

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

DAVID A. SED, ADMINISTRATOR WWA OF THE ESTATE OF ROBERT HEWITT, JR.,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	CASE NO. 2016-P-0019
	:	
- VS -	:	
	:	
ELAINE M. MUNDY, et al.,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 15 CVG 01954 R.

Judgment: Affirmed.

Michael A. Noble, Lentz, Noble & Heavner, LLC, 228 West Main Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

J. Michael Drain, 147 Bell Street, #202, Chagrin Falls, OH 44022 (For Defendant-Appellant).

Robert W. and Stephen A. Eckinger, Eckinger Law Offices, LTD., 1611 North Main Street, Suite 1, North Canton, OH 44720 (For Edward L. Mundy).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Elaine M. Mundy, appeals from the judgment of the Portage County Municipal Court, Ravenna Division, overruling her objections to a magistrate's decision granting appellee, David A. Sed, administrator of the Estate of Robert Hewitt,

Jr., a writ of restitution on a complaint for forcible entry and detainer. We affirm the trial court's judgment.

{¶2} On September 27, 2005, Robert Hewitt died. At the time of his passing, certain real property at 5236 McCormick Road, Ravenna, Ohio was titled in the name of a trust in his name. Hewitt had a will in which he appointed appellant executrix and her then-husband, Edward Mundy, successor. The will principally specified that all Hewitt's debts and expenses, including those associated with the administration of his estate, be paid as soon as convenient after his death. A residuary clause of Hewitt's will left all remaining assets to appellant and Edward to "share and share alike." After Hewitt's death, the record suggests the Mundys moved into the residence at 5236 McCormick Road. The Mundys divorced in 2010, but appellant continued to reside in the home.

{¶3} In September 2014, in a separate proceeding, the Portage County Court of Common Pleas determined the deed transferring ownership of the real property to the Hewitt trust was not properly acknowledged and, as a result, the transfer was void. Accordingly, at the time of Hewitt's death, the subject property was actually part of his probate estate. Hewitt's estate was subsequently reopened.

{¶4} On January 30, 2015, appellee was appointed administrator of the Estate of Robert Hewitt by the Portage County Probate Court. Appellee contacted appellant on numerous occasions informing her of his need to sell the subject real property to pay expenses related to the reopening and closing of the estate. Appellant neither responded to appellee nor did she leave the premises.

{¶5} On May 30, 2015, appellee sent appellant a letter advising her that, if she did not vacate the premises by July 1, 2015, he would proceed with an eviction action to

secure her removal. Appellant did not comply with the advisement and, on July 21, 2015, appellee served appellant with written notice that she must leave the premises. Appellee subsequently filed a complaint for forcible entry and detainer seeking restitution of the premises to the estate.

{¶6} Appellant filed a motion to dismiss the underlying complaint, arguing that, upon Hewitt's death in 2005, she immediately took title under the will. As the title owner of the property, she argued, the trial court did not have the authority to issue the writ of restitution in appellee's favor. Appellant additionally argued that, because she was not a lessee and did not have a rental agreement with Hewitt, the forcible entry and detainer action was an improper vehicle to obtain relief. Finally, appellant argued that the will allowed appellee, as the administrator, to sell the property if necessary. It did not, however, confer upon him the authority to manage the property or any individual in possession of the subject property.

{¶7} In response, appellee argued that, under the will, he had the authority to sell the property to cover expenses attendant to the reopening of the estate. Because the estate did not have sufficient funds to cover these expenses, he maintained that selling the property was a proper exercise of his authority. Appellee observed this action is not uncommon, noting that real property typically descends to the heirs upon the death of a decedent, subject to divestment, i.e., payment of expenses relating to the administration of the estate.

{¶8} After hearing the parties' arguments, the magistrate determined the will gave appellee, as administrator, the authority to bring the underlying action. As a basis for its decision, the court cited the following clause in the will:

{¶9} I make, nominate and appoint Elaine M. Mundy to be Executor of this, my Last Will and Testament, and in the event that she is unable or unwilling for any reason, to qualify or serve, I then make, nominate and appoint Edward L. Mundy as Successor Executor, hereby authorizing and empowering my said Executor or the successor to compound, compromise, settle and adjust all claims and demands in favor or against my estate and to sell at private or public sale at such prices and upon such terms of credit or otherwise as they may deem best, the whole or any part of my property, both real and personal and wheresoever situated, and to execute, acknowledge and deliver deeds and other proper instruments of conveyance thereof to the purchaser or purchasers thereof. My said Executor or the successor shall have the power to do all the acts necessary to carry out the provisions of this, my Last Will and Testament, without order of the Court.

{¶10} Because the will empowered appellee to sell the property to pay expenses relating to the estate's reopening, the court denied appellant's motion to dismiss.

{¶11} A hearing on the merits of the forcible entry and detainer complaint proceeded, after which the magistrate granted appellee's request for restitution of possession. On the same day, the trial court tentatively adopted the magistrate's decision. Appellant filed objections to the magistrate's decision; the objections essentially mirrored the arguments appellant made in her motion to dismiss. The trial court, however, did not specifically rule upon the same. In order to preserve her appellate rights, appellant filed a notice of appeal. This court subsequently remanded the matter for the trial court to rule upon appellant's objections. On remand, the trial court issued a judgment addressing and overruling each objection. This appeal followed. Appellant assigns two errors for our review. Because they are related, we shall address them together. They provide:

{¶12} "[1.] The trial court erred to the prejudice of Defendant-Appellant Elaine M. Mundy in issuing a writ of restitution in favor of the Plaintiff-Appellee where Elaine M.

Mundy was an owner of the subject property and had a superior right to possession of the property.

{¶13} “[2.] The trial court erred to the prejudice of Defendant-Appellant Elaine M. Mundy in issuing a writ of restitution where the fiduciary did not first avail himself of the probate court process to sell the real estate previously owned by the decedent and devised to her, before initiating a forcible entry and detainer complaint.”

{¶14} Under her first assignment of error, appellant contends the trial court erred in granting appellee relief because the forcible entry and detainer statute does not authorize an eviction against an individual in her position, i.e., she is not within the “defined class of defendants” enumerated under the statute. Under her second assignment of error, appellant asserts the trial court erred in granting appellee relief because the proper avenue for removing her from the subject property was through a proper petition filed in the probate court, pursuant to R.C. 2101.24. We shall address each argument in turn.

{¶15} First of all, we point out, appellant’s arguments on appeal were not specifically raised as objections to the magistrate’s decision. In this respect, she has waived these issues on appeal, but for plain error. Civ.R. 53(D)(3)(b)(iv).

{¶16} With respect to appellant’s first argument, appellant asserts the forcible entry and detainer statute does not contemplate her as a defendant to such an action. Appellant, however, fails to articulate why an individual in her situation is not subject to eviction.

{¶17} In the trial court, appellant maintained that, as an owner of the residence, she could not be evicted. Even if an owner is not generally subject to eviction under the

statute, appellant has failed to establish how she was, by operation of the will, an owner of the residence at the time the complaint was filed. Hewitt's will directed that all "the expenses and charges for the administration of [his] estate be paid out of [his] residuary estate as soon as convenient after my death." Item II, Last Will and Testament of Robert G. Hewitt, Jr. Pursuant to Item IV of the will, appellant and Edward Mundy were entitled to "all the rest, residue and remainder" of the Hewitt estate to "share and share alike." *Id.* Construing these provisions together, appellant was entitled to one-half of the remainder of Hewitt's estate, *after* expenses for the administration of the estate are paid. In short, her interest in the real property is subordinate to the payment of expenses associated with the administration of the Hewitt estate. As a result, she was not an owner of the real property, but merely had a stake in one-half of the residual assets remaining in the estate, post-payment of expenses.

{¶18} Moreover, it is undisputed that Hewitt's will empowered appellee to sell the property to pay expenses associated with the administration of the estate. Simply because appellant had an interest in the residual assets of the estate after the expenses were paid does not imply she had a right to remain in the dwelling. To the contrary, where a will vests an executor or administrator with a power of sale and further directs the circumstances of such a sale, the right of possession belongs to the executor or administrator. See *In re Estate of Line*, 122 Ohio App.3d 387, 391 (12th Dist.1997), citing *Hoffman v. Hoffman*, 61 Ohio App. 371, 373-374 (1st Dist.1939).

{¶19} At the hearing, appellee testified that, because the estate had been reopened, expenses had arose that required the sale of the property. These expenses included payment of legal fees relating to the reopening, administrator fees, and

appraisal fees. Moreover, appellee noted that Edward Mundy was not interested in taking title to one-half of the residence. Instead, he preferred his portion of the inheritance to be distributed in cash. Appellant did not contest or refute appellee's representations relating to the expenses or Edward Mundy's interest.

{¶20} R.C. 1923.02 governs "[p]ersons subject to forcible entry and detainer action." Subsection (A)(5) specifies, in relevant part, that one is subject to an eviction action "[w]hen the defendant is an occupier of land or tenements, without color of title, and the complainant has the right of possession." Appellant was the occupier of the subject property, without title to the same. And, as noted above, the will provides the administrator with the authority to settle all claims and demands against the estate. The expenses and distribution of the inheritance can be reasonably viewed as claims and demands. Appellee therefore possessed the testate right to sell, and therefore possess, the subject property. Accordingly, appellant was a proper defendant to the eviction action and the trial court did not err in granting the relief appellee requested. See *generally Estate of Wos v. Wos*, 6th Dist. Lucas No. L-05-1408, 2006-Ohio-4302 (a one-quarter beneficiary of a decedent's estate was a proper defendant under R.C. 1923.02(A)(5) and was not entitled to remain in a decedent's home where the executor had authority to sell residence).

{¶21} Appellant next asserts appellee should have sought leave through the probate court before seeking relief pursuant to R.C. 1923.02. She cites R.C. 2101.24(A)(1)(i), which provides, in relevant part:

{¶22} "Except as otherwise provided by law, the probate court has exclusive jurisdiction:

{¶23} “* * *

{¶24} “To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, petition by executors, administrators, and guardians[.]”

{¶25} As discussed above, Hewitt’s will authorized appellee to sell the subject property to settle any claims or demands against the estate “without order of the Court.” See Item VI, Last Will and Testament of Robert G. Hewitt, Jr. Moreover, appellee properly invoked the statutory remedies codified under R.C. Chapter 1923. That procedure is provided by law and, as a result, the probate court was not required to authorize the sale. Appellant’s argument therefore lacks merit.

{¶26} Appellant’s assignments of error are not well taken.

{¶27} For the reasons discussed above, the judgment of the Portage County Court of Common Pleas, Ravenna Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.