

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001668-DG

PHILIP J. GOODMAN

APPELLANT

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-XX-00001

EVELYN K. GOODMAN, EXECUTRIX
OF THE ESTATE OF LAWRENCE I. GOODMAN,
AND STEVEN A. GOODMAN

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

COMBS, CHIEF JUDGE: We granted discretionary review in this probate matter.

The appellant contends that the Fayette Circuit Court erred in reversing an order of the district court concerning the estate of his late father. The district court refused to accept a proposed informal settlement of the estate of Lawrence I. Goodman.

After our review of the record and the arguments of counsel, we are persuaded that

the district court's order requiring a formal settlement of the estate was not a final and appealable order. Consequently, we vacate the order of the circuit court and remand with directions to dismiss the appeal.

Lawrence Goodman died on February 20, 2004, at the age of 88 while residing in Lexington, Kentucky. Among his survivors were his spouse, Evelyn Kossoff Goodman, and two sons, Steven A. Goodman and Philip Jay Goodman. Lawrence's estate plan had been executed in January 2002. It included a revocable trust agreement that provided for the disposition of the bulk of his assets and a pour-over will that funded the *inter vivos* trust. Evelyn was to be appointed trustee and personal representative of Lawrence's estate. Pursuant to the estate plan, nearly all of Lawrence's assets were to be distributed to her.

The trust agreement provided that sons Steven and Philip were to receive the contents of specific safety-deposit boxes held by the trust at Lawrence's death. The agreement also provided that if a beneficiary of the trust contested the probate of the will or brought any action against the trustee, he or she would be deemed to have predeceased Lawrence for purposes of distribution of the trust assets.

After Lawrence died, his will was submitted to the probate division of the Fayette District Court, and Evelyn was duly appointed as Executrix. Evelyn filed two sworn inventories with the district court attesting to the contents and value of Lawrence's probate estate. Her second, amended inventory was filed after the contents of Lawrence's safety-deposit boxes were appraised.

As Executrix, Evelyn also investigated several claims made by Philip against his brother, Steven, and against his late father. Evelyn rejected these claims, and Philip declined to file an action against his father's estate.¹

On November 21, 2006, Evelyn submitted a proposed informal settlement of Lawrence's estate. The proposed settlement included Evelyn's sworn statement indicating that the estate was solvent; that all legal claims and debts had been paid; that no inheritance, estate, or death taxes were required to be paid; and that all court costs had been paid. Evelyn's proposed settlement provided the name of her attorney and the amount of the attorney's fee. The proposed settlement was accompanied by a verified waiver of the requirements for formal settlement of the estate executed by Evelyn in her individual capacity and as trustee of Lawrence's revocable trust. These documents were submitted to the court pursuant to the provisions of Kentucky Revised Statutes (KRS) 395.605. That statute compels a district court to accept from a fiduciary an informal settlement of a decedent's estate where all of the beneficiaries of the estate have executed a waiver of the requirements for a formal settlement of the fiduciary's accounts.

On December 8, 2006, Philip filed a written objection to the court's acceptance of the proposed informal settlement of Lawrence's estate. Philip contended that he was a beneficiary of his father's estate and indicated that he

¹ Philip did file an action in Fayette Circuit Court against his brother, Steven; Steven's wife, Julie; and Steven's law firm. 05-CI-01229. However, the action was ultimately dismissed by the trial court. The dismissal was affirmed by this court in July 2006. 2005-CA-001273-MR.

would not waive a formal settlement of the fiduciary's accounts.² Philip sought a formal settlement in order to insure that "there has been no wrongdoing and no undervaluation of assets which could result in a boomerang of potential tax liability in the future if such wrongdoings are uncovered."

On December 22, 2006, the Fayette District Court declined to accept the proposed informal settlement of the estate. However, the court suggested that Evelyn appeal its decision rather than undertaking a formal settlement of the estate. On January 19, 2007, Evelyn, as fiduciary of the estate, filed a timely notice of appeal to the Fayette Circuit Court.

On appeal, Evelyn contended that the district court had erred by failing to apply the plain meaning of the provisions of KRS 395.605 requiring the court to accept a fiduciary's informal settlement where all beneficiaries agreed to waive the requirements of formal settlement. She argued that the statute was intended to govern the administration of decedents' estates and not distributions anticipated by the terms of *inter vivos* trusts. Evelyn noted her role as the fiduciary of the estate, the only legatee, the sole representative of the *inter vivos* trust, and the beneficiary of the residuary of the estate. Therefore, she contended that the district court was required to accept her properly supported proposed settlement of Lawrence's estate.

Philip disagreed and argued that the district court had not erred by rejecting Evelyn's proposed informal settlement of his father's estate. He

² We reserve comment – as has the district court so far – about whether Philip's legal challenge to the settlement would serve to disqualify him as an heir under the terms of the will.

contended that consistent with the provisions of KRS 395.605, his “beneficial ownership interest” in a portion of Lawrence’s trust assets made him an indirect beneficiary of Lawrence’s estate, thus entitling him to demand a formal settlement of the fiduciary’s accounts.

Following oral argument, the Fayette Circuit Court concluded that Evelyn’s proposed settlement and verified waiver of the requirements for a formal settlement of the estate were sufficient to satisfy the provisions of KRS 395.605. On June 12, 2007, the Fayette Circuit Court entered an order reversing the district court’s decision not to accept the proposed informal settlement. In an order entered on July 20, 2007, the circuit court directed the district court to accept Evelyn’s proposed informal final settlement of the estate. This court granted discretionary review on November 16, 2007.

At the outset, we must consider Philip’s contention that the Fayette District Court’s order was not a final order and that, therefore, the circuit court lacked subject matter jurisdiction to consider the issues presented by Evelyn’s appeal. After our review, we agree that the order lacked the requisite finality to render it appealable.

Probate proceedings vest exclusive jurisdiction in the district court to oversee the administration and settlement of estates. KRS 24A.120. A direct appeal may be taken from the district court to the circuit court from any final action of the district court. KRS 23A.080(1).

“A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceedings, or a judgment made final under Rule 54.02.” Kentucky Rules of Civil Procedure (CR) 54.01. A final and appealable order has also been defined as one which “operates to divest some right in such a manner as to put it out of the power of the court making the order . . . to place the parties in their original condition.” *Murty Bros. Sales, Inc. v. Preston*, 716 S.W.2d 239, 241 (Ky. 1986). No authority – by way of statute or civil rule – authorizes an appeal of a district court to a circuit court. The suggestion of the district court that Evelyn file the appeal in circuit court was erroneous as it was recommending an interlocutory action and as well as an impermissible advisory opinion.

On behalf of the estate, Evelyn argues that preparation of a formal settlement would be unduly burdensome, time consuming, expensive, and essentially irrelevant to Philip’s interest under the terms of the trust. Evelyn contends that the district court’s order effectively ended the probate proceedings by requiring her to file a formal settlement of the estate. Thus, she construes the overall effect of the order as amounting to *de facto* finality.

In this case, the district court declined to accept Evelyn’s proposed informal settlement of the estate. Consequently, the estate remained open and the court’s jurisdiction over the matter was extant and continuing. The court’s decision to reject the proposed informal settlement did not finally adjudicate all the issues related to the probate of the estate. Instead, by its very terms, it

contemplated the entry of additional orders by the court. As observed earlier in this opinion, Philip's eligibility as an heir could logically be the subject of other orders.

It is true that Kentucky's appellate courts have carved out a variety of exceptions to the finality rule. However, none of those exceptions is relevant to these proceedings. It has consistently been argued that the potential burden of the inconvenience and costs of litigation should operate to justify immediate review of an otherwise non-final order. Our courts have addressed and rejected that contention. *National Gypsum Co. v. Corns*, 736 S.W.2d 325 (Ky. 1987). In *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713 (Ky.App. 1988), the appellant contended that requiring it to arbitrate pursuant to the trial court's order and only later permitting it to litigate that issue on appeal would be a tremendous waste of time and money – especially if error were found in the order compelling arbitration. Nonetheless, this court held that a trial court's decision to compel arbitration was not a final and appealable order.

We can find no precedent or authority to allow immediate review of the non-final order in the case before us. The decision of the Fayette District Court not to accept Evelyn's proposed informal settlement did not deprive the estate of a right that could not be later restored. Evelyn reserves the right to appeal any **final** order. Under specific circumstances, review of district court rulings would be directly available through an original proceeding for relief in the nature of

mandamus or prohibition in the circuit court. However, such was not the procedure or the relief sought in this case.

We hold that the Fayette Circuit Court lacked jurisdiction over the non-final order of the district court. Therefore, we vacate the circuit court's order of July 20, 2007, that directed the district court to accept the informal final settlement of Lawrence's estate. We remand the matter to the circuit court with directions that the appeal be dismissed.

ALL CONCUR.

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