

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-23-273

ESTATE OF LEO MITSIN

ON APPEAL FROM THE
PENOBSCOT COUNTY PROBATE COURT

APPELLANT'S BRIEF

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STATEMENT OF FACTS

Leo Mitsin died on April 21, 2008. (Tr. 8:2-3 (Oct. 25, 2022).)

In his will, he devised his entire estate to his trust, Mitsin Homestead Trust dated September 23, 2005 (the “Trust”). (A. 5-21.) The initial successor trustees of the Trust were his two sons, Jason T. Mitsin and Brian C. Mitsin. (Tr. 30:11; A. 5-8.) Jason T. Mitsin died on May 29, 2021. (Tr. 14:8 and 18.) His issue are two daughters, Taylor Mitsin and Avory Mitsin. (Tr. 32:9.) At the time of filing of the case this appeal is taken from, both said daughters were minors¹. (Tr. 32: 14 and 16.)

The Trust provides that one trustee should represent the families of each of Leo Mitsin’s sons at all times. (A. 5-8.) The Trust further provides a process for filling a trustee vacancy such as the one which occurred as a result of the death of Jason T. Mitsin, namely that the competent members of his family can appoint a successor trustee. (Tr. 31:17-32:2; A. 5-9.) Because such an election was impossible due to the minority of both of Jason’s daughters, Appellant Harley Wellman (“Harley”), on

¹ Taylor Mitsin has reached majority in early 2023.

November 15, 2021, filed a petition with the Piscataquis County Probate Court for appointment of such a successor trustee. (Tr. 32:22-15; A. 4-1 – 4-3.)

The Piscataquis County Probate Court transferred the matter to the Penobscot County Probate Court, which the Penobscot County Probate Court (Faircloth, J.) accepted by order dated November 30, 2021. (A. 4-7.)

On December 8, 2021, Brian Mitsin (“Brian”) filed an objection to Harley’s petition, essentially stating that spouses are excluded from any involvement in the Trust. (A. 4-8 – 4-11.) Harley was not married to Jason T. Mitsin. (Tr. 15:8.) Brian’s objection, however, did not contain any sort of counterclaim related to the Leo Mitsin homestead. (A. 4-8.)

The petition for appointment of successor trustee, along with other petitions related to the administration of the Estate of Leo Mitsin, which are not subject of this appeal, were scheduled for an initial hearing on October 25, 2022². (A. 4-12.)

² The said notice did not list the petition for appointment of successor trustee, which undersigned believes to be an unintended omission by the clerk.

At the commencement of the hearing, the Penobscot County Probate Court (Bearor, J.) defined the scope of the proceedings as (a) the petition for formal probate of the will of Leo Mitsin and appointment of personal representative; (b) the petition for removal of personal representative of the Estate of Leo Mitsin; and (c) the petition of appointment of a successor trustee for Jason Mitsin Family Group under the Trust³. (Tr. 3:11-21.) During the October 25, 2022, hearing, attorney Baldacci engaged in a line of questioning related to the use of the Leo Mitsin homestead, to which undersigned counsel objected on the ground of relevance. (Tr. 47:11-15.) The court overruled the objection. (Tr. 47:17.)

The hearing was continued to December 12, 2022, and undersigned counsel objected again to testimony related to the occupancy of the Leo Mitsin homestead, which the court overruled as well. (Tr. 16:7-14 (Dec. 12, 2022).)

³ “First the notice that the court sent out for this hearing today mentions a petition for removal of the personal representative and a petition for formal probative [sic!] will and appointment of personal representative. It should also have included a petition for appointment of successor trustee for the Jason Mitsin family group. All of those matters are going to be heard by the court today. Attorney Baldacci representing the respondent, personal representative, Brian Mitsin, did not object to the inclusion of the petition for appointment of successor.”

During the closing statement, Harley argued that the scope of the proceedings as it related to the Trust was limited to the appointment of a successor trustee. (Tr. 53:10-16; Tr. 54:14-22; Tr. 64:15-65:1.) The reason, while not explicitly stated, being that the use of the Leo Mitsin homestead was not part of any pleadings, nor any explicit or implied consent to the trying of the same in this case. (Id.)

On December 29, 2022, the Penobscot County Probate Court (Bearor, J.) issued an order in which it (a) denied the petitions related to the Estate of Leo Mitsin; (b) granted the petition for appointment of successor trustee; and (c) entered an order related to the use of the Leo Mitsin homestead. (A. 2-1 – 2-3.)

On January 10, 2023, Brian filed a “Motion to Reconsider Order Appointing Successor Trustee/and Request for Attorneys Fees.” (A. 2-4 – 2-5.) Harley filed an opposition to that motion on January 31, 2023. (A. 2-6 – 2-9.) The Penobscot County Probate Court (Brandmeir, J.) denied the motion on February 2, 2023. (A. 2-10.)

This appeal followed.

Since then, Brian has not moved for an amendment of his pleadings to include the Mitsin Homestead use issue.

STATEMENT OF THE ISSUE PRESENTED

- I. WHETHER THE TRIAL COURT ERRED IN ISSUING AN ORDER RELATED TO THE USE OF THE LEO MITSIN HOMESTEAD WHEN THE QUESTION WAS NOT PART OF ANY PLEADINGS IN THE MATTER NOR TRIED BY EXPLICIT OR IMPLIED CONSENT OF THE PARTIES AND THE PLEADINGS WERE FURTHER NOT AMENDED BY ORDER OF THE COURT.

ARGUMENT

- I. The trial court erred in issuing an order related to the use of the Leo Mitsin homestead when the question was not part of any pleadings in the matter nor tried by explicit or implied consent of the parties and the pleadings were further not amended by the court.**

Standard of Review

“We review an interpretation of the Rules of Civil Procedure de novo.”

McKeeman v. Duchaine, 2022 ME 23, ¶ 7, 272 A.3d 300,303.

This case presents the procedural question of when an issue which was not averred by either party in the pleadings can properly be tried and acted upon by the trial court when one party objects.

In Probate Court, civil matters, such as issues related to the interpretation of a trust, are subject to the pleading requirements of M.R. Civ. P. 8. M.R. Prob. P. 8(b). The requirement for a claim of relief under the M.R. Civ. P. are “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief which the pleader seeks.” M.R. Civ. P. 8(a).

Once the rules require either consent or leave of court to amend pleadings, in the absence of consent “leave shall freely be given when justice so requires.” M.R. Civ. P. 15(a).

An alternative avenue potentially applicable to this case is provided for under M.R. Civ. P. 15(b), namely amendments to conform to the evidence. In Bouchard v. Jacques, the Court distinguished two types of such amendments:

”The first situation, [. . .], occurs when ‘evidence is objected to at trial on the ground that it is not within the issues made by the pleadings.’ This type of amendment rests within the court's discretion, and the trial Justice is specifically directed to grant a continuance if necessary to avoid prejudice.

The other type of amendment, and the one the trial Justice in this case was attempting to implement, occurs when issues are ‘tried by express or implied consent.’ The rule states that failure to amend the pleadings when an issue is so tried will not affect the result of the case.”

Bouchard v. Jacques, 370 A.2d 680, 683 (Me. 1977)

The court may further amend pleadings under M.R. Civ. P. 15(b) on its own motion. Id.

An issue is presumed to have been validly tried by implied consent if the record is devoid of any objection thereto. Blue Spruce Co. v. Parent, 365 A.2d 797, 802-803 (Me. 1976). “Unless it may be

implied that the parties did in fact, and without objection, litigate the issue not pleaded as though it were in the pleadings, then the rule does not apply.” Id. at 803.

“If objection is made on the ground that the proposed evidence is not within the pleadings, the party offering it may move to amend the pleadings so as to make the evidence admissible.” 2 Harvey & Merritt, Maine Civil Practice § 15:5 at 493 (3d, 2014-2015)⁴.

At the beginning of the hearing, the Penobscot County Probate Court clearly identified the three petitions it was hearing, namely (a) the petition for formal probate of the will of Leo Mitsin and appointment of personal representative; (b) the petition for removal of personal representative of the Estate of Leo Mitsin; and (c) the petition of appointment of a successor trustee for Jason Mitsin Family Group under the Trust. All said petitions were filed by Harley and any responsive pleadings made by Brian were limited to those petitions. Brian did not file any competing petitions, nor did he make any counterclaim related to the use of the Mitsin Homestead.

⁴ M.R. Civ. P. 15(a) and 15(b) appear not to have been amended since 1959. M.R. Civ. P. 15 reporter’s notes.

Therefore, the homestead issue was not before the court pursuant to M.R. Prob. P. 8.

At no time prior to or during the hearing did Brian move the court to amend the pleadings to include his claim related to the homestead. Therefore, the homestead issue was not before the court pursuant to M.R. Civ. P. 15(a).

When the issue related to the use of the homestead, in the context of whether Harley lived in it, was first brought up at trial, Harley objected as to its relevance. The court overruled the objection with the statement “I’m going to allow it. I mean, we’ve established that she was there.” Tr. 47:17-18 (Oct. 25, 2022).

During the second day of the hearing, Brian again testified to the use of the homestead and Harley objected. Tr. 16:7-14 (Dec. 12, 2022). The objection was repeated later during the hearing. Tr. 44:19-20.

In his closing statement, Harley’s counsel repeatedly stated that the only issue related to the Trust properly before the court was the question of appointment of successor trustee. Tr. 53:10-16; Tr. 64:15-17.

All such objections should be sufficient to establish that the homestead issue was not tried by consent, whether expressed or implied.

The court also did not issue a ruling that it intended to include the issue of the use of the homestead based on the evidence presented, nor did it inquire whether both parties were prepared to litigate the question or consider a continuance of the matter to prevent prejudice.

Therefore, the homestead issue was not before the court pursuant to M.R. Civ. P. 15(b).

This issue is simply one for a separate trial.

CONCLUSION

Because the issue related to the use of the Mitsin Homestead was not properly before the trial court, Appellant respectfully requests that this Court

(a) vacate the trial court's order dated December 29, 2022, as it relates to the use of the Mitsin Homestead.

Dated this 31st day of October, 2023, at Dexter, Maine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald S. Nessmann, attorney for the Appellant, do hereby certify that I have made due service of the within Appellant's Brief⁵ by mailing two copies thereof by regular course of the United States Mail, postage prepaid, on the 31st day of October, 2023, to:

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⁵ The appendix will, by agreement of the parties, be submitted to the court during the first three weeks of the month of November, 2023.