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May 15, 2018

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

2017AP625 Christine Lindemann v. Geoffrey Maclay, Jr.
(L.C. #1983PR000897)

Before Kessler, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christine Lindemann, *pro se*, appeals two orders. In the first order, the circuit court removed her as a trustee of the Trust of Rene von Schleinitz ("Trust"). In the second order, the circuit court denied and dismissed petitions Lindemann filed prior to her removal. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.

Background

The history of this Trust has already been addressed in three prior decisions by this court and will not be repeated. *See* ***Trust of Rene von Schleinitz v. Maclay***, No. 2008AP677, unpublished slip op. ¶¶2-5 (WI App Feb. 5, 2009); ***Lindemann v. Maclay***, 2016 WI App 4, ¶¶4-13, 366 Wis. 2d 637, 874 N.W.2d 573; & ***Lindemann v. Maclay***, No. 2016AP1370, unpublished slip op. ¶¶9-16 (WI App July 5, 2017). For purposes of this appeal, it suffices to state that the Trust was created by Lindemann's maternal grandfather, Rene von Schleinitz. In addition to being a contingent beneficiary, years after the Trust was created, Lindemann became a cotrustee.

Following mediation in 2011, Lindemann entered into a stipulation with her parents, Geoffrey Maclay, Sr., and Edith Maclay, and her brother and cotrustree, Geoffrey Maclay, Jr. ("Rip").[2] The stipulation provided for the appointment of a third trustee, to act as a tie-breaker, and further specified that "[a] single trustee shall not take unilateral action regarding the Trust or its assets except as provided herein."[3]

In October 2016, Geoffrey and Edith filed a petition seeking Lindemann's removal as a trustee. Rip, in his capacity as cotrustee and as a contingent beneficiary of the Trust, joined in

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] For clarity, this court will refer to some of the individuals by their first names.

[3] The exceptions to the majority approval requirement are not material to this appeal.

the removal petition, as did Tod Maclay, another contingent beneficiary. Tod is Lindemann's brother.

The circuit court held a hearing on the petition. Lindemann, Rip, and Shelly Zucchi, Lindemann's sister, testified. The circuit court heard testimony and reviewed evidence reflecting that, among other things, Lindemann unilaterally sent a letter to tax authorities suggesting that the Trust had engaged in improper accounting conduct. Additionally, the testimony and evidence revealed that when the third trustee, former circuit court judge Michael Sullivan, resigned, Lindemann unilaterally attempted to require him to provide her with a general release as a condition of his cashing his final check. The circuit court also had before it evidence reflecting that Lindemann, without the consent of the other trustees, petitioned a local governmental plan commission to subdivide the Trust's real estate.

At the end of the trial, the circuit court set forth its findings:

> The [c]ourt has reviewed the documents that were submitted. I heard the testimony from multiple witnesses. I've reviewed the motions and written documentation from both sides. I obviously reviewed the exhibits that were introduced today.
>
> … [B]ased on the explanation provided to this [c]ourt and based on the ruling in [b]ankruptcy [c]ourt, Ms. Lindemann is not any longer a beneficiary or potential beneficiary of this Trust. Unfortunately, but realistically, her own actions have put her in [b]ankruptcy [c]ourt and her interest in this Trust was sold and that sale was approved within the last week by the [b]ankruptcy [c]ourt, so she's not a beneficiary. Her only sole remaining interest in this case is as one of the trustees. [Lindemann's attorney] is correct. Obviously, you can be beneficiary and the trustee or one or the other. They're not mutually exclusive or mutually inclusive.
>
> However, I agree completely with the moving party … and I'm granting the request to remove Ms. Lindemann as the trustee. She has developed multiple conflicts of interest. She's acted in adverse ways on multiple occasions, adverse to other beneficiaries, adverse to other trustees and adverse to the general interest of the

> Trust. She's violated orders from this [c]ourt and my predecessors on numerous occasions, far more if you review the entire file, certainly, at least, potentially others beyond the letter to the IRS, beyond the situation with Judge Sullivan. There have been, in my view, numerous breaches of trust.
>
> Her absolute outright hostility, not only to her siblings but to her mother and to this [c]ourt and the respect owed to this [c]ourt and the [b]ench and my predecessor, was evidenced today on the record on the stand. It's been evidenced in her behavior in writing letters to the IRS, basically threatening or, in his words, "blackmailing" former Judge Sullivan who everyone in this room should respect. Judge Sullivan has spent 20 to 25 years on the bench. He was a chief judge. He was retired. He took on this role as a third trustee in retirement, and he eventually threw his hands up and resigned in disgust, discomfort and, just general, frustration.
>
> This is a court of equity. Equity demands that Ms. Lindemann be off of this Trust, beyond all the other reasons. She has been adverse in multiple ways, almost enumerable ways to the general, ultimate interest of the Trust, the trustees, beneficiaries and contingent beneficiaries.
>
> She's litigated cases and done things adverse to prior rulings. Her animosity, it seethes out of her on the stand….
>
> Am I saying everything she's done as a trustee was bad? No. Were there some things she's done that's acceptable? Certainly. But that's not the question[] before the [c]ourt. She definitely took unilateral actions despite the involvement of a third trustee, despite Judge Sullivan, despite [a prior circuit court's] order. She needs to be removed and she's removed immediately.

The circuit court then issued a written order removing Lindemann as trustee.

After Lindemann's removal, the circuit court calendared a follow-up hearing to determine whether any person interested in the Trust wanted to pursue Lindemann's three pending petitions. In those petitions, Lindemann made the following requests of the circuit court: (1) remove Rip as trustee and remove Geoffrey as the property manager for the Trust; (2) appoint an independent trustee; and (3) issue a declaratory judgment regarding her beneficiary status under Wisconsin law. No interested party asked to take up Lindemann's petitions.

After concluding that there was no basis for it to interfere with the bankruptcy court proceedings and that Lindemann did not have standing or a personal stake in the issues presented, the circuit court denied and dismissed Lindemann's petitions.

Discussion

The decision to remove a testamentary trustee is addressed to the sound discretion of the circuit court. *See* ***First Wis. Nat'l Bank of Oshkosh v. Circuit Court for Fond du Lac Cty.***, 167 Wis. 2d 196, 201, 482 N.W.2d 118 (Ct. App. 1992). We may not disturb a decision addressed to the circuit court's discretion absent an erroneous exercise of that discretion. *See* ***Connor v. Connor***, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182. A circuit court erroneously exercises its discretion "'[i]f the record indicates that the circuit court failed to exercise its discretion, if the facts of record fail to support the circuit court's decision, or if this court's review of the record indicates that the circuit court applied the wrong legal standard[.]'" ***Id.*** (first set of brackets in ***Connor***; citation omitted).

WISCONSIN STAT. § 701.0706 codifies the standards for removal of a trustee.[4] Subsection (2) of that statute provides, in relevant part, that a circuit court may remove a trustee if *any* of the following apply:

> (a) The trustee has committed a material breach of trust.
>
> (b) A lack of cooperation among cotrustees substantially impairs the administration of the trust.

[4] Although Lindemann sets forth numerous standards from other jurisdictions, Wisconsin law applies here.

> (c) The court determines that removal of the trustee best serves the interests of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively.
>
> (d) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Id. [5]

Wisconsin law further provides that in a situation where a trustee is not coupled with an interest in the trust, the welfare of the trust's beneficiaries is the key matter for the trustee's consideration. *See* ***Laughlin v. Well Bldg. Co.***, 179 Wis. 56, 59, 190 N.W. 899 (1922) (explaining that "[i]n the case of a trust not coupled with any interest in the trustee, the welfare of the beneficiaries of the trust constitutes the chief matter for consideration"). If it is shown that the trustee is hostile toward one or more beneficiaries, the circuit court can take that into account when considering removal. *See* ***id.*** (holding that "[w]e have an open, avowed hostility to [the beneficiaries'] interest which of itself would justify a court in removing a trustee who has no interest in the execution of the trust").

Here, while acknowledging that some of the actions Lindemann took as trustee were acceptable, the circuit court nevertheless found that Lindemann committed numerous breaches of

[5] For the first time in her reply brief, Lindemann submits that under WIS. STAT. § 701.0706(2)(d), all qualified beneficiaries had to request her removal and the circuit court had to find that removal best served the interests of all the beneficiaries. Appellate courts do not address issues raised for the first time in an appellant's reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). In any event, she takes this language out of context. Paragraph (2)(d) provides *one* basis for the circuit court to remove a trustee.

trust, that her hostility toward the Trust's beneficiaries was evident, and that she acted adversely to them. The circuit court properly exercised its discretion when it decided to remove Lindemann as trustee.

Insofar as Lindemann argues that the circuit court erroneously exercised its discretion by not honoring the terms of the Trust, which specifies that there be two trustees, she is wrong. The law recognizes that there are occasions when a vacancy in trusteeship is created due to the removal of a trustee. Pursuant to WIS. STAT. § 701.0704(2), if a trustee is removed, so long as "one or more cotrustees remain in office, a vacancy in a trusteeship does not need to be filled." Here, the Trust has a remaining trustee, Rip.

Additionally, Lindemann suggests that a settlor's personal choice of an individual to act as trustee should be adhered to and contends that she should be given special consideration on this basis. This argument is unpersuasive given that she was not specifically chosen by the settlor, i.e., Rene von Schleinitz. He selected Marine National Exchange Bank and his daughter, Edith, to serve as trustees. Lindemann is one of three successor trustees. She was not personally selected by von Schleinitz.

As another facet of her appeal, Lindemann challenges the standing of Geoffrey to seek to remove her as a trustee because he is not "[t]he settlor, a cotrustee, or a qualified beneficiary." *See* WIS. STAT. § 701.0706(1) ("The settlor, a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative."). Even if we set aside the qualifications of Geoffrey for purposes of this appeal, the petition was filed by Edith, the sole life beneficiary of the Trust, and was joined by two contingent beneficiaries. Therefore, this action was properly before the circuit court.

Next, Lindemann argues that she has a contingent interest in the Trust and requests that we "regard the testator intent and make a determination as to if the interest is vested." She makes a number of assertions relating to the alienation of property, the sale of future interests in a trust, and the nonvesting nature of such interests due to a contingency. According to Lindemann, "[a]ny orders by the court to sell or dispose of the future interest [Lindemann has in the Trust] should be void or set aside."

Lindemann's arguments fail for at least two reasons. First, these aforementioned issues are not properly before us given that the circuit court did not issue the sale order relating to her interest in the Trust: a federal bankruptcy court did so. This court will not give what is tantamount to an advisory ruling on the correctness of a federal bankruptcy court order. *See* ***Miller Brands-Milwaukee, Inc. v. Case***, 162 Wis. 2d 684, 696-97, 470 N.W.2d 290 (1991) (reiterating that the court resolves the facts before it, and does not issue advisory opinions or address hypothetical facts). Second, even if it is somehow proper for this court to involve itself in federal bankruptcy court proceedings, the respondents argue that the sale of Lindemann's interest in the Trust is complete and that, consequently, the issues surrounding that interest are moot. Lindemann does not refute that the sale is complete. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (an assertion not disputed is deemed admitted). "An issue is moot when its resolution will have no practical effect on the underlying controversy." *See* ***PRN Assocs., LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. We agree that the issues surrounding Lindemann's interest in the Trust are moot and decline to reach their merits. *See* ***id.***, ¶29 (holding that "[a]ppellate courts generally decline to reach the merits of an issue that has become moot").

Lindemann makes a fleeting reference to "the interest of justice" in her reply brief. We exercise our discretionary reversal power only rarely and in exceptional cases. *See* WIS. STAT. § 752.35; *see also* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992) (explaining that discretionary reversal is granted "infrequently and judiciously"). This is not a case warranting that exercise.

Therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals