

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

In re: :  
Estate of Gilberto Garza, Jr., : No. 12AP-1000  
(Demencia Vargas-Ortega et al., : (Prob. No. 525604)  
Appellants). : (REGULAR CALENDAR)

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D E C I S I O N

Rendered on June 27, 2013

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*John L. Onesto*, for appellants.

*Baxter & Borowicz Co., L.P.A.*, and *Louis M. Borowicz*, for appellees.

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APPEAL from the Franklin County Court of Common Pleas,  
Probate Division.

SADLER, J.

{¶ 1} Appellants, Demencia Vargas-Ortega ("Demencia") and Joshua Mark Vargas ("Joshua"), co-executors of the estate of Gilberto Garza, Jr., appeal from a judgment of the Franklin County Court of Common Pleas, Probate Division. For the reasons that follow, we dismiss this appeal for lack of standing.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} On August 14, 2007, while at work for his employer, Sears Logistics Services, Inc., Gilberto Garza, Jr. ("the decedent"), became trapped in an industrial trash compactor and died at the scene from injuries sustained when he fell inside and the trash compactor was activated. The decedent had a will devising real property located in Hildalgo County, Texas, to his aunt, Demencia, and his nephew, Joshua. However, the

June 19, 2002 will made no provisions for any other property nor did it contain a residuary clause.

{¶ 3} Upon request of appellants, the will was admitted to probate, and appellants were appointed to serve as co-executors of the estate. Appellees, consisting of the decedent's father, Gilberto Garza, Sr. ("Gilberto, Sr."), and the decedent's three siblings, Jennifer Garza, Henry Garza, and Robert Garza, moved to have appellants removed as co-executors. Said motion was denied by the trial court.

{¶ 4} The purpose of opening the estate was to assert wrongful death and survival claims against decedent's employer. A settlement in that action was reached and appellants filed an application to approve settlement and allocation of the net settlement proceeds, consisting of \$257,210.23. Specifically, appellants asserted that 100 percent of the net settlement proceeds should be allocated to Demencia and Joshua as beneficiaries of the survival claim and none of the settlement proceeds should be allocated to the wrongful death action. Appellees challenged the application and argued 100 percent of the settlement proceeds should be allocated as a wrongful death settlement available only to the decedent's next of kin, specifically appellees. Additionally, appellees argued that even if allocated as 100 percent to the survival claims, because the will did not contain a residuary clause, the funds would not pass to Demencia and Joshua, but, rather, would pass intestate to decedent's father.

{¶ 5} The matter proceeded to a hearing before a magistrate. After consideration of the evidence presented at the hearing, including the testimony of six witnesses and admission of depositions and exhibits, the magistrate rendered a decision including findings of fact and conclusions of law. The magistrate found there was a close, personal, mutual, loving relationship between decedent and Demencia, decedent and Joshua, and decedent and Gilberto, Sr. The magistrate also found there was a mutual, loving relationship between decedent and Robert. With respect to the accident, the magistrate found decedent survived "seconds" in the trash compactor prior to his death.

{¶ 6} In the conclusions of law, the magistrate concluded wrongful death actions and survival actions are distinct legal remedies. A wrongful death action is brought by a fiduciary of the estate for the exclusive benefit of the beneficiaries defined by R.C. 2125.02 to cover pecuniary and emotional loss suffered as a result of the premature death of the

decedent. In contrast, the magistrate concluded a survival action is brought by the decedent's fiduciary for the benefit of the decedent's estate for injuries suffered while the decedent was still alive.

{¶ 7} Because the will present in this case did not contain a residuary clause, decedent's heirs, defined by R.C. 2105.06, were entitled to any proceeds from the settlement allocated to the survival claim. In this case, the magistrate determined, because decedent had neither a surviving spouse nor surviving children at the time of his death, decedent's only heir is Gilberto, Sr. With respect to the wrongful death beneficiaries, the magistrate concluded those consisted of appellees Gilberto, Sr., Robert, Henry, and Jennifer.

{¶ 8} The magistrate also concluded that Demencia and Joshua were not entitled to any amounts from the net settlement proceeds, and that 80 percent of the proceeds be allocated to the wrongful death claims and 20 percent be allocated to the survival claims. Accordingly, the magistrate allocated \$207,983.29 to the wrongful death claims and further allocated 79 percent of that amount to Gilberto, Sr., and 7 percent to each sibling. Therefore, \$51,995.82 was allocated to the survival claims to be delivered to the co-fiduciaries of the estate for administration.

{¶ 9} Appellants filed objections to the magistrate's decision challenging both the magistrate's factual findings and conclusions of law. Specifically, appellants challenged the magistrate's factual determinations regarding the relationships between decedent and his family, as well as the amount of time decedent survived in the trash compactor before his death. Appellants also challenged the magistrate's conclusions that (1) R.C. 2105.06 heirs are entitled to the proceeds of the survival claim, (2) the damages include loss of consortium, and (3) the wrongful death proceeds should be greater than the survival proceeds. Appellees filed a memorandum contra and appellants replied. After review, the trial court overruled appellants' objections and adopted the decision of the magistrate.

## **II. ASSIGNMENTS OF ERROR**

{¶ 10} This appeal followed, and appellants bring the following four assignments of error for our review:

I. The finding that there was a mutual loving relationship between Decedent and his father and brother was against the manifest weight of the evidence before the Court.

II. The finding that the decedent survived "seconds" in an industrial compactor prior to his death was against the manifest weight of the uncontested and un-refuted evidence before the Court.

III. The Magistrate erred when he found that, because the Will contained no residuary clause, the proceeds of the survival claim should pass to Decedent's heirs under Ohio Revised Code Section 2105.06.

IV. The apportionment of the settlement to the survival claim and the wrongful death claim was not supported by evidence.

### **III. DISCUSSION**

#### **A. Standing**

{¶ 11} After oral arguments, this court requested briefing on the issue of whether appellants, as co-executors of the estate, have standing to appeal the trial court's judgment in this case. In accordance with this court's request, the parties submitted supplemental briefs.

{¶ 12} "It is the duty of a fiduciary of an estate to serve as representative of the entire estate." *Wanamaker v. Davis*, 2d Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶ 20, quoting *Elam v. Hyatt Legal Servs.*, 44 Ohio St.3d 175, 176 (1989). Such fiduciary, in the administration of an estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. *Id.*

{¶ 13} In order to establish a right to an appeal from an order of the probate court, a fiduciary, such as an executor, must demonstrate that he is aggrieved by the judgment in his fiduciary capacity or that he is personally affected and appeals in his individual capacity. *In re Estate of Wirebaugh*, 84 Ohio App.3d 1, 3 (6th Dist.1992), citing *Fineman v. Cent. Natl. Bank of Cleveland*, 87 Ohio Law Abs. 236, 241 (8th Dist.1961); *Skelly v. Graybill*, 109 Ohio App. 277, 283-86 (5th Dist.1959); *Doty v. Peters*, 106 Ohio App. 435, 439 (12th Dist.1958); *In re Estate of Hoffman*, 68 Ohio App. 47 (1st Dist.1941); *First Natl. Bank of Cincinnati v. Rawson*, 54 Ohio App. 285 (1st Dist.1936). Ordinarily, an executor

is not an aggrieved party in a proceeding which affects only the rights of the beneficiaries. *Id.*, citing *Fineman; In re Estate of Byerly*, 74 Ohio Law Abs. 586, 587 (2d Dist.1956). In such a proceeding, the executor/beneficiary must appeal in his individual capacity or he is presumed to be satisfied with the judgment of the lower court. *Id.*, citing *Fineman; Rawson*. Indeed, where the executor does not represent all of the beneficiaries and/or those beneficiaries appear to resist the executor's contentions that the estate has been prejudiced by a probate court's order, courts have determined that the executor cannot appeal that order. *Id.*, citing *Cent. Bank Co. v. McCarthy*, 73 Ohio App. 431, 433 (1st Dist.1943).

{¶ 14} The beneficiaries in this case, Gilberto, Sr., Robert, Henry, and Jennifer, have not appealed from the trial court's judgment. Nonetheless, appellants contend that, as co-executors of the estate, they have standing to appeal the trial court's judgment because (1) the trial court failed to properly identify the estate's beneficiaries, and (2) the 80/20 allocation of the net settlement proceeds damaged the estate. According to appellants, through this appeal, they are "attempting to rectify prejudice to the Estate and maximize the beneficial interests to the eventual beneficiaries of the Estate once those beneficiaries are properly determined." (Supp. Brief, 2.)

{¶ 15} In this case, it is without question that the will admitted to probate bequeathed no property other than real property in Hidalgo County, Texas, nor did it contain a residuary clause. Thus, any settlement proceeds allocated to the survival claim would pass in accordance with R.C. 2105.06 to Gilberto, Sr., because decedent did not have a surviving spouse, surviving children or surviving mother.

{¶ 16} To the extent appellants assert that, in their fiduciary capacity, they are appealing to protect the assets of the estate for the "proper beneficiaries," they are in essence contesting the will as admitted to probate. However, it is well-settled that, pursuant to R.C. 2741.01, a will contest action may be brought only by one who has a direct pecuniary interest in the estate of the putative testator that would be defeated or impaired if the will admitted to probate is a valid will. *Moore v. Dague*, 46 Ohio App.2d 75, 85-86 (10th Dist.1975), citing *Steinberg v. Cent. Trust Co.*, 18 Ohio St.2d 33 (1969) (decided under former analogous section R.C. 2741.01). Moreover, an executor has no ground to appeal when the issue involves the interpretation of the will. *Fried v. Fried*, 65

Ohio App.3d 61, 63 (8th Dist.1989), citing *Boulger v. Evans*, 54 Ohio St.2d 371, 375 (1978). Thus, as co-executors of the estate, appellants have no pecuniary interest in the estate, and to the extent they are attempting to challenge the trial court's determination that they are not beneficiaries under the will, such an action could be sustained only if brought in their individual capacities. *In re Estate of Hoffman* at 50 (an administrator of an estate cannot use an appeal to advance his personal interests to the disadvantage of other parties).

{¶ 17} Additionally, as previously stated, where the executor does not represent all of the beneficiaries and/or those beneficiaries appear to resist the executor's contentions that the estate has been prejudiced by a probate court's order, courts have determined that the executor cannot appeal that order. *Wirebaugh*. Here, the settlement amounts apportioned to the survivorship claim would be held as an asset of the estate, but with no residuary clause, such asset would pass, in accordance with R.C. 2105.06, to Gilberto, Sr., who, in this appeal, resists and is actively opposing the co-executors' contention that the estate has been prejudiced by the probate court's order. Accordingly, we conclude appellants, as co-executors of the estate, have not been aggrieved by the probate court's judgment and, therefore, have no standing to appeal the same.

#### **IV. CONCLUSION**

{¶ 18} Because, in their capacity as co-executors of the estate of Gilberto Garza, Jr., they have not been aggrieved by the probate's court's judgment, appellants lack standing to appeal the judgment of the probate court and their appeal is hereby dismissed.

*Appeal dismissed.*

BROWN and CONNOR, JJ., concur.

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