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September 13, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1097 In re the estate of Virginia W. Ernest: Kathryn Tillisch v. The Estate of Virginia W. Ernest, by Legacy Private Trust Company (Mike Mahlik), as Personal Representative (L.C. # 2008PR261)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Kathryn Tillisch appeals a probate order that approved the final accounting by Legacy Private Trust Company, which served as the personal representative for the estate of Tillisch's godmother, Virginia Ernest, in an informal proceeding. The Estate moves for an award of attorney's fees on the ground that the entire appeal is frivolous. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the probate order, but decline to declare the appeal frivolous.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Virginia Ernest died in 2008, leaving assets subject to probate valued at over three million dollars in the estate's inventory. Ernest's will, executed in 1998, set forth over half a million dollars in specific bequests to nineteen different individuals and charities, with the remainder of her estate to be divided between her two children. One of the bequests was for $10,000 to Tillisch. However, after paying nearly two and a half million dollars in estate taxes,[2] plus funeral expenses, administration expenses and other fees, and accounting for over $400,000 in capital gains/losses that occurred during the administration of the estate, and the requested fees of the estate's personal administrator and attorney, the trust company submitted a final accounting showing a negative balance of about $64,000, and sought permission not to pay any of the named beneficiaries. After Tillisch filed an objection to the accounting and a demand for formal probate, the probate court held a hearing, disallowed over $5,000 of the expenses claimed by the estate, and approved the final accounting as modified by its order.

On this appeal, Tillisch raises eleven issues that fall into the broad categories of obtaining better documentation and valuation of the personal property included in the estate and disallowing additional expenses claimed by the estate. As a threshold matter, we note that many of Tillisch's challenges to specific items would have no practical effect unless the cumulative amount of the issues upon which she prevailed exceeded the amount by which the estate was determined to be insolvent. We therefore begin by discussing those items that would have the greatest potential impact upon the estate.

[2] The large amount of estate taxes was generated by the substantial amount of lifetime gifts Ernest had made, plus over four million dollars in non-probate transfers of IRA funds to her children, which resulted in a taxable estate of $9,282,531.

First, Tillisch contends that the circuit court erred in refusing her request for formal review of the estate inventory, which was done according to the informal probate procedure. Tillisch believes that there should be a formal accounting of the discrepancy between lists that had apparently been made for insurance purposes in 1980 containing hundreds of items of antiques, heirlooms, silver, china, collectibles, and other household goods, which at that time were collectively valued for replacement purposes at about $300,000, and the sale of only $63,023 in personal property from the estate. She further argues that her ability to present evidence regarding the valuation of personal property in the estate was unreasonably hampered by: (1) the personal representative's refusal to make copies of over 200 photographs of items from the estate at her expense, and instead open up the file for inspection at the trust company's office; (2) the personal representative's provision of a number of documents, including the aforementioned 1980 inventory lists and the original handwritten copy of the inventory the trust company made of the contents of the decedent's safe deposit box, less than twenty-one days before the hearing; and (3) the personal representative's failure to provide copies of appraisals it had obtained.

As to the photographs, Tillisch provides no authority for the proposition that the personal representative was required to make copies of photographs for her, and we are satisfied that the circuit court was within its discretion to find the personal representative's offer to open the file to inspection in its office to be a reasonable practice.

As to the 1980 inventory lists, we agree with the circuit court that those lists were so outdated as to have little relevance to the probate of Ernest's estate. The personal representative had no obligation to track down what had become of items that had been in the possession of Ernest and/or her husband nearly thirty years before; the personal representative's obligation was

to determine the value of those items that were still in the decedent's possession at the time of her death. It was entirely possible that a number of items included on the 1980 lists may have been given to the children or otherwise disposed of over the years—particularly after the death of Ernest's husband. Even aside from that possibility, it is not surprising that the proceeds of an estate sale auction (which involved the condition of the items as they were) would amount to only about a fifth of the purported replacement values of property that had once been in the decedent's possession. Contrary to Tillisch's assertions, then, we are not persuaded that any discrepancy between the values on the old lists and the proceeds of the sale was suspicious or that it required the circuit court to initiate formal probate proceedings.

As to the contents of the safe deposit box, the circuit court directed that several items from the box that were included on the handwritten inventory be auctioned off by sealed bids from any interested named beneficiaries. Tillisch has not identified any remaining items from the safe deposit box that have not been accounted for.

As to proof of appraisals, Mike Mahlik, the president of the trust company, testified that the trust company attempted to obtain appraisals for all of the jewelry—although some items were deemed by the appraisers as too commercially insignificant to offer a value. Mahlik further testified that staff of the trust company had worked with the decedent's children to sort through all of the items in the decedent's cluttered house, and that the woman who conducted the estate sale had catalogued and appraised all of the items in the house after trash, papers, and magazines had been disposed of, aside from photographs and personal memorabilia. Mahlik also noted that many of the collectibles that Ernest had were single items, which tend to sell for less at auction than do sets. The circuit court was entitled to find Mahlik's testimony regarding the appraisals credible, even if those appraisals had not been submitted to the court.

In sum, Tillisch has not shown that the circuit court's acceptance of the personal representative's valuation of the personal property in the estate was clearly erroneous, and the court was well within its discretion to refuse to conduct additional formal proceedings.

Next, Tillisch challenges the probate court's approval of about $57,000 in attorney's fees, on the grounds that the 43-page itemization of the law firm's time spent on the administration of this estate did not include any hourly rates or sworn testimony about the knowledge and experience of any of the ten individuals listed by initials as having contributed services, and that the itemization also included services provided before the opening of the estate and items related to the transfer of non-probate assets. The circuit court agreed with Tillisch that the estate should have provided affidavits or testimony regarding rates and experience, but nonetheless approved the entire bill.

WISCONSIN STAT. § 851.40(2) directs a circuit court to make a determination as to whether claimed attorney fees are just and reasonable, taking into account the time and labor involved, the experience and knowledge of the attorney, the complexity and novelty of the problems involved, the extent of the responsibilities assumed and the results obtained, and the sufficiency of the assets available to pay for services. Here, the circuit court's determination that the amount of attorney fees was reasonable was supported by the itemized bill and also the testimony of Mike Mahlik—the president of the trust company—that the lead attorney acting on the estate's behalf had "for the better part of 40 years" represented the family and that the entire attorney fee bill was in line with what he would expect given the issues involved and his years of experience in handling the probate of estates.

We are satisfied that the circuit court could properly make the determination it did based upon the evidence before it. Looking at the itemized bill, the court was able to see exactly what services had been provided, including those performed before the opening of the estate or relating to the IRA accounts, to judge their complexity and relation to the estate, and to calculate an average rate for all of those services. The court could then rely upon its own general knowledge of rates in the area, and a typical apportionment of services by firms using multiple attorneys, paralegals, and other staff, to determine whether the overall bill was reasonable.

Moreover, even if the circuit court had disallowed a few items on the legal bill or found the rates of some of the legal service providers to be too high, Tillisch has provided us with no reason to believe that such adjustments would have been sufficient to make the estate solvent, even in conjunction with her other claimed errors. The legal bill was about $57,000 and the deficit of the estate was over $58,000. We note that the total value of the other expenses Tillisch believes should have been disallowed—a $250 honorarium to the minister who performed the funeral service and $725 for funeral flowers ordered by the children prior to the opening of the estate—plus the addition to the asset column of about $725 worth of Packers tickets that were distributed to one of the children—would have decreased the estate's deficit by less than $2,000. That amount would likely have been largely offset by an increase in estate taxes if, as Tillisch claims, the court erred in allowing the personal representative to take a deduction of over $10,000 for an advisor fee that was ultimately not paid due to the estate's insolvency. And Tillisch's final claim of error—that the circuit court improperly allowed the funeral expenses to be paid before the costs of administration—would have no bearing on whether there were sufficient funds remaining to pay the named beneficiaries. Thus, the court would have needed to disallow nearly the entire legal bill for it to have made any difference in the estate's ability to pay

Tillisch's bequest. We therefore conclude that all of Tillisch's claims of error regarding which expenses were allowed or in what priority they were paid are moot.

Although we affirm the decision of the circuit court to approve the final accounting of Ernest's probate estate, we are not persuaded that the appeal was frivolous in its entirety. Therefore,

IT IS ORDERED that the probate order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the Estate's motion for an award of attorney's fees is denied.

Diane M. Fremgen
Clerk of Court of Appeals