

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00229-CV

IN THE ESTATE OF FRED DEERING

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Cause No. 10-26927-P

MEMORANDUM OPINION

Robert Deering appeals the appointment of a temporary administrator for the Estate of Fred Deering. The Probate Code authorizes appointment of a temporary administrator pending resolution of a contest regarding issuance of letters of administration. *See* TEX. PROB. CODE ANN. § 132 (Vernon 2003). Therefore, we hold that the trial court did not abuse its discretion by appointing a third party temporary administrator notwithstanding either the defects in the appellee's motion for appointment of a temporary administrator or error in the hearing on the appellant's objection to the appellee's application. Accordingly, we affirm the trial court's order appointing a temporary administrator.

Fred Deering executed a will that appointed his children, Robert Deering and Susan Ross, as independent co-executors of his estate. Fred died April 1, 2010. In an application to probate Fred's will, Susan alleged Robert was disqualified to serve as co-executor. Robert alleged he was qualified to serve as executor in his own application to probate Fred's will. On April 5, 2010, Susan filed an application for Temporary Administration. The trial court appointed Catherine Wylie as temporary administrator and later confirmed the appointment after a hearing on Robert's objection to the temporary appointment.

On appeal, Robert contends Susan failed to comply with the statutory requirements for an application for appointment of a temporary administrator. *See* TEX. PROB. CODE ANN. § 131A (Vernon Supp. 2009). In particular, Robert contends Susan failed to properly verify her application. *See* TEX. PROB. CODE ANN. § 131A(b). Robert also argues that Susan failed to allege facts that show an immediate need for the appointment. *See* TEX. PROB. CODE ANN. § 131A(b)(2). Susan alleged that a temporary administration was necessary: (1) to stop exploitation of estate assets; (2) to manage the Decedent's business interests, including monthly rental collections exceeding \$60,000; and (3) because of a pending contest. Susan failed to provide an unqualified verification for her petition, however, and swore only that the facts stated in the application were "true and correct to the best of my knowledge." An application for appointment of a temporary administrator must be verified. *See* TEX. PROB. CODE ANN. § 131A(b).

Susan applied for issuance of letters testamentary to the exclusion of Robert on the grounds that Robert is unqualified to serve. *See* TEX. PROB. CODE ANN. § 78(e) (Vernon 2003). In response, Robert applied for issuance of letters testamentary to him. *See* TEX. PROB. CODE ANN. § 77(a) (Vernon 2003). Thus, at the time the trial court appointed a temporary administrator there was a pending contest relative to the probate of the will or the granting of letters of administration. *See* TEX. PROB. CODE ANN. § 10 (Vernon 2003); *see also* TEX. PROB. CODE ANN. § 81(a)(7) (Vernon Supp. 2009). The trial court may appoint a temporary administrator “[p]ending a contest relative to the probate of a will or the granting of letters of administration[.]” TEX. PROB. CODE ANN. § 132. The trial court’s power of appointment pursuant to section 132 of the Probate Code is in addition to the trial court’s power of appointment under section 131A of the Probate Code. *Id.* Thus, the trial court could grant letters of temporary administration under section 132 of the Probate Code regardless of the defects in the application Susan filed under section 131A of the Probate Code. *Compare* TEX. PROB. CODE ANN. § 131A(b) (stating requirements for application for temporary administration), *with* TEX. PROB. CODE ANN. § 132 (no application required for temporary administration pending resolution of will contest). We overrule issue one.

Robert also contends that the trial court abused its discretion by refusing to allow him to present testimony at the confirmation hearing. Although the trial court conducted a hearing on Robert’s objection to the appointment of a temporary administrator, the trial

court did not conduct an evidentiary hearing on the motion. Robert and Susan were both present at the hearing and the trial court overruled Robert's objection to conducting the hearing without allowing parties to present testimony. The parties made informal bills of exception. *See* TEX. R. EVID. 103(a)(2),(b).

Robert argues that the trial court failed to follow established precedent. *See Nelson v. Neal*, 787 S.W.2d 343, 346 (Tex. 1990). In *Nelson*, two men died in an airplane crash. *Id.* at 344. The widow of one man, Neal, petitioned for appointment of a temporary administrator of the estate of the other man, Nelson, for the purpose of receiving service of process on the widow's wrongful death suit. *Id.* at 343-44. Nelson's son contested the appointment of a temporary administrator, but no evidence was taken during the hearing. *Id.* at 345-46. The Supreme Court held that the initial granting of the application for a temporary administration was prima facie evidence of the necessity for a temporary administration. *Id.* at 346. Because neither party proffered evidence at the hearing, the un rebutted prima facie evidence supported the trial court's order and there was no evidence in the record from which the appellate court could determine the trial court erred. *Id.* Robert argues that *Nelson v. Neal* establishes that a hearing conducted under section 131A of the Probate Code must be an evidentiary hearing.

Although Robert contested the appointment of a temporary administrator pursuant to section 131A of the Probate Code, the qualification of an executor named in the will is in dispute in this probate proceeding. The trial court appointed a temporary administrator

until resolution of that dispute. Section 132 of the Probate Code authorizes the appointment until such time as the trial court can hear the contest. *See* TEX. PROB. CODE ANN. § 132. Because the temporary appointment is authorized without a hearing, any error by the trial court in failing to conduct an evidentiary hearing pursuant to section 131A(b) of the Probate Code did not cause the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). We overrule issue two and affirm the trial court's temporary administration orders.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on September 13, 2010
Opinion Delivered September 23, 2010
Before Gaultney, Kreger, and Horton, JJ.