STATE OF MICHIGAN

COURT OF APPEALS

In re MINA L. OLSON TRUST & DEAN R. OLSON FAMILY TRUST

DEAN R. OLSON, JR., JAMES P. OLSON, and GREGORY A. OLSON, Co-Trustees for the MINA L. OLSON TRUST & DEAN R. OLSON FAMILY TRUST

Respondents-Appellants,

v

CONSTANCE J. CHAPPELL,

Petitioner-Appellee.

UNPUBLISHED
July 2, 2013

No. 307835
Eaton Probate Court
LC No. 10-47396-TV

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Respondents, Dean R. Olson, Jr., James P. Olson, and Gregory A. Olson, co-trustees for the Mina L. Olson Trust and the Dean R. Olson Family Trust, appeal as of right an order of the probate court approving payment of legal fees incurred by petitioner, Constance J. Chappell, when she served as trustee of the above trusts. The probate court approved as being reasonable and necessary $80,057.65 of the legal fees billed by the law firm that petitioner had retained. But because the probate court found petitioner negligent in her duties as trustee, the court held her personally liable for $27,000[1] of the fees as being necessitated by her inactions. As such, the court ordered the trusts to pay the law firm the remaining balance of $53,057.65. We affirm.

Petitioner is the daughter of decedents Dean and Mina Olson and was a trustee of the Dean R. Olson Family Trust and the Mina L. Olson Trust until she was replaced in July 2009 by respondents/successor trustees, her three brothers. Dean Olson died in 2001, and Mina Olson died in 2009. Petitioner filed a motion for payment of $99,166 in attorney fees billed by the law

[1] Petitioner had already paid $15,000 to Foster Swift; thus, the probate court ordered her to pay the balance of $12,000.

firm Foster, Swift, Collins, and Smith (Foster Swift) from the Mina L. Olson Trust.[2] The attorney fees in question accumulated from April 2009 until July 2009.

Respondents first argue that the probate court did not properly analyze whether the $53,057.65 in attorney fees ordered to be paid by the trusts were necessary, reasonable, and of benefit to the trust beneficiaries. We disagree.

We review for clear error a probate court's factual findings. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). We review for an abuse of discretion a probate court's decision whether to award attorney fees and the determination of the reasonableness of the fees. *Id*. An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Id*.

MCL 700.7817(w) provides that a trustee is empowered to do the following:

> To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

The record shows that petitioner was able to account for each hour charged by Foster Swift. Petitioner provided the testimony of the two attorneys who worked for petitioner; their testimony detailed the work they provided on the case. Petitioner also supplied an analysis of the hours Foster Swift billed, which identified six categories: general trust administration, income tax return preparation, minimum required distribution analysis, obtaining and analyzing financial information from 2001 through 2009, probate administration, and trustee transition. The probate court found that the work in the categories of general trust administration, minimum standard distribution work, and probate administration were legal services; and the work in the categories of analyzing financial information, income tax preparation, and trustee transition were provided to assist petitioner in trust administration.

Respondents do not argue that general trust administration, minimum required distribution work, and probate administration were not necessary legal services. However, respondents assert that preparing tax returns, asset inventories, and annual reports for the estate was not necessary legal work. Whether this is true is of no consequence because MCL 700.7817(w) clearly states that the trustee may retain an attorney "to advise or assist the trustee in the performance of the trustee's administrative duties." The work challenged here went to advising and assisting the trustee with such duties.

[2] Petitioner had originally sought contribution from the estate for $65,721.91 in legal fees but amended her request to $99,166.65, the full amount of billings from Foster Swift.

Respondents also argue that Foster Swift's work for the trust was not necessary because it performed the work for the trustee/petitioner as a result of her individual mismanagement of trust responsibilities. Further, respondents state that the trial court errantly failed to analyze whether petitioner performed her trust responsibilities in a reasonable and competent manner. MCL 700.7803 provides as follows:

> The trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

Prudence requires "acting with care, diligence, integrity, fidelity, and sound business judgment." *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998) (quotation marks and citation omitted).

Here, the probate court did reduce the amount of the legal fees owed in light of petitioner's actions, finding that petitioner's negligence in keeping records accounted for $27,000 in extra fees for which she was personally responsible. Of the billed total fee of approximately $99,000, $31,246 was for obtaining and analyzing records for the period of 2001 to 2009, including working with financial institutions and the trustee to locate information. The more senior attorney assigned to the case said that the lack of documentation from 2001 through 2008 caused Foster Swift to have to search for data, and the junior attorney stated that the fee could have been avoided with the maintenance of Mina Olson's financial records between 2001 and 2009. Further, that petitioner's negligence was an accounted factor in the amount of work performed for the trust did not negate that the work performed was necessary in administrating the trust. Whatever petitioner's negligence, it contributed to the amount of work necessary rather than the nature of the necessary work.

Similarly, respondents argue that the attorney fees incurred by petitioner did not benefit the estate because the work was performed for petitioner as an individual. MCL 700.7815(1)(c) provides that a trustee abuses her discretion when she "[f]ails to exercise the trustee's judgment in accordance with the terms and purposes of the trust." However, any "interested person" (such as respondents) could have petitioned the probate court to "review the propriety of the employment of a person by a trustee including an attorney . . . ." MCL 700.7207; see also *In re Temple Marital Trust*, 278 Mich App at 134. Moreover, respondents participated in beneficiary meetings and received memorandums summarizing Foster Swift's work. One of the memorandums contained a statement that legal expenses were billed on an hourly basis and that the services involved were "extraordinary" considering the lack of tax returns and trust accountings. The memorandum invited the beneficiaries to request billing statements, and billing statements were sent to the beneficiaries. Foster Swift also sent monthly invoices to respondents and mentioned with the June 2009 invoice that those involved should find a less costly way of resolving issues.

Additionally, some of the work Foster Swift billed for was at the request of respondents. At the request of James Olson, Foster Swift researched income that the estate's farm generated from rental and timber sales. Also at respondents' request, Foster Swift attempted to ascertain

the expenses, including medical care, of Mina Olson for the last eight years of her life. Foster Swift also researched the respondents' concerns about whether a decrease in Mina Olson's assets in 2001, 2002, and 2009 was accounted for by her expenses.

Accordingly, the probate court did not clearly err by finding that Foster Swift's services benefitted the trust estate.

Respondents also argue that the fees charged by Foster Swift to prepare tax returns exceeded the fees customarily charged for similar work in Clinton, Eaton, and Ingham Counties. Of Foster Swift's approximate $99,000 fee, $10,769.84 was charged for federal and state income tax preparation for 2001 through 2008 and a draft return for 2009. Respondents argue that the fees of an accountant range from $150 to $500 per tax return. Respondents submitted evidence that the mean fee for an accountant to prepare a tax return was $357. The billing attorney stated that the original agreement was for Foster Swift to coordinate the filing of individual and trust income tax returns with an accountant who had previously worked for the family. Foster Swift approached the accountant, but he did not believe he had enough information regarding assets, income, and expenses to complete the returns.

In *Smith v Khouri*, 481 Mich 519, 537; 751 NW2d 472 (2008), the Michigan Supreme Court, in the context of assessing case evaluation sanctions[3], published a formula for computing reasonable attorney fees:

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood [v Detroit Auto Inter–Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982)] and MRPC 1.5(a).

Michigan Rule of Professional Conduct 1.5(a) sets forth eight factors, which overlap the *Wood* factors. The factors set forth in MRPC 1.5(a) are:

> (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;

[3] The Supreme Court has since applied *Smith* when addressing reasonable attorney fees in other types of cases. See, e.g., *Coblentz v City of Novi*, 485 Mich 961; 774 NW2d 526 (2009) (remanding a Freedom of Information Act case for a redetermination of the reasonableness of attorney fees pursuant to the factors set forth in *Smith*).

(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.

Here, the probate court evaluated the reasonableness of Foster Swift's attorney fees in light of *Smith*, properly analyzed the relevant factors, and determined that the hourly fee charged by the senior attorney was reasonable and that the hourly fee charged by the junior attorney should be reduced from $205 to $175. The probate court also found that petitioner contracted with Foster Swift for a fee for legal assistants at an hourly rate of $150, thus reducing a paralegal's hourly fee from $190. The probate court found that the time expended by the senior attorney and the legal assistants was reasonable and that the time expended by the junior attorney was inflated due to inexperience, so the court reduced the junior attorney's time by one-third.

The probate court found that the circumstances of the case revealed that it was not unreasonable to expend the time billed to prepare the tax returns. This was consistent with the evidence. The junior attorney stated that preparing the tax returns was complex because they involved timber sales, bank liquidation, farm and non-commercial real estate rental and losses, and medical and nursing home expenses. Additionally, the financial records were in disarray and required significant work in order to collect and organize. An accountant, likewise, would have had to expend significant time gathering and organizing information in order to complete the delinquent tax returns. The probate court considered the specific factors and made unchallenged adjustments favorable to respondents.

Accordingly, the probate court did not err by finding that Foster Swift's fees were reasonable.

Respondents next argue that the probate court erred by denying their motion for a jury trial.[4] This Court reviews de novo questions of law. *In re Temple Marital Trust*, 278 Mich App at 128.

[4] Respondents argue that the instant matter involves an action against trust assets that require a jury trial according to MCR 5.101(C) and *In re Gordon Estate*, 222 Mich App 148; 564 NW2d 497 (1997). However, MCR 5.101(C) defines a civil action as two situations that are not the subject of the current dispute: "(1) Any action against another filed by a fiduciary or trustee. (2)

MCL 600.857(1) provides as follows:

> If a party to a proceeding in the probate court would have had a right before January 1, 1971 to demand a jury to determine a particular issue of fact in the circuit court upon a de novo appeal from that proceeding to the circuit court, that party shall on and after January 1, 1971 have the right to demand a jury to determine that issue of fact in the probate court proceeding.

Our Supreme Court stated in *In re Messer Trust*, 457 Mich at 380, that "the issue of prudence has never been a question of fact for the jury, even in cases involving testamentary trusts." "[I]t has been established in this state, at least as far back as 1881," the Court explained, "that the issue of a trustee's or other fiduciary's prudence is not a question for a jury but, instead, a question for the probate court to decide." *Id.* at 382; see also *In re Temple Marital Trust*, 278 Mich App at 138 (noting that the trial court is empowered to review the reasonableness of attorney fees as a "quick and efficient remedy" where excessive fees may have been paid). Therefore, the court did not err by denying the request.

Respondents next argue that petitioner was awarded attorney fees that were beyond the agreement between Foster Swift and petitioner. Specifically, they argue that the "purported billing of time to the Dean R. Olson Family Trust" was improper because the family trust was not included in the retention agreement. However, respondents have not specified any amount of the attorney fee award that was attributable to the family trust. "It is not enough for an appellant in his 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 claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Before an attorney is entitled to payment for services, a contract must establish an attorney-client relationship. *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995), citing *Wylie v City Comm of Grand Rapids*, 297 Mich 365, 373; 297 NW 526 (1941). In determining the existence of an attorney-client relationship, the inquiry considers the client's subjective belief that she is consulting the attorney in a professional capacity and "the client's intent to seek the attorney's professional legal advice." *People v Crockran*, 292 Mich App 253, 258-259; 808 NW2d 499 (2011), citing *Grace v Ctr for Auto Safety*, 72 F3d 1236, 1242 (CA 6, 1996). The "contract may be implied from conduct of the parties," and attorney employment is established where "the advice and assistance of the attorney are sought and received in matters pertinent to [the] profession." *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997), citing 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188.

Petitioner acting as co-trustee, with Mina Olson, of the Dean R. Olsen Family Trust, retained Foster Swift. After Dean Olson's death in 2001, Mina Olson, petitioner, and respondents met with an attorney at Foster Swift. In 2003, petitioner was appointed trustee of

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Any action filed by a claimant after notice that the claim has been disallowed." Likewise, *In re Gordon Estate*, 222 Mich App at 151-152, involves a creditor's claim against an estate.

the Mina L. Olson Trust and was co-trustee of the Dean R. Olson Family Trust. Petitioner held power of attorney for Mina Olson since 1997, was sole trustee of the Mina L. Olson Trust, personal representative of Mina Olson's estate, personal representative of Dean Olson's estate, and successor co-trustee of the Dean R. Olson Family Trust. After Mina Olson's death in 2009, petitioner contacted Foster Swift as the trustee in order to resolve the tax issues and facilitate trust administration. In April 2009, the senior attorney working on the matter met with petitioner and reviewed Mina Olson's will and trust. Petitioner testified that she retained Foster Swift at this meeting for assistance with her parents' entire estate rather than just one trust. In a May 27, 2009, letter, Foster Swift agreed to represent petitioner as an agent for her mother "prior to March 31, 2009," and as trustee for the Mina L. Olson Trust. The agreement also specified that one of Foster Swift's tasks would be assisting petitioner "in determining the federal and estate taxes and (a) filing the Mina L. Olson trust income tax returns, and (b) Mina Olson's individual tax returns for approximately the past ten years."[5]

As the court concluded, the agreement explicitly indicates that Foster Swift was representing petitioner with respect to her capacity as agent for her parents' trusts. The evidence established that petitioner was the trustee of the Dean R. Olson Family Trust and the Mina L. Olson Trust until she resigned in July 2009 and was replaced by her three brothers. The agreement refers to "representing [petitioner] as agent for your mother prior to March 21, 2009, and you as Trustee."

Accordingly, the probate court did not clearly err by finding that the fees involving the Dean R. Olson Family Trust were included in the attorney fees.

Respondents also argue that attorney fees were errantly awarded from periods of time before the retention agreement and after petitioner resigned as trustee. However, the record demonstrated that petitioner established the client-attorney relationship on behalf of the Mina L. Olson Trust in April 2009, before the May 2009 agreement, because she conferred with Foster Swift seeking "advice and assistance of the attorney . . . in matters pertinent to [the] profession." *Macomb Co Taxpayers Ass'n*, 455 Mich at 11. A formal contract is not necessary to create an attorney-client relationship. *Id.* Further, the trial court found that after petitioner resigned, respondents as successor trustees continued to use the services of Foster Swift with full knowledge that legal fees were being incurred; their continued use of Foster Swift and their failure to end the relationship despite their right to do so manifested a continuing attorney-client relationship.

Therefore, the probate court did not clearly err by finding that the fees before the written agreement and after petitioner's tendered resignation were included in the attorney fee award.

[5] Petitioner offered to resign as trustee more than once. It was decided that petitioner would resign at a July 10, 2009, meeting. Of Foster Swift's fee, $7,051 was spent managing the transition after petitioner resigned as trustee on July 15, 2009, and before respondents accepted the trust on August 19, 2009. Both the trust document and the resignation document stated that the resignation was not effective until receipt of the acceptance of the trust.

Next, respondents argue that venue was improper in Eaton County. We review for clear error a trial court's ruling on a motion to change venue. *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). The establishment of venue is properly within the power of the Legislature. *Keuhn v Mich State Police*, 225 Mich App 152, 153; 570 NW2d 151 (1997). Venue rules ensure proceedings are held in the most convenient forum. *Gross v Gen Motors Corp*, 448 Mich 147, 155; 528 NW2d 707 (1995). MCL 700.7204(1)(b) establishes venue for a proceeding involving an unregistered trust as, in relevant part, "in any place where the trust properly could be registered."[6] MCL 700.7209(1) details where a trust is registered, as such:

> The trustee of a trust that has its principal place of administration in this state may register the trust in the court at the place designated in the terms of the trust or, if none is designated, then at the principal place of administration. For purposes of this article, the principal place of the trust's administration is the trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee does not have such a place of business. For a corporate trustee, the usual place of business is the business location of the primary trust officer for the trust.

Here, there was no evidence of a principal place of business of respondents or principal place of administration for the trusts at the time petition was filed. In situations where there are co-trustees, as is here, venue is in "the usual place of business or residence of any of the cotrustees as agreed upon by them." MCL 700.7209(c). One co-trustee lived in Eaton County, and the other two lived in other states. Thus, according to statue, venue was proper in Eaton County.

Respondents next argue that the probate court erred by not allowing the testimony of Sanford Mandell, CPA. Respondents stated that they called Mandell to rebut testimony from the attorney who prepared the estate's tax returns that the tax returns were complex.[7] A trial court's decision on an evidentiary issue will be reversed on appeal only when there has been a clear abuse of discretion. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 333; 657 NW2d 759 (2002). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

Respondents had a duty to provide and serve witness lists within the time allotted by the trial court. MCR 2.401(I)(1). MCR 2.401(I)(2) provides that "[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162-163; 792 NW2d 749 (2010). Here, respondents did not include Mandell on any witness list. Nor did they

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[6] Both the Mina L. Olson Trust and the Dean R. Olson Family Trust contained clauses stating that the trusts were exempt from registration.

[7] Even without the testimony, the court concluded that that the tax returns were not unusually complex or novel.

disclose the anticipated testimony of an expert witness when asked in an interrogatory. Respondents had a duty to supplement discovery responses to include information acquired later, including "the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony." MCR 2.302(E)(1)(a)(*ii*). We reject respondents' contention that Mandell was offered only as a fact witness. Asking Mandell, in his capacity as an experienced accountant having reviewed the returns prepared by Foster Swift, whether the returns would be difficult to prepare and how much additional work would be required to prepare the delinquent returns is asking for his expert opinion. See MRE 702.

Therefore, the court's decision to prohibit Mandell's testimony was within the range of principled outcomes and, thus, not an abuse of discretion.

Finally, respondents argue that Foster Swift had a conflict of interest in the instant case because it brought a claim on behalf of petitioner but obtained an order against her. We conclude that respondents have abandoned this issue by providing it cursory treatment and by failing to sufficiently explain the basis for their claim. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Respondents fail to explain how they were prejudiced by an alleged conflict of interest between Foster Swift and petitioner; in order to appeal a decision, a party must be "interested in the subject matter of the controversy, one must also be injuriously affected or aggrieved . . . ." *Ford Motor Co v Jackson*, 399 Mich 213, 226 n 9; 249 NW2d 29 (1976). Regardless, an attorney is prohibited from representing one client "if the representation will be directly adverse to another client, or if that representation may be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's own interests." *Macomb Co Prosecutor v Murphy*, 233 Mich App 372, 385-386; 592 NW2d 745 (1999), rev'd on other grounds 464 Mich 149 (2001); see also MRPC 1.7. Here, Foster Swift represented petitioner in attempting to receive attorney fees from the trust she formerly administered as trustee. Foster Swift's interests were compatible with petitioner's interests as they both advocated for the trust to pay the attorney fees. Although the trial court ordered that petitioner was personally responsible for a portion of the fees, this was not a position advocated by Foster Swift.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell