

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ALBERT F. WALL, Deceased.

MARILYN W. OBOLENSKY,

Petitioner-Appellant,

v

WILLIAM E. CARROLL, JOHN M. CHASE, JR.,
ALBERT F. W. BREER, II,

Respondents-Appellees,

and

CARL BREER, II,

Respondent.

UNPUBLISHED

February 19, 1999

Nos. 204563;205619

Wayne Probate Court

LC No. 00477461

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Appellant, Marilyn Wall Obolensky, appeals as of right from different probate court orders relating to a testamentary trust established by her father, Albert F. Wall. The appeals concern the management of the trust by trustee, John Chase, and a former co-trustee, William Carroll, who retired on December 31, 1996. The Breer respondents are appellant's sons and the remainder beneficiaries under the trust.

In Docket No. 204563, Obolensky appeals the June 18, 1997, order granting the co-trustees' motion for summary disposition under MCR 2.116(C)(7), thereby dismissing Obolensky's petition to remove the co-trustees, her request for an audited accounting, her request to surcharge the co-trustees, and her request to have herself and Merryll Lynch appointed as successor co-trustees. In Docket No. 205619, Obolensky appeals the July 30, 1997, order allowing the trustee's tenth account (covering

1996), authorizing compensation for the trustee and the guardian ad litem, authorizing retention of trust assets, and renewing the trustee's appointment. We affirm.

In Docket No. 204563, Obolensky first argues that the probate court erred in granting the co-trustees' motion for summary disposition of her various petitions under MCR 2.116(C)(7). We disagree.

The petitions in question allege mismanagement and wrongdoing during previous accounting periods. Under the probate code, however, “[s]ubject to the right of appeal, and *except in case of fraudulent concealment or fraudulent misrepresentation* on the part of the fiduciary, the order of the court allowing an account of a fiduciary shall be final and conclusive against all persons in any way interested therein who are legally competent at the date of the order . . .” MCL 700.564(4); MSA 27.5564(4), repealed effective April 1, 2000 by 1998 PA 386 (emphasis added). Obolensky alleges that the co-trustees fraudulently failed to disclose the fair market value of assets, failed to disclose distributions of principal, and failed to demonstrate the relationship between distributions and the trust's purpose. However, because these are essentially claims that “additional information and more detailed facts might have been given to the probate court on the hearing of the respective accounts,” Obolensky's claims “could have been and should have been presented to the court, if at all, incident to the hearing of the appropriate current annual account . . .” *Thaw v Detroit Trust Co*, 307 Mich 6, 25; 11 NW2d 305 (1943). Thus, even taking the allegations as true, no fraud is shown by those facts and, therefore, summary disposition was proper because Obolensky's petitions are unenforceable as a matter of law. *Thaw, supra* at 25; *Guerra v Garrat*, 222 Mich App 285, 288-289; 564 NW2d 121 (1997).

Next Obolensky argues that the probate court erred in staying discovery pending resolution of the co-trustees' motion for summary disposition. We disagree.

It is undisputed that a trustee has a duty to keep the beneficiaries “reasonably informed of the trust and its administration.” MCL 700.814(1) and (3); MSA 27.5814(1) and (3), repealed effective April 1, 2000 by 1998 PA 386. It is also true that summary disposition is generally premature if discovery is incomplete. *Mackey v Dept of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, “if there is no fair chance that further discovery will result in factual support for the party opposing the motion,” summary disposition may be granted prior to the close of discovery. *Mackey, supra* at 333-334. Additionally, discovery can be denied or limited to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense . . .” MCR 2.302(C); see also *In re Hammond Estate*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996). Because the co-trustees' motion to dismiss under MCR 2.116(C)(7) challenged the legal sufficiency of Obolensky's petitions, the probate court did not abuse its discretion in staying discovery pending resolution of the motion.

Obolensky also argues that the probate court erred in refusing to remove appellee Chase as a co-trustee. We again disagree.

The probate code provides, in pertinent part, that “[i]f a fiduciary . . . neglects to render his account and settle the estate according to law or to perform any order of the court or absconds or otherwise becomes unsuitable or incapable to discharge the trust, the court may remove the fiduciary” MCL 700.574; MSA 27.5574, repealed effective April 1, 2000 by 1998 PA 386. Where, as here, there is no finding of mismanagement or indication of interference with the administration of the trust, personal animosity between the trustee and the beneficiary is, by itself, insufficient to constitute grounds for removal. See *In re Sumpter Estate*, 166 Mich App 48, 53-55; 419 NW2d 765 (1988). Thus, the probate court did not abuse its discretion in denying Obolensky’s petition for removal. *In re Green Charitable Trust*, 172 Mich App 298, 331; 431 NW2d 492 (1988).

In Docket No. 205619, Obolensky argues that the probate court erred in approving the co-trustees’ tenth account because it allegedly failed to distinguish between distributions of income and distributions of principal, thus giving the false impression that the trust was making money on its investments; because it failed to report trust assets at fair market value; and because it failed to state how the distributions were achieving the trust’s goals. We find no error.

The probate code provides that “[a] fiduciary shall file at least once a year, or oftener if the court directs, a complete itemized accounting of all his doings in the estate, showing in detail all of the receipts and disbursements and the property remaining in his hands, and in what form.” MCL 700.563(1); MSA 27.5563(1), repealed effective April 1, 2000 by 1998 PA 386; see also MCL 700.564; MSA 27.5564, repealed effective April 1, 2000 by 1998 PA 386. A trustee is required to exercise the same care as “‘a prudent man dealing with the property of another,’” that is, he must act with “‘care, diligence, integrity, fidelity and sound business judgment;” a fiduciary must also act with “‘honesty, loyalty, restraint from self-interest and good faith.” *In re Green Charitable Trust*, *supra* at 312-313 (quoting MCL 700.813; MSA 27.5813, repealed effective April 1, 2000 by 1998 PA 386). A probate court’s findings of fact are reviewed for clear error and must be affirmed unless this Court is left with the definite and firm conviction that a mistake has been made. *Id.* at 311. The probate court’s decision to allow particular items in the account to be charged against the estate is reviewed for an abuse of discretion. *In re Baldwin’s Estate*, 311 Mich 288, 311; 18 NW2d 827 (1945).

Here, contrary to Obolensky’s argument, the account distinguishes distributions of income from those of principal, indicates the income and interest earned by trust assets and, in the petition, states how these distributions achieved the trust’s goal of providing for appellant. The co-trustees had no obligation to list assets at fair market value where the cost/inventory values used were clearly disclosed in both the account and the petition.

Next, Obolensky argues that the probate court erred in approving the account without first granting her request for information. We disagree. Obolensky’s attorney indicated on the record that the request for information was not an objection to the account itself. Further, the account contains numerous supporting attachments which meet the co-trustees’ duty to keep Obolensky “‘reasonably informed of the trust and its administration.” MCL 700.814(1); MSA 27.5814(1), repealed effective April 1, 2000 by 1998 PA 386. Thus, there was no violation of this statute.

Obolensky also argues that the probate court erred in approving the co-trustees' request for attorney fees where there was no written agreement with the trust as required by MCR 8.303. We again disagree. The rule explicitly states that it applies only to a trustee appointed after its effective date of March 1, 1985. MCR 8.303(I). Because the co-trustees were appointed in 1968, the rule is not applicable.

Obolensky further argues that the probate court erred in refusing to allow her to litigate the quality of the investments chosen by the co-trustees. We disagree. This issue was litigated a few months earlier in connection with Obolensky's petition to compel certain investments. Thus, the court did not err in finding that this issue was barred by res judicata.

Lastly, Obolensky argues that the probate court erred in appointing a guardian ad litem where, at her age, she was not likely to have any more children. This argument is disingenuous, given that appellant was informed at the hearing that the guardian ad litem was appointed to protect the rights of the remainderpersons' minor children. Further, the trust document provides that, upon Obolensky's death, the corpus is to be distributed to her children and, if they are deceased, to her grandchildren. Thus, Obolensky's son's minor children had a protectable interest. There was no error.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski