

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nage Lee Damas, etc., et al.

Court of Appeals No. L-10-1125

Appellees/Cross-Appellants

Trial Court No. 2004 ADV 3012

v.

Thomas M. Damas, etc., et al.

DECISION AND JUDGMENT

Appellants/Cross-Appellees

Decided: December 9, 2011

* * * * *

Jean Ann S. Sieler and Mark A. Ozimek, for appellees/cross-appellants.

Glenn Rambo and Richard Kolb, for appellants/cross-appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal arises out of disputes concerning the revocable intervivos trust of Michael J. Damas ("Mike Damas"), executed on June 21, 2001, and amended on February 22, 2003 ("The Trust"). Mike Damas died on April 13, 2003. Nage Lee Damas, appellee/cross-appellant, succeeded Mike Damas as trustee upon his death. Nage

Damas is a party to the appeal and cross-appeal both individually and as successor trustee to The Trust.

{¶ 2} Nage Damas, Thomas M. Damas ("Tom Damas"), and Frederick J. Damas ("Rick Damas") are brothers and nephews of Mike Damas. Appellants-counterclaimants include Tom Damas, Tom's children (Ashley, Brandon, Kyle, Grant, Derek, and Andrea Damas), as well as Rick Damas. Cross-appellants include Nage Damas (individually and as successor trustee of The Trust), Nage's children (Nage, Alya, Micaela, and Tiernan Damas), Larry J. Damas, II (individually and as father and natural guardian of minors Nathan, Mary, and Lyla Damas), Amy Baum Newman (individually and as mother and natural guardian of minor Olivia Baum, a/k/a Olivia Newman), Michael J. Damas, II (individually and as father and natural guardian of Ziya and Myka Damas), and Camel Investments LLC.

History of Litigation

{¶ 3} Nage Damas, individually and as successor trustee, filed a declaratory judgment action in the Lucas County Court of Common Pleas, Probate Division, on December 14, 2004. The action sought for the court to declare first, that Michael J. Damas validly and competently executed both the revocable intervivos trust agreement of June 21, 2001, and its amendment of February 22, 2003, and second, that Nage Damas, as trustee, properly distributed securities listed in Schedule A of The Trust to Camel Investments, LLC. The action also requested trial court approval of a proposed distribution of the residual assets of The Trust to education beneficiaries.

{¶ 4} Appellants filed an answer and counterclaim. In the counterclaim, appellants sought for the court to declare the February 22, 2003 amendment to The Trust invalid and to set aside the transfer of Schedule A securities to Camel Investments. Appellants also sought for the court to order the trustee to account for and return all funds generated by the transferred securities and enjoin the trustee from further transferring or encumbering those assets. Appellants sought for the court to remove Nage Damas as trustee and to award appellants attorney fees.

{¶ 5} In an August 1, 2007 judgment, the trial court granted a motion for summary judgment of the trustee and declared that both The Trust and the 2003 amendment to The Trust are valid. The court found no evidence of undue influence, incapacity, or incompetency of Mike Damas either with respect to the 2001 trust agreement or its 2003 amendment. No appeal has been taken from that judgment.

{¶ 6} The remaining claims proceeded to a non-jury trial in January 2008. The trial court issued judgment on January 6, 2009. The court held that the trustee's distribution of securities listed in Schedule A of The Trust to Camel Investments, LLC was proper and that the trustee did not breach duties of loyalty and impartiality by making the distribution. The court also directed the trustee to distribute the remaining assets of The Trust (after payment of costs of administration and attorney fees) to education beneficiaries in equal shares, after crediting each education beneficiary for payments already made on his or her behalf.

{¶ 7} In a January 13, 2010 judgment, the trial court awarded the trustee attorney fees and ordered that the fees be paid from trust assets. In a judgment issued on March 31, 2010, and amended April 12, 2010, the trial court awarded attorney fees in the amount of \$214,700 and expenses in the amount of \$39,645.49.

{¶ 8} Appellants have appealed the January 6, 2009, January 13, 2010, March 31, 2010, and April 12, 2010 judgments to this court. Appellees/cross-appellants have filed a cross-appeal of the January 13, 2010 judgment as modified by the April 12, 2010 judgment.

{¶ 9} Appellants assert three assignments of error on appeal:

{¶ 10} "I. The Trial Court committed error in finding that Trustee Nage's distribution of the Securities was not a breach of the common law duties of loyalty and impartiality.

{¶ 11} "II. The trial court committed error in finding that R.C. 1340.22 did not bar Trustee Nage from distributing the Securities to Camel.

{¶ 12} "III. The trial court committed error in approving plaintiff's motion for approval of attorney fees and expenses."

{¶ 13} On cross-appeal, appellees/cross-appellants assert one assignment of error:

{¶ 14} "I. The trial court committed error in failing to enter an award of attorneys' fees against appellants to make the trust beneficiaries whole for fees and expenses incurred in defending appellees' claims, all of which were decided in trustee's favor."

{¶ 15} Mike Damas was a mayor of Toledo, president and member of the Board of Education of Toledo Public Schools and a businessman. In the 1950s, Mike and one of his sisters, Mary Damas, formed Damas Parking, Inc., Erie Parking Company, and Ohio Turnpike Motels, Inc. The companies are real estate holding companies. Shares to the three companies are listed in Schedule A to The Trust and their distribution under The Trust is a central issue in this appeal.

{¶ 16} In 1996, Mike Damas encouraged Nage Damas, Tom Damas, and Rick Damas to start a real estate investment company to do business in Missouri, similar in nature to the business of the Schedule A companies. Mike Damas provided seed money of \$90,000 for the enterprise and the three brothers formed CB3 Enterprises, LLC in 1996. Nage Damas actively managed the business. The respective interests of the brothers in the company were 40 percent by Nage and 30 percent each by Tom and Rick.

{¶ 17} At the end of 2002, after a falling out among the brothers, Nage decided to end his involvement in CB3. In January 2003, the brothers entered into an agreement under which Rick purchased Nage's interest and acquired Tom's interest in CB3. The trustee distributed the Schedule A securities to Camel Investments on May 15, 2003. At the time of distribution, CB3 was owned by Rick Damas and his wife and Camel Investments was owned by Nage Damas and Ronald Arthur. CB3 and Camel Investments both engaged in the business of owning and operating commercial real estate.

{¶ 18} Article VII of The Trust, is entitled "Beneficiaries." As amended by a February 22, 2003 amendment, paragraph 2(b) of the article provides:

{¶ 19} "*The Trustee may, in his discretion, transfer the securities reflected in Schedule A to Camel Investments, LLCs*, a limited liability company organized under the laws of the State of Missouri, with a principle place of business located at 10000 McGee, Kansas City, Missouri." (Emphasis added.) (Previously, The Trust provided for discretionary transfer of the securities to CB3 under identical wording.)

{¶ 20} Article VII, paragraph 2(d) of The Trust provided for the Michael J. Damas Education Trust. As amended in 2003, The Trust provides: "The express purpose of the Michael J. Damas Education Trust is to provide for assistance in obtaining education for the following nieces and nephews as beneficiaries * * *." The listed beneficiaries include the four children of Nage Damas, six children of Tom Damas, Olivia Baum, and any future natural or adopted children of Rick Damas, Tom Damas, Nage Damas, Larry J. Damas II or Michael J. Damas II.

Claimed Breach of Fiduciary Duties of Loyalty and Impartiality

{¶ 21} The parties agree that Mike Damas, the settlor, intended for the trustee, Nage Damas, to decide whether to distribute the Schedule A securities to Camel Investments, LLC or to permit the assets to become residue of The Trust and thereby become additional assets of the education trust. The parties also agree that this was an either/or decision.

{¶ 22} Under Assignment of Error No. I, appellants argue that the trial court erred in failing to hold that the transfer of the Schedule A securities to Camel Investments breached the trustee's duties of loyalty and impartiality because of a conflict of interest arising from the trustee's ownership interest in the company.

{¶ 23} Appellees argue that the distribution was specifically authorized by the terms of the trust and that no breach of loyalty or impartiality exists where a trustee acts within express terms of a trust authorizing the trustee make a distribution to his own benefit.

{¶ 24} The trial court agreed, relying on R.C. 5802.02 and the official comment to the Uniform Trust Code:

{¶ 25} "Pursuant to R.C. 5808.02, a trustee does not breach his duty of loyalty if 'the transaction was authorized by the terms of the trust or by other provisions of the Revised Code.' R.C. 5802.02 is based upon substantially the same language from Uniform Trust Code Section 802, which provides that a trustee does not breach his duty of loyalty if the 'transaction was authorized by the terms of the trust.' The official comment to R.C. 5802.02, which incorporates the official comment of the Uniform Trust Code, provides: 'The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.'"

{¶ 26} We agree with appellants' contention that R.C. 5808.02 is limited to transactions involving "a sale, encumbrance, or other transaction involving the

investment or management of trust property" and not to distribution of trust assets to beneficiaries. R.C. 5808.02(B). Nevertheless, we are not persuaded that the principle set forth in R.C. 5808.02 and the official comment to the Uniform Commercial Code does not apply equally as a matter of common law to distribution of trust assets to beneficiaries of a trust.

{¶ 27} R.C. 5808.03 concerns loyalty and impartiality. It provides: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." The official comment to the statute incorporates a comment from the Uniform Trust Code that "[t]he duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust."

{¶ 28} Given the determination that the trustee acted within the express authority granted by the settlor in distributing the securities to Camel Investments, LLC, we conclude that the trustee did not breach his duty of impartiality to education beneficiaries in making the distribution. It is clear that the settlor understood that funding of the education trust would be insufficient to cover the full cost of education of such a large class of education beneficiaries. Under the terms of The Trust, the discretionary authority of the trustee to distribute the securities to Camel Investments was not limited or subjected to compliance with any standard, including any requirement to consider the level of funding available to the education trust. The stated purpose of the education trust

was "to provide for assistance in obtaining education" for beneficiaries, not to pay the full costs of education. In our view the distribution was in accord with the respective interests of trust beneficiaries in view of the purposes and terms of the trust.

{¶ 29} Furthermore, R.C. 5810.06 provides that "[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."

{¶ 30} We conclude that Assignment of Error No. I is not well-taken.

R.C. 1340.22

{¶ 31} Former R.C. 1340.22(A)(1) prohibited exercise by a fiduciary of discretionary authority to make a distribution of trust principal or income "for the benefit of the fiduciary in the fiduciary's individual capacity." R.C. 1340.22(B)(1) provided for an exception to the prohibition where the power is limited by an ascertainable standard. Ascertainable standards are described in R.C. 1340.22(B)(2). The parties agree that the power to make the Camel distribution was not limited by any ascertainable standard. R.C. 1340.22(A) provides that a settlor can waive application of the statute in a manner set forth in the statute. The parties agree that The Trust does not contain the statutory waiver.

{¶ 32} The parties agree that R.C. 1340.22 applies to this case.¹ They dispute how to construe the term "fiduciary's individual capacity" as used in R.C. 1340.22(A)(1).

¹R.C. 1340.22 was in effect at the time of the distribution to Camel Investments. It was subsequently repealed and replaced by R.C. 5808.14, effective January 1, 2007,

Under Assignment of Error No. II, appellants argue that the trial court erred in failing to hold that Nage Damas, as trustee, was barred under R.C. 1340.22(A)(1) from distributing the Schedule A securities to Camel Investments. In making the argument, appellants contend that the distribution of the Schedule A securities to the limited liability company is to be treated as a distribution to Nage Damas in his individual capacity.

{¶ 33} At the time of distribution, R.C. 1340.22 provided in part:

{¶ 34} "1340.22 DISCRETIONARY DISTRIBUTIONS BY FIDUCIARIES

{¶ 35} "(A) Unless the governing instrument conferring the powers specifically refers to this section and states that this section does not apply and except as provided in divisions (B), (C), and (D) of this section, any of the following powers conferred upon a fiduciary by the governing instrument cannot be exercised by the fiduciary:

{¶ 36} "(1) The power to make any discretionary distribution of either principal or income to or for the benefit of the fiduciary *in the fiduciary's individual capacity*;

{¶ 37} "** * *

{¶ 38} "(B)(1) If division (A)(1), (3), or (4) of this section prohibits a fiduciary from exercising any power conferred by the governing instrument, the fiduciary, notwithstanding division (A)(1), (3), or (4) of this section, may exercise the power to the

with the adoption of the Ohio Trust Code. The parties agree, however, that R.C. 5808.14 does not apply to the distribution to Camel Investments, because under R.C. 5811.03(A)(5) the statutory change does "not affect an act done before the effective date."

extent set forth in the governing instrument, provided that the exercise of that power, in all events, shall be limited to an ascertainable standard.

{¶ 39} "*" * * ." (Emphasis added.)

{¶ 40} The trial court held that a limited liability company is a separate legal entity under both Missouri and Ohio law and that distribution of the securities to Camel Investments did not constitute a distribution to Nage Damas in his individual capacity as required under R.C. 1340.22(A)(1). Accordingly, the court held that the prohibitions of R.C. 1340.22(A)(1) do not apply to the distribution.

{¶ 41} Appellants argue that the statutory prohibition under R.C. 1340.22(A)(1) is not avoided through transfer of the assets to a limited liability company in which the trustee holds a membership interest. Appellants argue that the statute cannot be circumvented by use of a straw man.

{¶ 42} Appellees describe appellants' argument as requiring the court to hold that the statute applies whenever a discretionary distribution directly or indirectly benefits a fiduciary and that such a construction would require the court to disregard the phrase "in the fiduciary's individual capacity" and also require the court to insert the words "direct or indirect" into the statute. The parties agree that the issue is a matter of first impression.

{¶ 43} The Supreme Court of Ohio recently summarized the analysis required to construe a statute in *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 20-21:

{¶ 44} "As we explained in *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, 'in cases of statutory construction, "our paramount concern is the legislative intent in enacting the statute.'" Id. at ¶ 29, quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. To determine intent, we look to the language of the statute and the purpose that is to be accomplished by the statute, see *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217, and 'when its meaning is clear and unambiguous,' we apply the statute 'as written.' *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, 900 N.E.2d 601, ¶ 9.

{¶ 45} "Our role, as this court recognized in *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 373, 116 N.E. 516, is to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.' Indeed, as we determined in *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, statutes "'may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.'" Id. at ¶ 13, quoting *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus."

{¶ 46} R.C. 1340.22 was enacted under H.B. No. 427 of the 119th General Assembly on July 8, 1992. Uncodified Section 6 of the enactment provides:

{¶ 47} "Section 6. In enacting sections 1340.21, 1340.22, and 1340.23 of the Revised Code in Section 1 of this act, the General Assembly hereby declares its intent to codify certain fiduciary and trust law principles relating to a fiduciary's conflict of interests and, in general, to provide for the exercise of certain discretionary powers to distribute either principal or income to a beneficiary by a beneficially interested fiduciary for his own benefit to the extent of an ascertainable standard."

{¶ 48} The purpose of the statute was also a matter of expert witness testimony at trial. Expert witnesses for both appellants and appellees testified that R.C. 1340.22 was also enacted to remedy unintended federal estate tax problems arising from trusts that grant the trustee absolute or broad discretion to distribute trust assets but do not limit the authority by any ascertainable standard. As explained by witness Marvin Keller, "if the trustee has that broad discretion and dies, the IRS takes the position that because of that broad discretion, the trustee possesses what is tantamount to general power of appointment over those assets, causing that to be included in the deceased trustee's estate, and that could create some unintended federal estate tax problems, and also some problems for the attorneys who drafted those documents because there could be claims of malpractice * * *."

{¶ 49} We conclude that R.C. 1340.22(A)(1) is clear and unambiguous. The plain and ordinary meaning of the phrase "for the benefit of the fiduciary in the fiduciary's

individual capacity" does not extend to apply to distributions to a limited liability company in which the trustee holds a membership interest.

{¶ 50} The securities were transferred to a limited liability company, not to Nage Damas individually. A limited liability company is a separate legal entity under both Ohio and Missouri law. *Disciplinary Counsel v. Kafele*, 108 Ohio St.3d 283, 2006-Ohio-904, ¶ 18; R.C. 1705.01(D)(2)(e); *Renaissance Leasing, LLC v. Vermeer Manufacturing Co.* (Mo.2010), 322 S.W.3d 112, 125; R.S. Mo. 347.015(15). Under Ohio law, unless otherwise specified in its articles of incorporation, a limited liability company "may take property of any description or any interest in property of any description by gift, device, or bequest." R.C. 1705.03(B). Under Missouri law "[p]roperty transferred to or acquired by a limited liability company becomes property of the limited liability company. A member has no interest in specific limited liability company property." R.S. Mo. 347.061(1).

{¶ 51} In construing a statute, we are not to enlarge a statute's wording and are to avoid constructions that make provisions in a statute meaningless or inoperative. *In re Estate of Centrobi*, 129 Ohio St.3d 78, 2011-Ohio-2267, ¶ 13; *Boley v. Goodyear Tire & Rubber Co.*, supra. We agree with appellees that the construction argued by appellants would require the addition of the words "direct or indirect" to describe the type of benefit to which the statutory prohibition applies and require the court to ignore the statutory wording limiting operation of the statute to distributions made in the "fiduciary's individual capacity." We therefore find appellants' argument as to construction of the

statute to be without merit. We conclude that distribution to Camel Investments LLC was not made to or for the benefit of Nage Damas in his individual capacity and that the prohibition under R.C. 1340.22(A)(1) does not apply to the distribution. In our view such a construction is consistent with the purposes of R.C. 1340.22.

{¶ 52} We find appellants' Assignment of Error No. II not well-taken.

{¶ 53} Appellants and appellees both claim trial court error with respect to the award of attorney fees and expenses. No claim has been made either in the appeal or cross-appeal that the award of fees or expenses is unreasonable in amount for the work performed. Under Assignment of Error No. III, appellants dispute whether any award of attorney fees or expenses should have been made from trust assets. By cross-appeal appellees argue that the trial court erred in awarding payment of fees and costs from trust assets rather than requiring payment by appellants personally.

{¶ 54} The award of attorney fees in declaratory judgment actions is governed by R.C. 2721.16. The statute authorizes payment of attorney fees where "[a] section of the Revised Code explicitly authorizes a court of record to award attorney's fees on a claim for declaratory relief under this chapter." R.C. 2721.16(A)(1)(a).

{¶ 55} R.C. 5810.04 provides authority to award attorney's fees in judicial proceedings involving the administration of a trust:

{¶ 56} "Attorney fees and costs

{¶ 57} "In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require,

may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy."

{¶ 58} Appellees also argue that the trial court erred in failing to award attorney fees against appellants as a sanction for frivolous conduct pursuant to R.C. 2323.51(A)(2)(a)(iii).

{¶ 59} We review an award of attorney fees under R.C. 5810.04 under an abuse of discretion standard. *Wills v. Kolis*, 8th Dist. No. 93900, 2010-Ohio-4351, ¶ 52.

{¶ 60} The trial court overruled the motion to award attorney fees against appellants personally, finding that appellants' conduct was not frivolous and that there were genuine issues of law and fact presented in the case. The court held that under R.C. 5810.04 justice and equity required the court to deny an award of attorney fees against appellants.

{¶ 61} We have reviewed the record and find that there is competent credible evidence in the record supporting the trial court's conclusion that the appellants' claims were not frivolous and that the case presented genuine issues of law and fact. The litigation with respect to the trust presented circumstances where the elderly settlor amended his intervivos trust shortly before death. The amendment changed the beneficiary of corporate securities constituting a major portion of trust assets. A challenge to the validity of the amendment under the circumstances was reasonable pending further investigation and discovery. This case presented genuine issues of law

concerning fiduciary duties of the trustee and whether the distribution of the corporate securities under the amendment to the trust was prohibited under R.C. 1340.22.

{¶ 62} We agree with the trial court's conclusion that "unfortunately, when probate litigation is protracted it is fairly common for attorney fees to become very significant compared to the amount of money in dispute. This is an issue that the parties must consider in determining whether to continue down the path of litigation." In our view the trial court acted within its discretion in determining that in equity and justice the award of attorney fees and expenses in favor of the trustee was to be paid from assets of the trust and not by appellants personally.

{¶ 63} We find appellees' assignment of error on cross-appeal not well-taken.

{¶ 64} We also find appellants' Assignment of Error No. III to be without merit. The trustee was successful in defending the validity of the 2001 trust agreement and 2003 amendment to the trust against claims of incompetency or incapacity of the settlor and claims of undue influence. The trustee was also successful in defending claims of breach of fiduciary duties by establishing that distribution of trust assets was undertaken pursuant to the intent of settlor as demonstrated by the express terms of the trust.

{¶ 65} We find no abuse of discretion in the trial court's judgment under such circumstances that ordered payment of the trustee's attorney fees and expenses in proceedings with respect to the trust to be paid from the assets of the trust itself. The trial court acted within the discretion afforded it under R.C. 5810.04.

{¶ 66} We find appellants' Assignment of Error No. III not well-taken.

{¶ 67} We find that justice has been afforded the parties complaining and affirm the judgments of the Lucas County Court of Common Pleas, Probate Division. Pursuant to App.R. 24 appellants are ordered to pay costs with respect to their appeal. Pursuant to App.R. 24, appellees are ordered to pay costs with respect to the cross-appeal.

JUDGMENTS AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
