IN THE COURT OF APPEALS OF IOWA

No. 1-545 / 00-1568
Filed December 28, 2001

ROGER BRYANT,
Plaintiff-Appellant,

vs.

NORWEST BANK OF IOWA, N.A.,
Defendant-Appellee.

Appeal from the Iowa District Court for Cherokee County, Patrick M. Carr, Judge.

Plaintiff, beneficiary of a trust, appeals from a district court ruling granting partial summary judgment in defendant trustee's favor in plaintiff's suit alleging defendant's mishandling of the trust. **AFFIRMED.**

David P. Jennett, Storm Lake, and Laura L. Pattermann and Eric C. Hansen, Council Bluffs, for appellant.

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellee.

Heard by Sackett, C.J., and Huitink and Hecht, JJ.

000063

HECHT, J.

Roger Bryant appeals from a district court ruling granting partial summary judgment in favor of Norwest Bank of Iowa (Norwest) in his suit alleging mishandling of a trust. We affirm.

I. **Factual Background and Proceedings.** Roger and his two brothers, Russell and Robert, are the children of Dorothy and Frank Bryant, now deceased. Dorothy and Frank owned two 160-acre farms, the "Home Place" and the "East Place," both held in Dorothy's name. In April 1991, Dorothy and Frank conveyed both properties into a revocable trust. The trust provided for each parent to receive the income from the trust during their lifetime, and upon their deaths, the trust property was to be distributed to their children equally. The terms of the trust were amended several times thereafter with Norwest serving as trustee.

Prior to the creation of the trust, Dorothy had executed a mortgage against the Home Place to guarantee repayment of a loan Russell had obtained from the Corn Belt State Bank (CBSB). The loan became delinquent and CBSB initiated mandatory mediation proceedings. Under the resulting mediation agreement, the trust was to obtain a loan from Prudential Insurance Company (Prudential) and use the funds to purchase 160 acres of real estate owned by Russell and known as the "White Place." Russell, in turn, would pay the proceeds to CBSB to obtain a release of Dorothy's guaranty.

Dorothy and Frank amended the distributive terms of the trust in February of 1992. Under Article V of the amendment, Roger was to receive the Home

Place at the time of distribution, free and clear of all encumbrances, and Robert and Russell were to share the East Place and the White Place. The remaining trust asserts were to be distributed equally among the brothers.

In February of 1992, Russell conveyed the White Place to the trust in exchange for the Prudential loan proceeds which were paid to CBSB. Norwest, acting as trustee, executed a note in favor of Prudential, secured by mortgages on the three trust properties, including the Home Place. The note included a term penalizing early payment of the mortgages, creating a potential conflict with the Article V provision calling for Roger to receive the Home Place free of encumbrances. On December 1, 1993, Dorothy again amended the trust, abrogating the provisions of Article V and deleting the free and clear provision for Roger's inheritance. Under this amendment, the trust property was to be divided equally among the brothers, with the exception of $20,000 which was to be deducted from Robert's share and given to Roger. Dorothy, who had survived Frank, passed away a week later.

Roger filed an action in Dorothy's probate against Norwest, the executor and trustee, Russell, and Robert. In his petition, Roger objected to probate of Dorothy's will because it incorporated the amended distributive scheme contained in the December 1, 1993 trust amendment and asked the court to declare that the will in effect on February 20, 1992 be admitted to probate. Roger claimed the December 1, 1993 amendment was procured through the undue influence of certain of the trust's proponents. In July of 1996, Roger, Russell, and Robert executed a family settlement agreement to resolve the

issues in the pending will contest. Subject to court approval, the brothers agreed that if Prudential accepted a prepayment of its loan without penalty and each of them could obtain the necessary financing (1) Roger would receive the Home Place and pay Prudential $87,589 plus 37.06% of the interest accruing on the Prudential mortgage from July 22, 1996 until the mortgage was satisfied; (2) Robert would receive the East Place and pay Prudential $45,189 plus 19.11% of the interest accruing on the Prudential mortgage from July 22, 1996 until satisfied; and (3) Russell would receive the White Place and pay Prudential $103,589 plus 43.83% of the interest accruing on the Prudential mortgage from July 22, 1996, until satisfied. Under the terms of the settlement, the brothers settled "any and all claim or claims for damages that [they] now or in the future may have against each other in connection with or arising out of the current action filed by Roger" but expressly excluded from the release claims against Norwest "for any misconduct and/or breach of fiduciary duties in relation to handling the trust or administering the estate." Norwest was not a party to the settlement agreement which was approved by the district court in the probate proceeding on June 20, 1997.

Although Roger did receive the Home Place pursuant to the settlement, he did not receive it free and clear as had been contemplated in Article V of the Restated Trust as it existed in February of 1992. Roger filed this action against Norwest alleging negligence, breach of contract, fraudulent misrepresentation, and breach of fiduciary duty in connection with Norwest's execution of the Prudential note and mortgage. Roger contended Norwest negligently failed to

discover and disclose the prepayment prohibition and caused him damage by inducing Dorothy to amend the trust in December of 1993 to Norwest's advantage and his detriment. Norwest filed a motion for partial summary judgment contending Roger had no standing to enforce the provisions of the trust as it was written in February of 1992 because his interest was contingent at the time of the December 1993 amendment. The district court granted the motion, reasoning that Dorothy reserved the power to amend the trust and did so prior to Roger's interest vesting. The court rejected Roger's assertion the family settlement agreement resulted in an adjudication that the trust in existence prior to the December 1, 1993 amendment was the operative trust instrument. The court noted the settlement agreement was entered into by members of Roger's family without Norwest's participation, and the validity of the December 1, 1993 amendment was not independently resolved by the probate court. The Iowa Supreme Court denied Roger's application for interlocutory appeal. The matter proceeded to trial on Roger's damage claim as a beneficiary under the December 1993 trust as amended. The district court found Roger failed to prove damage and entered judgment in favor of Norwest. Roger appeals.

II. **Contentions on Appeal.** Roger contends the district court erred (1) in granting partial summary judgment in favor of Norwest regarding his standing to enforce the terms of the February 20, 1992 version of the trust and (2) failing to conclude the family settlement agreement entered into by the Bryant brothers preclusively established the February 20, 1992 version of the trust as the operative trust instrument. Norwest contends the district court properly

concluded Roger has no actionable claim under the trust as it existed in February of 1992 because Dorothy exercised her power to amend it in December of 1993 before her death; and claims the district court properly rejected Bryant's issue preclusion argument in this case.

III. Standard of Review. We review the grant of summary judgment for correction of errors at law. Iowa R. App. P. 4; *Whalen v. Connelly*, 593 N.W.2d 147, 152 (Iowa 1999). We review the record to determine if genuine issues of material fact exist and whether the trial court properly applied the law. *Anderson v. Miller*, 559 N.W.2d 29, 31 (Iowa 1997). We examine the record in the light most favorable to the party opposing the motion. *Id.*

IV. Discussion.

A. Roger's Standing to Sue Norwest. Roger contends the district court erred in granting partial summary judgment in Norwest's favor regarding his standing to enforce the terms of the February 20, 1992 version of the trust as they existed prior to the December 1993 amendment.

"Standing to sue has been defined to mean that a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Birkhofer ex rel. Johannsen v. Brammeier*, 610 N.W.2d 844, 847 (Iowa 2000) (citing Black's Law Dictionary 1405 (6th ed. 1990)). "Our test for standing is that the complaining party must (1) have a specific, personal, and legal interest in the litigation and (2) be injuriously affected." *Id.* (citing *In re Marriage of Mitchell*, 531 N.W.2d 132, 134 (Iowa 1995); *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 789 (Iowa 1994)).

A revocable trust is a living trust which may be revoked by the grantor. 76 Am. Jur. 2d *Trusts* § 11, at 42 (1992). "By definition, when a settlor sets up a revocable trust, he or she has the right to recall the trust at any time, and thereby regain absolute ownership of the trust property." *Id.*; *see also* 89 C.J.S. Trusts § 89 (1955) ("A settlor who reserves absolute power of revocation and modification possesses all the powers of ownership, and for many purposes is treated as the absolute owner of the property held in trust."). "Since the settlor has the absolute right to end the trust at any time and to distribute the trust property in any manner, those named as beneficiaries are merely potential devisees." *Ullman v. Garcia*, 645 So.2d 168, 169 (Fla. 3d DCA 1994). A beneficiary's interest under a revocable trust vests only upon the settlor's death, "when the trust assets are disposed of according to the terms of the trust document." *In re Estate of Nagel v. Roe*, 580 N.W.2d 810, 811-12 (Iowa 1998); *see also Seymour v. Seymour,* 85 So.2d 726, 727 (Fla. 1956); *Barnard v. Gunter,* 625 So.2d 56, 58 (Fla. 3d DCA 1993); *Nahar v. Nahar,* 576 So.2d 862, 863 (Fla. 3d DCA 1991).

We agree with the district court Roger lacked standing to enforce the terms of the February 20, 1992 version of the trust. As the district court properly concluded, Roger's interest in the trust was too contingent to constitute a legal interest sufficient to establish standing. *See Hoelscher v. Sandage*, 462 N.W.2d 289, 293-94 (Iowa Ct. App. 1990) (finding plaintiff beneficiaries lacked standing to challenge trustee in connection with the mortgage of trust property since as remaindermen under a revocable trust their interests would vest only upon the discretionary conduct of their mother); *see also In re Trust of Willcockson*, 368

N.W.2d 198, 201-203 (Iowa Ct. App. 1998) (holding the beneficiary of a trust failed to show sufficient interest to have standing to challenge termination of marital trust because beneficiary's mother could exercise her general power of appointment either in favor of or against beneficiary's interests). Dorothy's December 1993 amendment to the trust eliminated the provision giving Roger the Home Place free and clear of encumbrances. He consequently lacked standing to enforce the terms of the February 20, 1992 version of the trust.

Roger asserts there is a factual dispute involving the December 1, 1993 amendment, specifically, whether Norwest exercised undue influence over Dorothy to modify terms of the trust in order to protect itself from liability for its alleged negligence in failing to detect and disclose the prepayment penalty provision in the mortgage. We agree with the district court Roger had standing to bring an action against Norwest, but only as a beneficiary under the trust as amended on December 1, 1993. *See Florida Nat. Bank of Palm Beach County v. Genova*, 460 So.2d 895 (Fla. 1984) (holding undue influence claim in revocable trust action cannot be contested until settlor's death because by definition trust may be terminated at any time). Accordingly, the district court properly granted partial summary judgment in favor of Norwest.

B. Preclusive Effect of Prior Settlement Agreement. Roger contends the district court erred by failing to find the settlement agreement preclusively established the February 20, 1992 version of the trust as the operative trust instrument.

"The doctrine of issue preclusion prevents a party to a prior action in which a judgment has been rendered from relitigating in a subsequent action issues raised and resolved in the previous action." *Brown v. Kassouf*, 558 N.W.2d 161, 163 (Iowa 1997) (citing *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)). Issue preclusion applies if the following four requirements are met:

> (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.

American Family Mut. Ins. Co. v. Allied Mut. Ins. Co., 562 N.W.2d 159, 163-64 (Iowa 1997). In addition to these four requirements, "either (1) the parties in both actions must be the same (mutuality of parties), or (2) there must be privity between the party against whom issue preclusion is invoked and the party against whom the issue was decided in the first litigation." *Brown*, 558 N.W.2d at 163.

We conclude the validity of the December 1, 1993 trust amendment was not actually litigated during the pendency of Dorothy's probate. In their family settlement agreement, the Bryant brothers did not stipulate that any of the proponents of the December 1, 1993 trust amendment had unduly influenced Dorothy. Moreover, although the district court approved the Bryant brothers' settlement agreement in all respects in the Declaratory Judgment and Order Approving Settlement filed on June 23, 1997, the court made no finding of undue influence by the proponents; neither did it conclude the December 1, 1993

amendment was invalid. Under these circumstances, we cannot say that the issue was litigated for purposes of the application of issue preclusion principles.

"Issue preclusion may be used offensively as a sword by a new plaintiff against a defendant who was a party to the former litigation," *Dettman v. Kruckenberg*, 613 N.W.2d 238, 244 (Iowa 2000), however, it "is not available offensively when the defending party lacked full and fair opportunity to litigate the issue in the first action." *Aid Ins. Co. (Mut.) v. Chrest*, 336 N.W.2d 437, 439 (Iowa 1983).

We agree with the district court Roger cannot offensively use the court's approval of his family's settlement agreement against Norwest. We find, as the district court did, Norwest did not have a full and fair opportunity to litigate the issue in the first action which terminated in a family settlement agreement between Roger and his brothers. *See Music Sales Corp. v. Morris*, 73 F. Supp. 2d 364, 377 (S.D.N.Y. 1999) (holding collateral estoppel "applies only to issues that have been actually litigated; it does not apply either to issues that were determined without litigation (such as under a settlement agreement) or to those that could have been litigated but were not"); *see also Rockford Mutual Ins. Co. v. Amerisure Ins. Co.*, 925 F.2d 193, 198 (7th Cir. 1991) (stating settlement agreement was not full and fair litigation); *Imperial Constr. Management Corp. v. Laborers Int'l Union of N. Am. Local 96,* 729 F. Supp. 1199, 1207 (N.D.Ill. 1990) (finding "[i]ssues which were not contested in the prior proceeding cannot serve as a basis for collateral estoppel."). "While a court-approved settlement agreement . . . will suffice for purposes of *res judicata,* it will not satisfy the

requirements of collateral estoppel." *Music Sales Corp.*, 73 F. Supp. 2d at 377 (citing 18 *Moore's Federal Practice* § 132.03 [2][a] (3d ed. 1999). Accordingly, we find the district court did not err in concluding the settlement agreement did not preclusively establish the February 20, 1992 version of the trust as the operative trust instrument.

AFFIRMED.