

295 So.3d 1255

District Court of Appeal of Florida, Second District.

IN RE GUARDIANSHIP OF Leon
BLOOM, an incapacitated person.

Marc J. Soss, individually,
Appellant/Cross-Appellee,

v.

Marshall Bloom, individually,
Appellee/Cross-Appellant,
and

Robert M. Elliott, as Trustee of the Leon Bloom
Revocable Living Trust u/a/d 11/18/1998,
as Restated on 10/22/2009, Appellee.

Case No. 2D18-4441

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Opinion filed June 3, 2020

Synopsis

Background: In guardianship proceeding seeking to have beneficiary appointed as emergency temporary guardian of trustee's person and property, where trust was a party to the guardianship proceeding, personal representative of trustee's estate, who was substituted as petitioner in the guardianship proceeding, moved to disqualify successor trustee and appoint independent trustee, and to compel successor trustee to return fees paid from the trust. The Circuit Court, 12th Judicial Circuit, Sarasota County, [Frederick P. Mercurio, J.](#), granted both motions, and issued a sua sponte order requiring successor trustee to return \$20,000 held by successor trustee to the trust. Successor trustee appealed, and personal representative cross-appealed.

The District Court of Appeal, [Atkinson, J.](#), held that payments made by successor trustee to his attorney out of funds from trust were inappropriate, and thus, were required to be returned to the trust.

Affirmed in part, reversed in part, and remanded.

*1256 Appeal from the Circuit Court for Sarasota County;
[Frederick P. Mercurio](#), Judge.

Attorneys and Law Firms

[Marc J. Soss](#), pro se.

[James L. Essenson](#), [Barbara J. Welch](#), and [Matthew J. Kelly](#) of Law Firm of James L. Essenson, Sarasota, for Appellee/Cross Appellant Marshall Bloom.

No appearance for Appellee Robert M. Elliott.

Opinion

[ATKINSON](#), Judge.

Marc J. Soss appeals an order directing him to return funds to the Leon Bloom Revocable Living Trust (the Trust) in a guardianship proceeding in which he was removed as Successor Trustee. Marshall Bloom cross-appeals the same order and argues that the court abused its discretion in failing to direct Soss to return all of the funds he took from the Trust and to pay interest on those funds. We find no reversible error as to the issues raised by Soss but find that one of the issues raised by Bloom has merit. We reverse the portion of the order that directs Soss to return only certain funds rather than all of them and thus remand for the entry of an order directing Soss to return all of the funds he paid to his attorney.

In 1988, Leon executed a trust naming his wife, Dorothy Bloom, as a secondary beneficiary and his attorney, Robert Johnson, as Successor Trustee. In 2012, after Leon became temporarily incapacitated, Johnson assumed the role as Trustee. In 2014, Johnson filed a guardianship proceeding seeking to have Marshall, Leon's nephew and a beneficiary of the trust, appointed as emergency temporary guardian of Leon's person and property. In the proceeding, Dorothy, who was represented by Soss, sought reimbursement from the Trust for funds she alleged she had used to care for Leon.

As a result of mediation, the parties entered into a global settlement that was ultimately ratified by the court. In the settlement order, the court added the Trust as a party to the guardianship proceeding, accepted the resignation of Johnson as Successor Trustee, and appointed Caldwell Trust Company as Successor Trustee. In 2015, after Leon passed away, Caldwell filed a petition to resign as Successor Trustee. The court subsequently approved of Caldwell's resignation and ordered that "a successor trustee shall be presented for appointment by" July 23, 2015. The court found that Johnson was "an interested party for purpose of notice and objection to [the] successor trustee."

On July 23, 2015, Dorothy filed a Notice of Appointment of Successor Trustees and named her lawyer Soss and Raymond James Trust, N.A., as Successor Trustees. The notice was never filed with the court. A few days later, Johnson objected to Soss serving as Successor Trustee due to a conflict of interest; Johnson did not object to the appointment of Raymond James. After Raymond James declined to serve, *1257 Soss became the sole putative Successor Trustee.

On August 31, 2015, Johnson passed away. A Petition for Administration was filed in the Estate of Leon Bloom, and Marshall was appointed as personal representative of Leon's estate. Then, Marshall, as personal representative of Leon's estate, was substituted for Johnson as petitioner in the guardianship proceeding. Marshall, through his attorney James L. Essenson, filed a motion to disqualify Soss as Successor Trustee and to appoint an independent trustee.

Marshall moved on an emergency basis to have the circuit court hear the motion to disqualify Soss as Successor Trustee. The circuit court scheduled an evidentiary hearing on the motion for January 15, 2016. Two days before the hearing, Soss withdrew as counsel for Dorothy in the guardianship proceeding. Then, Marshall, as personal representative of Leon's estate, filed a motion for an order compelling Soss to return any fees paid from the Trust.

The circuit court subsequently entered an order removing Soss as Successor Trustee. The court found that Soss's representation of Dorothy in her claim against the Trust while simultaneously serving as Successor Trustee of the Trust created an irreconcilable conflict of interest that was not cured by his subsequent withdrawal as counsel for Dorothy. The court further found that Dorothy's purported appointment of Soss was never confirmed by the court as mandated by its order approving of Caldwell's resignation. The court also removed Marshall as personal representative of Leon's estate and appointed Robert M. Elliott to serve as Trustee of the Trust and personal representative of Leon's estate.

Thereafter, in the guardianship proceeding, Essenson noticed his appearance on behalf of Marshall, individually, and filed an amended motion for an order compelling Soss to return any fees paid from the Trust. Soss noticed his appearance as cocounsel for Dorothy. Later, Marshall moved for and was granted leave to adduce additional evidence about events that occurred after the evidentiary hearing on Soss's removal in order to complete the record, which was heard on January 8

and 9, 2018. The evidence largely focused on the funds Soss withdrew from the Trust while he was putative Trustee.

At the January evidentiary hearing, the current Successor Trustee's accountant, Kevin Hassel, testified that Soss, while acting as Trustee from August 2015 to April 2016, paid himself \$45,360 from the Trust and paid another \$82,500 to his attorney, John Waskom, who defended Soss in the disqualification proceeding. Mr. Hassel also testified that Soss overpaid Dorothy \$62,494. The current Successor Trustee's lawyer, Logan Elliott, testified that he contacted Waskom to return the funds that Soss paid him and that Waskom transmitted a check to him for \$18,708.75. Logan Elliott also testified that he sent a letter to Soss on May 11, 2016, seeking the return of the \$127,860 that Soss took from the Trust, and that Soss received the letter but never returned the funds.

Soss testified that he still held \$20,000 from the Trust and claimed that no one had ever demanded that he return it. He claimed that he had not seen the letter from Logan Elliott requesting the funds until mid-2017. Soss testified that he held the \$20,000, despite getting a demand to return funds taken from the Trust, in case he was awarded attorney's fees from the Trust. The circuit court then sua sponte entered an order requiring Soss to return the \$20,000 to the Trust.

*1258 During a line of questioning regarding the order accepting Caldwell's resignation as Successor Trustee, the circuit court asked Soss about a handwritten portion of the order that stated that "a successor trustee shall be presented for appointment by the end of" July 23, 2015, and that "Robert M. Johnson is an interested party for purpose of notice and objection to [the] successor trustee." Soss responded that the order did not specifically say that it had to be presented to the court; instead, it had to be "presented for appointment to the beneficiaries of the trust and Robert Johnson, as an interested party." Soss never asked for clarification as to what the court meant in the handwritten portion of the order.

Subsequently, Marshall filed a supplemental motion for an order compelling Soss to return the funds to the Trust. The circuit court conducted an evidentiary hearing on the supplemental motion on September 12, 2018. After hearing testimony and arguments from counsel, the circuit court found that, "based upon the totality of the evidence presented in the record, ... it was clear that there was an objection to Mr. Soss serving as co-trustee or trustee [and] that he was on notice of that fact throughout the time." The court also found "it

incredible to believe in good faith that [the order approving of Caldwell's resignation as successor trustee] was somehow misinterpreted." The court found that "it was clear that a successor trustee had to be presented and approved by the court or confirmed by the court, and that was never done."

Based on the testimony of Mr. Hassel, the court found that Soss took \$127,860 from the Trust, excluding any alleged overpayments he made to Dorothy. Of that amount, the court noted that \$18,708.75 was returned by Soss's attorney, Waskom, and that \$20,000 was returned by Soss due to an earlier court order, leaving a balance of \$81,151.25.

The court stated that it was not going to order the money paid to Waskom (totaling \$63,791.25) be returned. Although the court noted that these payments to Waskom were "ill-advised and inappropriate, in light of the clear evidence that Mr. Soss should not have been named as the successor trustee," the court found that "to order the return of those funds would be inappropriate and an undue punishment to Mr. Soss" because those funds went to Waskom and not to Soss.

As to the remaining amount of money paid to Soss (totaling \$25,360), the court found that those funds were "improperly paid from the trust" because although Soss was acting as "putative or de facto trustee," Soss "was not legally entitled to be paid that money in light of the Court's orders, and he was never legally the successor trustee." The circuit court stated the following:

I find that it would be an abuse of my discretion to ignore the fact that those payments were received by Mr. Soss at a time when he knew or should have known that he should not have made the payments because he was not an appropriate trustee; that as an experienced probate and trustee attorney, if he had any question about his ability to be presented and approved by the Court as successor trustee, simple enough in light of the fact he clearly knows how to file pleadings with the Court, he could have set a hearing on the request by Dorothy Bloom to appoint him as

successor trustee and had a hearing. That was not done.

As such, the circuit court ordered Soss to return \$17,959.50 to the Trust (\$25,360 minus the fees and costs of \$7,400.50 it awarded him in an earlier order). The *1259 circuit court declined to award interest on those funds.

Orders on fees are generally reviewed for an abuse of discretion. [Miller v. Fla. Ins. Guar. Ass'n](#), 200 So. 3d 200, 203 (Fla. 2d DCA 2016) (citing [Grapski v. City of Alachua](#), 134 So. 3d 987, 989 (Fla. 1st DCA 2012)); see also [In re Guardianship of Sitter](#), 779 So. 2d 346, 348 (Fla. 2d DCA 2000). Orders regarding fees must also be supported by competent, substantial evidence. See [In re Sitter](#), 779 So. 2d at 348. "A trustee has the burden of proving the necessity of all expenses incurred by him or her, including attorneys' fees." [Ortmann v. Bell](#), 100 So. 3d 38, 46 (Fla. 2d DCA 2011).

When a trustee seeks to charge a trust corpus with an expense incurred by him, including attorney fees, the burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and not for his own benefit nor the benefit of others.

[Barnett v. Barnett](#), 340 So. 2d 548, 550 (Fla. 1st DCA 1976) (emphasis added).

Here, at the September hearing, Soss testified about the services he performed while he was acting as Successor Trustee of the Trust in an attempt to establish the reasonableness of his fees. He provided the court with documentary evidence of the fees he took for himself as Trustee, which amounted to a total of \$25,360. Despite Soss's argument that he was entitled to compensation for acting as a "de facto" trustee, the court found that it would be an abuse of its discretion to award Soss compensation "when he knew or should have known that he should not have made the payments because he was not an appropriate trustee."

Despite finding that the payments to Waskom were "ill-advised and inappropriate," the court declined to order Soss

to return them—but not because Soss met his burden that such payments were reasonably necessary and for the benefit of the Trust. Instead, the court concluded that it “would be inappropriate and an undue punishment” to Soss because those funds had gone to his lawyer, Waskom, rather than to Soss directly. However, as Marshall correctly contends, those funds went to his attorney for the benefit of Soss—not for the benefit of the Trust. Cf. [McCormick v. Cox](#), 118 So. 3d 980, 987 (Fla. 3d DCA 2013) (affirming disallowance of attorney's fees that trustee paid to law firm in beneficiaries' action to remove trustee for breaches of fiduciary duties). Given that Soss failed to demonstrate that his payments to Waskom were “for the benefit of the trust, and not for his own benefit,” the circuit court abused its discretion in failing to order Soss to

return those funds to the Trust. See [Barnett](#), 340 So. 2d at 550. Accordingly, we reverse and remand with instructions that the circuit court enter an order requiring Soss to return all of the funds he paid to his attorney.

Affirmed in part, reversed in part, and remanded.

[SLEET](#) and [SALARIO, JJ.](#), Concur.

All Citations

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