

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-0624**

In re the Estate of: Josephine Lucille Bicanich, Decedent.

**Filed February 13, 2023  
Affirmed  
Klaphake, Judge\***

Dakota County District Court  
File No. 19HA-PR-16-518

Thomas Bicanich, Chisholm, Minnesota (pro se appellant)

Christopher J. Burns, Eric Friske, Henson & Efron, P.A., Minneapolis, Minnesota (for respondent Fiduciary Foundation, LLC)

James Hanvik, Bassford & Hanvik, PLLC, St. Louis Park, Minnesota (for respondent David Bicanich)

Peter Bicanich, Maple Grove, Minnesota (pro se respondent)

Constance O'Hara, Burnsville, Minnesota (pro se respondent)

Considered and decided by Bratvold, Presiding Judge; Jesson, Judge; and Klaphake, Judge.

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

## NONPRECEDENTIAL OPINION

**KLAPHAKE**, Judge

Appellant challenges the denial of his petition to remove the personal representative of his deceased mother's estate, arguing that the district court abused its discretion in denying the petition because the personal representative acted improperly and unlawfully. We affirm.

### DECISION

Appellant Thomas Bicanich challenges the denial of his petition to remove respondent Fiduciary Foundation, LLC as the personal representative of the estate of his late mother, Josephine Lucille Bicanich. An appellate court “will not reverse the district court’s determination regarding removal of a personal representative unless the district court clearly abused its discretion by disregarding the facts.” *In re Est. of Martignacco*, 689 N.W.2d 262, 269 (Minn. App. 2004), *rev. denied* (Minn. Jan. 26, 2005). “Cause for removal [of a personal representative] exists when removal is in the best interests of the estate, or if it is shown that a personal representative . . . has mismanaged the estate or failed to perform any duty pertaining to the office.” Minn. Stat. § 524.3-611(b) (2022).

This appeal concerns a dispute over the estate of Josephine Bicanich, who died testate in July 2016. Josephine is survived by her four children: Thomas Bicanich and respondents Peter Bicanich, David Bicanich, and Constance (Connie) O’Hara. The will named the four children as equal heirs to Josephine’s estate. As the district court observed, there is a demonstrated animosity and distrust among Josephine’s children that predates

her death and has resulted in Thomas and David being generally aligned against Connie and Peter, and has led to this continued litigation over the estate.

Josephine's will nominated her spouse as the personal representative of her estate and Connie and Peter as alternative co-personal representatives. Josephine's spouse predeceased her, and as a result following Josephine's death Connie and Peter both signed acceptances of appointment as personal representative of Josephine's estate and Connie petitioned for herself and Peter to be formally named co-personal representatives of the estate. Thomas filed a competing petition objecting to the appointment of Connie and Peter as co-personal representatives. The children subsequently failed to agree upon and nominate a personal representative, and the district court ultimately appointed Fiduciary Foundation as a neutral personal representative in September 2017. In October 2021, Thomas petitioned to have the district court remove Fiduciary Foundation as the personal representative. Following a two-day hearing, the district court denied the petition.

Thomas argues that the district court abused its discretion in denying his petition to remove Fiduciary Foundation as personal representative. He first argues that Fiduciary Foundation should be removed because it "did not uphold its fiduciary duty to protect [Josephine's] estate by not ever addressing the legitimate powers-of-attorney fraud allegations made by [Thomas] during [Josephine's] protracted probate." (Emphasis omitted.) He contends that both Connie and Peter "admitted that they transferred [Josephine's] property to themselves while [Josephine] lacked capacity" and generally alleges that Connie and Peter engaged in fraud while they had power of attorney over their

mother. He asserts that Fiduciary Foundation failed to appropriately respond to these allegations.

The district court rejected this argument and noted that the allegedly fraudulent conduct took place prior to Josephine's death, which was well before Fiduciary Foundation was appointed as the personal representative of the estate. The memorandum accompanying Thomas's petition to remove Fiduciary Foundation alleged that Connie and Peter perpetrated "an extensive embezzlement scheme" from August 2012 through January 2016, during which time they had power of attorney over Josephine. Fiduciary Foundation was not appointed as personal representative of the estate until September 2017—over a year and a half after the allegedly fraudulent conduct ceased. Thomas previously raised these claims in the district court proceeding related to Josephine's conservatorship. After Thomas raised these claims a neutral party audited the estate account, and the district court subsequently issued an order in December 2017 that determined that the conservator had "satisfactorily accounted for every part of the estate according to law." Thomas did not appeal that decision.

Moreover, Thomas's argument that Connie and Peter improperly transferred property to themselves concerns the transfer of two properties that were ultimately transferred back to Josephine prior to her death and consequently included in her estate.<sup>1</sup> On this record, we agree with the district court that Thomas's allegations of fraud by

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<sup>1</sup> The record contains a letter from Josephine's attorney informing Connie and Peter that he believed that they had improperly transferred title of the two properties to themselves. Thus, Thomas's general assertion that the transfer was improper may have merit, but the transfer did not ultimately impact the estate.

Connie and Peter did not establish cause to remove the personal representative because any fraud occurred prior to the appointment of the personal representative, it was addressed in the conservatorship proceeding, and the properties were included in the estate.

Thomas next argues that he established cause for removal because Fiduciary Foundation initiated an improper eviction action against him. Following Josephine's death, Thomas lived on one of the properties that was part of the estate (the Hibbing house). He did not pay rent, and continued to live there even after Fiduciary Foundation entered into an agreement with a third party to sell the Hibbing house. Fiduciary Foundation initiated an eviction action in August 2019, but it was dismissed because the required 90 days' notice was not provided to Thomas. After proper notice was eventually provided, Thomas's rights as a holdover tenant were terminated in February 2020.

Thomas contends that by initiating an improper eviction action and subsequently paying for the legal fees relating to the eviction action from the estate Fiduciary Foundation violated Minn. Stat. §§ 524.3-504, .3-712 (2022). But as Fiduciary Foundation notes, Thomas's arguments mischaracterize those statutes. Under Minn. Stat. § 524.3-504, a supervised personal representative "shall not exercise the power to make any distribution of the estate without prior order of the court." Fiduciary Foundation did not make a distribution, it allegedly paid a legal bill out of the estate. And the exhibit Thomas cites to as evidence that Fiduciary Foundation paid the legal fees out of his share of the estate is a letter that was sent to him before the eviction action was even initiated that states "[i]f you choose not to move the cost of the eviction will come out of your share of the proceeds from the estate." Thus, it is not clear that the challenged transaction has taken place, and

if it has then Thomas can raise such a challenge at the accounting of the estate. *See* Minn. Stat. § 524.3-1001(a)(1) (2022) (stating that any heir objecting to the final accounting of an estate may require the district court “to consider the final account or compel or approve an accounting and distribution”).

We also disagree that Fiduciary Foundation’s conduct in initiating an eviction action against Thomas constituted an improper exercise of power under Minn. Stat. § 524.3-712. We note that despite Thomas’s assertion that the eviction action was improper, the district court did ultimately terminate Thomas’s rights as a holdover tenant. It appears that there was initially some confusion over how many days of notice was required based on Thomas’s tenancy status, but after proper notice was provided, Thomas was required to vacate the property. Thomas had refused to vacate even after Fiduciary Foundation entered into an agreement to sell the house to a third party, thereby delaying the sale and impacting the estate. It was therefore not an improper exercise of authority to initiate the eviction action under the circumstances.

Thomas next argues that Fiduciary Foundation’s director and attorney submitted “false affidavits” to the district court to support the request for a temporary restraining order to prevent Thomas from residing at another property in the estate (the Chisolm house). Like the Hibbing house, the Chisolm house has been the subject of litigation during the probate process. In June 2020, the district court enjoined Thomas from residing at the Chisolm house. Thomas argues that that order was the result of the allegedly false affidavits, but as the district court noted, the “allegation that the affidavits used to obtain this restraining order contained material misrepresentations was not raised at that time nor

was it substantiated this time.” The district court went on to state that it tended to agree with Thomas’s contention that the affidavits contained some statements that were not based upon personal knowledge, but ultimately determined that “valid explanations were provided for the contents of these affidavits” and that “[t]he testimony regarding the basis for believing the veracity of the statements contained in the affidavits was reasonable and credible, and none of the statements was demonstrably false.” *See Gellert v. Eginton*, 770 N.W.2d 190, 194-95 (Minn. App. 2009) (stating that “appellate courts defer to district court credibility determinations”), *rev. denied* (Minn. Oct. 20, 2009); *see also Straus v. Straus*, 94 N.W.2d 679, 680 (Minn. 1959) (stating that “[c]onflicts in the evidence, even though the presentation is upon affidavits, are to be resolved by the trial court”); *Knapp v. Knapp*, 883 N.W.2d 833, 837-38 (Minn. App. 2016) (citing this aspect of *Straus*). Accordingly, the statements did not, as Thomas contends, constitute “false affidavits.”

Thomas also appears to attempt to seek review of a January 2021 district court order that determined that a transfer on death deed (TODD) executed by Josephine in 2015 relating to the Chisolm house did not comply with the statutes governing TODDs. Because the TODD was found to be invalid, the district court determined that the Chisolm house was “part of the decedent’s estate and is subject to the control of the personal representative.” Thomas previously attempted to appeal the January 2021 order, but this court determined that it was not an immediately appealable order. The merits of that order are outside the scope of this appeal as well. This appeal concerns the denial of Thomas’s petition to remove Fiduciary Foundation as personal representative, and the issue of

whether the 2015 TODD complied with Minnesota law is therefore not before the court and we decline to address it.

Finally, Fiduciary Foundation argues that this court should exercise its discretion under Minn. R. Civ. App. P. 138 to award damages and costs to Fiduciary Foundation. That rule provides: “If an appeal delays proceedings on a judgment of the trial court and appears to have been taken merely for delay, the appellate court may award just damages and single or double costs to the respondent.” Minn. R. Civ. App. P. 138. Fiduciary Foundation argues that this court chose to exercise its discretion to do so in a similar case, *In re Estate of Michaelson*, and should choose to do so here. 383 N.W.2d 353 (Minn. App. 1986).

In *Michaelson*, one of the decedent’s sons was initially appointed as personal representative, but was later removed following a petition filed by the other children. *Id.* at 354-55. The petition to remove alleged six reasons for removal, including that the personal representative was refusing to divide personal property of the estate and attempting to sell items he claimed to be personal property that in fact belonged to the estate, refusing to complete specific bequests, attempting to transfer estate property to a corporation he controlled, and claiming excessive expenses as personal representative. *Id.* at 355. The district court granted the petition to remove the personal representative and this court observed that the “numerous letters and pro se documents submitted by” the personal representative supported the district court’s finding that he had “become emotionally unstable.” *Id.* at 356. This court affirmed, and concluded: “This appeal is frivolous, completely without merit, and has served only to further delay the administration

of this estate.” *Id.* Based on this determination we exercised our authority under Minn. R. Civ. App. P. 138 to order the appellant to pay \$750 in damages and double costs to the respondents. *Id.*

We decline to award damages and costs at this time. As noted above, the appellant in *Michaelson* was initially appointed personal representative and subsequently engaged in misconduct that impacted the other heirs’ ability to receive their inheritance, including refusing to fulfill specific bequests, attempting to transfer estate property to himself, claiming estate property was personal property and attempting to sell it, and claiming excessive expenses. Thomas’s conduct has plainly impacted the estate and has resulted in prolonged litigation, but it is not as egregious as the conduct in *Michaelson*. And as noted above, there appears to have been some merit for Thomas’s initial claims of improper behavior by Connie and Peter that contributed to the prolonged litigation and animosity in this case. Those issues have been resolved and Thomas should not continue to attempt to relitigate them and delay administration of the estate, but under the circumstances we decline to award damages and costs.

**Affirmed.**