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law. Recognizing an employer's right to implement changes unilaterally under the circumstances described above does not adversely affect the policy behind the IRA. We therefore affirm.

CONCLUSION

For the reasons stated above, we affirm the order of the CIR.

AFFIRMED.

STEPHAN, J., not participating.

IN RE TRUST OF LEO A. HRNICEK, ALSO KNOWN AS L.A. HRNICEK, M.D., DECEASED. ADRIENNE H. BRIETZKE, APPELLANT, V. FIRST NATIONAL BANK NORTH PLATTE, APPELLEE.

792 N.W.2d 143

Filed December 3, 2010. No. S-10-192.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Contracts: Equity.** The right of retainer lies in equity.
5. **Limitations of Actions: Judgments.** It is axiomatic that a court's order is not subject to a statute of limitations defense.

Appeal from the County Court for Morrill County: RANDIN ROLAND, Judge. Affirmed.

Paul E. Hofmeister and Joseph A. Kishiyama, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellant.

John K. Sorensen, of Sorensen, Mickey & Hahn, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

First National Bank North Platte (FNBNP), as successor trustee of the trust of Leo A. Hrnicek, brought an action seeking to retain proceeds of the trust due to Adrienne H. Brietzke. The county court found Brietzke in contempt and otherwise granted FNBNP's request. Brietzke appeals. The primary issue on appeal is whether FNBNP can recover amounts owed to the trust by a beneficiary by retaining trust proceeds owed to that beneficiary. We affirm.

FACTUAL BACKGROUND

Leo A. Hrnicek and his wife had six children. In 1995, Hrnicek loaned $85,000, at 7-percent interest, to his daughter, Brietzke, and her husband. The loan was to be repaid beginning on April 1, 1995, over 15 years, for a total of 180 payments of $764.01 each. According to the terms of the loan, the last payment was to be made on March 1, 2010.

Hrnicek died on November 2, 1997. Upon his death, Hrnicek bequeathed all his property to the trustees of the "L. A. Hrnicek, M.D. Living Trust," dated May 30, 1997. Included in this property was the promissory note reflecting the loan from Hrnicek to Brietzke.

It appears that family drama ensued after Hrnicek's death, and litigation followed. On April 23, 2003, the county court approved a settlement entered into by various members of the family. That settlement provided that Brietzke and her cotrustee would both resign as trustees, to be replaced by FNBNP. In addition, Brietzke, whose counsel was a signatory to this settlement, "acknowledge[d] that she is indebted to [the] Trust," and that she agreed to "pay such debt in full according to the terms of the note." According to the record, payment on the loan had last been received from Brietzke on April 18, 2002.

Despite her promise to repay, Brietzke made no further payments on the loan. Thereafter, on June 1, 2009, FNBNP filed a motion asking the court to approve "retainage of trust distribution" otherwise owed to Brietzke on the ground that she had

not repaid amounts due to the trust under the court's April 23, 2003, order. Brietzke objected. Then on July 13, 2009, FNBNP filed an application with the county court asking that Brietzke be found in contempt for failing to abide by the court's order to repay the loan. FNBNP asked that the court order Brietzke to purge the contempt by repaying the principal and interest owed or, alternatively, allowing FNBNP to purge the contempt by withholding distributions due Brietzke under the terms of the trust.

A hearing was held on August 26, 2009, on both FNBNP's motion and its contempt application. At that hearing, a representative for FNBNP indicated that Brietzke had made no payments since April 18, 2002, had received about $103,000 in distributions under the trust, and could expect about $350,000 more before the trust was closed. The representative indicated that letters requesting repayment of the loan had been sent to Brietzke's counsel.

On September 28, 2009, following the hearing and prior to the court's decision, Brietzke filed a motion for distribution of the proceeds of the trust. On February 3, 2010, the county court found Brietzke in contempt of court and allowed FNBNP to "retain sufficient funds from any future distributions . . . to fully satisfy the outstanding balance of the promissory note owed to the trust in the amount of $55,600.11, plus per diem interest accumulating at a rate of $10.67 from April 18, 2002." Brietzke appeals.

ASSIGNMENTS OF ERROR

Brietzke assigns that the county court erred in (1) allowing FNBNP to retain funds from her distribution to repay the loan owed the trust and (2) calculating the amount due, since recovery of all or a portion of the amount due is barred by the applicable statute of limitations.

STANDARD OF REVIEW

[1-2] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.[1] When reviewing

[1] See *In Re Estate of Failla*, 278 Neb. 770, 773 N.W.2d 793 (2009).

a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[3] In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

ANALYSIS

Retainer.

In her first assignment of error, Brietzke assigns that the county court erred in allowing FNBNP to retain, or offset, from her distribution from the trust the unpaid amount of her debt owed to the trust, plus interest. Brietzke argues that while the probate code allows for such retention, the trust code makes no specific reference to this type of remedy.

The probate code does allow for retention:

> Unless a different intention is indicated by the will, the amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.[4]

This rule was the common-law rule.[5] And, as is noted by Brietzke, there is not a similar statute in Nebraska's trust code.

[4] However, Neb. Rev. Stat. § 30-3806 (Reissue 2008), a part of Nebraska's trust code, provides that "[t]he common

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[2] *Id.*

[3] *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004).

[4] Neb. Rev. Stat. § 30-24,101 (Reissue 2008).

[5] *In re Estate of Williams*, 148 Neb. 208, 26 N.W.2d 847 (1947); *Nelson v. Janssen*, 144 Neb. 811, 14 N.W.2d 662 (1944); *Fischer v. Wilhelm*, 139 Neb. 583, 298 N.W. 126 (1941); *Stanton v. Stanton*, 134 Neb. 660, 279 N.W. 336 (1938); *First Trust Co. v. Cornell*, 114 Neb. 126, 206 N.W. 749 (1925).

law of trusts and principles of equity supplement the Nebraska Uniform Trust Code, except to the extent modified by the code or another statute of this state." And as we noted in *Fischer v. Wilhelm*,[6] the right of retainer lies in equity.

Moreover, the Restatement (Second) of Trusts also supports the conclusion of the county court that FNBNP can retain a portion of Brietzke's distribution. Section 251A provides that

> [i]f a testator leaves property in trust and a beneficiary of the trust was indebted to the testator, the interest of the beneficiary in the trust estate is subject to a charge for the amount of his indebtedness, unless the testator manifested an intention to discharge the debt, or manifested an intention that the beneficiary should be entitled to enjoy his interest even though he should fail to pay his indebtedness.[7]

There is nothing in this record that would indicate any contrary intention.

This general rule has been relied upon again and again in trust cases in other jurisdictions—some citing to the Restatement and others to common law.[8] And in Minnesota, the Court of Appeals has twice implied, without discussion, that the Minnesota version of the probate code, which is codified in Nebraska at § 30-24,101, is applicable to trusts as well.[9]

We conclude that the retainer of a distribution is a valid, equitable remedy available to trustees in situations such as this. It was therefore not error for the county court to order such in this case. Brietzke's first assignment of error is without merit.

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[6] *Fischer, supra* note 5.

[7] Restatement (Second) of Trusts § 251A at 634 (1959).

[8] *Hurtig v. Gabrielson*, 525 N.W.2d 612 (Minn. App. 1995); *Matter of Will of Cargill*, 420 N.W.2d 268 (Minn. App. 1988); *In re Estate of Watters*, 245 Or. 477, 422 P.2d 676 (1967); *County Nat. Bank etc. Co. v. Sheppard*, 136 Cal. App. 2d 205, 288 P.2d 880 (1955); *In re Trust of Lunt*, 235 Iowa 62, 16 N.W.2d 25 (1944); *Sheridan v. Riley*, 32 Backes 288, 133 N.J. Eq. 288, 32 A.2d 93 (1943). See, also, *Brown et al. v. Sperry*, 182 Miss. 488, 181 So. 734 (1938) (utilizing rule in probate case).

[9] *Hurtig, supra* note 8; *Matter of Will of Cargill, supra* note 8.

Statute of Limitations.

Brietzke next assigns that the county court erred in ordering the particular amount retained from her distribution, because a portion of the principal and interest could no longer be recovered, as it was barred by the applicable statute of limitations.[10] Brietzke argues that any payment and accompanying interest due more than 5 years earlier is not recoverable.

[5] Brietzke overlooks the fact that the note signed by her and evidencing her obligation to pay was reduced to a judgment when she acknowledged that debt and agreed to pay it in the 2003 settlement, which settlement was approved by the county court. It is axiomatic that a court's order is not subject to any limitations defense.[11] Moreover, as was conceded by Brietzke's counsel at oral arguments, a court's exercise of its contempt powers also would not be subject to any statute of limitations.

Brietzke's second assignment of error is also without merit.

Calculation of Amount Due.

We finally note that at oral argument before this court, Brietzke took issue with the calculation of the amount due, and thus to be retained, from Brietzke's distribution from the trust. But Brietzke did not assign this as error, nor argue this in her brief. We therefore decline to address it further.

CONCLUSION

Retainer is a valid, equitable remedy available to the trustee in this case. And the trust's right of retainer is not barred by any statute of limitations. The decision of the county court is therefore affirmed.

AFFIRMED.

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[10] See Neb. Rev. Stat. § 25-205 (Reissue 2008).

[11] See *id.*