

EXHIBIT 1

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted February 22, 2023*

Decided February 24, 2023

BeforeDIANE S. SYKES, *Chief Judge*DAVID F. HAMILTON, *Circuit Judge*JOHN Z. LEE, *Circuit Judge*

No. 21-3203

KATHLEEN WHITE MUPRHY and
THOMAS WHITE, as co-administrators
of the estate of ANNA M. WHITE,
Plaintiffs-Appellees,

v.

ELIZABETH RICHERT,
Defendant-Appellant.

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 15 CV 8185

Heather K. McShain,
Magistrate Judge.

ORDER

Anna White sued Elizabeth Richert in state court, alleging that Richert—as trustee of a trust—forged a trust instrument and did not give Anna the property to which she was entitled under the authentic instrument. After Richert removed the case to federal court based on diversity jurisdiction, a magistrate judge held a bench trial and

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

entered judgment for the plaintiffs, finding that Richert (a Florida attorney) had forged the version used in her defense and breached her fiduciary duties. On appeal Richert unpersuasively questions subject-matter jurisdiction, her consent to proceed before a magistrate judge, and the judge's finding of breach. We thus affirm.

Robert Richert, who was Richert's uncle and Anna's brother, created a trust in 2008. It held an account at Fidelity Investments and named Robert trustee and Richert successor trustee. Robert became incapacitated in September 2009 and instructed Fidelity to recognize Richert as trustee. He died two months later. At the time of his death, the trust owned Robert's house in Arizona and roughly \$600,000 at Fidelity. As trustee, Richert wrote checks to Anna for about \$150,000 and to cash for about \$450,000. A year later, Anna bought a house in Buffalo Grove, Illinois, with a loan from Richert, who titled the house in Richert's name. They later signed a document stating that Anna had received all property to which she was entitled under the trust, and it purported to release Richert from all claims relating to that property.

Five years after the house purchase, Anna sued Richert. Filing in Illinois state court, Anna initially alleged that Richert represented her in the house purchase and committed legal malpractice by titling the Buffalo Grove house in Richert's name. Richert removed the case to federal district court, based on diversity jurisdiction. *See* 28 U.S.C. § 1332(a). Shortly thereafter the attorneys for both parties filed a joint status report stating, "Parties agree unanimously to proceed before a Magistrate Judge."

Anna expanded her suit to include a second claim, for breach of fiduciary duty, when discovery revealed three versions of the trust instrument. Fidelity produced the first two materially identical versions. The critical paragraph in those versions states:

If the Settlor's residence is part of the trust estate or is owned by the Settlor at the time of his death, then the Settlor's residence, personal effects, household goods, automobiles(s), and any interest he may have in any insurance policies thereon, shall be distributed to ELIZABETH K. RICHERT, the Settlor's niece. If at the time of the Settlor's death, the Settlor's residence is not part of the trust estate or is not owned by the Settlor, then forty-seven percent (47%) of the trust estate shall be distributed to ELIZABETH K. RICHERT, the Settlor's niece.

Richert produced a different version. In hers, the first sentence is the same, but the second sentence says "In addition to the Settlor's residence, forty-seven percent (47%) of the trust estate shall be distributed to ELIZABETH K. RICHERT, the Settlor's niece."

Anna's amended complaint asserts that Richert breached her fiduciary duty as trustee. She alleges that Fidelity's versions were authentic, Richert forged her version, and because the trust owned Robert's house when he died, the authentic version directed Richert to distribute to herself the house (and a few other assets) but not 47% of the Fidelity cash. Anna alleged Richert was obligated to distribute that cash to Anna and other beneficiaries under other uncontested provisions. In Richert's answer, she asserted that the release Anna had signed blocked the fiduciary-duty claim.

Richert moved for summary judgment on the ground that both claims were time barred, and she received partial relief. On the claim for legal malpractice, the magistrate judge ruled that the two-year limitations period had lapsed before Anna sued. But the fiduciary-duty claim survived because its five-year limitations period started when Richert and Fidelity produced the dueling versions of the trust instrument in 2017 and had not expired when Anna amended her complaint. Richert attacked the latter ruling, contending that she never consented to proceed before a magistrate judge. But the district judge rejected her argument because she offered no evidence that her attorneys had lacked the authority to consent for her and they had impliedly consented by litigating before the magistrate judge for over three years. Meanwhile, Anna White died. An Illinois court then appointed Kathleen White Murphy and Thomas White co-representatives of her estate, and the magistrate judge substituted them as the plaintiffs.

The case proceeded to a bench trial. Richert testified that, after Robert's death, she found her version of the trust in a safe in his house and kept the original, which one of her clients later stole. She did not report the theft to the police. This version, she said, later reappeared in her mailbox during this litigation, and she produced it about a year and half later. Finally, she testified that she did not recall what happened to the over \$450,000 in cash that she withdrew from Fidelity or why she drafted the checks to cash. After the trial ended, Richert argued that the district court lacked jurisdiction based on the probate exception to federal subject-matter jurisdiction.

The magistrate judge ruled for the plaintiffs. On jurisdiction, she explained that the probate exception applies only to a claim that requires probating a will or handling property in the custody of state probate court, and the fiduciary-duty claim involved neither. On the merits, she ruled that Fidelity's versions were authentic: Robert supplied one version when he opened the trust account, and Richert faxed the other to Fidelity. She found that Richert's version was counterfeit because only Richert had it, she said nothing about it until 17 months into the litigation, and her testimony was not credible. The magistrate judge also found that Richert breached her fiduciary duty by

failing to give Anna the correct share of the trust assets. Finally, she ruled that the purported release was unenforceable for lack of consideration: For releasing her claims, Anna received from Richert the property she was due under the trust instrument, but Richert as trustee was under a preexisting legal duty to give Anna that property.

On appeal, Richert maintains that the court lacked jurisdiction. She insists that diversity jurisdiction is absent and the probate exception applies. Her argument is underdeveloped, but we address it to ensure that jurisdiction is present, *see Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), and it is. First, the court had diversity jurisdiction. As Richert stated in her notice of removal, the amount in controversy at removal (the value of the Buffalo Grove home on the malpractice claim) exceeded \$75,000. *See* 28 U.S.C. § 1332(a). And the parties are diverse: Richert is a Florida citizen, Anna was an Illinois citizen, and the plaintiffs share Anna's citizenship for diversity-jurisdiction purposes. *See id.* § 1332(a)(1), (c)(2). It does not matter that the malpractice claim later dropped out of the case, because postremoval developments "do not eliminate jurisdiction proper at the time of removal." *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 905 (7th Cir. 2019).

Nor does the case fall within the probate exception. That exception "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate" and "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006). Richert offers no argument to undermine the magistrate judge's conclusion that Anna's claims—that Richert committed legal malpractice and breached her fiduciary duty—did not ask a federal court to probate a will, administer a decedent's estate, or take from a state probate court custody of a trust's assets.

Richert raises several challenges on the merits, but none persuades us. First, she argues that she never consented to proceed before a magistrate judge. A party's attorney may consent on that party's behalf to proceeding before a magistrate judge, *see Stevo v. Frasor*, 662 F.3d 880, 884 (7th Cir. 2011), and Richert's attorneys consented to the reassignment in the joint status report. Richert responds that a status report is not a form designed for consent. But no specific form of consent is required, *Roell v. Withrow*, 538 U.S. 580, 587 (2003); thus her attorneys' consent in that status report sufficed.

Second, Richert contends that summary judgment on the legal-malpractice claim "ratified" the release Anna had signed, relieving Richert of any liability for the administration of the trust. But Richert won summary judgment on the malpractice claim because it was time barred. That ruling said nothing about the release. Besides, as the magistrate judge explained, the release is unenforceable for lack of consideration

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because Richert was under a preexisting duty to give Anna the trust property to which she was entitled. *See Contempo Design, Inc. v. Chi. & N.E. Ill. Dist. Council of Carpenters*, 226 F.3d 535, 550 (7th Cir. 2000) (en banc). Richert does not challenge that reasoning.

Third, Richert argues that she did not breach her fiduciary duty because, in her view, under even Fidelity's versions of the trust she was entitled to receive the cash that she withdrew from Fidelity. She seizes on the second sentence of paragraph 5.4.1:

If at the time of the Settlor's death, the Settlor's residence is not part of the trust estate or is not owned by the Settlor, then forty-seven percent (47%) of the trust estate shall be distributed to [Richert].

Richert observes that the trust owned the house when Robert died. Because the house was then "not owned by Robert," she continues, one of the two alternatives of the "or" contingency was satisfied; she therefore could take 47% of the estate, beyond the home and other limited assets that the first sentence awards to her. But Richert's literalism conflicts with the paragraph's structure. It provides that Richert either receives (as specified in the first sentence) the house and other limited assets or (as specified in the second sentence) 47% of the estate, but not both. Richert's view eviscerates the first sentence, and we avoid interpretations that would render language superfluous. *Sterling Nat'l Bank v. Block*, 984 F.3d 1210, 1217 (7th Cir. 2021). Richert raises no other challenges to the finding, which the record amply supports, that Richert took more cash than she was authorized to keep for herself under the authentic version. Thus, the ruling that she breached her fiduciary duty is sound.

Finally, Richert faults the magistrate judge for refusing to acknowledge that she is not an Illinois attorney. But whether Richert was admitted to practice law in Illinois mattered only to Anna's legal-malpractice claim, on which Richert prevailed at summary judgment and which is not at issue in this appeal.

We have considered Richert's remaining arguments, but none merits discussion.

AFFIRMED

EXHIBIT 2

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March 22, 2023

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

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ELIZABETH K. RICHERT,
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No. 1:15-cv-08185

Heather K. McShain,
Magistrate Judge.

ORDER

Defendant-appellant filed a petition for rehearing and rehearing *en banc* on March 6, 2023. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.