

Estate of Hirsch

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA0069

City and County of Denver Probate Court Nos. 05PR653, 05PR654 & 05PR655
Honorable C. Jean Stewart, Judge

In the Matter of the Estate of Dorothy Hirsch, Deceased.

Charles E. Hirsch, Jr.,

Plaintiff-Appellant,

v.

Wells Fargo Bank West, N.A.; HCA HealthONE, L.L.C., d/b/a Presbyterian/St.
Luke's Medical Center; University of Nebraska Foundation; and Children's
Hospital Foundation,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division III

Opinion by: JUDGE HAWTHORNE
Taubman and Loeb, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: May 1, 2008

William C. Danks, Denver, Colorado, for Plaintiff-Appellant

Brown, Berardini & Dunning, P.C., Brian J. Berardini, David C. Walker,
Denver, Colorado, for Defendant-Appellee Wells Fargo Bank West, N.A.

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Denver, Colorado, for Defendants-Appellees HCA HealthONE, L.L.C., University
of Nebraska Foundation, and Children's Hospital Foundation

In this action concerning the validity and disposition of two trusts, plaintiff, Charles E. Hirsch, Jr., appeals the judgment of the Denver Probate Court in favor of defendants, Wells Fargo Bank West, N.A., HCA HealthONE, L.L.C., University of Nebraska Foundation, and Children's Hospital Foundation. The judgment upheld the validity of a trust created in June 2002 to fund the care of Dorothy Hirsch, upheld the validity of the September 2002 Restatement of the June 2002 trust, and found that Wells Fargo had not breached any fiduciary duties to plaintiff. We affirm.

I. Background

In 1965, Dorothy Hirsch (mother) and Charles Hirsch, Sr. (father) created separate revocable trusts funded with a substantial portion of their marital assets. The Hirsches named themselves and their adopted son, Charles E. Hirsch, Jr. (son), as co-trustees of both trusts.

Father died in 1979. By operation of the terms of father's 1965 trust, the trust became irrevocable, mother became its sole beneficiary for the duration of her life, and son became its sole trustee. Mother's 1965 trust remained revocable during her life, and she was the sole beneficiary while she was alive.

In 1997, son moved back to the United States after living in various countries for thirty-five years. He moved into his mother's residence, and they had a strained relationship. In 2002, when mother was ninety-six years old, son decided to move to Russia. Son was drinking heavily at the time and, against mother's wishes, was communicating with his biological mother.

Because son was moving to Russia, son, mother, William Carpenter (son's lawyer), Therese Barber (a Wells Fargo employee), and a mutual friend met at mother's residence in June 2002 for the purpose of executing a new trust, the Dorothy F. Hirsch Trust (June 2002 trust), drafted by son's lawyer, that would provide for mother's care. The parties agreed to fund the trust with mother's condominium (valued at \$220,000), mother's Wells Fargo investment account (valued at \$884, 277), securities from father's 1965 trust (valued at \$198,311), and other securities (valued at \$226,000). However, when mother learned that son was named as the sole beneficiary upon her death, she did not want to sign the trust agreement. But after son's lawyer assured her in the presence of son and the other individuals that the new trust was fully revocable and could be changed at any time, mother signed the

documents. The new trust named mother, son, and Wells Fargo as the co-trustees.

Immediately after the June 2002 trust ceremony, the Wells Fargo employee mistakenly delivered to son an Exxon stock certificate that was the property of father's 1965 trust. Contrary to the terms of the trust, son sold the stock and kept the \$40,000. Accordingly, this money was not part of the assets that funded the new 2002 trust.

Several weeks after son moved to Russia, mother contacted son's lawyer and told him she wanted to remove son as the beneficiary of the new trust and make HCA HealthONE, L.L.C., University of Nebraska Foundation, and Children's Hospital Foundation, defendants here, the sole beneficiaries. Son's lawyer referred mother to another lawyer, who, with the advice of another trust law specialist, drafted a restatement of the June 2002 trust. In September 2002, mother formally executed the restated trust (September 2002 trust restatement) in the videotaped presence of her lawyer, the Wells Fargo employee, and two other individuals. At the same ceremony, mother executed several notices to son of her revocation of his appointment as co-trustee of the June 2002 trust,

which son and Wells Fargo received.

Between the execution of the September 2002 trust restatement and mother's death, Wells Fargo supervised mother's care. Son interacted very little with mother, but he made persistent and repeated demands for funds. Mother died on November 15, 2004, and son learned of his disinheritance the following day.

Son challenged the validity of the June 2002 trust and the September 2002 trust restatement. He asserted that mother lacked the requisite testamentary capacity when she executed the June 2002 trust and the September 2002 trust restatement and asserted that the securities from father's 1965 trust were wrongfully transferred to the June 2002 trust. He also claimed that Wells Fargo breached its fiduciary duties to him by failing to inform him of his disinheritance.

After several weeks of proceedings in which the probate court heard testimony and received evidence regarding this matter, the court issued a written opinion containing detailed factual findings and legal conclusions. The court upheld the validity of the June 2002 trust and the September 2002 trust restatement. The court found that mother had the requisite testamentary capacity when

she executed the 2002 trust documents and applied the equitable doctrines of unclean hands and waiver to reject son's challenge to the transfer of securities from father's 1965 trust. The court also determined that Wells Fargo did not breach any fiduciary duties to son. On appeal, son challenges the court's legal conclusions, but does not challenge its factual findings.

II. Unclean Hands

Son contends the probate court erred in applying the equitable doctrine of unclean hands to bar his challenge to the use of securities from father's 1965 trust to fund the June 2002 trust. Specifically, son argues that the unclean hands doctrine may only apply when a plaintiff's improper actions damage a defendant. And, because son asserts that defendants here were not damaged by his actions, he claims the doctrine does not apply. We are not persuaded.

Litigation concerning trusts is generally governed by equitable principles. *E.g.*, *Paterson v. McMahon*, 99 P.3d 594, 598 (Colo. 2004). When parties request equitable relief from the courts, they must come to the court with "clean hands." *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (citing 1 Dan B. Dobbs, *Law of*

Remedies § 2.4(2) (2d ed. 1993)). The clean hands doctrine derives from the concept that one who seeks equity must do equity.

Salzman, 996 P.2d at 1269.

Various forms of improper conduct may bar a party's equitable claim, and the conduct need not be illegal. *Id.* Generally, however, courts only apply this doctrine when a party's improper conduct relates in some significant way to the subject matter in the litigation. *See Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 519 (Colo. App. 2006). Thus, contrary to son's assertion, damage to an opposing party is not a prerequisite to the application of the clean hands doctrine. *See Salzman*, 996 P.2d at 1269 ("In Colorado, the clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action may, as a result, lose entitlement to an equitable remedy."); *Rhine v. Terry*, 111 Colo. 506, 508, 143 P.2d 684, 685 (1943) ("The misconduct must relate directly to the transaction concerning which complaint is made or which is the subject matter in litigation.").

Moreover, *Taylor*, *Buschner*, and *Shores*, cited as supporting authority by son, do not hold otherwise. In those cases, the courts

refused to apply the clean hands doctrine when the conduct did not directly relate to the dispute at hand. *See Taylor v. Taylor*, 150 Colo. 304, 310, 372 P.2d 449, 453 (1962); *Bushner v. Bushner*, 134 Colo. 509, 515-16, 307 P.2d 204, 207-08 (1957); *Shores v. Shores*, 134 Colo. 319, 322-23, 303 P.2d 689, 691 (1956). That the defendants were not damaged by the conduct was not dispositive. *See Taylor*, 150 Colo. at 310, 372 P.2d at 453; *Bushner*, 134 Colo. at 515-16, 307 P.2d at 207-08; *Shores*, 134 Colo. at 322-23, 303 P.2d at 691.

Here, the probate court found, with record support, that son's prior improper conduct directly related to the relief he requested from the court, thus warranting the application of the clean hands doctrine to bar his challenge to the funding of the June 2002 trust from father's 1965 trust.

Because we conclude that the probate court did not err in applying the doctrine of unclean hands here, we need not address son's argument regarding waiver.

III. Mother's Testamentary Capacity

Son next contends that the probate court erred in finding that mother possessed the requisite testamentary capacity to execute

the September 2002 trust restatement because she did not understand the nature and extent of the property she owned. We are not persuaded.

Initially, we disagree with son's characterization of testamentary capacity as requiring knowledge of the nature and extent of property. As to this element, a testator need only know the extent of her property. *See Breeden v. Stone*, 992 P.2d 1167, 1170 (Colo. 2000); *Cunningham v. Stender*, 127 Colo. 293, 301, 255 P.2d 977, 982 (1953).

But, irrespective of defendant's characterization of testamentary capacity, we see no error in the court's finding. Whether mother possessed the requisite capacity was a matter of fact to be determined by the probate court. *See Scott v. Leonard*, 117 Colo. 54, 56, 184 P.2d 138 (1947).

A contestant of a facially valid will or trust has the burden of establishing lack of capacity. Individuals have capacity to execute testamentary documents so long as they are of sound mind and over the age of eighteen. Among other things, testamentary capacity requires that testators understand the extent of their property. *See Breeden*, 992 P.2d at 1170.

Here, son's assertion that mother did not understand the nature and extent of her property is based on her response to two questions asked by an attorney at the September 2002 trust restatement execution ceremony. The transcript states:

Q. [Attorney Pierson] . . . Now you have quite a lot of money in that trust. Do you realize that you have over a million dollars in that trust?

A. [Mother] No, I haven't been counting much.

Q. [Attorney Pierson] But you know there's quite a lot of money in there?

A. [Mother] I know there is some. There better be.

However, contrary to son's suggestions, individuals need not know the exact value of their estate in order to possess the requisite testamentary capacity. *See In re Estate of Romero*, 126 P.3d 228, 231 (Colo. App. 2005). Thus, we conclude that the probate court did not err in finding that mother possessed the requisite testamentary capacity.

IV. Execution of September 2002 Trust Restatement

Son further contends that the September 2002 trust restatement is invalid because the trust modification procedure set forth in the June 2002 trust was not followed. We disagree.

A settlor may revoke a valid trust when the trust reserves a

power of revocation. However, if the trust specifies a particular method of revocation, that procedure must be strictly followed.

Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 95, 322 P.2d 667, 671-72 (1958).

Here, the June 2002 trust included a modification provision, which read:

Settlor reserves the right to amend or revoke the trust under this agreement in whole or in part, at any time or times, by a writing delivered to trustee during settlor's life. No amendment with respect to trustee's compensation, duties, or liabilities shall be effective without trustee's written consent.

Son argues that his removal as trustee was a change of duties, which required his written consent. And, because he only received written notice of his removal and did not provide written consent, he argues that his removal was invalid. Accordingly, he contends that the amendment to the June 2002 trust (i.e., the September 2002 trust restatement) was also invalid because, as a co-trustee, he did not receive written notice of amendment.

However, the probate court rejected this argument:

The second sentence of Article IV [of the June 2002 trust] contemplates a situation where the trustee is given the prerogative to resign if he

does not wish to “consent” to those different but continuing duties. Here, however, [son] had no further duties to perform after he was removed, and his “consent” was not required.

We find the court’s reasoning persuasive and reject son’s argument.

V. Wells Fargo as Son’s Agent

Finally, son contends that the probate court erred in finding that Wells Fargo did not breach any fiduciary duties owed to him. We disagree.

Agency is a fiduciary relationship that results from the manifestation of consent by one person to another that the other person shall act on his or her behalf and subject to his or her control, and consent by the other so to act. *City & County of Denver v. Fey Concert Co.*, 960 P.2d 657, 660 (Colo. 1998). Agents may be classified into two general types: a general agent who is authorized to conduct a series of transactions involving a continuity of service and a special agent who is authorized to conduct a single transaction. *See Stortroen v. Beneficial Finance Co.*, 736 P.2d 391, 396 (Colo. 1987).

Whether an agency relationship exists is ordinarily a question of fact. *Id.*

Here, the probate court found that any agency relationship that may have existed between son and Wells Fargo was special in nature, was limited to the steps necessary to fund the June 2002 trust, and ceased to exist when Wells Fargo completed the funding of the June 2002 trust. Accordingly, the court found that Wells Fargo owed no fiduciary duties to son relating to his subsequent disinheritance or removal as co-trustee and, thus, there was no conflict of interest. The court supported its findings by detailing testimony and other circumstantial evidence of the dealings between son and Wells Fargo. Because the record supports the probate court's finding, we reject son's contention.

The judgment is affirmed.

JUDGE TAUBMAN and JUDGE LOEB concur.