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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001536-MR

JAMES BEARDMORE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-01457

JPMORGAN CHASE BANK, N.A. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: James Beardmore has appealed from an order and a separate judgment entered by the Fayette Circuit Court converting two trusts into a directed trust system and transferring the place of administration of these trusts to Delaware. Beardmore contends that the circuit court did not have subject matter jurisdiction to decide the matter based upon the application of the recently enacted

Uniform Trust Code (UTC), Kentucky Revised Statutes (KRS) 386B.1-010 *et seq*. Finding no error, we affirm.

JPMorgan Chase Bank, N.A. (JPMorgan) is the successor trustee under a deed of trust between donor John G. Stoll and Security Trust Company, originally dated August 3, 1932, and as amended on March 8, 1934, and December 11, 1953 (the Insurance Trust), and under the last will and testament of John G. Stoll dated December 8, 1953, as amended by several codicils, the last one dated April 9, 1958 (the Testamentary Trust). We shall collectively refer to these as the Stoll Trusts. Mr. Stoll passed away on August 26, 1959. The Stoll Trusts had identical distribution terms following the death of his wife on January 11, 1986. At that time, the net income from the principal of the trusts was to be divided equally among Mr. Stoll's children and issue by representation, and the issue of a deceased child was to take equally between them the deceased child's share of the income. The income was to be distributed in this manner until 21 years after the death of Mr. Stoll's children and issue who were living at the time of Mr. Stoll's death. At the end of the 21-year period, the trustee was to divide the principal of the Stoll Trusts among the individuals entitled to income in the same proportion as the income they had been receiving as distributions and pay each individual that amount. When this action was filed in 2014, there were 28 income beneficiaries under the Stoll Trusts and 133 contingent beneficiaries, 54 of which were under the age of 18. Based upon the life expectancies of the youngest issue when Mr. Stoll

passed away, it was expected that the Stoll Trusts would continue for another 50 years.

The Stoll Trusts provided the trustee with broad powers, including the selection of investments and third-party investment consultants. In the mid-1970s, the beneficiaries formed an informal family committee to discuss the investment portfolio, and this Family Trust Committee requested the trustee to invest some of the trust assets in nonstandard investments to maximize the value and returns of the trusts. Bank One, the trustee at that time, hired an independent investment consultant to recommend third-party investments to comply with the committee's request.

In 2013, JPMorgan determined that the Stoll Trusts should be reformed to formalize the Family Trust Committee and define the role played by it and the committee by creating a directed trust system under Kentucky Revised Statutes (KRS) 286.3-275, and that the Stoll Trusts should be relocated to Delaware for favorable income tax laws. To do so, JPMorgan filed motions in the probate division of Fayette District Court to appoint a representative, to reform the Stoll Trusts to directed trusts, and to release the registration of the trusts and transfer the place of administration to Delaware. This was contingent upon receiving a private letter ruling from the Internal Revenue Service confirming that this would not adversely affect the generation skipping tax-exempt status of the trusts. Of the at that time 151 income and contingent beneficiaries, 143 returned executed consents to JPMorgan. Seven beneficiaries apparently did not respond.

Only one person objected; namely, contingent beneficiary James Beardmore. The district court held the matters in abeyance based upon Beardmore's objection and the fact that the IRS had not yet issued a private letter ruling. The IRS issued a private letter ruling in January 2014 confirming that the reformation and relocation would not affect the generation skipping tax-exempt status. Beardmore's continued objection created an actual controversy between the parties, and the probate action was later dismissed without prejudice.

Due to the existence of an actual controversy, in April 2014, JPMorgan filed a verified petition for declaration of rights in Fayette Circuit Court setting forth the above facts and background. The circuit court appointed a guardian *ad litem* (GAL) to represent the interests of 54 unmarried infant defendants and the unborn issue of Mr. Stoll's children. The GAL filed an answer requesting that the court enter a judgment in favor of JPMorgan. JPMorgan filed entries of appearance and consent to judgment forms from 97 parties.

In June 2014, JPMorgan filed a motion for a judgment on the pleadings or for summary judgment seeking the relief it requested in its petition for declaratory relief. It noted that of the 165 current income and contingent-remainder beneficiaries, including unborn issue, JPMorgan had received consent forms from 155 of those beneficiaries. Beardmore had not yet entered an appearance, but he had not consented to the relief sought. But because Beardmore had not appeared or responded, JPMorgan sought a judgment because the allegations in its petition remained undisputed. In July, JPMorgan filed additional

entries of appearance and consents to judgment from six more parties, bringing the total to 161 of the 165 income and contingent-remainder beneficiaries. A hearing was also scheduled for that month.

Prior to the hearing, Beardmore filed a memorandum in support of his opposition to JPMorgan's motion. In reply, JPMorgan noted that Beardmore had not filed an answer to the petition and that his counsel, who filed the memorandum in opposition, was not admitted to practice in Kentucky and had not been admitted *pro hac vice*. JPMorgan stated that the memorandum should be stricken from the record because it was filed in violation of Kentucky Supreme Court Rule (SCR) 3.030, and that it contained "bizarre and unfounded accusations against every party involved in this action[.]"

The circuit court heard arguments from counsel and Beardmore on July 14, 2014. At that time, the court ordered Beardmore's counsel to comply with SCR 3.030[1] and rescheduled the hearing for July 17, 2014. It also ordered JPMorgan to file a notice and tender an order certifying the court's jurisdiction to rule on the pending matters.

Following the hearing, JPMorgan filed a notice related to the court's jurisdiction and application of the UTC, which became effective on July 15, 2014. JPMorgan stated that the recent amendments to KRS Chapter 386 did not affect or

[1] After the hearing, the Kentucky Bar Association certified that Beardmore's out-of-state attorney had paid the per-case fee of $270.00 pursuant to SCR 3.030(2) in a form filed with the circuit court on August 4, 2014. This Court has also granted out-of-state counsel's motion to be admitted to practice *pro hac vice* in the present appeal. During the pendency of the appeal, this Court received a notice of withdrawal from Beardmore's out-of-state counsel because his license to practice law in Hawaii had been revoked. Beardmore remains represented by local counsel.

alter the court's jurisdiction over the case, and even under the new law, the circuit court would continue to have jurisdiction over adversarial probate proceedings and some trust matters. One of the trusts at issue was a testamentary trust that was created by a probated will. In addition, under KRS 418.040, the circuit court would retain jurisdiction over this action because it was granted jurisdiction over actual controversies in declaratory judgment actions. KRS 386B.11-040 of the UTC also provided that a circuit court could retain jurisdiction over a matter after finding that returning it to the district court would substantially interfere with the effective conduct of the proceeding or prejudice the rights of the parties. JPMorgan asserted that to transfer the matter back to the district court would cause extreme delay and expense. Beardmore filed a response in opposition to JPMorgan's notice.

The court held a hearing on July 17, 2014, as scheduled. Beardmore at this time had local counsel in addition to his out-of-state counsel, but local counsel did not appear at the hearing. Beardmore's out-of-state counsel contended that the circuit court did not have jurisdiction to decide the matter because the probate matter should have been transferred to the circuit court; a new, declaratory action should not have been filed. In addition, the adoption of the UTC, which took effect two days before the hearing, placed jurisdiction in the probate court. Beardmore blamed any delay on JPMorgan's law firm and argued that there would not be any harm to return the case to the district court. JPMorgan explained the expense that would be incurred if the matter had to be returned to the district court

in arguing that the circuit court should retain jurisdiction. JPMorgan also pointed out that the declaratory judgment statute vests jurisdiction only in a court of general jurisdiction, which is the circuit court. After hearing these arguments from counsel, the circuit made several findings, including that a return to district court would substantially interfere with the effective conduct of the judicial proceedings and would prejudice the rights of the parties. It therefore retained jurisdiction to decide the matter on the merits.

After determining that it would retain jurisdiction, the circuit court went on to question the parties about the merits of the petition and motion. JPMorgan argued that modification was consistent with Mr. Stoll's intent, while Beardmore argued that Mr. Stoll never intended family members to control the trust, but he wanted an independent trustee to make the investments. The court permitted Beardmore to file a proposed judgment as JPMorgan had already done. Instead, Beardmore filed lengthy memoranda in opposition to JPMorgan's proposed judgment and motions as well as a supplemental addendum.

After taking time to consider the application of KRS Chapter 386, the circuit court entered two rulings on August 28, 2014. The first was an order on JPMorgan's petition for a declaratory judgment and for a judgment on the pleadings and/or for summary judgment requesting modification and transfer of the Stoll Trusts. The court first expressed some concern about the request to permit the Family Trust Committee, through an independent third-party consultant, to have the real power and authority to act, rather than the trustee, as being contrary

to the expressed intent of Mr. Stoll in the original trust instruments. But the court determined that recent statutes gave the court the power to modify the trusts for the benefit of the beneficiaries at their and the trustee's request. The court found that "Stoll's intent would be to maximize the income to the beneficiaries by whatever legal means necessary. The Court is persuaded the Motions under consideration would accomplish that intent even if Stoll could not have foreseen the enactment of these specific statutes." In the judgment entered the same day, the court granted JPMorgan's motion for summary judgment, modified the Stoll Trusts to create directed trusts pursuant to KRS 286.3-275, released registration of the trusts and authorized the transfer of administration of the trusts to Delaware pursuant to KRS 386.725, and directed payment of the GAL fees, attorney fees, and expenses through the Stoll Trusts. This appeal now follows.

On appeal, Beardmore argues that the circuit court did not have subject matter jurisdiction to rule on this matter and that there was insufficient evidence in the record to support modification of the Stoll Trusts as requested by JPMorgan.[2] In its brief, JPMorgan disputes Beardmore's arguments and urges this Court to affirm the circuit court's rulings.

[2] The appendix of Beardmore's brief includes a page listing five items that were intended, we assume, to be attached to the brief. These items include JPMorgan's petition for declaration of rights, JPMorgan's memorandum in support of its motion for summary judgment, Beardmore's memorandum opposing the motion for summary judgment, Beardmore's supplemental memorandum opposing the motion for summary judgment, and the final judgment. The only document attached to the brief is a partially illegible copy of the August 28, 2014, judgment. Beardmore failed to include a copy of the circuit court's order entered the same day, which was also listed on the notice of appeal as a ruling he sought to appeal. We decline to consider Beardmore's reply brief and its lengthy, separate appendix due to the nonsensical nature of both of these filings.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). The parties appear to agree that there are no disputed issues of material fact. Therefore, we shall review the circuit court's legal rulings *de novo*.

First we shall address the issue of the circuit court's subject matter jurisdiction. This consideration necessarily concerns the application of the UTC, which became effective on July 15, 2014, while this matter was pending. KRS 386B.11-040(1)(a) provides that the UTC "applies to all trusts created before, on, or after July 15, 2014[.]" In an amendment to KRS 24A.120(4), the General Assembly placed exclusive jurisdiction in the district court for "[m]atters involving

trusts in accordance with KRS 386B.2-030." KRS 386B.2-030 provides in relevant part as follows:

> Except with regard to matters otherwise provided for by statute:
>
> (1) The District Court and Circuit Court shall have concurrent jurisdiction of any proceedings in this Commonwealth brought by a trustee or beneficiary concerning any trust matter[.]

As Beardmore points out in his brief, for purposes of this case, the sections of the UTC addressing modification (KRS 386B.4-120 and KRS 386B.4-160) and the principal place of administration (KRS 386B.1-060) all provide that the district court "shall have exclusive jurisdiction over matters under this section." Beardmore therefore argues that the UTC vests the district court with exclusive jurisdiction over this case. While this is generally a proper statement of the law, we disagree that it applies in this case.

As both Beardmore and JPMorgan point out, KRS 386B.11-040(1)(c) addresses judicial proceedings for trusts initiated before the effective date of the UTC. The proceedings in this case were initiated prior to the effective date of the UTC, and therefore the circuit court would be permitted to retain jurisdiction and apply the superseded law if it found that application of a provision of KRS Chapter 386B would (1) "substantially interfere with the effective conduct of the judicial proceedings" or (2) "prejudice the rights of the parties[.]"

Beardmore contends that the circuit court did not make any findings in its final order related to whether the application of any provision of the UTC

would substantially interfere with JPMorgan's action and that he did not have the opportunity to be heard on this issue. He also states that because the district court probate action had been dismissed without prejudice, the matter could be remanded to that court with appropriate subject matter jurisdiction. The record does not support Beardmore's assertions.

Beardmore was certainly provided with, and took advantage of, the opportunity to argue the jurisdictional issue both orally at the July 14 and July 17, 2014, hearing dates and in his court filings. And while the circuit court did not reduce its oral findings to a written ruling or sign the order provided by JPMorgan as it stated it would, the court made sufficient findings on the record related to its certification of jurisdiction under KRS 386B.11-040(1)(c) as well as under KRS Chapters 24A (relating to probate jurisdiction)[3] and 418 (relating to declaratory judgment actions).[4] The court specifically stated at the July 17th hearing:

> I do find that I do have jurisdiction over this matter pursuant to KRS Chapter 24A and KRS Chapter 418. I am satisfied that . . . if I return this matter to district court that that would substantially interfere with the effective conduct of the judicial proceedings. The dec action is up here. There's no reason to return these motions to probate court. . . . And I think that it would also prejudice the rights of the parties if I were to not consider this matter on the merits at this time. And I do think that this court retains jurisdiction over the matters referenced

[3] KRS 24A.120(2) provides that the district court has exclusive jurisdiction in: "Matters involving probate, except matters contested in an adversary proceeding. Such adversary proceeding shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal[.]"

[4] KRS 418.040 permits a plaintiff to seek a declaration of rights "in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists[.]"

> in [JPMorgan's] petition. I don't know what an adversary proceeding is if it's not one party doing one thing and another party objecting. I can't beat that definition. So I do believe I have jurisdiction to consider this matter on the merits.

We agree with JPMorgan that the record supports the circuit court's findings. To move the matter back to district court would result in significantly more delay and expense to the trusts, including the need to re-serve and re-notice all of the beneficiaries. Accordingly, the circuit court made the requisite certification of jurisdiction to retain the case and decide it on the merits. We find no error in this ruling.

Turning to the merits of the circuit court's rulings, Beardmore argues that the circuit court's decision was not based upon sufficient findings of fact. As JPMorgan puts it, Beardmore simply disagrees with how the circuit court applied the law in this case.

First, we agree with JPMorgan that Kentucky law specifically permits a trust to be modified into a directed trust. KRS 286.3-275 provides in relevant part as follows:

> (1) When an instrument, under which a bank empowered to act as a fiduciary or trust company acts, reserves in the grantor, or vests in an advisory or investment committee or in one (1) or more other persons, any power, including, but not limited to, the authority to direct the acquisition, disposition, or retention of any investment or the power to authorize any act that the bank or trust company may propose, the fiduciary is not liable, either individually or as a fiduciary, for either of the following:

> (a) Any loss that results from compliance with an authorized direction of the grantor, committee, person, or persons; or
>
> (b) Any loss that results from a failure to take any action proposed by the bank or trust company that requires the prior authorization of the grantor, committee, person, or persons if the bank or trust company timely sought but failed to obtain that authorization.
>
> (2) The bank or trust company referred to in subsection (1) of this section is relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the grantor, an advisory or investment committee, or one (1) or more other persons have authority to direct the acquisition, disposition, or retention of any investment.

JPMorgan relies upon the common law doctrine of equitable deviation as adopted via the *Restatement (Second) of Trusts* § 167(1) (1959) in *Kelly v. Marr*, 299 Ky. 447, 185 S.W.2d 945, 948 (1945). *Restatement (Third) of Trusts* § 66(1) (2003) provides that "[t]he court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust." Comment a. of this provision indicates that "[t]he objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated." Even KRS 386B.4-120(1) of the UTC permits a court to "modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination

will further the purposes of the trust." The provision requires that "[t]o the extent practicable, the modification shall be made in accordance with the settlor's probable intention."

In its August 28, 2014, order, the circuit court relied upon this doctrine and made specific findings as to Mr. Stoll's intention, which was "to maximize the income to the beneficiaries by whatever legal means available." Modifying the Stoll Trusts to create a directed trust would formalize the Family Trust Committee, which would continue to utilize a third-party investment consultant in reaching any decision regarding the trust investments. And we agree with JPMorgan that Mr. Stoll could not have anticipated trust administration through a directed trust and various investment strategies because they did not exist when he was alive. Therefore, we find no error in the circuit court's decision to modify the Stoll Trusts to create a directed trust system.

Second, Kentucky law permits the change in the principal place of administration of a trust. Under the UTC, "[a] trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries." KRS 386B.1-060(2). JPMorgan had originally relied upon KRS 386.725, which was repealed upon the effective date of the UTC. That statute provided that "[a] trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management."

Beardmore contends that Kentucky remained the appropriate place of administration because the trusts had been established here and 63 of the beneficiaries lived in Kentucky. He also attempts to minimize the savings the move would result in, asserting that the $87,000.00 savings in 2011 and the $114,000.00 in 2012 had the trusts been administered in Delaware only constituted 0.1% of the net collective value of the trusts at the end of 2013, which was in excess of $100M. Finally, Beardmore states that the circuit court did not address the legal fees and costs incurred in the action to modify and transfer the trusts and that it did not make any findings to support the change in the principal place of administration. We disagree.

JPMorgan points to the favorable tax laws in Delaware as supportive of the transfer in that the Stoll Trusts were anticipated to continue for the next fifty years based upon its terms. The move to Delaware would provide a significant aggregate tax savings over those years. This reasoning is specifically mentioned in the commentary to the UTC, which provides that "[a] change may be desirable to secure a lower state income tax rate[.]" Unif. Trust Code § 108 cmt. (Uniform Laws Annotated).

In its order, the circuit court specifically found that "the Motions under consideration would accomplish [Mr. Stoll's intent to maximize the income to the beneficiaries.]" JPMorgan presented evidence of the significant savings such a move would allow, and Beardmore has not provided any legitimate reason or evidence to justify keeping the administration of the trusts in Kentucky.

Therefore, the circuit court properly permitted the transfer of the Stoll Trusts to Delaware.

For the foregoing reasons, the order and judgment of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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