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Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000893-DG
AND
NO. 2003-CA-001500-DG

DANIEL M. OYLER — APPELLANT/CROSS-APPELLEE

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-XX-000127

DOUGLAS S. THOMAS,
EXECUTOR OF THE ESTATE
OF JESSE MADOLIN METZINGER — APPELLEE/CROSS-APPELLANT
AND
JAMES METZINGER, FORMER ADMINISTRATOR
OF THE ESTATE OF JESSE MADOLIN METZINGER — APPELLEE

OPINION
REVERSING IN PART AND
AFFIRMING IN PART

** ** ** ** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: This Court accepted cross-motions for discretionary review of an order by the Jefferson Circuit Court dismissing an appeal of an order by the probate division of the Jefferson District Court and affirming in

the cross-appeal. The attorney for the former administrator of an estate argues that he has standing to appeal from a district court order denying his request for fees paid by the estate, and that he was entitled to fees as a matter of law. The executor of the estate argues that the district court was without jurisdiction to appoint the administrator and was without authority to award any costs or fees to the former administrator or his attorney. We agree with the attorney that he had standing to appeal from the district court's order. Therefore, we reverse the circuit court's order dismissing his appeal. Although we disagree with the circuit court's reasoning resolving the remaining issues, we find that the district court properly denied attorney's fees but allowed the former administrator to recover some costs incurred during his administration of the estate. Hence, we reverse in part, affirm in part, and affirm in result.

The underlying facts of this action are not in dispute. Jesse M. Metzinger died testate on June 3, 2000. She had previously executed a will on December 28, 1999, naming Douglas S. Thomas as her executor and sole beneficiary. Thomas filed an application to probate the will on June 3, 2000, and the district court appointed him executor on June 12. Jesse Metzinger's son, James

Metzinger, filed an objection to probate, primarily asserting that Jesse was not of sound mind when she executed the will and that the will had been obtained through undue influence. Following a hearing, the district court rejected probate of the will, removed Thomas as executor, and appointed James Metzinger as administrator of his mother's estate.[1]

In response, Thomas filed an original action in circuit court, pursuant to KRS 395.240(1), challenging the district court's decision to reject the December 28, 1999, will. However, the probate action was not abated, and Metzinger continued to act as administrator. Among other things, Metzinger hired attorney Daniel Oyler to serve as counsel for the estate. In his capacity as administrator, Metzinger also incurred expenses to preserve the estate's primary asset, certain real property which had been owned by Jesse Metzinger. While serving as administrator, Metzinger encumbered the real property with two mortgages without permission of the probate court.[2] Metzinger also used a portion of the mortgage proceeds to pay Oyler for

[1] Metzinger filed a separate appeal from this circuit court judgment. James Metzinger v. Douglas Scott Thomas, No. 2001-CA-002062-MR. On Metzinger's motion, this Court dismissed that appeal on April 17, 2002.

[2] *See* KRS 389.010.

the defense of the will-contest action, again without prior approval of the district court.

On July 26, 2001, a circuit court jury upheld the December 28, 1999, will, finding that Jesse Metzinger had testamentary capacity at the time she executed the will. The circuit court entered a judgment setting aside Metzinger's appointment and directing that Thomas be re-appointed as executor. Shortly after entry of this judgment, Metzinger filed a motion in district court seeking, among other things, an administrator's commission, expenses, and attorney's fees earned or incurred during his tenure as administrator. The district court, after noting the circuit court judgment and the unapproved mortgages on the real property, denied the motion on August 20, 2001. Pursuant to the circuit court judgment, the district court entered an order on August 30, 2001, re-appointing Thomas as executor.

In January of 2002, Metzinger filed a new motion for payment of an administrator's commission and expenses by the estate. Oyler separately moved for payment of attorney's fees and expenses. Thomas, in his capacity as executor, opposed the motion, asserting the district court had been without jurisdiction to reject the will on an adversarial issue. He argued that Metzinger's appointment

as administrator was void *ab initio*, and that neither Metzinger nor Oyler had any statutory right to an administrator's commission, expenses, or attorney's fees paid by the estate.

On September 25, 2002, the district court, per Hon. Virginia Whittinghill, agreed with Thomas and denied the motion for the commission, expenses, and attorney's fees. The court held that the district court lacked jurisdiction to consider a contested matter and therefore, Metzinger was never lawfully appointed as administrator of the estate. The district court also concluded that the estate was not responsible for attorney's fees incurred by Metzinger during the course of the will-contest proceedings.

After entry of that order, Metzinger obtained new counsel and moved the district court to reconsider its order insofar as it denied expenses which he incurred as administrator to maintain the real property. Following a hearing, the district court concluded that Metzinger had incurred certain expenses which were necessary to prevent waste of the real property. Consequently, the district court directed that Metzinger could recover a total of $2,529.06 from the estate. The district court re-affirmed

its prior ruling denying Oyler's request for attorney's fees.

Oyler appealed and Thomas cross-appealed from these rulings by the district court. Metzinger appeared as a cross-appellee, but he did not separately appeal from the district court's orders. In an order entered on April 3, 2003, the circuit court dismissed Oyler's appeal, finding that Oyler lacked standing to prosecute the appeal in his own name. On Thomas's cross-appeal, the circuit court affirmed the district court's order directing that certain expenses paid by Metzinger be reimbursed by the estate. Although the circuit court agreed with Thomas that Metzinger's appointment as administrator was void *ab initio*, the court concluded as a matter of equity that Metzinger was entitled to reimbursement of these expenses because they went for the benefit of the estate property. Oyler filed a motion for discretionary review of the circuit court's order, which this Court granted on July 10, 2003. Thereafter, Thomas filed a cross-motion for discretionary review, which this Court granted on September 10, 2003.

Oyler first argues that the circuit court erred in finding that he lacked standing to prosecute the appeal. The circuit court concluded that, because Oyler was

employed by James Metzinger, the former administrator, only Metzinger would have standing to appeal from a denial of attorney's fees. The standard for standing to sue is a judicially recognizable interest in the subject matter.[3] Standing is the right to appear and seek relief in a particular proceeding.[4] A person must have "a real, direct, present and substantial right or interest in the subject matter of the controversy."[5] We conclude that Oyler had a distinct interest in the outcome of Metzinger's motion for attorney's fees.

An administrator is allowed to retain the services of an attorney to assist and counsel him in the performance of his duties.[6] If an administrator does so, attorney's fees are a chargeable claim against an estate, provided the fees are reasonable.[7] Furthermore, KRS 396.185(1) provides that "[u]nless otherwise provided in

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[3] Windchy v. Friend, Ky., 920 S.W.2d 57, 58 (1996) *citing* City of Louisville v. Stock Yards Bank & Trust, Ky., 843 S.W.2d 327 (1992).

[4] Williams v. Phelps, Ky. App., 961 S.W.2d 40, 41 (1998).

[5] Winn v. First Bank of Irvington, Ky. App., 581 S.W.2d 21, 23 (1979).

[6] KRS 395.195(18).

[7] Harrell v. Westover, Ky., 283 S.W.2d 197, 199-200 (1955). *See also* Lucas v. Mannering, Ky. App., 745 S.W.2d 654, 656 (1987).

the contract, a personal representative is not individually liable on a contract entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and to identify the estate in the contract." As the allowance is made directly to the attorney and is chargeable as a claim against the estate, the attorney has standing to appeal from an order fixing or denying his fees. The personal representative cannot appeal for him.[8] Consequently, Oyler had standing to appeal from the district court's order.[9]

The central question in this appeal and cross-appeal concerns the district court's conclusion that it had lacked jurisdiction to reject the Thomas will or to appoint Metzinger as administrator of his mother's estate. The

[8] J. Merritt & N. Lay, 2 Kentucky Practice: Probate Practice and Procedure, §1083, p. 43 (1984 & 2004 Supp.). *Citing* Thomas v. Thomas, 162 Ky. 630, 172 S.W. 1054 (1915). *See also* Woford v. Woford, 267 Ky. 787, 103 S.W. 296, 299 (1937); and Bartlett v. Louisville Trust Co., 212 Ky. 13, 277 S.W. 250, 254 (1925).

[9] Oyler also argues that the circuit court's dismissal of the direct appeal precluded any review of the issues raised in Thomas's cross-appeal. Based on our finding that the circuit court erred in dismissing Oyler's appeal, this issue is now moot. Moreover, under CR 74.01, a court may have appellate jurisdiction over a cross-appeal even if it lacked jurisdiction over the direct appeal. In the current case, Oyler's lack of standing to prosecute the direct appeal would not affect the circuit court's jurisdiction to hear Thomas's cross-appeal.

district court has exclusive jurisdiction over all matters involving probate, except matters contested in an adversary proceeding. Thomas argues that issues of undue influence and lack of testamentary capacity are inherently adversarial claims which must be brought in circuit court. Therefore, he contends that the district court's rejection of the will and appointment of Metzinger was without jurisdiction and therefore void *ab initio*. Therefore, any commissions due to Metzinger or fees incurred by Metzinger and his attorney should have been rejected out of hand. Oyler argues that Metzinger's appointment was valid until set aside by the circuit court. Therefore, he is entitled to attorney's fees to be paid by the estate unless found to be unreasonable.

As Thomas correctly notes, KRS 24A.120(2) grants the district court exclusive jurisdiction in "[m]atters involving probate, except matters contested in an adversary proceeding." The precise meaning of the term "adversary proceeding" has been the subject of some debate.[10]

KRS 24A.120(3) 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

[10] *See* Merritt & Lay, 1 Probate Practice and Procedure, §§ 753-757, pp. 491-500 (1984 & 2004 Supp.).

subsection (2) of this section and therefore are within the jurisdiction of the district court." Nevertheless, there is no dispute that any challenge to a will based on undue influence or lack of testamentary capacity must be brought in circuit court. KRS 394.240(1) provides that a party may seek construction of a will in the circuit court by a separate action if the validity of the will is not in question, or by an original action in the circuit court contesting a district court's action in admitting or rejecting a will to probate.[11]

The thornier question is whether the district court is divested of jurisdiction once such issues are raised, or the district court's orders are merely subject to the superior jurisdiction of the circuit court. In reaching the former conclusion, Thomas and the lower courts rely heavily on this court's opinion in Fischer v. Jeffries.[12] In Fischer v. Jeffries, the Metcalfe Circuit Court dismissed a will-contest action, concluding that the action brought pursuant to KRS 394.240 was barred under the doctrines of *res judicata* and election of remedies because of the earlier proceedings in district court. This Court

[11] *See also* KRS 418.040 and 418.045.

[12] Ky. App., 697 S.W.2d 159 (1985).

disagreed, noting that the district court does not have jurisdiction to decide adversarial matters. The Court went on to add that, once adversarial matters were raised in district court, it "was divested of jurisdiction which lodged in the Metcalfe Circuit Court for a trial de novo as to the various issues raised by the parties including the validity of the will."[13]

This language proved troublesome because it suggested that the district court automatically loses jurisdiction over a probate matter when the first objection is raised.[14] In Mullins v. First American Bank,[15] this Court recognized the problem with the language used in Fischer and explained that

> [t]he Fischer opinion is brief and does not detail all the procedural events in that contest. Presumably the Metcalfe District Court rejected the will offered for probate which prompted the filing of a will contest in circuit court and the concomitant divestiture of the district court's jurisdiction. The opinion does not say that the district court erred in rejecting the will or that it should have refused to make a ruling. The issue in Fischer

[13] Id. at 160.

[14] Merritt & Lay, 1 Probate Practice & Procedure, § 756, pp. 72-75 (2004 Supp).

[15] Ky. App., 781 S.W.2d 527 (1989).

> does not concern jurisdiction but rather the preclusive effect, if any, to be afforded the district court's decision once a will contest has been filed. For these reasons the interpretation given the Fischer opinion by both the district and circuit courts herein is not warranted. Certainly Fischer does not suggest the procedure utilized by the district court of transferring the matter to circuit court on its own motion.[16]

The Court in Mullins went on to hold that when the probate statutes are read together, they require that: (1) all proceedings for the admission to probate of a will or codicil be commenced in the district court; (2) the district court must either admit or reject the instrument; and (3) the district court retains jurisdiction over the matter until such time as a will contest, or adversary proceeding, is commenced in the circuit court.[17] A decision by the district court to admit or reject a will has no preclusive effect on a subsequent action brought pursuant to KRS 394.240. But at the same time, the mere opposition of a party to the admission of a will does not automatically create an adversary proceeding. Rather, the district court's jurisdiction over probate matters

[16] Id. at 529

[17] Id. at 528.

continues until such time as a suit is filed in circuit court.[18]

We emphasis that the district court should not address issues relating to testamentary capacity or undue influence. Such challenges to a will are adversarial matters which must be brought in circuit court.[19] Nevertheless, the fact that such issues have been raised does not divest the district court of jurisdiction. The district court has the authority to admit or reject a will to probate.[20] The district court also has the authority to appoint an executor or an administrator of an intestate's estate.[21] While the district court should not have entertained Metzinger's allegation of lack of testamentary capacity or undue influence, it retained jurisdiction over the matter until an action was brought in circuit court.[22] Thus, the district court order rejecting Jesse Metzinger's will and appointing her son as administrator was valid

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[18] Id. at 529.

[19] Vega v. Kosair Charities Committee, Inc., Ky. App., 832 S.W.2d 895, 896-97 (1992).

[20] KRS 394.220.

[21] KRS 395.030.

[22] *See also* West v. Goldstein, Ky., 830 S.W.2d 379, 381-82 (1992).

until set aside by a contrary judgment of the circuit court.

Because Metzinger was lawfully appointed administrator, the district court had the authority to consider his request for an administrator's commission and for reimbursement of expenses.[23] The district court concluded that the expenses incurred by Metzinger were reasonable and necessary to prevent waste of the real property. Given the nature of these expenses – property taxes, utility bills, insurance, and plumbing repairs – we cannot dispute the district court's finding that Metzinger's payment directly benefited the estate and reasonably would have been made by any administrator or executor.

Thomas also argues that the district court erred by allowing reimbursement of these expenses because the real property was not a probatable asset of the estate

[23] KRS 395.150 and KRS 396.075(1). The circuit court suggested that even if the appointment of James Metzinger as administrator had been without authority, the district court "was acting in an equitable fashion in allowing these expenses to be reimbursed to Mr. Metzinger." However, it is well-established that the district court is not a court of equity. In fact, matters of equity are specifically excluded from the jurisdiction of the district court. KRS 24A.120(1). *See also* McElroy v. Taylor, 977 S.W.2d 929, 932 (1998). Consequently, the district court must have express statutory authority to reimburse costs or expenses incurred during the administration of an estate.

which was subject to the care of the administrator. However, Thomas never argued to the district court that the real property passed outside of probate. Indeed, during the district court proceedings he consistently asserted that the real property was part of the estate.[24] He will not be heard now to claim that the property was not subject to probate.

This brings us at last to Oyler's argument that he was entitled to an award of attorney's fees from the estate. As previously noted, the district court has the authority to award reasonable attorney's fees earned in the course of representing an estate. Nonetheless, we agree with Thomas and the district court that no fee was due to Oyler. In his initial motion seeking attorney's fees, Oyler stated that he had billed $18,808.56 in attorney's

[24] In his "Brief in Opposition of Awarding an Administrator's Commission and Attorney Fees" filed on August 15, 2001 (ROA 205-212), Thomas states that [t]he estate has no personal property but consists entirely of the former home of the decedent which has an approximate value of $66,000.00 to $75,000.00." (ROA 206). He made similar assertions in his "Brief in Opposition to Awarding an Administrator's Commission and Attorney Fees", filed on February 18, 2002 (ROA 276), and even in his statement of cross-appeal to the circuit court, filed on February 5, 2003 (ROA 462). Only later in that same cross-statement of appeal did Thomas alternatively argue, for the first time, that the real property passed to him outside of probate. (ROA 467).

fees and that he had received payment for $7,981.26, leaving an unpaid balance of $10,827.30.

However, most of the fees sought by Oyler related to his defense of Metzinger in the will-contest action. An executor has the right to incur attorney's fees on behalf of the estate to defend his authority to act.[25] But an administrator appointed on the supposition that the deceased died intestate will not be allowed his attorney's fees incurred in an unsuccessful effort to defend that appointment.[26] Oyler admitted that he has already received payment of a portion of his fees from estate assets without prior approval of the district court.[27] Furthermore, Oyler made no effort to show what fees were properly incurred as part of the administration of the estate. Under the circumstances, we agree with Thomas and the district court that Oyler has not shown that any additional fees were reasonable.

In conclusion, we disagree with the circuit court's conclusion that Oyler lacked standing to prosecute

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[25] Lucas v. Mannering, Ky. App., 745 S.W.2d 654, 656 (1987).

[26] Louisville Trust Co. v. Fidelity & Columbia Trust Co., 209 Ky. 289, 272 S.W. 759, 762 (1925). *See also* Merritt & Lay, 2 Probate Practice & Procedure § 1072, p. 29.

[27] ROA 113-115.

an appeal in his own name from the denial of his attorney's fees. We also disagree with the lower court's finding that the order appointing Metzinger as administrator of his mother's estate was void *ab initio*. Rather, his appointment, although erroneous, was within the district court's jurisdiction and remained valid until set aside by the circuit court judgment. Nonetheless, we agree with the result reached by the district and the circuit courts.

Accordingly, the opinion and order of the Jefferson Circuit Court is reversed insofar as it dismissed the appeal brought by Daniel M. Oyler, but is affirmed insofar as it affirmed the district court's order denying Oyler's request for attorney's fees. In the cross-appeal, the order of the Jefferson Circuit Court is affirmed insofar as it affirmed the district court's order's allowing reimbursement of some expenses to Jesse Metzinger.

TACKETT, JUDGE, CONCURS.

BARBER, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

BARBER, JUDGE, CONCURRING: Although I reach the same conclusion that the majority does, i.e., the district court retains jurisdiction until a will contest suit is filed in circuit court, I disagree with the majority's rationale that because the district court retains

jurisdiction, it could hold a hearing on adversarial issues. That logic grants the district court jurisdiction beyond what is allowed by statute. I would allow the expenses of Metzinger as legitimate claims against the estate as they benefited the real property and prevented waste.

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