STATE OF MICHIGAN

COURT OF APPEALS

LAURA ROSE NOBLE, Personal Representative of the ESTATE OF JAMES ROSE,

Petitioner-Appellee,

v

LOUIS G. BASSO, JR.,

Respondent-Appellant.

UNPUBLISHED
March 13, 1998

No. 194684
Oakland Probate Court
LC No. 82-154567-SE

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

This suit involves allegations of breach of fiduciary duties by respondent, who served as the independent personal representative of the estate of the decedent, James Rose. We reverse.

Respondent argues on appeal that the probate court erred in finding that he breached his fiduciary duties by investing estate funds in stocks, bonds and other securities. We agree. Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous. *In re Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court. *Id*.

A will should be interpreted according to its actual intent. The testator's intent is to be gleaned from the four corners of the testamentary instrument, absent an ambiguity. *In re McPeak*, 210 Mich App 410, 412; 534 NW2d 140 (1995); *In re Allen*, 150 Mich App 413, 416; 388 NW2d 705 (1986). In construing a will or interpreting the meaning of particular words, parts, or provisions of a will, and in determining the intention of the testator in relation thereto, the courts must consider the will as a whole, including its general scope, logical implications, and necessary inferences. *In re Charlton Estate*, 9 Mich App 625, 634; 157 NW2d 821 (1968). If a will evidences either a patent or a latent ambiguity, the court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rules of construction. *In re Allen, supra*, 150 Mich App 416.

In this case, under article III of the will, respondent's exercise, as executor of the estate, of the "powers and discretions" set out in the will were not be to "subject to question by or on behalf of any beneficiary…regardless of its effect upon the interest of such beneficiary."

Article VI of the will provides that respondent, as trustee, was to:

> take possession of the trust property, and to collect and receive the moneys, interest, profits and income arising therefrom, with full power in the trustee to manage, invest and reinvest the same and all such trust estate in deposits and accounts bearing interest at financially sound banking institutions….

The will also provides, in article VII, that respondent was "not limited by any specific powers given in this instrument" and was given the "broadest, fullest and most complete power and authority", to be exercised in his "sole and absolute" discretion. Read as a whole, the language in the various provisions provides a broad grant of discretion to respondent but is arguably ambiguous. The will provisions could mean that investment was limited to banks or that the trustee had the power to invest all funds, whether in a bank or elsewhere.

Given the ambiguity, the surrounding circumstances should be considered. Respondent testified that there was no indication that decedent wanted him to be limited with respect to the investments of estate funds. He did not feel that either article VI or the decedent restricted him to putting money in a bank account because it did not make any financial sense to do that. Further, respondent was the drafter of the will and indicated that had the decedent indicated to him that he wanted this restriction, he would have used more restrictive language. Both the widow and decedent's daughter, petitioner Laura Rose Noble testified that respondent was a "very good" family friend and that he and decedent were "very close." The widow admitted that she did not understand money matters and that respondent knew her husband well enough to know his feelings about investing in the stock market. Although the widow believed her husband was very conservative, there was some evidence that he was willing to take chances in business and money matters. The widow conceded that her late husband could have in fact intended that investment be made in "secure" stocks.

These circumstances, considered with the broad grant of power given in various provisions of the will lead to the conclusion that the testator did not intend to limit respondent in the manner that the probate court determined. Accordingly, the lower court clearly erred in finding that the will only allowed respondent to invest in a bank. Nor is there any evidence that respondent breached his fiduciary duties in failing, in light of the conditions set forth in the will, to fund the trusts. Respondent asserts, and no contrary evidence was presented below, that the trusts could not be funded. The will specifically gives respondent the discretion to make all decisions about the creation and management of the marital and residuary trusts. Respondent cannot be faulted for not distributing income from trusts that could not be funded. In any case, as petitioner acknowledges in its brief on appeal, no damages were specifically assessed for the alleged failure to fund the trusts.

The question then becomes whether the court's assessment of damages is proper in light of our finding that respondent acted within his authority in making investments. We conclude that it is not. An independent personal representative is a fiduciary who must observe the standard of care of a prudent person acting for the purposes of a trust from the time of appointment until final distribution of the assets of the estate. MCL 700.341; MSA 27.5341. An independent personal representative shall not be surcharged for any good faith act of administration if the act in question was authorized at the time. MCL 700.343; MSA 27.5343. See also MCL 700.346; MSA 27.5346, MCL 700.347; MSA 27.5347.

Here, the evidence establishes that the investments were prudently and carefully made. Respondent made proper consultations and thoroughly investigated the investments before investing. Although the market conditions took a turn for the worse in 1987, which hurt the investments, there is no evidence of negligence or lack of good faith. Respondent agrees that he would have made different investments if he had been investing with the benefit of hindsight. A fiduciary is not required to be the guarantor of his investment strategy.

Respondent's remaining claims are moot in light of our finding that respondent did not breach his fiduciary duties. We do note, however, that the provisions of the will exonerate respondent from liability for tax decisions involving the estate, including liability for interest and penalties. It is also clear from the testimony of the widow that, without respondent's knowledge, she gave away title to assets belonging to the estate in exchange for cash from a stock sale involving her brother- and sister-in-law. The evidence does not support the trial court's finding that it was "preposterous" for respondent to issue the widow credits rather than additional income for that amount. Although the trial court and the beneficiaries might disagree with respondent's judgment, decisions concerning the estate and accounting for the distribution of income were within his discretion. There was no evidence that respondent mismanaged estate funds or based decisions on his own, rather than the estate's, best interest. Even petitioner's counsel conceded at the hearing below that respondent made the decisions concerning the estate in good faith.

Reversed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs