STATE OF MICHIGAN

COURT OF APPEALS

In re MARIO BELL TRUST.

CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION, INC.,

Petitioner-Appellant,

v

TERI A. JORDAN, Successor Trustee,

Respondent-Appellee.

UNPUBLISHED
June 4, 2013

No. 309010
Wayne Probate Court
LC No. 2011-772230-TV

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Petitioner, Center For Special Needs Trust Administration, Inc. (CSNTA), appeals the probate court's order that directed the company to return a $2,500 fee charged to the Mario Bell Trust. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Mario Bell, a minor, sustained injuries from exposure to lead paint. The Wayne Circuit Court approved a settlement on December 6, 2007, pursuant to which Bell received $100,000. After costs and attorney fees, the proceeds amounted to approximately $60,000. Bell's mother, Mary Drake, sought to establish a special needs trust for the benefit of Bell. Because Drake could not qualify for a surety bond in the amount necessary to secure the trust, her attorney proposed that CSNTA, a Florida Company, could act as initial trustee, with local attorney, Michele Fuller, acting as agent for CSNTA. The probate court appointed Melvin Jefferson, Jr., as Bell's guardian ad litem.

On March 8, 2008, Jefferson filed a report stating that a special needs trust would manage the settlement proceeds while also allowing Bell to remain eligible to receive government benefits. He stated that CSNTA charges a set up fee of $2,500, an annual fiduciary fee of 1.5% of the trust assets, as well as legal fees and tax return preparation fees. Jefferson recommended that the court appoint CSNTA as initial trustee and that Fuller should be "given authority to execute any documents necessary to establish, fund and administer the [t]rust." He further stated

that CSNTA "should qualify with the filing of a $60,000.00 surety bond or an amount reflective of the next proceeds actually received by the . . . [t]rust." As respondent notes, Jefferson did express concern that the settlement amount had already been significantly reduced because of costs related to the underlying litigation. At a hearing on March 13, 2008, the probate judge also expressed considerable reservations about the expenses related to opening and maintaining the trust.

At the next hearing, on April 1, 2008, the probate judge again expressed concern about the costs of the trust through CSNTA, including the $2,500 set up fee and ongoing expenses. He questioned whether different, less expensive services might be appropriate and it appears from the transcript that Drake's counsel and the probate judge were under the impression that Ms. Fuller's services, including court appearances and handling of disbursement requests, would be included in the set-up fee and annual percentage payment, rather than billed separately. In a written order, the court directed that the disability payback trust be established. The order stated that the court approved the terms and provisions of the trust as submitted to the court and that, for CSNTA to qualify as initial trustee, it must file an acceptance of appointment and proof of posting of bond in the amount of $55,000. The court further ordered that CSNTA shall have the power and authority to establish and transfer assets to the trust and that, as trustee, CSNTA was permitted to administer the trust without restriction, without court supervision, and without annual accountings. The court conducted a hearing on June 17, 2009, to determine whether the trust should continue. At the hearing, Drake questioned why the trust was managed by a Florida company. The court replied that Fuller is a local attorney and the use of CSNTA was probably the most economical route to handle the settlement proceeds. The court ruled that the trust should continue with no change.

On December 21, 2011, the court heard CSNTA's motion to resign as trustee. CSNTA's representative at that time, Mary Schmitt Smith, stated that a bond was filed in the 2008 proceedings, but "it didn't make the books or the records of the court file." The court ordered CSNTA to submit a final accounting, which reflected that Fuller charged for legal services at a rate of $250 per hour and, after 2008, CSNTA raised its annual fee to two percent of the trust amount, and charged $350 annually for tax preparation. Despite making disbursements from the funds, which were invested with Boston Asset Management, the record reflects that CSNTA did not actually file a petition to qualify as trustee until November 2011, and did not post the appropriate surety bond until that time. Immediately thereafter, CSNTA moved to resign as trustee, and the court ultimately appointed attorney Teri Jordan as successor trustee.

CSNTA filed a petition to allow accounts in December 2011 and Jefferson, as Bell's GAL, filed a report on January 27, 2012. Jefferson noted that the trust was not filed with the court until November 2011 and that CSNTA did not qualify as trustee until that time. He pointed out that a surety bond was obtained under the protective order file rather than the trust file and that, therefore, it may not have actually protected the settlement assets. According to Jefferson:

> Given that the Trust was not established until November, 2011, it would appear to be inappropriate to grant the requested set up fee. Further, there is the question of whether the set up fee represents services that were beneficial to [Bell].

Jefferson further asserted that the trustee failed to abide by the trust requirements that the trustee regularly visit Bell to assess his living conditions and to evaluate his needs. Jefferson also recommended that the court reduce Fuller's legal fees, and he noted that Mary Schmitt Smith already agreed to a reduction of her legal fees.

At a hearing on the accountings on January 31, 2012, Mary Schmitt Smith acknowledged Jefferson's report, and she did not dispute his recommendations. Rather, Mary Schmitt Smith asked the court to approve costs of $366 for filing the petition and qualifying the trust, as well as $742 for the surety bond that she secured on November 30, 2011. As successor trustee, Jordan stated that Drake expressed concern about Bell's "continuing unmet needs" and Jordan expressed concern about the trustee's failure to keep track of the vehicle purchased with funds from the trust as well as to keep in regular contact with Drake and Bell.

The probate judge observed that Bell benefited from the vehicle, that it was appropriate for the trust to pay past auto insurance premiums for it, but that future payments for the vehicle should be brought before the court. The court ordered CSNTA to return the $2,500 set up fee noted in the first accounting on the basis of Jefferson's recommendation, and the court also followed Jefferson's recommendations with regard to the attorney fees. The court also ordered that the trust should reimburse CSNTA for costs to file the petition to qualify the trust, and it cancelled the bond obtained by CSNTA because a new bond was properly secured by Jordan.

II. DISCUSSION

"An appeal of a decision of the probate court . . . is on the record; it is not reviewed de novo." *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). As this Court explained in *In re Townsend Conservatorship*, 293 Mich App 182, 186: 809 NW2d 424 (2011):

> We review a probate court's factual findings under the "clearly erroneous" standard. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.*

This Court reviews a probate court's dispositional rulings for an abuse of discretion. *Lundy Estate*, 291 Mich App at 352.

Pursuant to MCL 700.1302, the probate court has the authority to order final accounts and to review fees of a trustee. "If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." MCL 700.7708. However, here, the trust document specifically states that the trustee "may pay himself or herself reasonable compensation" for both ordinary and extraordinary services. Under MCL 700.7708(2):

> If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if either of the following apply:

(a) The duties of the trustee are substantially different from those contemplated when the trust was created.

(b) The compensation specified by the terms of the trust would be unreasonably low or high.

Further, a trustee is entitled to reimbursement from the trust for "[e]xpenses that were properly incurred in the administration of the trust." MCL 700.7709. Both parties also cite *Comerica v Adrian*, 179 Mich App 712, 724–725; 446 NW2d 553 (1989), in which this Court set forth several factors to determine whether a trustee's fee is "reasonable," including:

> (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10), the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

In its petition to allow accounts, CSNTA specifically asked the court to approve fees, costs, and expenses incurred by CSNTA as trustee. Further, as noted, at the hearing on the accounts, Mary Schmitt Smith, as CSNTA's representative, did not dispute Jefferson's assertion that the $2,500 should not be allowed. As respondent points out, CSNTA could have presented evidence to challenge this recommendation or cross-examined Jefferson pursuant to MCR 5.121(D), but CSNTA chose not to do so. Thus, notwithstanding CSNTA's claim, on various grounds, that the court should be reversed for ordering it to return the "set up" fee, we could decline to address any such argument as waived because CSNTA failed to raise a challenge in the probate court. As our Supreme Court opined in *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008):

> By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [Footnoted citations omitted.]

Moreover, we hold that the probate court did not abuse its discretion when it ordered CSNTA to reimburse the $2,500 "set up" fee. CSNTA failed to follow the court's order to initiate the trust and failed to file the procedures set forth in MCR 5.501. CSNTA did not file a petition to qualify as trustee, did not accept the appointment or serve notice of the acceptance, and failed to properly secure the trust through the required bond, which appears to have been secured in the wrong action. CSNTA only petitioned for appointment and properly secured the bond as procedural hurdles to allow it to formally resign as trustee. And, again, CSNTA failed to

challenge the report of the GAL regarding the fees and his concerns about the trustee's failure to visit Ball to assess his current situation and future needs. The rules and statutes concerning the requirements of a trustee, as well as probate court orders and the trust document itself, are more than mere formalities. Together, they serve to protect the assets and interests of the trust beneficiary. Here, in light of CSNTA's errors and omissions, the probate court clearly acted within its sound discretion in declining to allow the charge for a $2,500 "set up" fee.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan