

Court of Appeals, State of Michigan

ORDER

In re TIFFANY SMITH Trust

Docket No. 303128

LC No. 2009-000042-TR

William B. Murphy, C.J.
Presiding Judge

David H. Sawyer

Joel P. Hoekstra
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued October 25, 2012, is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 27 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

In re TIFFANY SMITH TRUST.

JUDY ANDERSON, Guardian for JOSHUA A.
SMITH, and JULIE MELCHIORI, Trustee for the
TIFFANY SMITH TRUST,

Appellees,

v

LORETTA A. PLUMLEY,

Appellant,

and

CHRIS PAQUIN,

Not Participating.

UNPUBLISHED
December 27, 2012

No. 303128
Gogebic Probate Court
LC No. 2009-000042-TR

ON RECONSIDERATION

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Appellant,¹ Loretta Plumley, appeals as of right the probate court's order imposing a surcharge of \$168,058.84 for misappropriation of funds from the Tiffany Smith Trust. We affirm.

When Tiffany Smith learned that she was dying, she established a trust for the benefit of her minor son. The trust named Smith's cousin, Loretta Plumley² (appellant), as managing

¹ Although Chris Paquin is named as an appellant, he subsequently settled his claim, and is no longer a party to the appeal. The term "appellant" in this opinion will refer exclusively to Loretta Plumley.

² Loretta Plumley is referred to by her maiden name, Loretta Wrosch, in the Tiffany Smith Trust. To avoid confusion, "Plumley" or "appellant" will be used throughout this opinion to mean either Loretta Plumley or Loretta Wrosch.

trustee and, additionally, named Smith's mother, Judy Anderson, as both guardian of Smith's minor son and co-trustee.

The trust was funded by Smith's life insurance policy and was created with a \$400,751.09 payment upon Tiffany's death. Of these funds, a \$50,000 gift was to be paid directly to appellant, and an additional \$50,000 gift was to be paid directly to Chris Paquin. The remaining balance was to be invested and used for the minor son's benefit.

Contrary to the express terms of the trust, appellant failed to fund an account for the son's daily expenses and, likewise, failed to report all trust activity to Anderson. Anderson, therefore, filed a petition in Gogebic Probate Court to compel appellant to make an accounting of the trust activity. Several court proceedings ensued.

Appellant and Anderson stipulated to have Julie Melchiori, an accountant and unrelated third party, named as replacement trustee of the Tiffany Smith Trust. The stipulated order compelled appellant to cooperate with Melchiori's requests for information regarding the accounting and management of the trust's funds. Despite the order, appellant continued to not follow Melchiori's requests.

The probate court held a series of hearings to consider sanctions against appellant and to review Melchiori's trust report. Appellant refused to testify at these hearings due to a possible criminal investigation into her misappropriation of funds.

At the conclusion of these hearings, the probate court found that appellant "misappropriated and embezzled" funds from the Tiffany Smith Trust. The court then surcharged appellant a total of \$168,058.84. This figure was based on the court's acceptance of Melchiori's report and consisted of \$115,558.84 in funds spent inappropriately, \$2,500 in appellant's incurred legal expenses paid from the trust, and the \$50,000 gift that was owed Paquin. Paquin testified in a previous hearing that, although he allowed appellant to use a portion of his gift, he did not waive his right to the gift.

Plaintiff first argues that the probate court's order violated her due process rights by failing to give notice of her criminal contempt and order to repay \$168,058.84. Plaintiff's argument fails because she was not found in contempt. Rather, the probate court imposed a surcharge for her mishandling of the trust.

Appellant next argues that the probate court erred by denying her compensation for time spent on trust services and expenses related to the minor son. Appellant believes this error should result in a reduction of her surcharge. We disagree that appellant was denied rightful compensation. Instead, the probate court acted within its statutory authority when it denied appellant her requested compensation.

We review a probate court's decision to impose a surcharge on a trustee for an abuse of discretion. *In re Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007). And we review a probate court's findings of fact for clear error. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009). A finding of fact is considered clearly erroneous when this Court is left with a firm and definite conviction that a mistake was made. *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). The Michigan Trust Code applies to all trusts. MCL 700.8206(1)(a). According to the Michigan Trust Code, any violation of a duty owed to the

beneficiary by the trustee is considered a “breach of trust.” MCL 700.7901(1). A court has the power to remedy a breach of trust through various methods. MCL 700.7901(2)(a)-(j). Among these methods, is a court’s right to “[r]educe or deny compensation to the trustee.” MCL 700.7901(2)(h). Likewise, “[a] court may reduce or deny a trustee’s claim for compensation, expenses, or disbursements with respect to a breach of trust.” MCL 700.7904(3).

We conclude that the probate court did not clearly err when it found that appellant was in breach of the trust. Appellant violated several terms of the trust that were established for the benefit of Smith’s minor son. Appellant failed to fund an account to provide for Smith’s son’s daily expenses and refused to give an accounting of the fund to her co-trustee. Additionally, appellant failed to provide appropriate documentation for her claimed services as trustee and expenses for the minor child. The probate court, therefore, acted within its statutory authority under MCL 700.7901 and MCL 700.7904 when it denied appellant her requested compensation. We, therefore, affirm the probate court’s decision on this issue.

Finally, appellant argues that the probate court erroneously found that Paquin had not waived his \$50,000 gift from the trust. Appellant believes this error should result in a reduced surcharge. We disagree.

We review a probate court’s findings of fact for clear error. *In re Estate of Raymond*, 483 Mich at 53. A lower court’s decision is considered clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *In re Green Charitable Trust*, 172 Mich App at 311. Here, the probate court made no mistake in finding that Paquin had not intentionally waived his gift of \$50,000 from the trust. Paquin testified in a previous hearing that he had not intended to waive his gift. Appellant further argues that, because Paquin settled his claim with the trust for less than the full \$50,000 he was entitled to, the amount of the portion of the surcharge related to the Paquin gift should be reduced by the difference between \$50,000 and the amount for which he settled with the trust.³ We disagree. The amount of the settlement between the trust and Paquin is irrelevant to the fact that appellant was not entitled to receive the \$50,000 from the trust that should have gone to Paquin. Because appellant was not entitled to receive the \$50,000, she must return it. In short, any windfall arising from the fact that Paquin agreed to settle his claim against the trust for less than the full \$50,000 should accrue to the benefit of the trust, not to the benefit of appellant.

Affirmed. Appellees may tax costs.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

³ The information regarding the settlement was not part of the record on appeal. Our consideration of it is based upon the parties’ representations and appellant’s argument in her reply to the motion for reconsideration.