

IN THE SUPREME COURT OF IOWA

No. 18-0927

Appeal from Johnson County District Court No. TRPR030161
The Honorable Mary E. Howes, Judge

APPELLANT'S BRIEF

IN THE INTEREST OF

MAXWELL R. ALBERHASKY,
Petitioner-Appellant

AND CONCERNING

GEORGE RODNEY ALBERHASKY,
Respondent-Appellee

AND

GRAYSON H. ALBERHASKY,
Intervenor-Appellee

/s/ Stephen C. Gerard II

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the Trial Court err in conducting an Evidentiary Hearing on Respondent-Appellees Motion to Dismiss? 10

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II. Did the Trial Court err in failing to apply the proper legal standard for determining a motion to dismiss? 11

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Iowa R.Civ.P. 1.402(2) (Formerly Rule 69(a))

ROUTING STATEMENT

Considering the applicable criteria in Rule 6.1101, this case should be transferred to the Court of Appeals for determination.

STATEMENT OF THE CASE

Petitioner-Appellant filed a Petition in equity alleging that the Respondent-Appellee, his father, acted improperly and breached his fiduciary duties in his capacity as a trustee/custodian in transferring the funds held in a 529 College Savings Plan wherein he was the named beneficiary to the Intervenor-Appellee, his brother, and in liquidating his interest in a limited-liability corporation for less than its fair market value. (App., Pg. 6, Petition p. 1-4).

Respondent-Appellee filed a Motion to Dismiss (App., Pg. 9) and the trial court set the Motion for hearing. (App., Pg. 366). At the hearing, the trial court improperly heard testimony and took evidence. (Transcript, p. 6, Line 23 to p. 21, Line 10).

In it's Ruling (App., Pg. 371) the trial court relied

upon the testimony and evidence presented at the hearing on the Motion to Dismiss by the Respondent-Appellee and failed to apply the proper legal standard for deciding a Motion to Dismiss and failed to apply the proper standard for whether a petition states a cause of action under notice pleading rules.

STATEMENT OF THE FACTS

Background

Respondent-Appellee George Rodney Alberhasky (hereinafter Rod) is the father of Petitioner-Appellant Maxwell R. Alberhasky (hereinafter Max) and Intervenor-Appellee Grayson H. Alberhasky (hereinafter Grayson). Rod held the position of custodian/trustee over all of the various assets of his sons. These assets were funded for Max's benefit primarily by gifts from his grandmother, Alois Alberhasky (hereinafter Allie). (App. 66, Exhibit A, Affidavit of JoEllen Alberhasky dated 8-25-11). The existence of these assets became known during the litigation of Rod's Motion for Modification filed in Dissolution of Marriage Johnson County Case No. **CDDM012155**, where payment of college expenses for Max and Grayson, was in issue. (Ruling on Petition for Modification filed 8-9-11 in CDDM012155, Pg. 7-8).

The evidence in the Modification proceeding established that Allie had a long history of making gifts

each year in an amount equal to the maximum annual gift tax exclusion to each of her four grandchildren, Max, Grayson, and the two children of her daughter, Respondent JoEllen M. Alberhasky (hereinafter JoEllen). (App. 66, Exhibit A, Affidavit of JoEllen Alberhasky dated 8-25-11). These gifts were held and managed, in Max and Grayson's case, by Rod, as custodian/trustee, in Uniform Gift to Minor's Act (UTMA) accounts, 529 College Savings Plans, and interests in a limited-liability corporation known as Alberhasky Family LLC. (App. Pg. 360; Ruling and Order filed 9-8-11).

Following the dissolution of marriage, Max chose to live primarily with his mother while Grayson chose to live with his father. Rod's animus towards Max and his resulting intentional violations of his fiduciary duties to Max and favoring Grayson arise from this situation.

529 College Savings Plan

In 2010, Allie took advantage of an estate planning tactic which allowed her to front-load five years of annual gifts by establishing 529 College Savings Plan accounts for each grandchild. On March 4, 2010, Allie arranged for a check in the sum of \$65,000 to be drawn from the assets of the Alois Mary Alberhasky Revocable Trust payable to "Iowa Advisor 529 Plan." On the check receipt it was noted "FBO Max Alberhasky." (App. Pg. 99; Check Receipt Alois Alberhasky Trust Custody

dated 3-2-10). Rod and JoEllen, who were the trustees of the Alois Mary Alberhasky Revocable Trust, were named as trustees of the 529 College Savings Plan funds. Similar checks were written in identical amounts to fund plans for each of Allie's four grandchildren, including Grayson. (App. Pg. 98; Edward Jones Deposit Receipt dated 3-4-10).

Allie passed away on November 29, 2011. Upon Allie's passing, Rod became the successor owner of Max's 529 College Savings Plan funds with Max being the designated beneficiary. (App. Pg. 101; IAdvisory 529 Enrollment Application).

On July 12, 2012, the Court entered an Order appointing JoEllen as trustee of Max's assets. (App. Pg. 81; Order filed 7-12-12 in CDDM012155). JoEllen asked to be excused from this appointment and on September 7, 2012, the Court entered an Order appointing the US Bank as trustee of Max's assets. (App. Pg. 91; Order filed 9-7-12 in CDDM012155).

On September 10, 2012, all of the funds in the 529 College Savings plan established for Max's benefit were transferred to his brother Grayson pursuant to directions signed by Rod. (App. Pg. 106; IAdvisor 529 Statement dated 9-11-12).

On December 29, 2012, Max contacted his father by email requesting to use funds from his 529 College Saving Plan for upcoming college expenses. On December 31, 2012,

Rod informed Max that he no longer had any funds in a 529 College Savings Plan.

Alberhasky Family LLC

Presumably as an estate planning tactic, Allie transferred her interest in a farm located in North Liberty, Iowa, into a corporation or partnership known as Alberhasky Family. Rod, JoEllen, and the four grandchildren were each gifted shares in the corporation.

In February 2011, while a ruling in the Dissolution Modification was pending, and after Rod had been removed as trustee, which action was stayed pending reconsideration, Rod apparently liquidated Max's interest in Alberhasky Family.

Neither Max, nor his attorney, nor, presumably the Court, were consulted about this liquidation, nor were any details provided. The Petitioner-Appellant submits that the evidence at trial in this cause of action will show that Rod liquidated Max's interest for less than its fair market value, to the benefit of himself and Grayson, the remaining shareholders.

ARGUMENT

Preservation of Error for Appellate Review

Respondent-Appellee's Motion to Dismiss was set for hearing by the trial court. In his Brief in Resistance to Motion to Dismiss, p. 6, and again in his Notice Re:

Attendance at Hearing, p. 1-2, (App., Pg. 369), Petitioner-Appellant set forth the legal standards for deciding a motion to dismiss.

At the Hearing, Petitioner-Appellant's counsel again reminded the trial court of the legal standards to be applied to a motion to dismiss. (Transcript, p. 3, Lines 12-25 and p. 4, Lines 1-3).

The trial court proceeded to conduct an evidentiary hearing and made findings of fact in the trial court's Ruling from the evidence presented. (App., Pg. 371; Ruling, p. 2-4).

I. Did the Trial Court err in conducting an Evidentiary Hearing on Respondent-Appellees Motion to Dismiss?

A long line of precedent regarding motions to dismiss clearly recognizes that a motion to dismiss cannot be aided by an evidentiary hearing. "We have held that a motion to dismiss can neither rely on facts not alleged in the petition (except those of which judicial notice may be taken) nor be aided by an evidentiary hearing." *Rief v. Evans, et al*, 630 N.W.2d 278, 284 (Iowa 2001); *Ritz v. Wapello County Board of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999); *Tate v. Derifield*, 510, N.W.2d 885, 887 (Iowa 1994). (emphasis added).

II. Did the Trial Court err in failing to apply the proper legal standard for determining a motion to dismiss?

"A motion to dismiss tests the legal sufficiency of a plaintiff's petition." *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). "Nearly every case will survive a motion to dismiss under notice pleading. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004).

"The district court's decision to grant a motion to dismiss is proper only when the petition, 'on its face shows no right of recovery under any state of facts.' " *Rieff*, *Id.* at 284, citing *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). (Emphasis added).

The court "must review the petition in its most favorable light, resolving all doubts and ambiguities in its (petitioner's) favor." *Rief*, *Id.* at 284. The court "must accept as true the allegations in the petition." *Rief*, *Id.* at 284, citing *D.M.H by Hefel v. Thompson*, 577 N.W.2d 643, 644 (Iowa 1998).

"A motion to dismiss should not be liberally granted." *Rief*, *Id.* at 284. "At issue is the petitioner's right to access to the district court, not the merits of his allegations." *Richards v. Iowa Dept. of Revenue & Fin.*, 454 N.W.2d 573, 574 (Iowa 1990). "At this stage of the litigation no question is presented as to truth of the allegations

contained in the challenged pleading. The sole issue is whether plaintiffs are entitled to their day in court" *Grandischnig v. Polk County*, 164 N.W.2d 106 (Iowa 1969). Cited favorably in *Rief, Id.* at 284.

III. Did Plaintiff-Appellant's Petition state a cause of action under notice pleading standards?

Max has clearly stated a cause of action against his father as custodian/trustee of his various funds and accounts. Max alleges his father's actions breached his fiduciary duties and were done in bad faith and with malice towards Max. Rod is clearly on notice of what actions Max complains of and what facts upon which the complaints are based.

Iowa R.Civ.P. 1.402(1) (formerly Rule 67) provides a general guideline in measuring the sufficiency of a pleading, providing that "(the) form and sufficiency of all pleadings shall be determined by these rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits." (emphasis added). *Lamantia v. Sojka*, 298 N.W.2d 245, 247 (Iowa 1980).

More significantly, the petition was not required to identify a specific legal theory; it is sufficient if the prima facie elements of a claim are stated, and this statement is "fair notice" to the defendant. Under such "notice

pleading," Iowa R.Civ.P. 69(a), it is sufficient if the petition apprises a defendant of the incident giving rise to the claim and of the general nature of the action. To require the plaintiffs to go further and identify the specific legal theory underlying the claim would be inconsistent with the notice pleading concept in rule 69(a), requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief." See *Lamantia v. Sojka*, Id. at 247.

Whether the 529 College Savings Plan funds could be construed as a trust is an issue for the Court's determination. A constructive trust is a remedial device by which the holder of a legal title is held to be a trustee for the benefit of another *who in good conscience is entitled to the beneficial interest*. A constructive trust may be based upon equitable principles and may be imposed where a defendant has profited inequitably at the expense of the plaintiff. *Neimann v. Butterfield*, 551 N.W.2d 652, 654 (Iowa App. 1996). (emphasis added).

Whether the funding of the 529 Plan was a gift from a donor to a beneficiary is an issue for the Court's determination. The evidence in the Modification proceeding established that Allie had a long history of making gifts each year in an amount equal to the maximum annual gift tax exclusion to each of her four grandchildren.

Under the background facts and circumstances of this case, the Court could find that a completed gift was made, albeit into a vehicle which achieved income tax and estate tax benefits but without the intent to allow Rod to subsequently take away that gift.

Max's interest in Alberhasky Family was held or managed by Rod as trustee or custodian. No documents have been produced which clearly set forth how this asset was held.

The custodian of UTMA assets is required to observe the standard of care that would be observed by a prudent person dealing with the property of another. Iowa Code Section 565B.12(2). This is a fiduciary standard. Whether Rod observed this standard in liquidating Max's interest in Alberhasky Family for an amount less than its fair market value to the benefit of himself and Grayson is an issue for the Court's determination.

CONCLUSION

It is clear that the trial court relied on evidence introduced at the hearing on Respondent-Appellee's Motion to Dismiss. Further, the trial court failed to consider and apply the proper legal standards for deciding a motion to dismiss and the proper legal standards to determine if the Petition met the requirements of notice pleading.

Plaintiff-Appellants Petition has been pending for

nearly five years. It is time to give Max his day in court. Petitioner Appellant respectfully requests the appellate court reverse the decision of the trial court and remand this matter to the district court for further proceedings to allow a determination in this case on its merits.

REQUEST FOR ORAL SUBMISSION

Petitioner-Appellant requests to be heard in oral argument upon submission of this case.

CERTIFICATE OF COSTS

No costs were incurred for printing or duplicating paper copies of briefs required by the Rules of Appellate Procedure.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

[x] this brief has been prepared in a monospaced typeface using Courier New in font size 12 and contains 243 lines, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(1)(g)(2).

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September 7, 2018

Certificate of Service

I hereby certify that a copy of the foregoing Appellant's Proof Brief was served upon the Clerk of the Supreme Court, and Attorneys Stephen B. Jackson, Kerry A. Finley, and Justin A. Teitle by EDMS, and said attorneys by e-mail at the addresses shown below this 6th day of September, 2018.

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