

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1032

ROCCO BEATRICE

vs.

JOHN W. LOMBARDI, trustee.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Rocco Beatrice (Rocco),<sup>2</sup> a beneficiary of the Avellino Ultra Trust, brought the underlying complaint in equity in the Probate and Family Court seeking to remove and replace defendant John W. Lombardi as trustee. Rocco's primary claims were that Lombardi had breached his fiduciary duty to the trust beneficiaries and had failed to pay Rocco for services rendered to the trust. Rocco further alleged that his sister, defendant Ineria Beatrice Smith (Ineria), also a beneficiary of the trust, had conspired with Lombardi to dissolve the trust and had improperly withdrawn trust assets.<sup>3</sup> Lombardi counterclaimed that Rocco had forfeited his right to the trust assets under the

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<sup>1</sup> Of the Avellino Ultra Trust.

<sup>2</sup> We use the first names of the Beatrice family to avoid confusion.

<sup>3</sup> Ineria Beatrice Smith has not participated in this appeal.

trust's "no contest" clause. The counterclaim also sought a declaratory judgment that Mariannina Beatrice (Mariannina), Rocco, and Ineria's mother, remained a beneficiary of the trust and that Lombardi was authorized to make payments from the trust for her care. Following a trial, the judge found for the defendants on all claims and counterclaims. Rocco challenges the judge's findings and appeals from the judgment. We conclude that the judge erred in removing Rocco as a contingent beneficiary of the Avellino Ultra Trust insofar as he found that Rocco forfeited his rights under the trust's no contest clause. In all other respects we affirm the judgment.

Background. We summarize the judge's comprehensive written findings supplemented by evidence from the trial record that is not in dispute. The Avellino Ultra Trust was a grantor trust created in November 1999, by Rocco and Ineria's parents, Vincenzo and Mariannina. The trust was prepared at Rocco's direction for the purpose of protecting his parents' assets from any Medicaid liability that might arise should they enter a nursing facility.<sup>4</sup> Vincenzo and Mariannina were the grantors and primary beneficiaries of the trust. Rocco and Ineria were named as contingent beneficiaries, whose beneficial interests in the trust assets would become effective upon the deaths of Vincenzo

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<sup>4</sup> Rocco was a certified public accountant and a certified asset protection planner.

and Mariannina. Defendant Lombardi, a family friend, was named as the sole trustee. According to the terms of the trust, it was the intent of the grantors to "provide primarily for the health, education, support and maintenance of the named [b]eneficiaries during [their] lifetimes."

Vincenzo died leaving Mariannina as the sole beneficiary of the trust. The Beatrice family home, the primary asset of the trust, was sold for \$380,000 in June 2015. To facilitate the sale, Rocco prepared a trustee's certificate that Lombardi signed at Rocco's direction. Among other things, the document certified that Mariannina had been removed as a beneficiary in April 2006 and had surrendered her special limited power of appointment under the trust. Relying on expert testimony, which he credited, the trial judge found that the trustee's certificate was unenforceable. More specifically, the trial judge found that "[Rocco] was unable to produce any evidence indicating that [Mariannina] had relinquished her beneficial interest in any documents, that the [c]ertificate was voluntarily executed by [Mariannina], that it was witnessed by two (2) adults, or that it was delivered to the trustee," all of which were prerequisites to relinquishment under article II, paragraph M of the trust.<sup>5</sup> The trial judge concluded, therefore,

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<sup>5</sup> Article II, paragraph M of the trust provides, in relevant part, that a beneficiary "may at any time by an instrument in

that "[Mariannina] has always been and still is a [b]eneficiary of the [t]rust."

The judge further found that Lombardi had diligently carried out his duties as trustee for sixteen years and that Rocco's claim to the contrary was frivolous. In addition, the judge found that Ineria had properly requested and spent trust assets to care for Mariannina, as permitted by the terms of the trust, and that Rocco had failed to produce evidence to support his claim that Ineria had spent trust assets for personal reasons. The judge determined that Rocco was properly reimbursed by Lombardi for \$14,472.84 in maintenance expenses related to the family home, but found no basis for Rocco's claim for a \$22,500 "management fee" related to the sale of the property. The judge also concluded that by bringing the underlying civil action, Rocco violated the no contest provision of the trust, and thereby forfeited his rights as a contingent beneficiary.

Finally, the judge concluded that Rocco's complaint was pursued in bad faith and that his actions undermined the trust purpose of providing for his elderly mother. Rocco was ordered

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writing signed and filed with the [t]rustee and witnessed by two (2) adult witnesses irrevocably surrender and relinquish any part or the whole of any of the power of appointment granted above, either unconditionally or upon any such terms, provisions or conditions as may be expressed and declared in any such written renunciation."

to reimburse the trust in the amount of \$171,689.36, the trust expenses related to defending Lombardi and Ineria in this action.

Discussion. We accept the judge's factual findings unless they are clearly erroneous. See Makrigiannis v. Nintendo of Am., Inc., 442 Mass. 675, 677 (2004). "A finding is 'clearly erroneous' only when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997), quoting Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977). In applying this standard, "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). "We are not bound, however, by the judge's conclusions of law, and we must ensure that the judge's ultimate findings and conclusions are consistent with relevant legal standards." Demoulas, supra at 510.

1. Factual findings. Rocco argues that the judge's factual findings were against the weight of the evidence. His principal challenge is to the finding that Mariannina remained a beneficiary of the trust. Rocco relies primarily on the trustee's certificate that he prepared as evidence that

Mariannina had been removed as a beneficiary in April 2006 and had surrendered her special limited power of appointment under the trust. The judge was not bound to accept the representations in the trustee's certificate. Where the certificate did not comply with article II, paragraph M of the trust, and where there was expert testimony that the certificate was invalid, we see no clear error in the judge's finding that factual findings were supported by the evidence and reasonable inferences from that the trust certificate was unenforceable. The judge's other factual findings were supported by the evidence and reasonable inferences from that evidence.

2. Summary judgment. Prior to trial, a different judge allowed Lombardi's motion for partial summary judgment, concluding that Mariannina remained a beneficiary of the trust. The trial judge addressed a motion for reconsideration of that order immediately before trial. In doing so, the judge reminded Rocco that his argument that Mariannina was no longer a beneficiary of the trust was contrary to the summary judgment order and contrary to the report of a guardian ad litem. Nevertheless, Rocco persisted, claiming that there was new deposition testimony to consider. The judge denied Rocco's motion for reconsideration of the summary judgment order.

At trial, Rocco continued to pursue his argument that his mother had been removed as a beneficiary and offered evidence in

support of that claim. After trial, the judge again found that Mariannina had never removed herself as a beneficiary of the trust. Therefore, we need not resolve the question whether, based on the summary judgment record alone, there was a genuine issue of material fact regarding Mariannina's status as a beneficiary. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016). Rocco has shown no prejudice because that issue was relitigated and resolved at trial. After hearing all of the evidence, the judge found that Rocco "was unable to produce any evidence indicating that [his mother] had relinquished her beneficial interest."<sup>6</sup>

3. No contest clause. Article V, paragraph D of the trust provides, in pertinent part, that a beneficiary forfeits his rights under the trust if he contests the trust or its provisions in court.<sup>7</sup> The judge found that Rocco "contested the

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<sup>6</sup> Rocco's claim at oral argument that he was precluded from offering evidence at trial regarding his mother's relinquishment of her status as a beneficiary is not supported by the record. Rocco testified repeatedly and without objection that his mother was no longer a beneficiary.

<sup>7</sup> The paragraph provides: "If any beneficiary of this trust shall . . . contest in any court the validity of this trust . . . or seek otherwise to void, nullify, or set aside this trust or any of its provisions, then the right of that beneficiary . . . to take which is given to him or her by this trust, shall be determined as it would have been determined had the beneficiary predeceased the execution of this trust agreement without surviving issue."

trust in this litigation" and thereby forfeited his rights as a beneficiary. We disagree.

Although forfeiture clauses are valid in Massachusetts, they are to be narrowly construed "because equity does not favor forfeitures." Savage v. Oliszczak, 77 Mass. App. Ct. 145, 149 (2010). Here, Rocco's complaint alleged that Lombardi breached his fiduciary duty as trustee by failing to pay Rocco for expenses, failing to provide an accounting, and by conspiring with Ineria to dissolve the trust. None of the allegations in the complaint challenged the validity of the trust or any of its terms. Accordingly, we do not interpret Rocco's action in filing the complaint as one that violates article V, paragraph D of the trust, the so-called "no contest" clause.

Nor do we interpret Rocco's response to Lombardi's motion for summary judgment as violative of the no contest clause. While Rocco's argument that his mother relinquished her rights under the trust may have been inconsistent with the trust's purpose, Rocco never contested the validity of the trust. Rather, he argued that his mother had voluntarily removed herself as a beneficiary to facilitate the sale of the family home, and that she had signed an affidavit to that effect. While there was evidence supporting the judge's finding that Rocco acted in bad faith, the evidence did not support a finding that Rocco contested the validity of the trust. Accordingly,

construing the no contest clause narrowly, as we must, it was error to conclude that Rocco forfeited his rights as a beneficiary pursuant to article V, paragraph D of the trust.

4. Attorney's fees. In support of his award of attorney's fees to Lombardi and Ineria, the judge reasoned that Rocco's failure to take advantage of settlement opportunities was indicative of his bad faith. On appeal, Rocco contends that this reasoning "appears to be punishing [Rocco]" for choosing to proceed to trial. First, we note that the judge made these comments regarding Rocco's unnecessary prolonging of the litigation in support of his conclusion that Rocco's claims were "wholly insubstantial, frivolous, and not advanced in good faith" under G. L. c. 231, § 6F. A party aggrieved by a judge's decision to award fees and costs under § 6F must appeal to a single justice of the Appeals Court within ten days of the decision pursuant to G. L. c. 231, § 6G. Because Rocco failed to do so, an appeal of the award of fees and costs under § 6F is not properly before us. See Palmer v. Murphy, 42 Mass. App. Ct. 334, 341 (1997).

Rocco would fare no better were we to reach the merits of this claim. Before trial, the judge forewarned Rocco that the question of Mariannina's beneficiary status had been resolved on summary judgment and that he had an "uphill battle." The judge then revisited the summary judgment order based on Rocco's claim

of "new evidence," but denied Rocco's motion to reconsider. Before the trial commenced, the judge cautioned Rocco that there could be an award of attorney's fees should he not prevail. Rocco chose to pursue his claims at trial despite the judge's cautionary statements. He had a right to do so. We are not persuaded, however, that he was punished by the judge for exercising that right. In determining whether Rocco's claim was frivolous and pursued in bad faith, the judge was entitled to consider Rocco's persistence in an argument at trial that had twice been rejected.

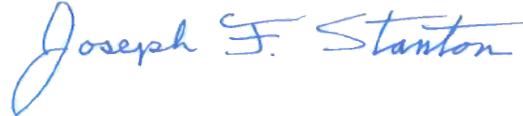
5. Judicial bias. Rocco's claim of judicial bias requires little discussion. It was never raised in the trial court by objection or by a motion for recusal. Therefore, the judicial bias claim is not timely. See Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 548-550 (1998). Moreover, the examples of judicial bias cited by Rocco reveal only that the judge made rulings that were unfavorable to him. "The mere fact that a party suffers adverse rulings during litigation does not establish lack of judicial impartiality." Clark v. Clark, 47 Mass. App. Ct. 737, 739 (1999).

Conclusion. So much of the judgment as removed Rocco Beatrice as a contingent beneficiary of the Avellino Ultra Trust

for violating the no contest clause of the trust is reversed.  
The judgment is otherwise affirmed.<sup>8</sup>

So ordered.

By the Court (Sullivan,  
Kinder & Lemire, JJ.<sup>9</sup>),



Clerk

Entered: June 25, 2020.

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<sup>8</sup> The defendant's request for damages and double costs pursuant to Mass. R. A. P. 25, as appearing in 376 Mass. 949 (1979), is denied.

<sup>9</sup> The panelists are listed in order of seniority.