

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1531-14T1

IN THE MATTER OF THE  
ESTATE OF EVELYN BERRY.

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Argued April 5, 2016 – Decided April 15, 2016

Before Judges Hoffman, Leone and Whipple.

On appeal from Superior Court of New Jersey,  
Chancery Division, Probate Part, Somerset  
County, Docket No. 96-00278.

Susan Schleck Kleiner argued the cause for  
appellant Darryl Fusco.

Raymond A. Grimes argued the cause for  
respondents Brook Berry and Garrett Berry.

PER CURIAM

Defendant Darryl Fusco appeals from an October 8, 2014  
final order of the Chancery Division, Probate Part, awarding  
damages and counsel fees in favor of plaintiffs Garrett and  
Brook Berry in the amount of \$554,893.31. We affirm.

I.

We discern the following facts from the record of the six-  
day bench trial before Judge Edward M. Coleman. Evelyn Berry  
died testate on March 30, 1995. Shortly before her death, she  
signed a new twenty-six-page Last Will and Testament (the Will).

Evelyn<sup>1</sup> had four children from two different marriages. The two older, adult children from her first marriage were defendant and Tara. The two younger, minor children from her second marriage were Garrett and Brook. At the time of her death, Garrett was fourteen and Brook was eleven.

In Article Four of the Will, Evelyn established the "Berry Family Trust" (the Trust) to provide for the maintenance, support, and education of her two minor sons:

In making the provision for distribution under this paragraph it is my intent that the primary purpose of this trust is to provide for the care and education of my said sons who, at the time of the preparation of this will, are minors and that only to the extent that any assets remain in the BERRY FAMILY TRUST after the care and education of my said sons have been provided for . . . shall the remaining distribution provisions of the BERRY FAMILY TRUST come into effect. *I make this provision not because of any lack of love or affection for my adult children, DARRYL G. FUSCO and TARA L. ARNOLD, but because of a desire to treat all of my children equally and to provide for my currently minor sons the same type of benefits and advantages previously provided for my adult children by making provision for the care and education of my said minor sons just as during my life I assisted in providing for the care and education of my said adult children.*

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<sup>1</sup> For ease of reference, we refer to the decedent and her children other than defendant by their first names.

At the time the youngest of Evelyn's surviving children reached the age of twenty-four, or the age of twenty-one and was not enrolled in a college or trade school, the Will provided for the equal division of the remaining principal among Evelyn's surviving children. The Will also appointed defendant as co-trustee of the Trust.

When Evelyn died, her business — Lyn's Liquors (the liquor store) — represented the principal asset of her estate. In addition, Evelyn had a house located in Branchburg (the Branchburg House), as well as an interest in an estate in Germany estimated at \$200,000. To fund the Trust, Article Seven, Section (u) of the Will allowed defendant to purchase the liquor store "for a purchase price equal to the greater of 28% of [the liquor store's] gross sales for the calendar year immediately preceding the year of my death or, if different and higher, the 1995 calendar year." The Will further provided for the payment of the purchase price "in equal amortized monthly payments over a term of eleven (11) years with interest at the rate of 15.39% compounded annually."<sup>2</sup> The Will also included a substantial pre-payment penalty "equal to one fifth of the remaining balance due on the note at the time of prepayment."

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<sup>2</sup> The eleven years would thus provide a steady stream of income until her youngest son, Brook, was twenty-two years old.

Following Evelyn's death, defendant did purchase the liquor store, as permitted by the Will. Defendant presented little testimony or documents regarding the sale. While defendant claimed he made payments for the liquor store, his records were incomplete. Plaintiffs asserted that not only did defendant fail to make timely and full payments, he later sold the liquor store — in 1998 — for approximately \$365,000 and failed to pay off the balance owed for the purchase of the liquor business. Importantly, Article Seven, Section (u) of the Will also established the right of the beneficiaries to recover attorney's fees should defendant default on his obligation to pay the amount owed for the purchase of the liquor store.

According to plaintiffs, defendant mismanaged the Trust by, among other things, speculating on volatile stocks and trading on margin; misappropriating funds by borrowing the beneficiaries' money at will without interest or repayment; and treating the money as his own. This conduct caused the beneficiaries to file suit to recover their inherited money which defendant "had stolen, squandered and misappropriated."

In his oral opinion, Judge Coleman found that defendant breached his fiduciary duty by failing to keep adequate records, failing to make reasonable investments, and making certain investments that were prohibited by the Will. The judge further

found that defendant breached his fiduciary duties to invest and manage the assets solely in the interests of the beneficiaries, noting that "defendant [] admits to borrowing large sums of money from the trust assets for his own benefit, to invest in his own liquor stores, to pay his own bills for those liquor stores." Further, defendant "admits to trading on . . . margin[,] which[] was prohibited." He "borrowed money and never repaid it [and used] the trust funds for his own personal benefits, all showing bad faith on his part with regard to his fiduciary duties."

The judge adopted the findings of plaintiffs' financial expert, Joel Molnar, CPA, MBA, who testified that a reasonable fiduciary would have invested approximately half in stocks and half in bonds with a conservative five-percent return.

The judge also found that defendant breached his fiduciary duties by failing to maintain adequate records and account for trust assets, and by engaging in self-dealing by investing in trust funds and entities in which he had an ownership interest. Nevertheless, the judge found no basis for the award of punitive damages. The judge also rejected defendant's argument that Tara should share liability as a co-trustee, finding that she was not complicit in defendant's wrongful activities.

The judge found credible and adopted the calculation of plaintiffs' expert regarding the net purchase price of the liquor store, and various credits that should apply. The court specifically rejected defendant's claim that the purchase price of the liquor store required a downward adjustment to reflect a \$25,000 judgment, as defendant presented no evidence that he satisfied the judgment. The court also rejected defendant's argument that an earlier, alleged settlement with Garrett represented a full and complete release of any of Garrett's claims, finding "deception" by defendant regarding "the money that was actually owed to Garrett."

The court further awarded attorney's fees to plaintiffs based on the provision in the Will authorizing defendant's purchase of the liquor store, which included a valid attorney's fee provision that defendant accepted when he purchased the store. The October 8, 2014 Order of Judgment awarded plaintiffs \$554,893.31, representing \$94,621.93 in compensatory damages to Garrett; \$81,664.55 in compensatory damages to Brook; \$240,747.83 in compensatory damages to Garrett and Brook for the liquor store; and \$137,879 for attorney's fees and costs incurred by plaintiffs. This appeal followed.

## II.

Initially, we note that the scope of our review of findings made by a trial court in a non-jury case is limited. We review the factual findings made by a trial judge to determine whether they are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citation omitted). Such findings made by a judge in a bench trial "should not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Id. at 483-84. Factual findings that "are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case" enjoy deference on appeal. State v. Johnson, 42 N.J. 146, 161 (1964).

On appeal, defendant presents the following arguments for consideration:

### POINT ONE

THE TRIAL COURT ERRED IN [] FAILING TO APPORTION ANY LIABILITY AGAINST THE CO-TRUSTEE.

- A. TARA ARNOLD WAS A CO-TRUSTEE AND OWED A FIDUCIARY DUTY TO THE BENEFICIARIES.
- B. TO THE EXTENT THAT DARRYL FUSCO WAS HELD TO HAVE BREACHED HIS FIDUCIARY DUTIES, HE SHOULD BE ENTITLED TO AN OFFSET OR A CREDIT RELATING TO TARA ARNOLD'S LIABILITY.

POINT TWO

THE TRIAL COURT ERRED IN AWARDING  
[ATTORNEY'S] FEES.

- A. THERE WAS NOT A SUFFICIENT WRITING TO  
OBLIGATE DARRYL FUSCO TO PAY  
[ATTORNEY'S] FEES.
- B. TO THE EXTENT THAT [ATTORNEY'S] FEES  
ARE ALLOWED, THE AMOUNT AWARDED WAS  
EXCESSIVE AND REPRESENTS AN ABUSE OF  
DISCRETION.

POINT THREE

THE TRIAL COURT ERRED IN FAILING TO CREDIT  
DARRYL FUSCO A \$25000 CREDIT FOR PAYMENT OF  
THE SECOND MORTGAGE.

POINT FOUR

THE TRIAL [COURT] ERRED IN ITS FINDING THAT  
DARRYL FUSCO ACTED IN BAD FAITH.

After carefully reviewing the trial record, we reject defendant's arguments and affirm substantially for the reasons expressed by Judge Coleman in his oral opinion of September 2, 2014. The record contains adequate, substantial and credible evidence supporting the judge's findings and conclusions. We add the following comments.

Defendant's claim that the court erred in not assessing any damages against Tara clearly lacks merit. While plaintiffs could have asserted a claim against Tara, see Branch v. White, 99 N.J. Super. 295, 306 (App. Div.), certif. denied, 51 N.J. 464 (1968), they declined to do so. The court found credible Tara's



testimony that she did not control, invest, or borrow any trust funds or assets as defendant did. Instead, the court found that it was defendant who improperly borrowed from the Trust, traded on the margin, lost thousands in speculative option trading, and misappropriated funds. Tara testified that she only opened the Schwab accounts under defendant's direction, and closed Brook's account because money had been disappearing from it. Judge Coleman found defendant solely responsible for plaintiffs' damages based on defendant's deception and misconduct, and properly rejected defendant's request to hold Tara liable for not stopping him. We defer to Judge Coleman's findings. See Cesare v. Cesare, 154 N.J. 394, 412 (1998).

Defendant's claim that the court erred in awarding attorney's fees, or alternatively, that the amount was excessive, also clearly lacks merit. The scope of appellate review of a counsel fee award is narrow and "fee determinations by trial courts will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). New Jersey has adopted the "American Rule" which prohibits recovery of counsel fees by the prevailing party against the losing party. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 404 (2009). Despite the constraints of the American rule and New Jersey's public policy

against fee-shifting, an allowance of counsel fees may be made even if not authorized by rule or statute where the parties themselves have so agreed in advance by contract. Satellite Gateway Com. v. Musi Dining Car Co., 110 N.J. 280, 285-86 (1988); see also In re Unanue, 311 N.J. Super. 589, 597-98 (App. Div.) (enforcing testamentary trust provision calling for payment of attorney's fees by the party losing litigation out of disputes over the trust), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).


In the context of wills, "[i]f the devise be upon terms which are capable of being enforced in equity, and the gift be accepted, equity will compel compliance with the conditions annexed to it." Bird v. Hawkins, 58 N.J. Eq. 229, 243 (Ch. 1899). We discern no basis for defendant's argument that the court abused its discretion in awarding the attorney's fees based on the terms of the Will. The court reasoned that by accepting the terms of the Will concerning the purchase of the liquor store, defendant agreed to accept the provision making him liable for attorney's fees in the event he defaulted. We further note that the court limited the award of attorney's fees to those fees incurred in connection with defendant's default on the payments owed for purchase of the liquor store. Our review

of the record convinces us that the trial court reasonably exercised its discretion in the amount of attorney's fees awarded here.

Defendant's remaining appellate arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION