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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3201-13T3

IN THE MATTER OF HENRY ENRICO SCUDERI,

An Incapacitated Person.

Submitted May 27, 2015 – Decided July 9, 2015

Before Judges Messano and Hayden.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County, Docket No. 232629.

R. Dale Winget, attorney for appellant Richard Scuderi.

Hendricks & Hendricks, attorneys for respondent Maryanne Scuderi Mantz (George F. Hendricks, on the brief).

PER CURIAM

Defendant Richard Scuderi appeals from the February 10, 2014 order authorizing the listing for sale of certain property and dismissing his counterclaim to have plaintiff Maryanne Scuderi

Mantz removed as guardian of their father, Henry Scuderi.[1] For the reasons that follow, we affirm.

The record reveals the following facts. In 2011, Henry suffered a major hemorrhagic stroke, which rendered him paralyzed on the right side of his body, unable to stand or walk unattended, or to speak clearly. As a result of the stroke, Henry was "described as having limited mental capacity, cognitive deficits, expressive aphasia, and severe neurological impairment." Thereafter, plaintiff moved to have Henry declared incapacitated and sought to become his guardian. Defendant objected, and argued that he should be named Henry's guardian.

After a four-day guardianship trial, Judge Frank M. Ciuffani found Henry to be an "incapacitated person . . . unfit and unable to govern himself and manage his affairs[.]" Judge Ciuffani appointed plaintiff as Henry's guardian in part because Henry had named her as the alternate executor of his estate. The judge also noted that the parties had a contentious relationship and questioned whether defendant's contest of the guardianship was due to genuine concern for Henry. In his order, Judge Ciuffani required plaintiff to seek court approval prior to disposing of Henry's real property.

[1] Because defendant and his father share the same last name, we refer to Henry by his first name. We mean no disrespect.

On July 25, 2012, plaintiff filed an order to show cause and complaint requesting authorization to purchase Henry's rental property. Plaintiff offered $331,000, which was the average of three appraisals she acquired. In support of her application, she provided documentation noting that Henry's continued care and treatment were depleting his liquid assets.

Defendant opposed the sale and again requested that the court "consider" removing plaintiff as Henry's guardian. Defendant claimed that plaintiff was engaged in "self-dealing" and "failed to implement the plan of care presented to the [c]ourt" for Henry. He offered a comparative market analysis suggesting a price of $449,000 as proof that plaintiff "low-ball[ed]" the value of the property, and an email from a local hospital expressing interest in purchasing the property. Moreover, defendant claimed that Henry was not "thriv[ing]" at his care facility, and that plaintiff failed to disclose all of Henry's liquid assets.

The judge held a hearing on September 21, 2012, at which he scheduled another hearing to permit further investigation as to the hospital's interest in purchasing the property. On November 8, 2012, the judge authorized plaintiff to sell the property, but not to herself. The home was subsequently listed for $379,000 and on January 2, 2013, a buyer offered to purchase it for $355,000, which the court accepted. The net amount to the estate after real

estate commission was roughly the same as plaintiff's original offer.

In December 2013, plaintiff filed a new complaint requesting authority to sell Henry's residence. In support, she asserted that Henry is unlikely to return to his residence, his care was approximately $4000 a month, and she continued to pay "considerable carrying costs and expenses associated with the maintenance of [Henry's] remaining real property[.]"

Defendant opposed the sale, and again requested that the court remove plaintiff as Henry's guardian and appoint him instead. Defendant claimed that selling Henry's home would deprive the estate of substantial rental income. He maintained that plaintiff had wasted the rental value of the property as she had previously rented it for below market value. Moreover, defendant asserted that Henry's health had "severe[ly] declined" since he was moved to Parker Home, a different care facility.

At the February 7, 2014 hearing, the judge noted that Henry's estate had become reduced over time, and questioned whether a new guardianship trial to resolve defendant's claims would unnecessarily further reduce the estate. Specifically, the judge noted that Henry's care cost approximately $50,000 a year and that the initial guardianship trial cost about $60,000, which was

charged to Henry's estate. The judge determined that he could not summarily remove an executor, but reserved making a decision.

On February 10, 2014, Judge Ciuffani issued an order authorizing plaintiff to sell Henry's residence[2] and dismissed defendant's counterclaim requesting removal and replacement of the guardian. The judge found that a plenary hearing on defendant's claims was not warranted since it would unnecessarily further deplete Henry's estate, and because defendant was raising the same arguments that had previously been decided. This appeal followed.

On appeal, defendant argues that the trial court erred in refusing to conduct a plenary hearing prior to authorizing the sale of Henry's residence and dismissing his claim that plaintiff should be removed as Henry's guardian. In particular, defendant contends that there were genuine issues of material fact regarding plaintiff's self-dealing, wasting of assets, and Henry's poor care at Parker Home. We disagree. Defendant also raises arguments opposing the court's authorization of the sale of Henry's home. In their briefs both parties acknowledged that if the house was sold, the issue would be moot. We agree. See Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) ("An issue is 'moot' when the decision sought in a matter, when

[2] Plaintiff subsequently listed the property, which was sold after obtaining court approval in 2014. Defendant did not seek a stay of the sale.

rendered, can have no practical effect on the existing controversy.") (internal citations omitted). As such, the only remaining issue is whether the judge abused his discretion in not holding a plenary hearing and in dismissing the counterclaim for removal.

We first consider our standard of review. We will not disturb the factual findings and legal conclusions of a trial judge unless we are convinced that those findings and conclusions "are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Tractenberg v. Twp. of West Orange, 416 N.J. Super. 354, 365 (App. Div. 2010) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "However, '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Ibid. (quoting Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)) (alteration in original).

The decision to remove a fiduciary is left to the sound discretion of the court and will not be disturbed in the absence of manifest abuse. In re Trust for the Benefit of Duke, 305 N.J. Super. 408, 438 (Ch. Div. 1995), aff'd o.b., 305 N.J. Super. 407 (App. Div.), certif. denied, 151 N.J. 73 (1997). A court has

abused its discretion "if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Removal of a fiduciary is an extraordinary remedy and an application to remove one is only granted sparingly. See Braman v. Cent. Hanover Bank & Trust Co., 138 N.J. Eq. 165, 196-97 (Ch. 1946). Courts are reluctant to remove a fiduciary acting "in good faith, with ordinary discretion and within the scope of his [or her] powers[.]" Connelly v. Weisfeld, 142 N.J. Eq. 406, 411 (E. & A. 1948). While a fiduciary can be removed for acts done in breach of trust, see Clark v. Judge, 84 N.J. Super. 35, 62 (Ch. Div. 1964), aff'd o.b., 44 N.J. 550 (1965), but the applicant seeking removal must produce competent evidence demonstrating misconduct or other potential harm to the trust. In re Estate of Hazeltine, 119 N.J. Eq. 308, 316-17 (Prerog. Ct.), aff'd, 121 N.J. Eq. 49 (E. & A. 1936).

Rule 4:83-1 designates that "all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to [Rule] 4:67." Consequently, probate matters are specifically subject to Rules governing

expedited summary actions when in the trial court. See Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003).

Actions brought in a "summary manner" are distinguishable from summary judgment actions because in a summary action, the court makes findings of fact and accords no favorable inferences to the action's opponent. O'Connell v. N.J. Mfrs. Ins. Co., 306 N.J. Super. 166, 172 (App. Div. 1997), appeal dismissed, 157 N.J. 537 (1998). If the court is "satisfied with the sufficiency of the application, [it] shall order defendant to show cause why final judgment should not be rendered for the relief sought." Courier News, supra, 358 N.J. Super. at 378 (quoting R. 4:67-2(a)). Furthermore, summary actions are specifically designed to be expeditious and avoid plenary hearings. Under Rule 4:67-5,

> The court shall try the action on the return day, or on such short day as it fixes . . . [i]f . . . the affidavits show palpably that there is no genuine issue as to any material fact[.] If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment. At the hearing or on motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action . . . .

Consequently, judges sitting in probate on summary proceedings have broad discretion in determining the genuine nature of the

factual dispute and whether the issue may merit a plenary hearing. See Tractenberg, supra, 416 N.J. Super. at 365 (holding that a judge properly utilized a summary proceeding to determine whether facts supported the claim that the attorney-client privilege or attorney work product protected the release of certain documents under the Open Public Records Act).

Here, we find that Judge Ciuffani reasonably exercised his discretion in determining that a plenary hearing was not warranted and dismissing the counterclaim for removal. The record supports the judge's finding that defendant raised basically the same arguments and allegations at the initial guardianship trial and the prior opposition to the sale of the rental property, and he had not provided new competent proofs supporting his claims sufficient to warrant a hearing. For example, defendant's chief argument concerns allegations of "self-dealing" based upon plaintiff's 2012 request to the court to buy the rental property, which the court previously considered and did not find "self-dealing."

Additionally, defendant provided no evidence for his bare allegation that his father is not doing well at the nursing home, which contradicts the reports plaintiff filed from the nursing home concerning Henry's condition. Further, defendant's claim that plaintiff has not adequately disclosed how the funds are

being spent on Henry is contradicted by her yearly accounting reports documenting Henry's assets and the expenses incurred on his behalf. Defendant's disagreements with plaintiff about how much of Henry's residence needed painting and the cost of the painting certainly do not amount to sufficient reasons to remove the current guardian.

In sum, we cannot say on the basis of this record, that Judge Ciuffani mistakenly exercised his discretion. Thus, there is no basis to reverse his dismissal of defendant's counterclaim.

Affirmed.