149JJH

Time of Request: Wednesday, October 08, 2014 08:48:12 EST
Client ID/Project Name: office
Number of Lines: 174
Job Number: 1826:483446297

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 1
Source: NJ State Cases, Combined
Search Terms: sabatino and NAME(zirkle)

Send to: Bremer, Whitney
DONALD D VANARELLI
242 SAINT PAUL ST
WESTFIELD, NJ 07090-2146

1 of 1 DOCUMENT

IN THE MATTER OF ROBERT HANCOCK ZIRKLE, SR., DECEASED.

DOCKET NO. A-5281-11T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2014 N.J. Super. Unpub. LEXIS 2195

April 29, 2014, Argued
September 8, 2014, Decided

PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-270-11.

COUNSEL: Lori A. Saxon, appellant, argued the cause Pro se.

Russell F. Anderson, Jr. argued the cause for respondent Cindy Tharayil.

JUDGES: Before Judges Messano and **Sabatino**.

OPINION

PER CURIAM

Robert Hancock Zirkle ("decedent") died on December 24, 2008 while a resident of New Jersey. He was survived by three adult children: Cindy Tharayil; Robert Zirkle, Jr. ("Robert Jr."); and Todd Zirkle.[1] On January 9, 2009, Tharayil applied to the Bergen County Surrogate for summary administration of decedent's estate pursuant to *N.J.S.A.* 3B:10-4, which was granted.[2]

1 To avoid confusion, we find it necessary on occasion to refer to the various family members by their first name; we intend no disrespect by the informality.

2 *N.J.S.A.* 3B:10-4 provides in relevant part:

> Where the total value of the real and personal assets of the estate of an intestate will not exceed $10,000.00 and the intestate leaves no surviving spouse or domestic partner, and one of his heirs shall have obtained the consent in writing of the remaining heirs, if any, and shall have executed before the Surrogate of the county where the intestate resided at his death . . . the affidavit herein [*2] provided for, shall be entitled to receive the assets of the intestate of the benefit of all the heirs and creditors without administration or entering into a bond. Upon executing the affidavit, and upon filing it and the consent, he shall have all the rights, powers and duties of an administrator duly appointed for the estate . . . .

At the time of decedent's passing, Lori Ann Saxon

was married to Todd and was the mother of J.S.Z, one of decedent's granddaughters. Saxon and Todd separated in 2009, and divorce proceedings ensued in another jurisdiction. On July 6, 2011, Saxon filed an action in probate on behalf of J.S.Z., claiming that decedent had executed a will on June 6, 2005 (the "2005 will") that left a majority of his estate to J.S.Z. She further alleged that Tharayil had mismanaged decedent's estate and improperly disbursed its assets while he was alive. Saxon sought to have the 2005 will admitted to probate and have herself appointed *administratix cum testamento annexo*.[3]

> 3 The pleadings are not contained in either party's index. Saxon's request was governed by *N.J.S.A.* 3B:10-15, "Appointments of substituted administrators."

Tharayil filed an answer denying any knowledge of the 2005 will or that [*3] she had misappropriated any of decedent's assets. She moved to dismiss the complaint, but that motion was denied on September 23, 2011. Discovery ensued, and the matter was tried without a jury. Tharayil and Saxon appeared pro se.

Saxon claimed that Tharayil must have known about the 2005 will, since Tharayil was acting under a power-of-attorney as her father's attorney-in-fact. An earlier will that decedent executed in 1999, while he lived in Arizona, split the estate equally among his three children. The 2005 will, however, included a significantly different distribution that provided sixty-one percent of the estate would go to J.S.Z., two other grandchildren would each receive nine percent, and the balance would go to the adult daughter of decedent's recently-deceased partner. Under the terms of the 2005 will, Robert Jr. and Tharayil were intentionally disinherited.

The trial judge found Saxon's testimony "contain[ed] contradictory statements[,]" and her assertion that Tharayil and her brothers must have known about the 2005 will was "not persuasive." Instead, the judge found that Tharayil only had a copy of the 1999 will, which she believed distributed decedent's estate as if he had died intestate. [*4] The judge "impute[d] to . . . [Tharayil] the knowledge that there *might* be a newer will," a possibility which the judge believed Tharayil had "pursued, but . . . was unable to confirm." The judge could not specifically conclude that Tharayil possessed "knowledge . . . there was in fact another will."

The judge also rejected Saxon's claims that Tharayil had misappropriated decedent's funds before his death, finding instead that any funds were "spent down in due course by the decedent or used by . . . Tharayil as his attorney-in-fact to pay for his care until his death . . . ." The judge also credited Tharayil's testimony regarding the handling of decedent's funds, including distributions she made to herself and her siblings pursuant to her power-of-attorney, and other distributions made to her mother, who was decedent's former wife, and the five grandchildren.

The judge found the testimony of Robert Jr. to be "forthcoming and credible." He was aware of the 1999 will, and agreed with his siblings to have Tharayil distribute $10,000 to each of them. Robert Jr. stated unequivocally that there "was no money missing." In short, the judge concluded that the "pre-death distribution, while not in accordance [*5] with convention, was not done for any illegal or devious purpose. It [was] not fraudulent."

The judge categorically rejected Saxon's claim that Tharayil had misappropriated $417,000 of decedent's money to pay off her own mortgage. The judge found Saxon's pursuit of this claim was "not made in good faith," and that conclusion "tend[ed] to affect [his] impression of [Saxon's] intentions and . . . [gave him] doubt as to her overall credibility in the litigation."

Lastly, the judge determined that "[t]oo much time ha[d] passed between late 2009 when [Saxon] 'discovered' [the 2005 will] and mid-2011 when she . . . appl[ied] to the Surrogate to probate this will[,]" and he further found that Saxon had failed to "explain her delay in notifying the interested parties as to the existence of the 2005 will or in seeking to have it admitted to probate." The judge noted that Saxon's attempt to probate the 2005 will would be time-barred, pursuant to *Rule* 4:85-1.[4] On May 11, 2012, the judge entered an order that denied Saxon's application to probate the 2005 will and denied "[a]ny other relief that was requested or which may be inferred from the pleadings filed by [Saxon] . . . ."

> 4 That *Rule* provides:
>
> > If a will has been probated by the Surrogate's [*6] Court or letters testamentary or of administration, guardianship or trusteeship have been issued, any person aggrieved

> by that action may, upon the filing of a complaint setting forth the basis for the relief sought, obtain an order requiring the personal representative, guardian or trustee to show cause why the probate should not be set aside or modified or the grant of letters of appointment vacated, provided, however, the complaint is filed within four months after probate or of the grant of letters of appointment, . . . or if the aggrieved person resided outside this State at the time of the grant of probate or grant of letters, within six months thereafter.

[*R.* 4:85-1.]

Although not part of the appellate record, Tharayil apparently filed a motion after trial for sanctions pursuant to *Rule* 1:4-8.[5] In a short written statement of reasons, the judge explained that Tharayil sought $20,735.84 in fees and costs paid to a law firm representing her in the suit until "mid-litigation [when] she discharged her attorneys and proceeded thereafter self-represented." Tharayil also sought "a monetary award to herself for her 'time' that she spent . . . in defending herself" thereafter.

> 5 In response to our questioning [*7] at oral argument, Tharayil's appellate counsel supplied us with the "post-hearing submission" she made to the trial judge that presumably supported her request.

The judge reasoned that there was "no provision" in law to reimburse Tharayil for her own time. As to Tharayil's former counsel's time, the judge determined it was partially compensable under *Rule* 1:4-8. First, he concluded that Saxon's claim that Tharayil had misappropriated $417,000 of decedent's assets to pay off the mortgage on her own home was clearly frivolous, and he further determined that the "dogged pursuit" of this claim amounted to "one-third of the litigation." The judge awarded Tharayil $6,912 in counsel fees in an order filed on June 29, 2012.

On appeal, Saxon contends that Tharayil committed fraud both before and during the trial. She also asserts that the trial judge continued to exercise jurisdiction over the case after her appeal was filed. Having considered these arguments in light of the record and applicable legal standards, we affirm.

We begin by noting that

> [f]inal determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "we do not disturb the factual [*8] findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]"
>
> [*Seidman v. Clifton Sav. Bank, S.L.A.*, 205 N.J. 150, 169, 14 A.3d 36 (2011) (quoting *In re Trust Created By Agreement Dated December 20, 1961, ex. rel. Johnson*, 194 N.J. 276, 284, 944 A.2d 588 (2008) (internal quotation omitted)).]

"'[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" *Mountain Hill, L.L.C. v. Twp. of Middletown*, 399 N.J. Super. 486, 498, 945 A.2d 59 (App. Div. 2008) (quoting *State v. Barone*, 147 N.J. 599, 615, 689 A.2d 132 (1997)).

In this case, the trial judge had the opportunity to assess the credibility of the two principal witnesses, Saxon and Tharayil. He concluded that Tharayil and other witnesses, including Robert Jr., were credible and Saxon was not. Moreover, the judge concluded that Saxon simply failed to prove the allegations made in her complaint. Our assessment of the record convinces us that the judge's factual findings and the legal conclusions drawn therefrom were amply supported by the credible evidence in the record, and we find no basis to disturb them.[6] We therefore affirm the order of May 11, 2012 in all respects.

> 6 Saxon's claim that the trial judge continued to "issue unwarranted relief . . . long after the case was on appeal" lacks any support [*9] in the record. *R.* 2:11-3(e)(1)(E).

Saxon's amended notice of appeal, filed on July 25, 2012, specifically lists the trial judge's order of June 29,

2012 that awarded Tharayil counsel fees and costs pursuant to *Rule* 1:4-8 as another order from which she seeks review. Tharayil's brief includes a specific point heading in which she argues that she is entitled to an additional fee award because Saxon's appeal is frivolous.

Initially, we refuse to consider Tharayil's request at this time. *Rule* 2:11-4 specifically permits an award of counsel fees on appeal in certain circumstances, but such a request "shall be made by motion supported by affidavits . . . which shall be served and filed within [ten] days after the determination of the appeal." Without deciding the merits of the issue, Tharayil's request does not comply with the *Rule*, and raising the issue in respondent's brief is both procedurally improper and premature.

"A trial court's determinations on the availability and amount of fees and costs for frivolous litigation are reviewable for 'abuse of discretion.'" *Ferolito v. Park Hill Ass'n*, 408 N.J. Super. 401, 407, 975 A.2d 473 (App. Div.) (quoting *Masone v. Levine*, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App. Div. 2005)), *certif. denied*, 200 N.J. 502, 983 A.2d 1110 (2009). An indulgent reading of Saxon's brief, however, fails to disclose any specific legal argument as to why the trial judge's award of sanctions [*10] under *Rule* 1:4-8 was an abuse of discretion. The only argument advanced is that the judge's underlying decision at trial was erroneous, and, by implication, Saxon's pursuit of her claims was therefore not frivolous.[7] For the reasons already stated, we must reject that assertion, and we have been provided with no other sound basis to otherwise disturb the judge's award of fees under *Rule* 1:4-8.

7 We deem any other arguments regarding the fee award to have been waived since they were not asserted in Saxon's brief. *See, e.g.*, *Sklodowsky v. Lushis*, 417 N.J. Super. 648, 657, 11 A.3d 420 (App. Div. 2011) (citations omitted) ("An issue not briefed on appeal is deemed waived.").

Affirmed.