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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002258-MR

KATHERINE COMBS JARVIS
AND HUGH J. CAPERTON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA ECKERLE, JUDGE
ACTION NO. 08-CI-013731

NATIONAL CITY AND
PNC BANK NATIONAL ASSOCIATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Katherine Combs Jarvis and Hugh J. Caperton appeal the award of summary judgment to National City and PNC Bank National Association. The narrow question before the Court is whether the repeal of KRS[1] 386.180 in

[1] Kentucky Revised Statutes.

2008, eliminating limits on the compensation charged by testamentary trustees, is effective with respect to trusts which predate the repealed statute. The banks argue the repeal of the statute means they are now free to charge reasonable commissions on all testamentary trusts, just as they do on *inter vivos* trusts. Jarvis and Caperton, beneficiaries of trusts[2] established years ago, argue the commission ceilings expressed in KRS 386.180 at the time the trusts were created remain in effect.

In a well-reasoned and thorough opinion and order, which we adopt as our own and set forth in full, the trial court granted summary judgment to the banks. We affirm.

OPINION AND ORDER

> This matter stands submitted upon the motion of Plaintiffs, National City and PNC Bank National Association (hereinafter, "Plaintiffs"), for summary judgment. The Defendants, Katherine Combs Jarvis and Hugh Caperton (hereinafter, "Defendants"), filed a written response, to which Plaintiffs replied. After having carefully considered and thoroughly reviewed the motion, the documents in the Court's file and the applicable law, the Court will grant Plaintiffs' motion.

OPINION

> On December 30, 2008, Plaintiffs filed a Verified Complaint for Declaratory Judgment against Defendants pursuant to KRS 418.040, et seq. The Complaint states that Plaintiffs serve as testamentary trustees of the Katherine Lovern Craft Trust, the John Riley Craft Trust and the Hugh J. Caperton Trust. Defendants are beneficiaries of the trusts.

[2] The wills establishing the trusts contain no agreement or reference to trustee fees.

Plaintiffs' primary allegation is that the banks, as trustees, have been deprived of a "reasonable commission" for their services. Until recently, KRS 386.180 governed trustee commissions and provided that testamentary trustees were entitled to an annual commission of up to 6% of the income from the trust, plus 0.3% of the value of the trust principal. In lieu of the annual principal fee, the fiduciary had the option of taking a commission not to exceed 6% of the fair value of the principal distribution at the time of termination of the trust. Under KRS 386.180, a trustee was only entitled to additional compensation for the performance of unusual or extraordinary services.

House Bill 615 effectively repealed KRS 386.180 on July 17, 2008. In the wake of that action, there have been no rulings to determine how to calculate compensation for trustees. This Opinion may be the first on the issue.

Plaintiffs argue that the General Assembly's reason for repealing KRS 386.180 was to abolish the ceiling on compensation for trustees of testamentary trusts. A trustee's fee for overseeing a non-testamentary, or *inter vivos*, trust has historically not been capped. Trustees of *inter vivos* trusts retain a "reasonable fee" for their services, and Plaintiffs assert they are entitled to same.

Defendants assert there is no justiciable issue and that under quasi-contract principles, Plaintiffs are not relieved of the obligations they knowingly accepted simply because of the repeal. Defendants' second argument regarding quasi-contract theory is more akin to an equitable estoppel claim in that they assert the Plaintiffs should not be allowed to represent that they will receive a certain amount of compensation and then later change their position to obtain a greater fee. Defendants further argue that various statutes (i.e., - KRS 395.105, 386.655, 395.326, 396.610, etc.) illustrate how the legislature intended to treat testamentary trusts different from *inter vivos* trusts. Last, Defendant asserts

that all necessary parties have not been joined in this action.

As set forth in Civil Rule 56, summary judgment is granted when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." In determining whether to grant a motion for summary judgment, this Court is to view the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). "A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. Thus, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

When construing statutes, Courts are guided by KRS 446.080, which provides as follows: "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." "Thus, the cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Financial Group* [*, Inc.*] *v. Morton,* 289 S.W.3d 193, 197 (Ky. 2009) (citation omitted).

Generally, a repeal is intended to replace old law with new law. *Martin v. High Splint Coal Co.,* 103 S.W.2d 711, 718 (Ky. 1937). Here, there is no new law or savings clause to interpret. Section 4 of HB 615 states, "The following KRS section is repealed: 386.180 Compensation of trustees of estates." The plain language of the repeal indicates that the legislature intended to remove any form of statutorily imposed guidelines regulating the fee habits of trustees of testamentary trusts. Otherwise, the legislature would have drafted and enacted a new law establishing how the fees should be calculated. Therefore, in the absence of a statute

directing otherwise, the Court can only conclude that trustees of testamentary trusts are entitled to collect a "reasonable fee" commensurate with the performance of their duties.

Trustees of testamentary trusts are subject to the strict procedural requirements of probate court, so the two different kinds of trustees are often afforded different treatment under the law. House Bill 615 is likely the legislature's attempt to diminish the divide.

Contrary to Defendants' argument, the Court finds that the issue of whether Plaintiffs are entitled to apply a reasonable fee to trusts where the banks had previously elected to take a "termination fee" under KRS 386.180 is a justiciable issue. *Combs v. Matthews,* 364 S.W.2d 647, 648 (Ky. 1963). Established case law provides that a justiciable controversy is presented when "the advanced determination of which would eliminate or minimize the risk of wrong action by any of the parties." *Id.* The parties here must take some action with regard to payment. This Court's opinion is thus not merely advisory.

Defendants' second argument regarding quasi-contract, while creative, is unsupported by case law. Defendants cite *Robinson's Executor v. Robinson,* 179 S.W.2d 886 (Ky. 1944), which involved an executor's compensation. That case is irrelevant as KRS 395.105 governs how much an executor is owed for the performance of his duties. Defendants' reliance on *Kentucky Association of Counties All Lines Fund Trust v. McClendon,* 157 S.W.3d 626 (Ky., 2005) is also misplaced. That case does not involve any form of written instrument, and is therefore inapposite to the matter at hand. Further, while all parties must operate pursuant to existing law, such a mandate does not translate into an unwritten contract between private parties to abide forever to the law that existed at the inception of their relationship. There is no legal basis for the Court to create and impose such a fictional contract.

Finally, the Court finds that all necessary parties are present in this action. It is undisputed that Defendants are the trust beneficiaries under the first estate, and any descendants would be contingent remaindermen. Under the doctrine of virtual representation, Defendants are entitled to represent the interests of all contingent remaindermen beneficiaries. *See Carroll v. First National Bank & Trust Co. of Lexington*, 227 S.W.2d 410, 411 (Ky. 1950); *see also Hermann v. Parsons,* 78 S.W. 125 ([Ky.] 1904).

Plaintiffs tendered the affidavits of Cynthia Maddox, Senior Vice President and Trust Director at PNC Wealth Management, and copies of the testamentary documents at issue. Ms. Maddox's affidavit states that managing a testamentary trust can often be time consuming and complicated. Defendants have offered no affirmative evidence countering these assertions. Construing the facts in a light most favorable to the Defendants, there are no genuine issues of fact to preclude summary judgment. Plaintiffs have shown that the issue involved is purely one of law, and they are entitled to summary judgment as a matter of law in the form of a declaration.

ORDER

Wherefore, IT IS HEREBY ORDERED that the motion of Plaintiffs, National City and PNC Bank National Association, for summary judgment should be and hereby is granted. The Court hereby declares that for serving as trustees of testamentary trusts, Plaintiffs may hereinafter charge a reasonable fee, generally commensurate with the fee that would be charged for similar nontestamentary trusts, and in the limited instances of testamentary trusts that are or have been subject to a termination fee, the testamentary trustees' determination of reasonable fees may also take into consideration the fees charged or deferred, prior to the repeal of KRS 386.180, so that the total fee they receive during the administration of a trust is reasonable.

The Opinion and Order of the Jefferson Circuit Court, entered on November 6, 2009, is AFFIRMED.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent and express several grounds for my disagreement.

This action was commenced pursuant to KRS 418.040. Because an action for declaratory judgment did not exist at common law, it is permitted as a result of statutory law pursuant to which a declaration of rights can only be sought where an actual controversy exists. KRS 418.040.

> To justify an action for declaratory relief there must be a real or justiciable controversy involving specific rights of the parties. *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.,* Ky., 697 S.W.2d 946, 948 (1985). A justiciable controversy does not include questions "which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy." *Dravo v. Liberty Nat'l Bank & Trust Co.,* Ky., 267 S.W.2d 95, 97 (1954). "A mere difference of opinion is not an actual controversy ...." *Jefferson County v. Chilton,* 236 Ky. 614, 33 S.W.2d 601, 605 (1930) (citations omitted).

Curry v. Coyne, 992 S.W.2d 858, 860 (Ky.App. 1998).

The sparse record lacks evidence that an actual controversy exists between the parties. There is no description or record of the probate activity and, therefore, no claim or support for the fee that the banks intend to charge, whether

the banks intend to request fees retroactively, or that fees are disputed. Further, there is no evidence of the agreement entered into by the banks and the beneficiaries in the probate court at the time the banks accepted administration of the trusts. Thus, it cannot be determined if an actual controversy exists as to the amount of fees claimed by the banks.

Although the banks alleged an actual controversy in their complaint, the banks did not state its nature with specificity. Without service of process upon them, the beneficiaries answered the complaint admitting that an actual controversy existed. No further evidence as to the controversy was submitted. The first motion for summary judgment was not supported by an affidavit stating facts establishing an actual controversy and the only affidavit in the record, filed by Cynthia Maddox, vice-president and director of PNC Wealth Management, reads as a memorandum of law rather than a sworn statement of facts establishing an actual controversy. Further, the wills attached to the affidavit were not verified by a stamp in the will book at the county clerk's office or by probate court stamp.

My examination of the record reveals there is no actual controversy between these parties and the request for declaratory judgment is one made only to obtain an advisory opinion regarding the repeal of KRS 386.180. Essentially, the action is the equivalent of a class action litigation resulting in the opportunity for every probate trustee to apply for retroactive fees for the administration of trusts within this state.

Although counsel for each party has high legal principles, ethics and high legal competence, I am astounded that the majority reaches such a far-reaching decision based on the facts and circumstances presented. The following question dominates my thinking: Are the beneficiaries adequate representatives of every trust beneficiary in Kentucky? I ask the question because there is no indication why the beneficiaries who live in two different states but are represented by the same attorney and who were not served with process agreed to litigate the controversy. Because of the circumstances under which this case is before the Court, I believe it should not serve as establishing the law applicable to all trustees' fees.

Even if my initial conclusion that there is no actual controversy between the parties is untenable, I disagree with the majority's conclusion that the General Assembly intended the repeal of KRS 386.180 to be retroactive. It is a basic premise of statutory construction that it is the role of the courts to effectuate the legislative intent. *White v. Commonwealth*, 32 S.W.3d 83 (Ky.App. 2000). Regarding the retroactive application of legislative action, KRS 446.080(3) states: "No statute shall be construed to be retroactive, unless expressly so declared."

House Bill 615, which repealed KRS 386.180, was passed on April 15, 2008, the year the General Assembly "stopped the clock at midnight" so that a budget could be passed and no mention was made that the repeal applied retroactively during the hearing before the House or Senate Judiciary Committees. The silent legislative record is particularly significant because KRS 386.180 was

not merely remedial in nature but it imposed substantive rights and duties upon the trustees and beneficiaries.

Throughout the lifetimes of the three trusts involved in this litigation, the trustees' compensation was governed by KRS 386.180. Under the statute, once the trustees made an election, the election became irrevocable. *First Security National Bank v. des Cognets*, 563 S.W.2d 476 (Ky.App. 1978). Yet, the majority allows the banks to recover fees for decades prior to the repeal of KRS 386.180, a direct interference with the vested rights of the beneficiaries to bind the banks to the compensation agreed to by their acceptance of their positions as trustees.

For the reasons stated, I dissent.

BRIEFS FOR APPELLANT:

Homer Parrent, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

Virginia Hamilton Snell
Louisville, Kentucky