

RENDERED: OCTOBER 20, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000626-DG

DEBORAH CHEN MARR

APPELLANT

ON DISCRETIONARY REVIEW FROM BREATHITT CIRCUIT COURT
v. HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 16-XX-00001

AGNES MARIA BELLAMY, AS ADMINISTRATRIX
AS HEIR TO THE ESTATE OF VIRGIL BELLAMY,
BONNIE BOWLING, BURTON BELLAMY,
MYRTLE BELLAMY, AND SHARON GROW

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

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

JONES, JUDGE: Deborah Marr appeals from an Order of the Breathitt Circuit

Court affirming the District Court's decision that Appellee should not be removed

as Administratrix of Virgil Bellamy's estate. For the reasons more fully explained

below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Virgil Bellamy died intestate on December 23, 2014. Virgil left a substantial financial estate, mostly in the form of stocks and stock funds. Virgil's other significant valued property passed by survivorship. Virgil was survived by his wife, Myrtle Bellamy, and five children: the Appellee, Agnes Maria Bellamy; Bonnie Bowling; Burton Bellamy; Sharon Grow; and the Appellant, Deborah Marr. Myrtle did not want the appointment as Administratrix; instead, she expressed a desire that her daughter, the Appellee, Agnes "Maria" Bellamy, be appointed. Initially, Maria sought to informally settle the estate. Maria approached her siblings and asked them to sign an informal settlement agreement. All of the siblings except Deborah signed the informal settlement agreement. Acting without counsel, Maria presented the informal settlement agreement directly to the district court judge, Judge Profitt, instead of filing the informal settlement with the clerk. Judge Profitt refused to sign the agreement because it was not unanimous as Deborah had not signed it. As Maria was acting without counsel, Judge Profitt advised Maria of the next steps she should take to initiate formal settlement proceedings.

Thereafter, Maria filed a petition to be appointed as Administratrix of the Estate. Maria presented her petition to the district court with waivers agreeing to her appointment by Virgil's surviving spouse, Myrtle, as well as four of the five children, excepting Deborah Marr. Deborah was listed as an heir at law on the attachment to the petition. It is undisputed that Deborah did not sign the waiver.

Thereafter, the district court appointed Maria as Administratrix of the Estate and set a bond of \$1.5 Million, unsecured by the court.

Next, a hearing was held before the district court. Only Deborah and her counsel were present. At the hearing, Deborah's counsel objected to Maria's appointment as well as her *ex parte* contact with Judge Profitt. Judge Profitt explained that it was his practice in most estate proceedings that appear to be uncontested to handle them off the record. Judge Profitt also disclosed that he had known Burton Bellamy for many years previously but had not seen him in over five years. The two would eat at the same restaurant and likely dined together on numerous occasions, but they are not friends. Judge Profitt explained that while he did not believe he had done anything to put Deborah at a disadvantage, in light of the circumstances, he would voluntarily recuse from the case to avoid any issues.

Next, Deborah sought to have Maria removed as Administratrix. In addition to the *ex parte* contact, Deborah maintained that it was unlawful for Maria to have been appointed without notice to all interested parties and a hearing. Deborah's objections were heard by a specially appointed district court judge. A bench trial was held before Special District Judge Holbrook on September 28, 2015. Both Maria and Deborah were present at the hearing with counsel.

Maria testified that her mother and siblings, excepting Deborah, agreed that she should be appointed as Administratrix of the Estate as she lived with her parents, was familiar with Virgil's stock purchases, and had the time to deal with managing the estate. Maria explained that she talked with all of her

siblings, including Deborah, about her intention to seek appointment as Administratrix. She maintained that as a result of the conversations, Deborah was at least on some notice that their mother wanted Maria to be the Administratrix of the Estate and that Maria was taking steps to try to get the Estate distributed to the heirs. Maria also testified about her management of the estate. Maria stated that after her appointment, she spent a significant amount of time locating all of Virgil's stocks and transferring them into one account. Maria testified that she emailed the heirs and provided that the estate would be divided such that 50% would go to Myrtle Bellamy as the surviving spouse and the remaining 50% would be divided equally between the children with each receiving 10%. Maria testified that she also asked the heirs if they wanted to receive their share in stock or cash. Maria indicated that Deborah never indicated whether she wanted her share in stock or cash, but that her siblings all preferred stock to cash. Each of the other heirs provided Maria with account numbers for their shares to be transferred to them individually. Because she did not get any indication from Deborah as to her preference or directions as to where to transfer the shares, Maria directed Scottrade to sell 10% of the stock and send the check to Deborah. Deborah's check was in the amount of \$135,858.70. Maria further testified that on the day of the hearing, September 28, 2015, the value of Deborah's cash distribution was more than the value of the individual stocks she would have received had she elected to receive stock instead of cash.

Deborah also testified at the hearing. Her testimony revealed that she was aware that her siblings and mother desired for Maria to be appointed as Administratrix. Further, Deborah also testified about various conversations she had with her other siblings. These conversations caused her to question whether she would be receiving less than her fair share of the estate.

Ultimately, the court denied Deborah's motion to remove Maria as Administratrix. The court also denied Deborah's motion to reconsider. Deborah then appealed to the Breathitt Circuit Court, which affirmed the ruling of the district court.

This appeal followed.

II. ANALYSIS

Deborah makes three main arguments on appeal. First, she argues that Maria was appointed as Administratrix without proper notice and a hearing. Second, she argues that the procedural irregularities render Judge Profitt's appointment of Maria as Administratrix void. Finally, she argues that Maria was hostile to the estate and incapable of discharging the estate.

Generally, where a hearing is to be held on application for appointment as fiduciary, notice must be given to interested parties under KRS¹ 395.016. However, in *Treas v. Treas*, 240 S.W.2d 593 (Ky. 1951), the Court specifically held that where the surviving spouse waives her right to be appointed, and nominates a qualified person, the court may appoint the nominee without

¹ Kentucky Revised Statutes.

notice and a hearing. Here, Virgil Bellamy's surviving spouse, Myrtle Bellamy, waived her right of appointment, and nominated their daughter, Maria, to be named Administratrix of the Estate. As such, under *Treas*, notice and a hearing were not required.

This principle is further supported by KRS 395.015(2), which provides that:

In the case of intestacy, or where an administrator with will annexed or de bonis non is to be appointed, if there be no surviving spouse, or if such spouse waives the right of appointment or is not qualified to act and does not nominate a suitable administrator and there is more than one (1) resident heir-at-law entitled to appointment, the court shall thereupon set a time for hearing such application. Notice of said hearing shall be given to the surviving spouse and all known heirs of the deceased residing in the state, or elsewhere, in the manner provided in KRS 395.016.

Importantly, under KRS 395.015(2), if the surviving spouse waives the right of appointment or is not qualified, and ***does not*** nominate a suitable administrator, and there is more than one resident heir-at-law entitled to appointment, then the court shall set a hearing for such application with notice to all known heirs and the surviving spouse. Here, Virgil Bellamy's surviving spouse, Myrtle Bellamy, waived her right of appointment and nominated their daughter, Maria. Myrtle signed the waiver on the Petition for Appointment of Administratrix and Maria was a suitable person to be named Administratrix of the estate. The record reveals that she lived with her parents her entire adult life and

continued to live with her mother after her father's passing. Maria was retired and had the time to devote to the proper management of her father's substantial estate. Thus, under both KRS 395.015 and *Treas*, where the surviving spouse declines and nominates a qualified person, such person may be appointed without notice and a hearing. Accordingly, Maria was properly appointed as Administratrix and notice and a hearing were not required.

Next, the court properly declined to remove Maria as Administratrix under KRS 395.160. The provisions of KRS 395.160 authorize the district court to remove the estate's personal representative where the personal representative: moves out of the state and fails to designate a process agent; becomes insane "or otherwise incapable to discharge the trust[;]" goes bankrupt; or is in failing circumstances. While Deborah makes several allegations against Maria, there is no evidence of any action by Maria that rendered her incapable of discharging her duties or otherwise warrants her removal.

The hearing before the district court revealed that Maria kept appropriate records in relation to her duties and sought to dispose of the trust in a timely manner. While Deborah may have disagreed with some of Maria's decisions, there was no showing that Maria was hostile to the estate itself or that she improperly disposed of the estate's assets to Deborah's detriment. *See Price's Adm'r v. Price*, 291 Ky. 211, 163 S.W.2d 463, 465 (1942).

Finally, the order appointing Maria was not void even though Judge Profitt ultimately recused himself. Judge Profitt complied with KRS 395.040 and

KRS 395.015 when he appointed Maria as Administratrix, and his order appointing is valid, notwithstanding his later decision to recuse. *See Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 550 (Ky. 2011). Additionally, any procedural irregularities were cured by Judge Holbrook's Order overruling Deborah's motion to remove Maria. *See Logsdon v. Logsdon*, 334 S.W.2d 919 (Ky. 1960).

IV. CONCLUSION

For these reasons we affirm the Breathitt Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Taylor Kain
Louisville, Kentucky

BRIEF FOR APPELLEE AGNES
MARIA BELLAMY:

Darrell A. Herald
Jackson, Kentucky