

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000232-MR

JAMES F. DINWIDDIE, JR.,  
EXECUTOR, BENEFICIARY AND TRUSTEE  
PURSUANT TO THE LAST WILL AND TESTAMENT  
AND CODICILS OF JAMES F. DINWIDDIE, SR.

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT  
FAMILY COURT DIVISION  
HON. ROBERT A. MILLER MARSHALL  
CASE NO. 14-CI-00078

ELIZABETH DINWIDDIE ARCADU,  
BENEFICIARY OF THE LAST WILL AND TESTAMENT  
AND CODICILS OF JAMES F. DINWIDDIE, SR., DECEASED;  
AND ZACHARY DINWIDDIE, BENEFICIARY OF THE LAST  
WILL AND TESTAMENT AND CODICILS OF JAMES  
F. DINWIDDIE, SR.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: James F. Dinwiddie, Jr., (Dinwiddie, Jr.) appeals from an order of the Grayson Circuit Court dismissing his petition to settle his estate in probate. Contrary to its order, he argues that the circuit court did have subject matter jurisdiction and that it erred in dismissing. After our review, we affirm.

James F. Dinwiddie, Sr., (Dinwiddie, Sr.) died testate on February 7, 2012. In his original will, he named his son, Dinwiddie, Jr., as the executor of his estate; later, in a codicil, he named Danny Haynes and Larry Perkins as co-executors. Subsequently, Haynes and Perkins were removed as co-executors in an agreed order. In his will, Dinwiddie, Sr., provided that Dinwiddie, Jr., Elizabeth Graham Arcadu, Zachary W. Dinwiddie, and Debra Jordan were each to receive shares of one-fourth of the property.<sup>1</sup>

The parties to this action initially attempted to resolve the case in district court.<sup>2</sup> On February 17, 2014, the three individual beneficiaries (with Dinwiddie, Jr., acting as trustee for Debra Jordan's trust) filed waivers of periodic settlement. An informal periodic settlement was also filed. The district court rejected the informal settlement and instructed the parties to file a formal settlement. Dinwiddie, Jr., then appealed to the circuit court, which dismissed his appeal on the grounds that the Notice of Appeal contained several errors and that the order was not final and appealable.

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<sup>1</sup> Debra Jordan's share was placed in a trust, and she would only receive it upon the fulfillment of certain conditions. Dinwiddie, Jr., was the trustee of that estate.

<sup>2</sup> The record of the district court is not before this Court.

Dinwiddie, Jr., then filed a petition in the circuit court, requesting the settlement of the estate and a declaration of rights as to whether he could execute liens on the property. After the action was filed in the circuit court, Dinwiddie, Jr., paid off a mortgage on one piece of estate property. The Leitchfield Deposit Bank, the only adversarial party in this case, dismissed itself from the action.

The circuit court dismissed the petition of Dinwiddie, Jr., holding that it had no jurisdiction over the matter because there were no contested issues. The court also noted parenthetically that there had apparently been several errors in settling the estate. This appeal followed.

Dinwiddie, Jr.'s, sole argument on appeal is that the circuit court erred when it determined that it did not have subject matter jurisdiction over this appeal.<sup>3</sup> We have reviewed the record and we agree that the issues involved were uncontested. Thus, the circuit court properly declined jurisdiction and appropriately dismissed the case. Therefore, we affirm.

Subject matter jurisdiction refers to the ability of the court to hear cases over “the kind of case assigned to that court by a statute or constitutional provision.” *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012). In other words, “a court is deprived of subject matter jurisdiction only where that court has not

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<sup>3</sup> The appellees did not file a brief in this case. We may apply the penalties under Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) at our discretion. *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We may “(i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” CR 76.12(8)(c). Because the appellees are apparently in agreement with Dinwiddie, Jr., we shall accept his statement of the facts and issues in this case as correct.

been given, by constitutional provision or statute, the power to do anything at all.”

*Id.* KRS 24A.120(2) provides that district courts have exclusive jurisdiction in “[m]atters involving probate, **except matters contested** in an adversary proceeding. Such adversary proceedings shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal[.]” (Emphasis added.) KRS<sup>4</sup> 24A.120(3) continues that reasoning and provides that “[m]atters not provided for by statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of subsection (2) of this section and therefore are within the jurisdiction of the District Court[.]”

Dinwiddie, Jr., argues that he should have been permitted to have his case heard in circuit court and that his case is “adversarial” because KRS 395.510(1) allows cases such as his to be brought in circuit court. KRS 395.510(1) provides as follows:

A representative, legatee, distributee or creditor of a deceased person may bring an action in circuit court for the settlement of his estate provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative.

This Court has previously defined the term “adversarial” in the context of KRS 395.510(1) to include only contested issues:

[O]nce the complaint was filed in circuit court, the district court retained jurisdiction over any uncontested matters, but in the context of this case, about the only

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<sup>4</sup> Kentucky Revised Statutes.

uncontested matter was the fact that Claudia Sanders died having executed a will. Since the will was properly admitted to probate, *there were no uncontested matters* for the district court to resolve. Moreover, Hale's allegations were far more than an accounting matter as Fernandez contends. They gave rise to precisely the type of "adversary proceeding" contemplated in KRS 395.510(1).

*Hale v. Moore*, 289 S.W.3d 567, 580 (Ky. App. 2008) (emphasis in original). See also *Lee v. Porter*, 598 S.W.2d 465, 467 (Ky. App. 1980) superseded by KRS 387.520 on other grounds as recognized in *Karem v. Bryant*, 370 S.W.3d 867, 870 (Ky. 2012) ("In order to grant each person so entitled to his day in court with relation to probate matters, the General Assembly enacted KRS 24A.120(1) which placed exclusive jurisdiction in the district courts for such cases except those that are to be contested in an adversary proceeding...).

If the estate of Dinwiddie, Sr., had involved any contested issues, those matters could have – and should have – been resolved in the circuit court.

If such an adversarial action is pursued in circuit court, the district court shall retain jurisdiction to entertain any motions or matters not related to the adversarial proceeding, and shall, at the conclusion of the circuit court action, proceed with the probate of the estate to its conclusion.

*Mullins v. First Am. Bank*, 781 S.W.2d 527, 529 (Ky. App. 1989). See also *Vega v. Kosair Charities Comm., Inc.*, 832 S.W.2d 895, 897 (Ky. App. 1992).

Dinwiddie, Jr., cannot point to a contested issue appropriate for the circuit court's consideration. Indeed, his brief states that all remaining parties are in agreement and that each has executed a waiver of the formal settlement process.

The complaint filed by Dinwiddie, Jr., requests a declaration of rights “regarding his obligations and authority of the Executor/ Fiduciary to place long term leases ... with regard to the farm property.” However, the complaint acknowledges that there was no present dispute as to any leasing obligation and that the parties were considering retaining the properties in the event that they should not sell. “A court is precluded from deciding ‘[q]uestions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy[.]’” *Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160, 166 (Ky. App. 2015) (quoting *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. App. 2014)).

Dinwiddie, Jr., also argues that pursuant to KRS 379.170, jurisdiction automatically vested in the circuit court upon his filing there. KRS 379.170 provides as follows:

The provisions of KRS 379.010 to 379.160 shall not prevent an action to settle an estate by the assignee, or by any creditor or creditors representing one-fourth (1/4) of the liabilities, from being brought in the Circuit Court. When an action involving a settlement of the estate is brought in the Circuit Court of the county in which the assignment was made, the jurisdiction of the District Court shall cease, and all papers relating to the estate filed in the District Court shall be transferred by the clerk of the Circuit Court to the files of the Circuit Court. The Circuit Court may exercise any power conferred on the District Court by KRS 379.010 to 379.160 in administering and settling the assigned estate.

The unambiguous language of KRS 379.170 applies to assignees or creditors. The estate was never assigned to Dinwiddie, Jr., and he is not a creditor; thus, KRS 379.170 is inapplicable.

Finally, Dinwiddie, Jr., argues that the circuit court erred when it failed to approve the informal settlement of the estate. Because we have determined that the circuit court lacked subject matter jurisdiction in this case, the circuit court could not have erred in this regard, and this is a moot point.

Dinwiddie, Jr., may continue to pursue this action in the district court in the event that the matter is still pending.

We affirm the order of the Grayson Circuit Court dismissing this matter.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

James F. Dinwiddie, Jr.  
Atlanta, Georgia