

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of HELEN D. EWBANK Trust.

PHILIP P. EWBANK, SCOTT S. EWBANK,
AND BRIAN B. EWBANK,

UNPUBLISHED
March 8, 2007

Petitioners-Appellants,

v

KARIN H. SWANSON, CO-TRUSTEE, AND
ROBERT C. TUCK, FORMER CO-TRUSTEE,

No. 264606
Calhoun Probate Court
LC No. 01-001032-TT

Respondents-Appellees.

In re Estate of PAUL C. EWBANK Trust.

PHILIP P. EWBANK, SCOTT S. EWBANK,
AND BRIAN B. EWBANK,

Petitioners-Appellants,

v

KARIN H. SWANSON, CO-TRUSTEE, AND
ROBERT C. TUCK, FORMER CO-TRUSTEE,

No. 264608
Calhoun Probate Court
LC No. 01-001033-TT

Respondents-Appellees.

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Petitioners appeal the order of probate Judge Donald Halstead dismissing their Restated Petitions to Surcharge trustees Karin Swanson and Robert Tuck and dismissing all claims for acts before June 1, 1992. We affirm in part, and remand in part for additional findings.

On October 11, 1977, Paul and Helen Ewbank, husband and wife, executed mirror-image trusts, which are now the subject of this suit. Both trust agreements were completely revocable and reserved all incidents of ownership of trust assets to the settlor. Each trust agreement named the surviving spouse as the beneficiary for life, and each provided for identical distribution of the assets after the death of the surviving spouse—to their daughter and daughter-in-law for life, and the remainder to their six grandchildren, who were named in the trust agreements. Petitioners are grandsons and remainder beneficiaries of both Paul and Helen. Respondent Swanson is their granddaughter, and she is also a remainder beneficiary. Respondent Tuck was a co-trustee with Swanson and a successor to Theodore Van Dellen, the Ewbanks' attorney and family friend, who was initially a trustee for both trusts.

Paul Ewbank died on November 10, 1980, and Helen Ewbank died on October 24, 1999. After Helen's death, Van Dellen resigned as trustee, and Swanson took responsibility for distributing the assets. Eventually, Tuck was appointed as a co-trustee. Unhappy with the pace of distribution of the trusts' assets, petitioners filed a petition to replace Swanson and Tuck as trustees, and eventually filed a petition to surcharge both for breach of their fiduciary duties. Petitioners also requested that the co-trustees provide them with accountings for both trusts since their inception in 1977. Respondents protested, arguing that petitioners were not entitled to accountings between 1977 and 1999 because petitioners were not currently vested beneficiaries, but merely contingent, remainder beneficiaries, until Helen died in 1999. The probate court noted that, before this Court decided *In re Childress Trust*, 194 Mich App 319; 486 NW2d 141 (1992), trustees were not required to provide remainder beneficiaries with accountings, and thus, respondents would not be required to provide accountings for the trusts' investments before June 1992. The court then dismissed the petition to surcharge for claims based on acts that occurred before June 1, 1992.

Petitioners argue on appeal that the trial court wrongly dismissed the surcharge action for claims before 1992 because, applying *Childress*, it found that the trustees owed no duty to provide information regarding the trusts' administration before 1992, and thus, they could not be surcharged for a breach of fiduciary duty for any breach before 1992. We conclude that the trial court's holding was incorrect.

A trustee's duties to beneficiaries are determined by the trust agreement and the intent of the settlor. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983). Relevant statutes and case law also define what duties the trustee owes. *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). Whether a trustee has breached his duties is determined by the facts of each case. *Id.* A trustee owes a duty of care to both the income beneficiaries and the remainder beneficiaries of a trust. *In re Butterfield Estate*, *supra* at 256. The duty of care is defined in part by the prudent investor rule, codified in the revised probate code at MCL 700.813, and now codified in the Estates and Protected Individuals Code (EPIC): "Except as otherwise provided by the terms of the trust, 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 . . . the trustee is under a duty to use those skills." MCL 700.7302. Long before the prudent person rule was codified, the Michigan Supreme Court held that "a trustee must show the utmost good faith. He must exercise in the execution of the trust the degree of care and diligence which a man of ordinary prudence would exercise in the management of his own affairs." *Michigan Home Missionary Soc v Corning*, 164

Mich 395, 402; 129 NW 686 (1911). The Court defined prudence as “acting with care, diligence, ‘integrity, fidelity and sound business judgment.’” *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998), quoting *In re Buhl’s Estate*, 211 Mich 124, 132; 178 NW2d 651 (1920).

In addition, a trustee must act with honesty, good faith, and loyalty, and must refrain from acting in his or her own self-interest. *In re Green Charitable Trust*, *supra* at 313. If a trustee acts in good faith, with reasonable diligence, he is not liable for mere mistakes in judgment. *In re Estate of Norris*, 151 Mich App 502, 512; 391 NW2d 391 (1986); *In re Tolfree’s Estate*, 347 Mich 272, 285-286; 79 NW2d 629 (1956). Further, a trustee must act impartially between successive beneficiaries, respecting the differing interests each has. Restatement Trusts, 3d (Prudent Investor Rule) (1992), §232, at 181; *In re Butterfield Estate*, *supra* at 257.

In this case, the trial court dismissed the surcharge claims for any acts prior to June 1, 1992. It apparently decided that because the trustees had no duty to account to the remainder beneficiaries before 1992, they had no fiduciary duties at all to those remainder beneficiaries. The parties and the trial court in this case focused on whether *Childress* was applicable and whether it required the trustees to provide notice to the petitioners. Such focus, however, was misplaced. A trustee’s fiduciary duties are not swept away simply because there is no obligation to provide account reports to beneficiaries. Although a trust agreement may relieve a trustee’s duty to account to beneficiaries, it cannot relieve the duty to account to the probate court. *Raak v Raak*, 170 Mich App 786, 793; 428 NW2d 778 (1988). Even in situations where beneficiaries have no right to receive trust reports, “the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust.” *Id.* at 792, citing *Wood v Honeyman*, 169 P2d 131, 166 (Or 1946). In *Raak*, this Court held that the trustee could be required to account for the trust’s assets to determine what happened to \$70,000 of the corpus because, without an accounting, there was no way to prove the faithful performance of the trustee’s duties. *Id.* at 790. Therefore, in this case, even if the trustees had no duty to account to the petitioners as remainder beneficiaries, they still had fiduciary duties to the petitioners, which may have been breached. *In re Butterfield Estate*, *supra* at 256. As such, they may be required to account for the trust funds. *Childress* does not address whether a trustee can be surcharged for negligence, and the trial court’s reliance on the case to resolve the issue was improper.

A beneficiary may petition the probate court to “surcharge” the trustee for a breach of fiduciary duties. *In re Tolfree’s Estate*, *supra* at 288; *In re Green Charitable Trust*, *supra* at 309; MCL 700.7306(4). Further, any beneficiary of the trust may file for a surcharge, including remainder beneficiaries. See *In re Messer Trust*, *supra* at 373. Thus, a surcharge action by the petitioners in this case was the proper remedy to address the trustees’ alleged breach of fiduciary duties.

The trial court erred by dismissing the surcharge petition solely on the basis that the trustees had no duty to provide accounts to the remainder beneficiaries. We note, however, that the trial court could have properly considered whether petitioners’ claims were barred by laches. Respondents raised that defense below, and the trial court acknowledged that it could consider the defense in its ruling. Nevertheless, it did not make findings of fact or conclusions on that issue.

Laches is an equitable affirmative defense that is primarily applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). The unreasonable delay must cause a change in a material condition, which results in prejudice. *Id.* at 612. The defendant bears the burden of proving that a lack of due diligence by the plaintiff caused him prejudice. *Id.* While laches is not generally applied when the parties have a fiduciary relationship, *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990), it will be applied in certain circumstances where there is a fiduciary relationship. See *Seguin v Madison*, 328 Mich 600, 607-608; 44 NW2d 150 (1950) (allowing laches as a defense where beneficiaries delayed suit 35 years).

In this case, petitioners claim a breach of fiduciary duty for poor investments since 1977, and they particularly point to the failure to sell Eagle-Picher Industries stock in the late 1980s when the company was embroiled in asbestos litigation and declared bankruptcy. Petitioners waited well over ten years to assert their claims. During that time, memories faded, old accountings and files were lost, and two trustees died—Helen Ewbank and Van Dellen. Respondents have clearly been prejudiced by the delay because evidence necessary for their defense is unavailable. Petitioners argue that they did not receive accountings and had no knowledge of the trusts until their grandmother died, and so the delay in asserting their claims is not unreasonable. A factual issue thus exists, which should be resolved by the trial court on remand.

Further, we note that both parties claim that MCL 700.7307 supports their arguments for and against a conclusion that this action is barred by the applicable statute of limitations. The statutory provision relied upon is part of the Estates and Protected Individuals Code, which has a section that makes it applicable to actions, like those at issue here “commenced after [April 1, 2000] . . . except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act’s procedure.” MCL 700.8101(2)(b). On remand, the trial court should consider and apply these statutory provisions, as appropriate, especially with regard to respondents’ argument that petitioners’ claim for breach of fiduciary duties prior to 1992 should be barred because, under the doctrine of “virtual representation,” their interests were represented by Helen, the primary beneficiary of both trusts until her death in 1999. Also, see MCL 700.7303(3)(a).

On appeal, respondent Tuck separately argues that the trial court’s dismissal of the petition for surcharge for claims arising before 1992 should be affirmed, at least as to Tuck, because it is undisputed that he did not become a trustee until April 18, 2000. An appellee may argue alternative grounds for affirmance as long as he is not seeking to enlarge the relief granted by the trial court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Tuck is not seeking to enlarge the relief previously granted to him, but he is merely arguing alternative grounds to affirm the lower court’s dismissal. Thus, we may address his argument.

Tuck was named a trustee of both trusts in April 2000. Any cause of action against Tuck for failing to pursue a claim against Van Dellen accrued after Tuck became a trustee, which was well after June 1, 1992. We therefore affirm the court’s dismissal of surcharge claims against respondent Tuck for trustee actions before June 1, 1992.

In reaching our conclusion, we note that petitioners, in their reply brief, indicate that they wish to appeal the dismissal of post-1992 claims as well. However, petitioners failed to include those claims in the statement of questions presented, and they are not properly presented for this Court's review. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Further, a reply brief may only contain rebuttal argument; raising an issue in a reply brief is insufficient to properly present it for appeal. MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004). Therefore, we will not address the dismissal of any post-1992 claims.

We affirm the trial court's order dismissing petitioners' claims against respondent Tuck. We otherwise reverse the trial court's order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette