mary filed numerous objections to this accounting and, after a contested hearing, the probate court approved it.² On March 7, 2019, Fraser filed a petition to allow a second annual accounting, including the period from February 15, 2018 to February 15, 2019. This accounting reflected the sale of the Alderly Way home, which sold for \$213,500, minus costs

² The record provided to this Court does not contain a transcript of this hearing, but the probate court's order allowing the accounting indicates that a hearing was held on August 1, 2018.

associated with the sale such as real estate agent commissions and closing costs. This accounting also reflected attorney fees and costs incurred by the trust in responding to Mary's numerous court filings and appeals related to the trust, as well as the expenses related to her eviction, with net trust assets listed as \$117,175.21 in cash. Again, Mary filed numerous objections to the accounting, and the probate court held a contested hearing on July 10, 2019. At the hearing, Fraser testified that legal fees had been incurred related to nine appeals³ taken by Mary from various orders of the probate court, as well as a circuit court appeal of the district court's eviction order. Fraser also testified that some of the loss in trust assets represented the difference between the Alderly Way home's actual sales price and its estimated value in previous accountings. Fraser further testified that before the Alderly Way home was sold, the trust had approximately \$5,800 in cash remaining, the majority of which was spent on miscellaneous expenses related to the maintenance of the home. Finally, Fraser testified that by the time the Alderly Way home had been sold, there were no other trust assets to be distributed to beneficiaries.

After the contested hearing, the probate court entered an order allowing the second accounting and ordering Mary, as a sanction for a frivolous filing, to pay the trust's attorney fees and costs incurred in relation to the petition. This appeal followed.

II. APPELLATE ISSUES

Although Mary's brief on appeal possesses most of the formal requirements of an appellate brief, it consists primarily of a long recitation of her perception of the factual and procedural history of this case. This statement of facts is far from "without argument or bias" as required by our court rules. See MCR 7.212(6). Moreover, the majority of the statements of fact made in this section are not supported by citations to relevant transcripts, pleadings, or other documents filed with the probate court, which is also required by our court rules. *Id.* The statement of facts also contains numerous questions; it is unclear whether these are intended to represent issues on appeal or merely rhetorical questions. If they do represent questions presented, they are presented in a manner that does not conform to our court rules. See MCR 7.212(7). Mary's statement of questions presented essentially states only two questions: did the probate court err by allowing the second accounting, and did the probate court err by awarding sanctions for the filing of frivolous objections. However, the first question clearly encompasses many different sub-issues raised by Mary in various parts of her brief. On the basis of this Court's review of the brief and lower court record, it appears that Mary raises the following issues on appeal: (1) whether the probate court erred by not allowing Mary or her counsel more time to review the materials associated with the petition to allow a second accounting, (2) whether Fraser violated his duties as trustee by failing to disburse \$40,000 in trust assets to Mary, (3) whether Fraser violated his duties as trustee by failing to purchase a one-bedroom condominium for Mary, (4) whether Fraser violated his duties

³ This Court's records indicate that at the time of the hearing, Mary had filed at least nine claims or applications for leave to appeal with this Court, including five that were dismissed for lack of jurisdiction, lack of merit in the questions presented, or failure to persuade this Court of the need for immediate appellate review. Many of these unsuccessful or dismissed appeals were further appealed to our Supreme Court, without success.

as trustee by having her evicted from the Alderly Way home, and (5) whether the probate court erred by imposing sanctions upon her for a frivolous filing. We will address these issues in turn.

III. DISCOVERY VIOLATION

Mary argues that the probate court erred by granting the petition for a second accounting, because the discovery process had not been completed and Mary or her counsel were unable to fully review the receipts submitted by Fraser that accompanied the accounting. We disagree. Because this issue was not raised before or decided by the probate court, it is unpreserved; we review unpreserved issues for plain error. See *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

Mary's claim that she lacked adequate time to review the receipts accompanying the second accounting lacks factual support. The record shows that the second accounting was filed on March 7, 2019, and that Mary was served with this filing. Mary filed her objections to the accounting on April 8, 2019. A scheduling order for the contested hearing was entered on April 18, 2019, which provided that discovery would close on July 3, 2019, and the contested hearing would be held July 10, 2019. Mary does not explain why over four months was an insufficient time for her attorney to investigate the receipts and other documents associated with the second accounting; nor did her attorney raise this issue during the hearing. Moreover, the hearing transcript shows that Mary's counsel was quite familiar with the documentation underlying the petition and extensively questioned Fraser on specific items in the accounting and the underlying documentation. There was no error, plain or otherwise, in the probate court's failure to sue sponte find a discovery violation. *Kloian*, 272 Mich App at 242.

IV. EVICTION

Mary also argues that her eviction from the Alderly Way home was improper, because the trust instrument permitted her to stay in the house until another home had been provided for her through the purchase by the trust of a one-bedroom condominium for her. We disagree. The issue of whether the trust instrument permitted Mary to stay in the Alderly Way home more than two years after the decedent's death was already litigated before the probate court, was appealed to this Court, and was the subject of an application for leave to appeal to our Supreme Court, which was denied. See *Basso* (Docket No. 342370), unpub op at 2-3. We will not entertain a collateral attack on that issue here. See *Workers' Compensation Agency Director v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 475; 853 NW2d 467 (2014). The same is true for any issues raised by Mary with regard to Fraser's alleged failure to maintain the home, as we stated in *In re Estate of Basso* (Docket No. 342370), unpub op at 3:

[T]he terms of the trust only required the trustee to use trust funds to pay for the trust residence's taxes, insurance, upkeep, and maintenance for the same two-year period that Mary was allowed to occupy the trust residence--until December of 2016. The money from the trust that was set aside for the trust residence's maintenance and upkeep had depleted by December of 2017, resulting in the trust residence sustaining severe damages, something that would not have occurred had Mary vacated the trust residence in December of 2016 and allowed Fraser access to the trust residence."

Finally, to the extent Mary's appeal is a challenge to the order of eviction from the district court, we note that this issue is not properly before us, and, according to statements made by Fraser and Mary's counsel at the contested hearing, appears to be the subject of a separate proceeding.

V. FAILURE TO DISTRIBUTE \$40,000/PURCHASE CONDOMINIUM

Mary also argues that Fraser violated his duties as trustee by failing to cause the trust to distribute \$40,000 to her and purchase a one-bedroom condominium for her, as the terms of the trust dictate. We disagree. This issue involves the interpretation of a trust instrument, which we review de novo in the same manner as a contract. *In re Estate of Stan*, 301 Mich App 435, 442; 839 NW2d 498 (2013).

Our goal in interpreting a trust instrument is to ascertain and give effect to the intent of the settlor, which is to be gauged from the trust document itself unless there is an ambiguity. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). "The powers and duties of the trustees, and the settlor's intent regarding the purpose of the trust's creation and its operation, are determined by examining the trust instrument." *Id.* We must attempt to construe the instrument so that each word has meaning. *Id.* We must read the trust as a whole, and all provisions of the trust must be given effect and harmonized if possible. *In re Raymond Estate*, 438 Mich 48, 52; 764 NW2d 1 (2009).

The trust instrument in this case contains a provision for the distribution of the proceeds of the sale of the Alderley Way home, a separate provision for the distribution of \$40,000 directly to Mary, and a third residuary clause governing the distribution of any remaining trust assets. The provision that sets forth the distribution of the proceeds of the sale of the home is detailed, complete, and unambiguous: the proceeds from the sale are to be used by the trustee in the trustee's "sole discretion" to purchase Mary a one-bedroom condominium in her name and pay all taxes and condominium fees for six months, and, if the funds allow, to pay Mary's school tuition and fees for one year, with any remaining proceeds to be divided equally between Mary and her two sisters. This provision also states that the trustee is to set aside from the "rest, residue, and remainder of the estate" funds to pay for the taxes, insurance, upkeep, maintenance, and repairs for the Alderly Way home for two years following the decedent's death. The provision providing for a distribution of \$40,000 to Mary is simple: Mary is to be distributed \$40,000 in cash from the trust. Read together, as we must, *Raymond*, 438 Mich at 52, these two provisions provide that Mary is to receive \$40,000 in cash from the remainder of the estate, separate from the proceeds of the sale of the Alderly Way home.

Regarding the \$40,000 distribution, it was clear from the first accounting filed by Fraser that, due primarily to Mary's ceaseless litigation, there simply were insufficient trust assets to pay her that distribution. Earlier accountings from the original trustee were approved by the probate court and had been affirmed on appeal, and we will not revisit them. *Workers' Compensation Agency Director*, 305 Mich App at 475. Further, as was made clear at the contested hearing regarding the second accounting, the majority of the funds that remained had to be used to effectuate the sale of the home, including to evict Mary and to pay unpaid utilities and other expenses occasioned by her staying in the home longer than two years. Fraser could not be expected to simply conjure funds out of nowhere to distribute to Mary. And to the extent that Mary argues that, now that the home has been sold, the trust has sufficient assets to pay her the

\$40,000, we disagree. As discussed, the distribution of the proceeds of the sale of the home was the subject of a separate, detailed provision; apart from those proceeds, the cupboard was bare and Mary's distribution could not be made.

Regarding Fraser's failure to cause the trust to purchase Mary a one-bedroom condominium, Fraser argues that the language of the trust instrument permitted him to spend "any" amount of the proceeds "in his sole discretion" toward this end, and that, in light of the depletion of a large portion of the trust assets, the possibility of further litigation, and his fiduciary duty towards *all* beneficiaries, not just Mary, he had therefore opted to exercise that discretion not to spend trust assets on a one-bedroom condominium. We agree.

A trustee owes a fiduciary duty to all beneficiaries. See MCL 700.1212 (1); see also *Hertz v Miklowski*, 326 Mich 697, 700; 40 NW2d 452 (195). This includes the duty to prudently manage the estate. *Id.* Further, although the word "shall" indicates a mandatory, rather than discretionary, provision, see *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013), the language of the trust provision at issue indicates that the trustee "shall" use "any" of the proceeds from the home's sale, in his "sole discretion," towards the purchase of a condominium for Mary. The word "any" generally "casts a wide net" and "encompasses a wide range of things . . . in whatever quantity or number, great or small" *People v Hesch*, 278 Mich App 188, 195; 749 NW2d 267 (2008). In other words, the language of the trust instrument creates a discretionary trust provision. See MCL 700.7103(d)(1) (defining a discretionary trust provision as one that "provides that the trustee has discretion, or words of similar import, to determine . . . [w]hether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust"). This provision empowers the trustee to spend whatever quantity of the proceeds from the sale of the Alderly Way home to purchase Mary a condominium that he determines, in his discretion, is appropriate, that exercise of that discretion being informed by his fiduciary duty to all beneficiaries. Under the circumstances of this case, in which one beneficiary has drained the trust of hundreds of thousands of dollars in assets, as well as prevented the sale of real property as dictated by the trust for over two years, requiring forcible eviction at yet more trust expense, we cannot say that Fraser abused his discretion or violated his fiduciary duty by choosing to spend none of the proceeds in this manner. *Hertz*, 326 Mich at 700.

VI. SANCTIONS

Finally, Mary argues that the probate court erred by imposing sanctions upon her for filing frivolous objections to the petition for a second accounting. We disagree. We review for clear error a probate court's determination that a filing is frivolous and worthy of sanctions. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous when, 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.* at 661-662

Whether a pleading is frivolous depends on the facts of the case. *Id.* at 662.

A pleading is frivolous if at least one 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).]

In this case, the probate court found that, in filing her objections to Fraser's petition for a second accounting, Mary was "simply trying to drain all of the assets out of the trust." The court further stated that "this hearing should not have been necessary" in light of the fact that Mary was responsible for decreasing the assets of the trust to the point that the distributions she sought could not have been made by Fraser. Therefore, the probate court found both that Mary's primary purpose in filing objections was vexatious and that her objections lacked arguable legal merit. *Kitchen*, 465 Mich at 661. We agree. As discussed, several of Mary's claims were unpreserved or had been the subject of previous unsuccessful litigation; moreover, Mary's arguments that Fraser should somehow have purchased her a condominium and distributed \$40,000 in cash to her, when her own actions had depleted the trust assets to the point that it was impossible to do so, lacked any arguable legal merit. We will not belabor the point further. The probate court's order does not leave us with a definite and firm conviction that a mistake was made when it ordered sanctions in the form of attorney fees related to her objections to the petition and the necessity of a contested hearing to resolve them.

Affirmed. As the prevailing party, Fraser may tax costs. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Mark T. Boonstra