

ESTATE OF LEO MITSIN

Argued May 8, 2024
Decided May 23, 2024

Panel: STANFILL, C.J., and MEAD, HORTON, CONNORS, LAWRENCE, and DOUGLAS, JJ.

MEMORANDUM OF DECISION

Harley R. Wellman appeals from an order of the Probate Court (Penobscot County, *Bearor, J.*) appointing her co-trustee of the Mitsin Homestead Trust and requiring her and Brian C. Mitsin, the other co-trustee, to devise a reasonable use agreement for real property held by the Trust. Wellman argues that the issue of the use of the Trust property was outside the scope of the pleadings and not tried by express or implied consent of the parties. *See* M.R. Civ. P. 15(b); *see also* M.R. Prob. P. 15.

The record indicates that the legal issue of the parties' use of the Trust property was not raised in the pleadings. Wellman was the one who first adduced evidence about the use of the Trust property. Specifically, she submitted an affidavit with her petition indicating that she was living full time on the Trust property and that Mitsin had tried to evict her. She also introduced testimony at trial about Mitsin's use of the Trust property. Although the parties did not ask the court to allocate the use of the property between them, the court did not err or abuse its discretion when it ordered the co-trustees to come up with a reasonable use agreement, which the Trust itself requires. *See Dobbins v. Dobbins*, 2020 ME 73, ¶ 11, 234 A.3d 223 ("We review de novo whether a court has legal authority to take the action it has taken." (quotation marks omitted)); *Davis v. Mitchell*, 628 A.2d 657, 659-60 (Me. 1993) (reviewing for an abuse of discretion trial court's finding that an issue was tried by consent); *see*

also M.R. Civ. P. 54(c) (“Except as to a party against whom a judgment is entered by default, every judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings.”); M.R. Prob. P. 54(c).

Additionally, Mitsin requested sanctions and attorney fees, arguing that Wellman appealed for the sole purpose of delaying the implementation of the court’s order. *See* M.R. App. P. 13(f); *Aubuchon v. Blaisdell*, 2023 ME 5, ¶ 17, 288 A.3d 805. We deny Mitsin’s request because we disagree, and because Mitsin did not make his request in a “separately filed motion” as the appellate rules require. M.R. App. P 13(f); *see* M.R. App. P. 13 Advisory Note – November 2011 (quoting Fed. R. App. P. 38 Advisory Note – 1994 Amendments).

The entry is:

Judgment affirmed. Brian Mitsin’s request for sanctions and attorney fees denied.

Gerald S. Nessmann, Esq. (orally), Austin Law Offices, P.C., Dexter, for appellant Harley R. Wellman

Joseph M. Baldacci, Esq. (orally), Bangor for appellee Brian C. Mitsin