STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0021

In re: Trust of Phyllis Gene Jones, Settlor

Filed August 13, 2018
Affirmed
Klaphake, Judge*

Ramsey County District Court
File No. 62-TR-CV-15-15

Kent Carroll Jones, Cairo, New York (pro se appellant)

Rodney J. Mason, Karin Ciano, Mason & Helmers, St. Paul, Minnesota (for respondent First Trust Company)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this trust dispute, appellant challenges the district court's denial of his petition to remove the trustee, arguing that the trustee breached its duty of loyalty to him by failing to invest in physical assets and respond to appellant's communications voicing his concerns about the trustee's investment strategy. We affirm.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

D E C I S I O N

Appellant Kent Carroll Jones contends that the district court erred in denying his petition to remove respondent First Trust Company (First Trust) as trustee. Jones argues that First Trust breached its duty of loyalty to him by failing to "protect the trust from an economic calamity by investing in physical tangible assets." We review the district court's decision whether to remove a trustee for an abuse of discretion. *In re Will of Gershcow*, 261 N.W.2d 335, 338 (Minn. 1977). A district court's finding that a trustee did not breach a fiduciary duty or abuse its discretion in administering a trust will not be set aside unless it is clearly erroneous. *In re Trusts Created by Hormel*, 504 N.W.2d 505, 512 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). We defer to the district court's assessment of a witness's credibility. Minn. R. Civ. P. 52.01. "The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court." *Id.*

A beneficiary may petition the court to remove a trustee if, among other things, the trustee has committed a serious breach of trust or the trustee is unfit, unwilling, or persistently fails to effectively administer the trust to best serve the interests of the beneficiaries. Minn. Stat. § 501C.0706(a), (b) (2016).

"A trustee owes a duty of loyalty to the beneficiaries. A trustee shall not place the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802(a) (2016). The trustee has a duty to refrain from allowing its personal interests to conflict with its interests as trustee. *Smith v. Tolversen*, 190 Minn. 410, 413, 252 N.W. 423, 425 (1934). A trustee breaches the trustee's duty of loyalty to the beneficiaries when the trustee acts for personal gain. *In re Revocable Trust of Margolis*, 731 N.W.2d 539, 545 (Minn. App. 2007).

A trustee who invests trust assets must also "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." Minn. Stat. § 501C.0901, subd. 2 (2016). In satisfying this standard, the trustee "shall exercise reasonable care, skill, and caution." *Id.*

Jones argues that his interest is to "place investments in physical assets, such as a house [and] silver coins" and that the "trustee refuses to place this interest of [his] above the trustee's own" interest. Jones argues that First Trust breached its duty of loyalty by refusing to "yield to [his] interest to preserve the trust as [he] see[s] fit."

This argument is unpersuasive. First, Jones does not explain how First Trust has placed its interests above his own by refusing to invest Jones's trust share in physical assets. *See Margolis*, 731 N.W.2d at 545 (noting that a trustee's duty of loyalty requires it to avoid conflicts between its own interests and its interests as trustee and that a trustee can breach the duty of loyalty by acting for personal gain).

Second, First Trust's duty of loyalty to Jones does not require abdication of its responsibility to exercise its discretion in determining which investments of Jones's trust share are in his best interests. Article 14, section 2 of the trust gives the trustee the authority to exercise its investment powers as it "determines in its sole and absolute discretion to be in the best interests of the beneficiaries," and Article 14, section 3, subparagraph e, provides the trustee with authority to choose a wide variety of investment types. Thus, the trust gives First Trust significant discretion to determine which investments are in Jones's best interests. First Trust is not required to make investments as Jones sees fit.

Third, Jones has failed to demonstrate that First Trust's investment strategy is not in his best interests. Jones asserts that he "fully expect[s] in [his] lifetime a currency crash of the United States dollar that shall affect all investments in dollars" and that as a result, only the portions of the trust invested in "assets that are not dollar based shall withstand the economic crash." But this assertion is not supported by record evidence, and without such evidence, we cannot conclude that First Trust is unfit to be trustee solely because it did not make such investments. In sum, the district court did not err by finding that First Trust had not breached its duties to Jones as trustee.

Jones also argues that First Trust has failed to respond to his communications about the importance of investing in physical assets. To the extent that this argument is an argument that First Trust's unresponsiveness makes it unfit to be trustee under Minn. Stat. § 501C.0706(b), it is unpersuasive. The referee who heard Jones's removal petition found "plenty of evidence that . . . [First Trust has] attempted to contact [Jones]." Although the referee made that finding during the hearing and did not restate it in his order approved by the district court, it is implicit in the referee's finding that "First Trust has not breached its duties as Trustee," and is supported by the record. First Trust submitted an affidavit from Adam Stern, First Trust's vice president, and a March 25, 2016 letter to Jones as evidence that it had responded to Jones's communications regarding investment in physical assets. In the letter, Stern noted Jones's concerns with First Trust's investment strategy and offered to shift its investment strategy from "moderate" to "cautious."

Finally, Jones argues that the second restatement of the trust does not reflect decedent's intent.[1] Jones did not raise this argument during the hearing on his petition to remove First Trust as trustee; that hearing was limited to the removal petition, approval of First Trust's accounts and investment plan, and an award of attorney fees. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Although some accommodations may be made for pro se litigants, they are generally held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). We therefore decline to consider this issue for the first time on appeal.

Affirmed.

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[1] Jones also states in his brief that he "object[s] to the attorney's fees for First Trust Company being paid out of the trust" and "cannot in good faith approve of the accounts that [the] District Court approved by the order of November 1, 2018" because he has "no faith in [First Trust]." We construe these arguments as an extension of Jones's argument that First Trust should be removed as trustee rather than as a challenge to the merits of the district court's award of attorney fees or approval of First Trust's accounts.