

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 10, 2009 Session

T/U/A AUSTIN W. DUKE, v. TERESA DUKE SIMMONS

**Direct Appeal from the Circuit Court for Davidson County
Probate Division
No. 06P-1473 Hon. Randy Kennedy, Judge**

No. M2008-01967-COA-R3-CV - Filed April 30, 2009

Petitioner had created an irrevocable trust in 2004, naming his daughter as trustee, but subsequently brought this action to remove her. After an evidentiary hearing, the Trial Court removed the trustee, appointed a substitute trustee, and awarded attorney's fees to petitioner. The trustee who was removed has appealed the award of attorney's fees from the trust fund. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and JOHN W. MCCLARTY, J, joined.

Harlan Dodson, III., Donald Capparella and Amy J. Farrar, Nashville, Tennessee, for Appellant, Teresa Duke Simmons.

Overton Thompson, III., and Blaine H. Smith, Nashville, Tennessee, for Appellee, Austin W. Duke.

OPINION

This appeal arises from a Judgment by the Trial Court, wherein the Court ordered the removal of the trustee of an irrevocable trust and awarded attorney's fees to the petitioner to be paid out of the trust. The sole issue on appeal is the award of attorney's fees.

Petitioner Austin W. Duke created an irrevocable trust, the Austin W. Duke

Irrevocable Trust (the trust), on March 10, 2004. Respondent/appellant Teresa Duke Simmons, the oldest daughter of Austin W. Duke, was designated in the trust instrument as the original and sole trustee. On September 18, 2006, Mr. Duke filed a Petition to Remove Trustee, and his petition stated: "That at the time of the trust's creation Mr. Duke was married to Patsy Elizabeth Duke and that the children of Mr. Duke were concerned that in the event of a divorce between Mr. Duke and Patsy Duke or upon the death of Mr. Duke, Patsy Duke would receive a large portion of the assets of Mr. Duke." The Duke children encouraged Mr. Duke to create a trust and to place a large portion of his assets in the trust to protect the children's inheritance and to prevent Patsy Duke from receiving the assets. The petition further stated that before the trust was created Mr. Duke was in two automobile accidents and suffered numerous injuries, including severe head trauma. While he was in a weakened condition the Duke children, including respondent, encouraged him to create the trust and to put a large portion of his assets into the trust. The terms of the trust requires the trustee to pay all of the trust's income to Mr. Duke and also provides:

. . . so much of the principal of the trust, at any time and from time to time, that the Trustee, exercising a reasonable discretion, determines to be required or desirable for my happiness, comfort, health, maintenance, education and support, or to comply with my obligations under my Postnuptial Agreement with my wife Patsy Elizabeth Duke.

Upon Mr. Duke's death, the remainder of the trust passes to his children in equal shares, and the petition represented that at the time of the filing of the petition the trust had approximately \$2,300,000 in assets.

The petition alleged that Mr. Duke and Mrs. Simmons had disagreed over the administration of the trust and what distributions should be made from the trust to Mr. Duke and that their relationship was inharmonious and unfriendly. The petition charged that Mrs. Simmons was unfit to be the trustee, that she failed to follow certain statutory requirements and refused to distribute \$500,000 to Mr. Duke for payment to Patsy Duke as required by the trust. The petition also stated that petitioner and respondent attempted to resolve certain disagreements by filing a joint petition to approve certain changes to the trust and an order was issued by the Court. However, despite the order, Mrs. Simmons failed to effectively administer the trust. The petition concluded by asking the Court to remove Mrs. Simmons as trustee under Tenn. Code Ann. § 35-15-706 and that the Court appoint an independent successor corporate trustee.

The matter was heard before the Trial Court, where Mr. Duke and Mrs. Simmons testified. After the evidentiary hearing, the Trial Court entered an Order which provided the following:

1. Mr. Duke created the trust on March 10, 2004 and named Mrs. Simmons the sole trustee. Later Mr. Duke filed a petition to have Mrs. Simmons removed as the sole trustee.

2. The Court has considered both the Tennessee common law and the Tennessee Uniform Trust Code to determine if Mrs. Simmons should be removed as trustee.
3. Mr. Duke and Mrs. Simmons have not spoken since May 2005 as there is a rift between them and Mrs. Simmons is extremely reluctant to call Mr. Duke. Mrs. Simmons finds calling Mr. Duke highly unpleasant and Mr. Duke believes that nothing good would come from communication with Mrs. Simmons. There is a complete breakdown of communication between the parties.
4. At the time the trust was created, the parties had a strong, open line of communication. Subsequent events created the rift and changed the dynamic such that the parties have not communicated in two years.
5. Other than a complete breakdown of communication between the parties, Mrs. Simmons has effectively administered the trust. There is no concern that she committed any misconduct or malfeasance or otherwise breached her fiduciary duty to the trust.
6. Because of the complete breakdown of communication and based on the entire record, Mrs. Simmons should be removed as trustee based on Tennessee common law as delineated in *Maydwell v. Maydwell*, 185 S. W. 712 (Tenn. 1916), under Tenn. Code Ann. § 35-15-706(b)(3) because Mrs. Simmons is “unwilling” to administer the trust effectively and under Tenn. Code Ann. § 35-15-706(b)(4) because there has been a change of circumstances. The removal of Mrs. Simmons best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a successor trustee is available.
7. Cumberland Trust and Investment Company in Nashville, Tennessee shall serve as successor trustee to be effective upon its acceptance of the trust and Cumberland’s fee schedule is attached hereto as Exhibit A.
8. Each party was to bear its own costs and should counsel for either party seek to be compensated from the trust, an appropriate petition should be filed with the court.

Cumberland Trust and Investment Company’s fee schedule was attached to the Order and sets forth the annual fee for administration of the trust would be between \$11,000 and \$16,000.

Mr. Duke then filed a motion for approval of attorney’s fees in the amount of \$89,109.50 and costs in the amount of \$1,740.21, for a total of \$90,849.71, to be paid from the trust.

Mr. Duke claimed that the attorney's services were necessary for the benefit of the entire trust and the fee request was reasonable. Mrs. Simmons' response in opposition of the fees, stated there was no evidence that the services billed for were for the benefit of the entire trust, and at a subsequent court hearing, the Trial Judge entered an order approving the payment of fees and costs in the amount requested from the trust, and concluded Mr. Duke's attorneys' services were for the benefit of the trust and the sum was a reasonable and proper expense of the trust.

As the appeal concerns only an award of attorney's fees and costs to Mr. Duke to be paid from the trust, only a limited recitation of the facts presented at trial is required.

Mr. Duke created the trust on March 10, 2004 and funded it with his personal assets. He appointed his oldest daughter, Mrs. Simmons, as the sole trustee of the trust, and for a time following the creation of the trust the relationship between Mrs. Simmons and Mr. Duke was fine and they spoke on a daily basis. Mr. Duke testified that his relationship with Mrs. Simmons began to deteriorate when he and his second wife, Patsy Duke, spent more money on the renovation of their home than they had originally planned. He said that Mrs. Simmons "balked" at providing more money from the trust than she had anticipated doing. At about this time, Mr. Duke stopped making distributions to the trust from his personal assets. Mrs. Simmons agreed that she considered the cost of the renovation excessive because she was concerned that cost could not be recovered if the house was sold. According to Mrs. Simmons, in November 2004, Mr. Duke told her that he did not want her involved in his finances anymore. Both father and daughter agreed that the last time they spoke with each other was in May of 2005 and neither party had made any effort to communicate with the other since that time. Additionally, both parties were of the opinion that any attempt to communicate with each other would be "non-productive." Mrs. Simmons stopped making distributions from the trust after May 2005 and both she and her father hired attorneys. Between May 2005 and the trial, Mrs. Simmons had incurred approximately \$50,000 in legal fees, which had been paid out of the trust. Mrs. Simmons made no attempt to communicate with her father and all communication regarding the trust has been through their respective lawyers.

Another source of contention between Mr. Duke and Mrs. Simmons is associated with Mr. Duke's divorce from his second wife, Patsy Duke. When Mr. Duke divorced Patsy, their postnuptial agreement provided that she would receive \$500,000, which Mr. Duke requested the trust pay from the trust estate. The trustee refused on the grounds that since it would be a discretionary disbursement, she had the right to refuse. Mrs. Simmons testified that she refused to resign as trustee because she did not see any benefit to having an independent trustee appointed. She stated that she was not aware of how much an independent trustee would charge, but she acknowledged that she was paid \$20,000 for the first year she served as trustee. Mrs. Simmons testified that she had no idea how her father's health was or who, if anyone, was looking after her father. In fact, Mr. Duke married and divorced his third wife during the time between May 2005 and the trial date, unbeknownst to his entire family.

This Court reviews a trial court's decisions regarding the award of attorney's fees using the abuse of discretion standard of review. *In re Estate of Greenamyre*, 219 S.W.3d 877, 885 -

886 (Tenn. Ct. App. 2005). This Court in *Estate of Greenamyre* explained the abuse of discretion standard and characterized it as a review-constraining standard that calls for less intense appellate review and, therefore, less likelihood the trial court's decision will be reversed. *Id.* (citing *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App.1999)). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Id.* at 886 (citing *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App.2000)). A trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Id.* (citing *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001)), and reasonable minds can disagree about its correctness. *Id.* (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn.2000)). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Id.* (citing *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn.1996)). Accordingly, a trial court will be found to have “abused its discretion” only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Id.* (citing *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App.1999)).

Appellant argues the Trial Court’s award of attorney’s fees should be reversed because recovery of those fees was not specially pled. Appellant cites to *Marshall v. First Nat. Bank of Lewisburg*, 622 S.W.2d 558 (Tenn. App. 1981) to support her position. In that case the trial court denied plaintiff’s request that his attorney’s fees be paid out of the trust at issue. This Court affirmed the trial court’s ruling based, in part, on the fact that plaintiff had failed to plead such fees as an element of special damages in his complaint as required by Rule 9.07 of the Tennessee Rules of Civil Procedure. The *Marshall* court concluded that “[s]ince an award of attorneys' fees is fairly unusual, plaintiff should have the obligation of specially pleading such an item of damages” and further opined that “in cases involving trusts and large estates involving complex litigation, the attorneys' fees are apt to be substantial and it seems only fair to require the plaintiff to put the trustee on notice as to any claim for attorneys' fees.” *Id.* at 561.

The holding in *Marshall* has been modified by the courts under certain circumstances. This Court considered the issue of whether attorney’s fees must be specifically pled as special damages to ensure recovery in *In re Estate of Greenamyre*. There one of the parties to the litigation insisted that another party was not entitled to have her attorney's fees paid by the estate, as ordered by the trial court, because the request for attorney's fees was not specifically pled in her answer as required by Tenn. R. Civ. P. 9.07. We concluded that while including a specific prayer for attorney's fees in an answer is a “prudent practice”, there were two reasons why the failure to so plead should not undermine the request for attorney's fees. First, the party seeking the award of fees had clearly put both the estate and all other parties on notice in her pre-trial brief that she was seeking to have her attorney's fees paid by the estate. Second, despite the Court’s observation in *Marshall* approximately twenty-five years prior that requests for attorney's fees were “fairly unusual,” seeking the payment of attorney's fees was now more commonplace. The court then stated that courts “now hold with some consistency that failing to request attorney's fees specifically is not fatal in cases

where the parties already know that attorney's fees may be recovered from another party.” *Id.* at 885. The *Greenamyre* Court cited to several cases where the courts have not enforced the failure to comply with Tenn. R. Civ. P. 9.07 where a statute specifically authorizes the recovery of attorney's fees from another party: *Bloomington's By Mail v. Huddleston*, 848 S.W.2d 52, 56 (Tenn.1992); *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn.1989); *Hardcastle v. Harris*, 170 S.W.3d 67, 90 - 91 (Tenn. Ct. App. 2004); *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 533-34 (Tenn. Ct. App. 2002).

In this case, petitioner filed suit pursuant to the Tennessee Uniform Trust Act, which provides for an award of fees and costs from the trust under certain circumstances. Petitioner filed a post-trial motion for approval of fees and costs following the issuance of the Final Judgment wherein the Trial Court indicated that counsel for either party could file a petition for compensation of fees and costs from the trust. Mrs. Simmons filed a fairly extensive response to the request that set forth the argument that there was no evidence that the removal of Mrs. Simmons benefitted the trust as a whole. She did not make the additional argument in her response that an award of fees and costs from the trust was inappropriate because there was no specific plea for special damages as required by Tenn. Code Civ. P. Rule 9.07. It is a well settled principle of law that issues not raised in the trial cannot be raised for the first time on appeal. *Jordan v. Jordan*, No. W2002-00854-COA-R3-CV, 2003 WL 1092877 at *8 (Tenn. Ct. App. Feb. 19, 2003)(citing *Lovell v. Metro. Gov't.*, 696 S.W.2d 2 (Tenn.1985); *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn.1983)); *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 151 (Tenn.1991)). Accordingly, appellant's argument that the Trial Court abused its discretion when it awarded plaintiff attorney's fees and costs from the trust based on plaintiff's failure to specifically plead special damages is not reviewable.

The determinative issue for consideration is whether the Trial Court abused its discretion when it awarded Mr. Duke attorney's fees and costs from the trust. The Tennessee Uniform Trust Code addresses the payment of attorney's fees and costs in a judicial proceeding involving the administration of a trust:

- a) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Tenn. Code Ann. § 35-15-1004.

Appellant argues that the Comment to the official statutory text emphasizes “that litigation costs may be awarded ‘if the litigation is deemed beneficial to the trust’ itself, as opposed to the individual beneficiaries.” The language regarding individual beneficiaries is not, however included in the Comment. The exact text of the Comment provides:

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable

attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust **The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.** Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust

Tenn. Code Ann. § 35-15-1004 cmt. (emphasis added).

The provision in the Tennessee Uniform Trust Code that the court may award costs and reasonable attorney's fees to any party if the litigation is deemed beneficial to the trust is also well established in the common law of Tennessee that predated the enactment of the Uniform Trust Code.¹ Tenn. Code Ann. § 35-15-106 explicitly provides that “[t]he common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.”² This principal was set forth in *Nickas v. Capadalis* 954 S.W.2d 735 (Tenn. App.1997) as follows:

In an action involving a trust, the award of attorney's fees from the trust corpus is permitted “only when the services of such attorneys inure to the benefit of the entire estate as distinguished from services rendered to benefit one or more of the individuals interested in the trust.” *Marshall v. First Nat'l Bank*, 622 S.W.2d 558, 560 (Tenn. App. 1981)(citing *Pierce v. Tharp*, 224 Tenn. 328, 455 S.W.2d 145 (1970), *cert. denied*, 402 U.S. 929, 91 S. Ct. 1527, 28 L. Ed.2d 863 (1971)). For example, attorney's fees may be awarded to the successful petitioner in an action against a trustee for breach of trust. *Marshall*, 622 S.W.2d at 560 (citing *Hail v. Nashville Trust Co.*, 31 Tenn. App. 39, 212 S.W.2d 51 (1948)). Unless some benefit is contributed to the preservation of the trust estate, however, an award of attorney's fees is not permitted from the trust fund, “notwithstanding the rule that a trust estate

¹ The Tennessee Uniform Trust Code took effect July 1, 2004. Tenn. Code Ann. § 35-15-101.

² Comment to T. C. A. § 35-15-106: The Tennessee Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

should bear the expense of the administration of the trust.” *Marshall*, 622 S.W.2d at 560.

Id. at 741.

The Trial court specifically held that Mrs. Simmons should be removed as trustee because “her removal best serves the interests of all the beneficiaries and that the services of Mr. Duke’s lawyers “were for the benefit of the Trust.” These findings by the Trial Court can only be set aside upon a finding that the Trial Court abused its discretion.

Appellant relies heavily on *Marshall v. First Nat. Bank of Lewisburg*, 622 S. W. 2d 558 to support her position that her removal did not benefit the trust but was only benefitted Mr. Duke. The *Marshall* Court stated that while an award of attorney’s fees is within the discretion of the trial court, such an award is not appropriate unless some benefit is derived to the preservation of the trust by the litigation. *Id.* In the case before us, appellant argues that under the holding in *Marshall*, the Trial Court abused its discretion because the Trial Court itself found that (1) Mrs. Simmons effectively administered the trust and only removed her because of the breakdown in communication between herself and her father and (2) because there was no evidence in the record to show that the trust benefitted from the litigation. However, the Trial Court did not find that Mrs. Simmons had effectively administered the trust. The Trial Court, in fact, found that because of the “complete breakdown in communication” Mrs. Simmons was “‘unwilling’ to administer the Trust effectively and her removal best serves the interests of the beneficiaries.” The Trial Court did find that “other than the complete breakdown in communication” Mrs. Simmons had effectively administered the trust and the Court acknowledged that there were no concerns that she had committed any misconduct or malfeasance or otherwise breached her fiduciary duty with respect to the trust. But appellant’s representation that the Trial Court found that Mrs. Simmons effectively administered the trust, thus her removal could not benefit the trust, is not established by the record.

Appellant further argues that Mrs. Simmons served as trustee without charge and that her replacement with a corporate trustee that would charge the trust a fee for services could not benefit the trust. This argument is not supported by the record. Mrs. Simmons commenced her activities as trustee in March 2004 and she ceased administering the trust by at least May 2005. Since May of 2005, all aspects of administration of the trust, except the payment of legal fees, had been conducted by the trust’s attorneys. Mrs. Simmons was paid \$20,000 for conducting the duties of trustee during the first year the trust was in existence. She was not paid a fee for serving as trustee after that first year, presumably, because she did not provide many services to the trust during that period but relied on the trust’s lawyers who were paid approximately \$50,000 for their services to administer the trust up until the time of trial. The fee schedule provided by the Cumberland Trust and Investment Company shows that if the trust had between \$2,000,000 and \$3,000,000 in assets, the annual fee for administration of the trust would be between \$11,000 and \$16,000. Thus, the appointment of the institutional trustee would likely cost the trust less than it had paid for the services of Mrs. Simmons and the lawyers for the trust who stepped in to manage the trust once communication broke down between Mrs. Simmons and Mr. Duke. The evidence supports the Trial

Court's findings that the replacement of Mrs. Simmons as trustee benefitted all of the beneficiaries and that the services provided by Mr. Duke's attorneys benefitted the trust. We conclude the Trial Court did not abuse its discretion when it awarded Mr. Duke his attorney's fees and costs.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Teresa Duke Simmons.

HERSCHEL PICKENS FRANKS, P.J.