Circuit Court for Baltimore County
Case No. C-17-3948

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2666

September Term, 2018

STUART FINK

v.

MORRIS H. FINK TRUST, *et al*.

Nazarian,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 22, 2020

This appeal is the latest, and hopefully the final, chapter in the saga of the Fink Family Trusts. Both parents have died, and the trustees filed a petition asking the Circuit Court for Baltimore County to approve their plan to consolidate the trusts and distribute their assets. Stuart Fink challenges his brothers' authority, in their capacity as trustees of the trusts (the "Trustees"), to seek this approval and the circuit court's decision to grant it. We affirm the judgment except for the court's decision to allocate all of the Trust's attorneys' fees from Stuart's share of the proceeds, which we reverse.

I. BACKGROUND

Morris and Lucille Fink[1] had three sons, Aaron, Norman, and Stuart. In 1992, Morris and Lucille created a pair of identical revocable living trusts: the Morris H. Fink Trust (the "Morris Trust") and the Lucille E. Fink Trust (the "Lucille Trust"). Each was the grantor of the trust bearing their name and the other their trustee. Among their provisions, each revocable trust became irrevocable, and its assets divided into two separate trusts (a marital trust and a residuary trust) when the grantor died. Both contained provisions granting the Trustees broad powers and discretion to manage the trusts' assets and administer them. Each also contained an identical provision that authorized the trustee to merge or terminate the trusts after both Morris and Lucille had died. And both provided that the sons, in birth order, would serve as trustees in the event that Morris or Lucille ceased serving in that role.

[1] We will refer to the various members of the Fink family by their first names purely for clarity. We mean no disrespect.

Morris died in 1993, and the Morris Trust became irrevocable. Aaron and Norman, the two older sons, both declined to serve as trustees, so Stuart agreed to serve as a co-Trustee with Lucille. The Lucille Trust documents (and the Morris Trust documents as well) were silent about compensation for trustees, and the issue had not been discussed at the time Stuart assumed the role. After serving for several years, Stuart raised the topic, and between November 2001 and April 2006, Stuart issued payments totaling $473,000 from the Trust to himself.

Those payments led to the first round of family trust litigation. Lucille, Aaron, and Norman filed a complaint in the circuit court alleging that Stuart had breached his fiduciary duties to the Lucille Trust, converted trust assets, and been enriched unjustly. Stuart filed a counterclaim alleging that his brothers had interfered with his administration of the trust. Stuart demanded a jury trial, so the judge directed a jury to decide the unjust enrichment and conversion claims and to determine the amount of damages while the court decided the remaining counts. After a three-day trial, the jury found that Stuart had converted trust assets and had been enriched unjustly, and awarded damages of $290,000. The court found that Stuart had breached his fiduciary duties and ordered him removed as a trustee. On September 26, 2012, the court entered judgment against Stuart and in favor of the Trust. Stuart appealed and, in an unreported opinion, we affirmed. *Fink v. Morris H. Fink Trust et al*., No. 1662, Sept. Term 2012 (Md. App. Oct. 9, 2014), *cert. denied*, No. 625, Sept. Term 2014 (Feb. 23, 2015).

Since then, three relevant events have occurred (or not). *First*, Stuart has made no

payments on the judgment, which remains outstanding and has accrued post-judgment interest at the statutory rate. *Second*, Aaron and Norman took over as Trustees of the Morris Trust and co-Trustees of the Lucille Trust. Lucille appointed them as additional trustees to the Morris Trust on September 27, 2012 and had removed Stuart as a Trustee of the Lucille Trust in 2007. *Third*, Lucille died in February 2017. Lucille's death triggered the same sequence of events as Morris's had in 1993: the Lucille Trust became irrevocable, and the Trusts' provisions regarding merger, dissolution, and liquidation (and payments to beneficiaries) kicked in, and Aaron and Norman remained as the Trustees of both trusts.

The Trusts filed a Petition for Merger of Trusts and Distribution in the circuit court on April 20, 2017. Citing Article Nineteen, the merger and termination provisions in both trusts, the Trusts asked the court to enter an order accepting jurisdiction over the trusts, requiring anyone objecting to the dissolution and distribution of the Trusts' assets ($1,643,771.06 between them at the time of filing) to file objections and show cause, to permit the Trustees to distribute the Trusts' assets as set forth in a schedule, and to award the Trustees the fees and costs associated with the Petition. Stuart filed an Answer on June 26, 2017, in which he disputed the court's jurisdiction to order relief, disputed that his brothers were the Trustees of the Morris Trust (he claimed that Lucille lacked the mental capacity to appoint them), and denied that they were entitled to the relief they sought.

The circuit court convened a hearing on Stuart's objections on November 30, 2017. The court didn't take sworn testimony—the parties submitted documents by agreement and the court heard argument from counsel. Stuart raised a number of objections to the

Trustees' plan that boil down primarily to his views that the trusts cannot be merged or dissolved, but must be divided into three new trusts with the proceeds divided equally among the brothers, and that spendthrift provisions in both trusts prevented the unpaid judgment from being taken from Stuart's share of the proceeds. Stuart objected to merging the trusts because "you can't use the merger of Lucille and Morris Fink Trusts to create a larger asset base from which to get money from Stuart Fink," that because only the Morris Trust obtained a judgment against Stuart, he "is entitled to his full interests in the Lucille Fink Trust and he is entitled to the protection of those interests under the spendthrift clause." The purpose of the Trusts' merger proposal, he argued, "is to make those assets available to pay the debts with respect to the Morris Fink Trust." The Trusts responded that spendthrift provisions don't apply where the trustee and beneficiary are the same, else a person could set up a trust for the purpose of avoiding creditors, and that the Trusts have the right to collect the judgment owed by Stuart from his share of the proceeds in either or both Trusts. Stuart replied that Morris set up the trust for the purpose of passing assets to his children and protecting them "from the depredations of creditors who may or may not be legitimate."

At the close of the hearing, the court ruled from the bench that "it is appropriate to merge the Morris Fink Trust along with the Lucille Fink Trust." The court also stated that it saw "no impediment at this time to the collection of the judgment and accrued interest against Stuart Fink from the assets of the trusts and [that Stuart] should pay the costs of these proceedings." On December 5, 2017, the court entered a written order granting the

Petition's request to merge the trusts, ordering Stuart to "pay the costs of the proceeding," and ordering the Trustee to "file a final accounting."

On April 2, 2018, the Trusts filed a Motion to Show Cause Permitting Distribution and Dissolution of Trusts. The motion stated that the final distribution and accounting had to await the final approval of Lucille's estate, but that that had occurred and an exhibit listed all of the assets available for distribution. The exhibit showed "Non-Trust Assets," an inheritance of $74,616.71 that Aaron and Norman had received to cover administrative costs;[2] the Morris Trust, which contained $976,703.00 in investment accounts and $147.88 in real estate; and the Lucille Trust, which contained $768,846 in investment accounts and $176.00 in real estate. The exhibit divided the grand total, $1,820,165.71, three ways to calculate each brother's share as $606,721.90. From there, the Trusts proposed to deduct from Stuart's share (and redistribute to Aaron and Norman) the 2012 judgment plus post-judgment interest, a total of $441,435.62, and the Trusts' legal fees in obtaining that judgment, a total of $118,307.00. With the Trusts' legal fees allocated in full to Stuart, Stuart would receive $46,979.28 and the brothers would receive $886,593.21; if the Trusts bore their own fees, Stuart would receive $165,286.28 and the brothers $827,439.71. The motion also attached a Judgment Worksheet showing the interest calculation and reports detailing the attorneys' fees that the Trusts sought to recover. Stuart filed an opposition that incorporated his prior objections to the merger and distribution plan, argued that the

[2] The motion stated that any proceeds remaining in this account after the expenses of the Trusts were paid and final returns filed would be distributed evenly.

demand for attorneys' fees was barred by limitations, and that the Morris Trust was not entitled to post-judgment interest. The Trusts responded, and the court—a new judge had been assigned to the case after the original judge retired—scheduled a hearing.

At the hearing on August 20, 2018, the court opened by telling everyone that it had read the file and did not plan to revisit the decisions to date. Stuart attempted again to argue that Lucille's death compelled the termination of the Trusts and equal division of the assets, without regard to the outstanding judgment. He contended that the Trusts could have imposed a remedy called impoundment against Stuart's share of the assets, but because they obtained a judgment against him for conversion, the spendthrift provisions of the Trusts prevented them from collecting the judgment from Stuart's share. The Trusts responded that this all had been litigated previously, but in any case impoundment wasn't available: until Lucille died, her Trust was revocable and none of the brothers, including Stuart, had any enforceable entitlement to its assets.

The parties then went back in chambers with the court and never returned. On September 18, the court entered a final judgment approving the dissolution of the Trusts:

> with allowance for post judgment interest on the judgment obtained against Stuart Fink and the offset of attorney's fees incurred against Stuart Fink's portion such that the final distributions of the Trusts' assets shall be as follows
>
> | | |
> |---|---|
> | Aaron Fink | $921,571.93 |
> | Norma[n] Fink | $921,571.93 |
> | Stuart Fink | $81,958.00 plus the real estate interests currently held in GR Holding & Shady Grove |

Stuart filed a timely Notice of Appeal.

II. DISCUSSION

Stuart challenges the judgment on a combination of procedural and substantive grounds.[3] *First*, he contends that the Trusts failed to state a claim upon which relief could be granted, that the Petition asked the circuit court to bless actions the Trusts were empowered to take and about which there was no justiciable controversy. *Second*, he claims that the circuit court erred by awarding relief without taking evidence or testimony. *Third*, he argues that the circuit court erred in awarding the Trustees the attorneys' fees the Morris Trust incurred in the first round of litigation. *And fourth*, he disputes that his share of the Trusts' assets were subject to attachment. We address the first, second, and fourth issues together and agree with the circuit court's decision to authorize the Trustees to merge the Trusts, distribute the proceeds, and recoup the judgment and interest from Stuart's share. We agree with Stuart, though, that the Morris Trust's attorneys' fees could not properly be assessed solely against his share of the final distribution.

A. The Circuit Court Appropriately Considered The Petition And Authorized The Trusts To Act.

[3] Stuart stated the Questions Presented in his brief as follows:

1. Did the Appellees' Petition state a claim upon which relief could have been afforded?
2. Did the Circuit Court err in awarding relief to Appellees, despite receiving no evidence?
3. Did the Circuit Court err in awarding attorney's fees to Appellees?
4. Did the Circuit Court err in concluding that Appellant's interest in the Trusts was subject to attachment.

Boiled to their essence, Stuart's first, second, and fourth arguments posit that the Trustees lacked the authority under the two Trust documents to merge and distribute the Trusts' proceeds as they proposed and that the circuit court lacked the authority to bless their plan. With one caveat that we address in the next section, we disagree.

First, Stuart argues that the Trusts, the petitioners in this case, failed in their petition to state a claim upon which relief could be granted. He cites the general Maryland Rules on the commencement of civil actions and claims not to be able to divine what causes of action the petition states. The Trusts point to § 14.5-202 of the Maryland Code (1974, 2017 Repl. Vol.), Estates and Trusts Article ("ET"), a provision of the Maryland Trust Act, and argue that the circuit court had jurisdiction over all matters involving these Trusts.[4] Neither cites the provision that matters: ET § 14.5-201 provides, in so many words, that "[o]n the invocation of the court's jurisdiction by an interested person . . . the court may intervene actively in the administration of a trust, fashioning and implementing remedies as the public interest and the interests of the beneficiaries may require."[5]

And that's exactly what the petition initiating this case asked the court to do. "A

[4] That section is relevant insofar as Aaron and Norman, by agreeing to serve as Trustees, submitted themselves to the jurisdiction of the circuit court "regarding a matter involving the trust." ET § 14.5-202(a). Same for Stuart, in his capacity as a beneficiary. ET § 14.5-202(b).

[5] The Act also authorizes a trustee or beneficiary to commence "[a] proceeding to approve or disapprove a proposed modification or termination under §§ 14.5-410 through 14.4-414 of this subtitle, or combination or division of a trust under § 14.5-415 of this subtitle." ET § 14.5-409(b). The Trustees haven't sought specifically to invoke any of the listed provisions, but the relief they authorize mirrors the provisions of the Trust documents that the Trustees seek to invoke.

court having equity jurisdiction has general superintending power with respect to trusts," ET § 14.5-201(d)(1), and the Trusts invoked the jurisdiction of the Circuit Court for Baltimore County. The Trusts asked the court to take jurisdiction (as it had, by the way, once before in the life of these Trusts) and authorize the Trustees to merge the Trusts and distribute their assets. Because "[a] judicial proceeding involving a trust may relate to a matter involving the administration of the trust, including a request for instructions and to declare rights," ET § 14.5-201(c), the relief the petition sought fell squarely within the authority the statute contemplates. And although the petition is a concise document, it identifies the Trusts and relevant parties, refers to the operative provisions of the Trusts' documents, attaches supporting documentation, and requests specific relief (detailed in an exhibit).

To be sure, the Trustees didn't *need* to seek advance permission from the court to carry out their plan. As they interpreted the Trust documents, their powers included the power to merge and dissolve the Trusts and distribute the assets, and they could have done so and waited to see if Stuart would sue them. They also could have sought a declaratory judgment. All the same, the approach the Trusts took—to file a petition mirroring the old-fashioned plea in equity—was appropriate. The petition they filed sought authority the circuit court was empowered to grant, and it stated claims for relief that the court was empowered to grant and, in fact, did grant.

Second, Stuart complains that the court awarded relief without receiving evidence, that the petition wasn't verified or accompanied by affidavits or sworn testimony, and that

the Trusts failed to support their claims for relief with admissible evidence. One out of three of these is true: the petition wasn't verified. But that doesn't matter, and Stuart otherwise seems to have forgotten that he, through counsel, agreed on the record at the first hearing in this case to proceed with argument and an agreed set of documents:

> THE COURT: All right. And you're ready to call your first witness?
>
> [COUNSEL FOR THE TRUSTS]: Your Honor, [counsel for Stuart] and I have had many discussions about this hearing and I think as we alluded to in the last time that we appeared before you *we don't know that any testimony is actually necessary, that it may—*
>
> THE COURT: Oh, okay.
>
> [COUNSEL FOR THE TRUSTS]: *—essentially be legal argument based on the documents we've submitted to you. Obviously we had another trial that we went through. We believe that all the documents, probably 99.9% of the evidence that we can fathom that you may want to hear is admitted as part of the record either from the previous trial or part of what we've submitted as part of this proceeding[s]*.
>
> At an abundance of caution I have with [the Trustees] in the event that we come across anything that we believe we need to proffer or in the event we need to present any testimony.
>
> THE COURT: All right so you want to just proceed with argument then?
>
> [COUNSEL FOR THE TRUSTS]: We believe that's appropriate Your Honor.
>
> THE COURT: *Okay. I see [counsel for Stuart] nodding his agreement so—*
>
> [COUNSEL FOR STUART]: *That's correct Your Honor*.
>
> THE COURT: —you may proceed.

(emphasis added).

Stuart cannot claim now that he was prejudiced by a lack of evidentiary formality

when he agreed to the exact procedure the court followed. Moreover, Stuart's claim that it was "impossible for [him] to meaningfully advance the defenses he asserted at the trial level" is belied by the facts that (a) he raised all of the arguments he wanted about the Trustees' authority, Lucille's capacity, the terms of the Trusts, the spendthrift provisions, and the Trusts' right to collect attorneys' fees, and (b) he never served or sought discovery, depositions, or any other means of developing his case. After the first hearing, the court issued an order to show cause directing the parties to raise any objections to the Trustees' proposal. Stuart filed objections, but none of them related to the provenance or authenticity of documents, any factual dispute that required discovery, or any element of the factual record that precluded a ruling. His arguments throughout the circuit court proceeding were purely legal and flowed from the agreed universe of documents.

Third, the Trusts' proposed merger and dissolution plan was consistent with the Trust documents and the record. Generally speaking, the Maryland Trust Act directs the court to apply the terms of a trust. *See generally* ET § 14.5-105.[6] Article Nineteen of both Trusts expressly allows the Trustees, after the last of the grantors dies, to merge and terminate the Trusts:

> A. If the Trustee of any trust under this Agreement concludes at any time or times after the death of the last to die of Grantor and the Grantor's wife that another trust created under some other trust instrument has substantially similar dispositive provisions (even though not identical) for the benefit at that time of the same primary beneficiary or

[6] The Act directs the court to override trust terms that violate certain enumerated statutory parameters of trust creation, ET § 14.5-105, but there is no allegation that the terms of these Trusts raise any such problems.

> beneficiaries (even though the identity of the non-primary beneficiary or beneficiaries is not identical), the Trustee may, in the Trustee's sole and absolute discretion, transfer the assets held hereunder to such other trust to be merged with such other trust and to be thereafter administered as one single trust under the terms of such other trust instrument. All decisions hereunder (including but not limited to whether the trusts have substantially similar provisions and the same primary beneficiary or beneficiaries) shall be made in the sole and absolute discretion of the Trustee.
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> B. At any time after the death of the last to die of Grantor and the Grantor's wife, the Trustee, in the Trustee's sole and absolute discretion, may determine that the size of any trust hereunder does not warrant the cost of continuing the same in trust, or that its administration would be otherwise impractical, the Trustee, in full discharge of the Trustee's duty, may terminate such trust and pay over the remaining principal and income thereof to the person or persons then entitled or permitted to receive the income of such trust. Upon any such payment, the interest of all succeeding beneficiaries, whether vested or contingent, shall be terminated and the Trustee shall be relieved of all duties in connection with such find and shall not be required to account therefor in any court.

Article Thirteen of both Trusts provides that when the last of the two parents dies (and after distributing personal property and making some other specified gifts), "the Trustee shall divide the balance of the trust property as then constituted into as many shares, per stirpes and not per capita, as Grantor shall have children then living . . . so that there shall be one (1) equal share for each child of Grantor then living . . . ." Article Sixteen, the spendthrift provision of the Trusts, requires the Trustee to make all payments from the Trusts only to the person or persons entitled to them and not to any other person or corporation, and precludes any beneficiary from pledging their right to payments from the Trusts. And under the Act, Trustees have the powers enumerated in the Trust documents

as well as "[o]ther powers appropriate to achieve the proper investment, management, and distribution of the trust property." ET § 14.5-815(a)(2)(ii).

So once Lucille died, the Trustees had the authority under the Trust documents to combine the two trusts. They had the authority to marshal the assets of the combined trusts for distribution, which included not only the investment accounts held by the trust, but also the judgment in favor of the Morris Trust against Stuart and the statutory interest that has accrued on it. They had the authority to collect that judgment from Stuart as part of their responsibility to achieve a proper management and distribution of the trust property. And with the exception of their decision to recoup the Morris Trust's attorneys' fees entirely from Stuart, which we address shortly, the Trustees' merger and distribution plan was consistent with their authority and permissible under the Trust documents, and the circuit court approved it correctly.

Stuart contends, with vigor, that the spendthrift provision of the Trusts precluded the Morris Trust or the merged Trusts from collecting the outstanding judgment against his aliquot share of the proceeds. And he would be right if his judgment creditor were anyone other than the Morris Trust itself—the spendthrift provisions do preclude the Trustee from paying distributions to anyone other than the beneficiary entitled to receive them. *See, e.g.*, *Duvall v. McGee*, 375 Md. 476, 493–94 (2003) (declining to allow tort judgment creditor to attach tortfeasor's trust proceeds). But in this instance, he has the analysis backward. The Trust isn't attaching or garnishing his share of the proceeds for the benefit of a creditor—it's calculating Stuart's share by offsetting the amount Stuart owes to the Trust

(for, by the way, converting the Trust's assets and enriching himself unjustly with them). Trusts *are* allowed to recover from a trustee's share the losses the trust sustained through a breach of trust he committed. *Ehlen v. City of Baltimore*, 76 Md. 576, 579 (1893) ("[W]e take it to be well settled that where a *cestui que trust* takes part—or, in other words, participates—in a breach of trust, whereby loss is occasioned to the trust estate, his interest in the trust property may be applied to make good the loss sustained by other *cestuis que trustent*, who did not participate in such breach."); *Frank v. Wareheim*, 177 Md. 43, 54 (1939) ("In Maryland the general rule is to retain out of a legacy or distributive share whatever the legatee or distributee owes the estate."); Restatement (Second) of Trusts, § 257 (Am. Law Inst. 1957) ("If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust, unless the settlor manifested a different intention."). Indeed, this is functionally the impoundment remedy that Stuart himself argues the Trust should have. And besides, even if the Trust were to pay Stuart his full share, it's not as though the judgment would vanish: the Trust would still be able to (and the Trustees presumably would have a duty to) attempt to collect the judgment from Stuart anyway. Perhaps Stuart was hoping for an opportunity to spend the proceeds or otherwise render himself judgment-proof before the Trust could execute. Whatever his motives, the spendthrift provisions of the Trust do not prevent the Trust from collecting its judgment against Stuart from Stuart's share of the termination proceeds, and we affirm the circuit court's decision approving the Trustees' merger and distribution plan to that extent.

B. The Trustees Were Not Entitled To Assess The Trust's Attorneys' Fees Against Stuart's Share Of The Proceeds.

Finally, Stuart challenges the circuit court's decision to allow the Trust to deduct from Stuart's share of the proceeds the attorneys' fees the Morris Trust incurred in pursuing the first lawsuit and this litigation. On this point, he's right. "'Maryland generally adheres to the common law, or American rule, that each party is responsible for the fees of its own attorneys, regardless of the outcome.'" *Ibru v. Ibru*, 239 Md. App. 17, 47 (2018) (*quoting Friolo v. Frankel*, 403 Md. 443, 456 (2008)). There are exceptions to this rule—a contractual provision shifting fee responsibility and a statutory right to collect fees among them, *see id.*—but the Trusts haven't identified any authority independently authorizing them to collect attorneys' fees from Stuart. Instead, they cite their general authority under the Trust documents to pursue claims and a trustee's statutory power on termination "to retain a reasonable reserve for the payment of debts, expenses and taxes." ET § 14.5-817(b). They haven't cited Maryland Rule 1-341 or argued that Stuart's defenses to or conduct in the first lawsuit were maintained in bad faith or without substantial justification. We review a decision to award attorneys' fees for abuse of discretion, *Ibru*, 239 Md. App. at 47, although in this instance the award depends on whether there's legal authority to ground it.

There isn't. There is no dispute that the Morris Trust had the authority to bring suit against Stuart, to pursue an appropriate recovery for the Trust assets Stuart converted, and to collect the judgment that resulted. And as we held above, the Trustees had the authority

to file their petition and to seek approval from the court to carry out their plan to merge the Trusts and distribute the proceeds. But that doesn't mean that the merged Trust can shift to Stuart the attorneys' fees the Morris Trust incurred in the first suit or the Trusts' fees from this petition. There are no provisions of the Trust documents that allow prevailing parties to collect fees or require losing parties to pay them, no provision of the Trust Act that authorizes trustees to collect fees under these circumstances, or any other source of authority permitting a deviation from the usual rule here. The Trustees' decision to incur the cost of suing Stuart involved some risk to the Trust itself and its beneficiaries, who at the time of the first suit included Lucille as well as the three brothers. The Trustees could simply have merged the Trusts and distributed the proceeds and put back on Stuart the decision to sue if he was unhappy, which might have avoided the second round of litigation costs. The Trust bearing its own fees means, in the life of this Trust, that all of the beneficiaries share the expenses equally, including Stuart. And in the absence of authority to deviate from the American rule, the circuit court abused its discretion in authorizing the Trusts to deduct attorneys' fees incurred in litigation against Stuart entirely from Stuart's share of the final distribution. When the Trust makes its final distribution, it must treat attorneys' fees as an expense of the Trusts as a whole.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. APPELLANT TO PAY COSTS.