STATE OF MICHIGAN

COURT OF APPEALS

In re BEVERLY HOWE FAMILY TRUST.

GEORGE RIZIK, Trustee for the BEVERLY HOWE FAMILY TRUST,

Appellee,

v

THOMAS HOWE,

Appellant,

and

KRAIG SIPPELL and STEVEN E. HOWE,

Other Parties.

UNPUBLISHED
December 2, 2021

No. 355094
Genesee Probate Court
LC No. 18-210539-TV

Before: RICK, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Appellant, Thomas Howe, appeals as of right the probate court's September 23, 2020 order approving the final account of George Rizik, as successor trustee of the Beverly Howe Family Trust (the "Family Trust"), discharging Rizik as a fiduciary, and closing the file.[1] We remand for further proceedings.

[1] As acknowledged by appellant during oral argument, appellant's issue regarding his motion to compel deposition testimony is now moot. Therefore, we do not address this issue. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

I. BACKGROUND

This case involves a dispute regarding disbursements made from an irrevocable trust that Beverly Howe established in 2014, in which her two sons, Thomas and Steven, were named as income beneficiaries.[2] In 2018, appellee Rizik was appointed successor trustee of the trust. In May 2020, Rizik, filed a petition for approval of his final account, requested that he be discharged as successor trustee, and requested attorney fees and costs in the amount of $6,848.92. Thomas filed an answer to the petition in which he challenged several disbursements, complained that Rizik had not provided supporting documentation for several entries, and objected to the hourly rate of $300 for attorney fees as unreasonable.

At a hearing on September 4, 2020, the probate court inquired of counsel for Thomas if an evidentiary hearing on his objections was required. Counsel did not directly answer, but asked the probate court if it had reviewed his supplemental objections and then stated, "I have nothing more to add." The probate court indicated that it would decide the matter on the basis of what Thomas had filed. Thereafter, the court entered an order allowing Rizik's final account, directing that any remaining assets be released to Sippell, discharging Rizik as fiduciary, and closing the file.

II. DISBURSEMENT OF TRUST ASSETS

Thomas first argues that the probate court erred by approving Rizik's final account as successor trustee where Rizik disbursed assets from the Family Trust to pay for the care and maintenance of Beverly, who was not a beneficiary under the trust instrument.[3]

"This Court reviews for clear error the probate court's factual findings and reviews de novo its legal conclusions." *Estate of Lewis v Rosebrook*, 329 Mich App 85, 93; 941 NW2d 74 (2019) (cleaned up). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* (cleaned up). The probate court's dispositional rulings are reviewed for an abuse of discretion. *In re Gerstler Guardianship/Conservatorship*, 324 Mich App 494, 507; 922 NW2d 168 (2018).

The thrust of appellant's argument on appeal is that Rizik did not have authority to disburse trust funds for Beverly's care and expenses. As our Supreme Court observed in *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983), "[t]he law is well established that one must look to the trust instrument to determine the powers and duties of the trustees and the settlor's intent regarding the purpose of the trust's creation and its operation." If the meaning of a trust is in dispute, the paramount objective "is to ascertain and give effect to the intent of the settlor," with the intent of the settlor to be "carried out as nearly as possible." *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

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[2] As counsel acknowledged during oral argument, while the trust was intended as a "Medicaid Trust", all parties, including Thomas and Steven, the named trust beneficiaries, agreed that the trust would impermissibly be used to supplement the funding of services covered by Medicaid.

[3] As noted above, despite the express language of the trust, the record indicates that appellant was aware that the trust was established to solely benefit Beverly.

The Michigan Trust Code provides that "[u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article." MCL 700.7801. Further, MCL 700.7802(1) provides that the trustee is to administer the trust "solely in the interests of the trust beneficiaries." Under MCL 700.7810, a trustee is required to "take reasonable steps to take control of and protect the trust property." MCL 700.7814(1) imposes a duty on a trustee to keep qualified trust beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." MCL 700.7816 addresses the general powers of a trustee, and provides, in pertinent part:

> (1) A trustee, without authorization by the court, may exercise all of the following:
>
> (a) Powers conferred by the terms of the trust.

The Beverly M. Howe Family Trust was adopted by Beverly on September 16, 2014. The trust instrument provides that it is irrevocable, and it names Thomas and Steven as "income beneficiaries of this trust." Section 2.2 provides that the "Trustee may pay to the beneficiaries herein, such part or all of the net income and principal of this trust as necessary in the Trustee's sole discretion to assist in education, maintenance, and support, including sums necessary to protect beneficiaries' property." Section 2.4 provides that the trust will terminate upon the death of Beverly and all assets are to be distributed under the terms of Article III, which in turn provides that all undistributed income and principal is to be distributed "pursuant to the terms of the Beverly M. Howe Trust dated August 28, 1996, as amended."

Thomas objected to Rizik's final account, arguing that some disbursements by Rizik for Beverly's care and benefit were not authorized under the terms of the Family Trust. On appeal, appellant argues that $119,821.32 was improperly distributed from the trust to a nonbeneficiary. However, appellant did not provide this Court with an itemized list of disbursements that he challenges on appeal. Additionally, based on the record, appellant did not indicate the specific disbursements or sum total of the disbursements that he deemed improper. Rather, appellant appeared to have raised a general objection to "Petitioner's use of any of this money for a non-beneficiary as it is not permitted by the Trust Code of Michigan . . . ."

We note that some of the disbursements for Beverly's care were approved in prior court orders, without objection, and Thomas did not appeal those orders. Thomas attempted to also appeal those orders as part of this appeal. However, this Court partially dismissed this appeal for lack of jurisdiction as it related to those prior orders, and also denied Thomas's motion for reconsideration of that decision, because the prior orders were each final orders appealable by right under MCR 5.801(A)(2), and Thomas did not timely appeal the orders. *In re Beverly Howe Family Trust*, unpublished order of the Court of Appeals, entered November 30, 2020 (Docket No. 355094), reh den *In re Beverly Howe Family Trust*, unpublished order of the Court of Appeals, entered January 14, 2021 (Docket No. 355094). We agree with Rizik that Thomas is not permitted to challenge any disbursements that were previously approved by the probate court, and for which Thomas did not file an appeal by right. Such action would amount to an impermissible collateral attack on these prior orders. See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995)

(concluding that "a collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal.").

In approving Rizik's final account, the probate court did not expressly address Thomas's general challenge to the disbursements. Despite the trial court asking whether an evidentiary hearing was warranted, Thomas did not request a hearing and relied on his filed objections. As indicated, Thomas failed to specifically identify the alleged improper disbursements below or on appeal. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158, 161 (2002) (cleaned up). Further, "[i]t is not enough for an appellant in his [or her] brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his [or her] claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his [or her] position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). This issue was not properly preserved below, and Thomas has abandoned this issue on appeal. Therefore, we decline to address this issue. See *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Additionally, to the extent that Thomas now argues that he seeks to surcharge Rizik for the alleged improper disbursements, that issue is also not properly before this Court because Thomas did not file a petition to surcharge below or raise the issue in his brief on appeal. See *id.*

III. FINAL ACCOUNTING – CHARGES INCURRED

Thomas also raised objections to fees that the successor trustee charged throughout the probate court proceedings and that were ultimately approved by the probate court as part of the final accounting. These include fees for (1) several services that the successor trustee sought recovery for that were performed by a fiduciary, rather than an attorney, but under circumstances in which the successor trustee did not seek fiduciary fees; (2) fees for services that the successor trustee rendered as part of a transaction involving the transfer of Beverly's home into the Family Trust, and fees that only benefited the successor trustee, not the trust estate; and (3) $242 for e-mails relating to services rendered that the successor trustee did not produce in response to a discovery request. Thomas also challenges as unreasonable the $300 hourly fee charged by Rizik for his services. Thomas further asserts that the amount of hours for which Rizik charged for his legal services is unclear from the "Activities Report" he submitted as part of the final accounting.

While the probate court approved Rizik's final account, it did not address Thomas's challenges to Rizik's fees and charges. Without any findings or an explanation of the probate court's decisions on these contested issues, this Court, as an error-correcting Court, is not in a position to review the probate court's ultimate determination or determine whether it erred by approving the contested fees and charges. See *Wolfenbarger v Wright*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350668); slip op at 13; see also *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973). Accordingly, on remand we direct the probate court to provide factual findings regarding Thomas's specific challenges to Rizik's fees and charges sufficient to facilitate appellate review. In addition, with regard to attorney fees, the probate court shall follow the framework set forth in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281-282; 884 NW2d 257 (2016), which sets forth the procedure a court must follow in determining a reasonable attorney fee.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron