

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE TRUST OF
WALLACE W. WALTER, DECEASED.

No. 40758

KIMBERLY BEUHNING,
INDIVIDUALLY AND AS NATURAL
PARENT OF GAREHARDT
BEUHNING, A MINOR, CHELSE
BEUHNING, A MINOR, AND SAXON
BEUHNING, A MINOR,
Appellant,

vs.
PATRICIA WALTER BERG, AS
TRUSTEE OF THE WALLACE W.
WALTER TRUST,
Respondent.

FILED

JUL 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order adopting a special master's recommendations regarding trust administration. Eighth Judicial District Court, Clark County; Mark W. Gibbons, Judge.

FACTS AND PROCEDURAL HISTORY

Wallace Walter (Walter) created a trust during his lifetime that named his long-time friend, Patricia Walter Berg (Berg), as successor trustee and lifetime income beneficiary. The trust designated his living children, including his daughter Kim Walter (Kim), as contingent income beneficiaries after Berg's death. When Walter passed away, Berg served as personal representative for his estate, during which time she made unsecured loans to herself from estate assets. The probate court ordered Berg to deposit security in the form of stock into the estate until she repaid the estate with interest, and Berg complied. The court discharged her of her duties as personal representative, and she began her tenure as

successor trustee of the trust, into which the residuary of the estate was transferred.

After Berg became trustee of the Walter trust, Kim again alleged that Berg made unsecured loans to herself. After a hearing on the matter, the district court determined that Berg had made unsecured loans to herself, but that she repaid these loans with interest. However, the court removed her as trustee and appointed Nevada State Bank as successor trustee. Kim then petitioned for delivery of converted funds, among other things, alleging that Berg had not repaid all of the loans. Berg filed accounting reports corresponding with her tenure as trustee and petitioned for fees and discharge. A special master presided over a hearing regarding the petition and accounting reports, and determined that Berg ultimately caused no damage to the trust. However, the special master recommended that the district court require Berg to personally pay \$15,000 of Kim's legal fees for her previous failure to render adequate accountings. The special master also recommended that Berg be allowed to pay her accounting and legal fees from trust principal. The district court approved the special master's recommendations after a hearing on Kim's objections to such. Kim appeals.

DISCUSSION

Appointment of special master and report

Kim argues that the district court erred in appointing a special master, the Clark County Probate Commissioner, to preside over the trust proceedings, and asserts that the special master did not prepare the requisite report in violation of NRCPC 53(e)(1). We conclude that both of these arguments lack merit. As to the first argument, Kim failed to

object at or near the time of the special master's appointment; therefore, she failed to preserve the issue for appeal.¹ As to the second argument, Kim apparently challenges the report on the grounds that Berg's counsel prepared it. This challenge is without merit. As a fundamental matter, the master signed the report and Kim made no attempt to have the master revisit the report as having been contrary to his decisions in the matter. Also, the preparation of the report in this instance by the prevailing party for submission to the master was compatible with the common practice in the Eighth Judicial District.²

Substantial evidence

Kim argues that the district court erred in not awarding damages commensurate with the loss in principal. This argument assumes Berg caused damage to the trust, contrary to the special master's findings and the district court's subsequent approval of them. This court reviews a special master's findings under a clearly erroneous standard,³ meaning that it will only overturn such findings if unsupported by

¹See Venetian Casino Resort v. Dist. Ct., 118 Nev. 124, 130, 41 P.3d 327, 330 (2002).

²See, e.g., EDCR 7.21. That appellate counsel for Kim would attempt to advance these arguments is somewhat mystifying. This court's time and resources are severely limited; this type of argument creates needless consumption of both.

³See NRCP 53(e)(2) (requiring a court in a non-jury action to accept a special master's findings unless clearly erroneous); see also Diversified Capital v. City N. Las Vegas, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979) (citing to NRCP 53(e)(2) in stating that this court reviews a special master's findings under the "clearly erroneous" standard).

substantial evidence.⁴ Substantial evidence is that which a reasonable mind might accept as sufficient to support a conclusion.⁵

In challenging the accounts, Kim contends that the trust principal losses amounted to approximately \$198,000, that the master's findings that no loss occurred were erroneous in light of testimony from her expert that he could not follow Berg's transactions, and that Berg breached her fiduciary duties in not following a particular investment strategy. We conclude that these claims were the subject of conflicting evidence. First, Berg presented expert testimony that the disparity between the estate's residuary figure and the amount of estate assets actually transferred to the trust is attributable in large part to the payment of professional fees, estate taxes, and income distribution to Berg as lifetime beneficiary. Second, this testimony also indicated that the trust's value decreased substantially due to the downturn of the market during her tenure. Third, Kim's expert only marginally challenged the validity of Berg's accounting reports and merely proffered a proposed financial standard by which to assess her investment practices. According to his standard, the trust should have generated \$257,000 more than it actually generated during Berg's tenure. However, on cross-examination, the expert conceded that he premised his calculations on an incorrect starting balance and a number of months not encompassed within Berg's

⁴See Dewey v. Redevelopment Agency of Reno, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003).

⁵Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

actual tenure as trustee.⁶ Kim's expert also based his calculations on funds that outperformed hundreds of others.⁷ As the finder of fact, the special master was entitled to weigh the evidence, determine witness credibility, and act accordingly.⁸ We conclude that substantial evidence supports the special master's finding that Berg caused no damage to the trust.⁹

Admissibility of evidence

Kim argues that the special master erred in preventing her from introducing evidence relating to the estate proceedings and the

⁶Kim argues that this court should place the burden of proving the accuracy of the account on the trustee. We decline to reach this issue, as substantial evidence in this case supports the special master's implicit finding that Berg proved the accuracy of the account, as demonstrated by accountant testimony and reports.

⁷Kim argues that Berg violated the prudent investor rule, codified in NRS 164.745. In support of her argument, she alleges that (1) Berg failed to invest trust assets until July 2000, when the account transferred to Wells Fargo, and (2) the trust should have generated more than \$257,000. The special master made no specific findings of fact regarding either of these allegations. Nonetheless, we conclude that Kim's argument lacks merit because substantial evidence supports the special master's finding that Berg caused no damage to the trust.

⁸See Olivero v. Lowe, 116 Nev. 395, 403, 995 P.2d 1023, 1028 (2000) (stating that it is within the province of the fact finder to weigh the evidence, determine credibility, and act upon such conclusions).

⁹Kim asserts that she did not receive receipts or vouchers verifying the trust accounts. NRS 165.180 vests the district court with discretion to compel trustees to produce documentation related to trust accounting. Given that substantial evidence exists without this documentation to support the finding that Berg caused no damage to the trust, we conclude that neither the Commissioner nor the district court abused their discretion in requiring no further production of records.

amount of estate funds transferred to the trust. NRCP 53(c) provides that a special master may rule upon admissibility of evidence unless otherwise directed by the order of reference.

At the outset, we conclude that the Commissioner properly excluded evidence regarding Berg's performance as personal representative of the Walter estate. The doctrine of collateral estoppel precludes Kim from relitigating the settlement of the Walter estate and the issues leading to the discharge of Berg from her duties as personal representative in April 1999.¹⁰

With regard to evidence concerning disparities in the amounts actually transferred to the trust, the master ultimately permitted Kim's counsel to question Berg's expert regarding the transfer. If Kim wished to introduce additional evidence concerning the extent of estate funds transferred to the trust, she could have done so. The record contains no indication that such proofs were either offered or rejected.¹¹

¹⁰See Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998) (stating that doctrine of collateral estoppel precludes parties from relitigating an issue of fact or law in a subsequent suit if it was actually and necessarily litigated in a previous suit); see also NRS 150.210 (stating that an order settling an estate account is conclusive against all persons, but that a person with a legal disability may move to reopen and examine the account).

¹¹Kim argues that the special master erred in admitting evidence regarding what estate assets transferred to the trust because Berg failed to produce evidence on this issue. Based on the accounting reports and accountant testimony offered by Berg on this issue, we reject Kim's contention and conclude that the special master committed no error in admitting this evidence.

Payment of professional fees

Kim argues that the district court erred in permitting Berg to pay her professional fees from trust principal because of her removal and failure to keep adequate accounting records.

This court reviews a district court's order allowing disbursement of trust funds related to distribution and administration of the trust under an abuse of discretion standard.¹² NRS 165.210(2) provides that an attorney for a trustee is entitled to compensation for services relating to intermediate and final accounts. NRS 153.070, as incorporated into NRS 164.005, requires that a court grant, in an amount it deems reasonable, expenses and compensation to a trustee for settlement of trust accounts. Former NRS 164.330(d) provided that professional fees incurred in relation to accountings, other than periodic judicial accountings, or judicial proceedings primarily concerning income interest shall be assessed against such income, "unless the court directs otherwise." Further, former NRS 164.340(1) states that attorney fees, costs and other expenses primarily concerning the trust principal are to be assessed against trust principal.¹³

¹²Hannam v. Brown, 114 Nev. 350, 362, 956 P.2d 794, 802 (1998).

¹³Both NRS 164.330 and NRS 164.340 were repealed in 2003. See 2003 Nev. Stat., ch. 355, § 48, at 1984. However, we rely on these provisions in determining the proper source of professional fees because they were effective when the litigation underlying Kim's December 10, 2001, petition commenced. Further, the district court, on September 18, 2001, entered an order that the Revised Principal and Income Act, formerly codified in NRS 164.140 through NRS 164.370, governed distributions from income and principal.

We conclude that the district court, in adopting the special master's findings and recommendations, did not abuse its discretion in allowing Berg to deduct her accounting and attorney fees from trust principal.¹⁴ First, substantial evidence supports the special master's findings¹⁵ that Berg reasonably incurred attorney and accounting fees in connection with the matter, and that there was insufficient trust income to cover these fees, which approximated \$72,000. Second, the proceedings concerned trust accounting and Berg's performance as trustee, both of which primarily concern trust principal and thus justify deduction of fees from trust principal under former NRS 164.340. Third, as explained earlier, substantial evidence supports the finding that Berg caused no damage to the trust; therefore, the district court did not err in permitting her to deduct attorney and professional fees from the trust.¹⁶ Fourth, the

¹⁴In a November 19, 2002, hearing on Kim's contentions regarding the special master's report and recommendations, former District Court Judge Mark Gibbons stated his general understanding that professional fees should be deducted from trust income first, and recommended that Kim move for reconsideration of the special master's ruling on this issue. The district court ultimately adopted the special master's report in its entirety in an order filed December 12, 2002, which leads us to conclude that the district court adopted the special master's recommendations on this issue, despite the statements it made during the hearing.

¹⁵Kim asserts that the special master did not include in his written findings that the trust generated insufficient income to cover professional fees and therefore remand on this matter is appropriate. We reject this contention because the special master stated during the hearing that there was insufficient trust income to pay these fees, and it is undisputed that the trust generated \$43,000 over three years.

¹⁶Kim argues that Berg's payment of attorney fees from trust assets caused more damage to the trust. We reject this contention because

continued on next page . . .

district court required Berg to personally pay \$15,000 of Kim's attorney fees for previously filing inadequate accounting reports. We conclude that the district court acted within its discretion in assessing this penalty and permitting Berg to deduct professional fees from trust principal.

Notice of professional fees

Kim argues that she received insufficient notice of Berg's legal and accounting fees. We disagree. Although statutory provisions require testamentary trustees to file a ten-day notice of their fee requests prior to hearings on intermediate and final accountings, there is no such requirement imposed on non-testamentary trustees.¹⁷ Therefore, we turn to general principles governing notice of fees. Under Davisohn v. Steffens, a motion for attorney fees should be made reasonably promptly after entry of judgment to aid the non-prevailing party in its decision on whether to appeal.¹⁸ In this case, Berg requested the Commissioner to approve the payment of approximately \$72,000 in legal and accounting fees during the hearing. Because Berg submitted her notice of fees before the entry of judgment, we conclude that the timing of her notice was sufficient.

... continued

statutes such as NRS 164.330 and NRS 164.340 authorize deduction of attorney fees from trust assets.

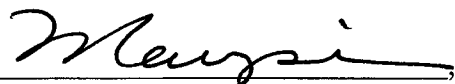
¹⁷NRS 165.045(2); NRS 165.055. NRS 165.020(c) defines a non-testamentary trustee as one who serves under a trust created by means other than a will. The decedent executed the trust by means of an independent trust document; therefore, we consider his trust to be a non-testamentary trust.

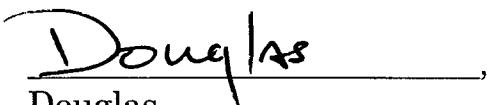
¹⁸112 Nev. 136, 139, 911 P.2d 855, 857 (1996).

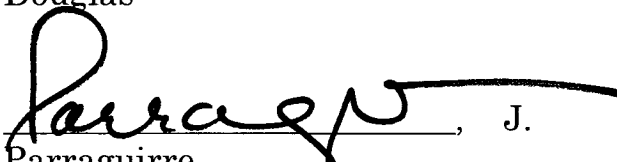
CONCLUSION

We conclude that substantial evidence supports the district court's determinations that Berg caused no damage to the trust and that she could pay her professional fees from the trust principal. We also conclude that the special master committed no error in his evidentiary rulings. Therefore, we

ORDER the judgment of the district court AFFIRMED.¹⁹


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 7, District Judge
Cary Colt Payne
Lionel Sawyer & Collins/Las Vegas
Clark County Clerk

¹⁹We have considered Kim's remaining assignments of error and find them without merit. We also wish to comment that the briefs submitted on behalf of Kim are in many respects disjointed and not supported by the record. We fully expect that this will not be repeated in the future.