

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re The Estate of Keith A. Keisser,
Deceased

[Thomas F. Smith—Appellant]

Court of Appeals No. L-12-1228

Trial Court No. 2010EST0955

DECISION AND JUDGMENT

Decided: June 28, 2013

* * * * *

Norman A. Abood, for appellant.

Sarah A. McHugh and William T. Maloney, for appellee Sarah A.
McHugh, Administrator of the Estate of Keith Keisser.

John W. Rozic, for appellee Kayla Marie Keisser.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Thomas F. Smith appeals March 22, 2012 and July 18, 2012 judgments of the Lucas County Court of Common Pleas, Probate Division, in proceedings in the Estate of Keith A. Keisser, deceased. Mr. Keisser died on May 3, 2010. The decedent named

Smith to serve as executor of his estate in his will. The trial court determined that Smith was not suitable to serve as executor and appointed Sarah A. McHugh to serve as a neutral, independent administrator, WWA, instead.

{¶ 2} Mr. Keisser's will includes a bequest of property to his daughter, Kayla Marie Keisser, and directs that the property be placed in a testamentary trust if Ms. Keisser is under age 18. Ms. Keisser was under age 18 at the time of Mr. Keisser's death. She was age 18 at the time of the July 18, 2012 judgment.

{¶ 3} The March 22, 2012 judgment granted the administrator authority to file a motion to terminate the testamentary trust. In the July 18, 2012 judgment, the probate court, pursuant to R.C. 2109.62(B), ordered (1) the testamentary trust set out in the will terminated, (2) Sarah A. McHugh (Administrator of the Estate, WWA/DBN) dispense with distribution to the trust from the estate, and (3) the administrator make a direct distribution from the estate to Kayla Keisser, the intended beneficiary of both the trust and estate under the will. Kayla Keisser and Administrator McHugh are appellees.

{¶ 4} Appellant did not include assignments of error in his appellate brief as required by App.R. 16(A)(3), but identified issues for review. Editing the issues as to form, they assert two trial court errors:

1. The trial court erred, as a matter of law, in determining that the Administrator of the Estate has standing, as opposed to the Testamentary Trustee of the Trust created by Decedent's Last Will, to move to terminate that trust pursuant to ORC 2109.62.

(A) A motion to terminate a trust can only be brought by a trustee.

(B) Pursuant to ORC 2109.62 the probate court does not have the power to deny establishment of a trust.

2. The trial court erred in terminating the trust created by Decedent's Last Will pursuant to ORC 2109.62(B).

{¶ 5} Appellee Kayla Keisser argues that appellant is not the fiduciary of either the estate or testamentary trust and lacks standing to appeal the June 26, 2012 judgment.

Case History

{¶ 6} At the time of his death, the decedent and Melissa Keisser, his surviving spouse and mother of his daughter, appellee Kayla Keisser, were in the midst of an acrimonious divorce. Mr. Keisser died on May 3, 2010, and on May 11, 2010, Mrs. Keisser filed an application for appointment as an administratrix to administer the estate. In the application Mrs. Keisser asserted that to her knowledge Mr. Keisser did not leave a will. The trial court appointed Mrs. Keisser administratrix.

{¶ 7} On May 13, 2013, Tracy Barber (the person named as alternate executor in the will) filed an application for the probate and establishment of a lost will and testament of Mr. Keisser. She also filed an application for appointment as executrix of the estate and motion to revoke the appointment of Mrs. Keisser as administratrix. On June 3, 2010, appellant filed an application for appointment as executor. On that date Mrs. Keisser also filed Mr. Keisser's will with the trial court.

{¶ 8} The trial court ordered the will admitted to probate on June 4, 2010. The court revoked the letters of authority previously issued to Mrs. Keisser to administer the estate in a judgment filed on June 11, 2010.

{¶ 9} The will names appellant as the primary person to serve as executor of the estate. It refers to Mrs. Keisser in strong terms, as his daughter's "gold digger mother" in the bequest to appellee Kayla Keisser. It provides the following bequest to Mrs. Keisser:

Property: Maximum of \$1 and due to pending divorce only the 50% share due spouse of Marital Property divided by Judicial Order and not a penny more. If divorce settled Maximum of \$1 beyond 50% share of Marital Property divided by Judicial Order and not a penny more. The Maximum of \$1 is to be paid in denomination of 100 US Pennies unwrapped but newly minted.

{¶ 10} Hearings on appointment of a fiduciary to administer the estate proceeded on June 7 and 9, 2010, before the court magistrate. In a decision filed on June 25, 2010, the magistrate determined that neither appellant nor Mrs. Keisser should be appointed as executor or administrator, finding both to be unsuitable.

{¶ 11} The magistrate set forth detailed findings of fact concluding that appellant had assumed authority to act as executor even prior to discovery of the original will or establishment of the copy by the court and that appellant failed to use available remedies to seek appointment of a special administrator, temporary restraining orders and

preliminary injunctions to maintain the status quo. The magistrate concluded that appellant's actions were unacceptable.

{¶ 12} The magistrate held that appellant acted to deny Mrs. Keisser's authority to act as administrator when he denied Mrs. Keisser keys to decedent's residence and access to his computer. The magistrate concluded: "Denying the keys and a laptop when Mrs. Keisser was legally appointed and ignoring fears that computer programs * * * [were] * * * crucial to decedent's business operations are not the actions the Court would expect of a suitable fiduciary."

{¶ 13} Noting the existence of hostility and coldness in the relationship between appellant and Mrs. Keisser, the magistrate also concluded that an inherent conflict was presented by the fact that appellant, as executor, would be able to influence the amounts that ended up in the trust or subject to spousal election.

{¶ 14} In a judgment filed on July 12, 2010, the trial court approved the magistrate decision of June 25, 2010, concluded that no prior applicant was suitable to administer the estate, and appointed Ms. McHugh as a neutral, independent administrator, WWA. Appellant waived his rights to administer the estate and consented to the appointment of Ms. McHugh as administrator in a formal waiver filed with the trial court on July 27, 2010.

{¶ 15} It is significant to note that in the June 25, 2010 decision, the magistrate recognized that "[t]here is not presently an application pending for Trustee and the

qualifications and suitability of Mr. Smith to act in that position should be tabled until the appropriate time.”

{¶ 16} Ms. Keisser argues that appellant lacks standing to make this appeal because the will does not name appellant personally as trustee, but simply designates that “the executor/administrator to be trustee.” Appellant argues that he was named executor in the will and that it was the decedent’s intent that he also serve as testamentary trustee.

{¶ 17} In his reply brief appellant argues that he applied for appointment as testamentary trustee and that the trial court never ruled on his application. Appellant did not refer in his brief to the date he filed his application for appointment as testamentary trustee or where in the record evidence of the application could be found. The court has undertaken its own review of the record and does not find any record of an application by appellant for appointment as testamentary trustee.

{¶ 18} Under R.C. 2101.24(e), probate courts are granted exclusive authority “[t]o appoint and remove * * * testamentary trustees, direct and control their conduct and settle their accounts.” Under R.C. 2109.02, with limited exceptions, “[n]o act or transaction by a fiduciary is valid prior to the issuance of letters of appointment to the fiduciary.”

{¶ 19} Appellant was not appointed either executor or testamentary trustee by the probate court. The court denied appointment as executor based upon a conclusion that he was unsuitable for appointment. The court left open the issue of appellant’s suitability for appointment as testamentary trustee because appellant had not applied for

appointment as testamentary trustee. Our review of the record does not disclose that appellant subsequently applied for appointment as testamentary trustee.

{¶ 20} As he was never appointed, appellant lacks the status of a testamentary trustee to make this appeal. Appellant’s interest in the decedent’s estate is limited to payments for services as executor or testamentary trustee in its administration. He has not been appointed by the court to serve in either fiduciary capacity. We conclude that appellant cannot demonstrate a present interest in the subject of this appeal.

“Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.”

Ohio Contract Carriers Assn. v. Pub. Util. Comm. (1942), 140 Ohio St.

160, 23 O.O. 369, 42 N.E.2d 758, syllabus; *Ohio Domestic Violence*

Network v. Pub. Util. Comm. (1992), 65 Ohio St.3d 438, 439, 605 N.E.2d

13, 14. *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 619, 665

N.E.2d 209 (1996).

{¶ 21} Lacking the status as either the executor or testamentary trustee and lacking any present interest in the subject of this appeal, appellant lacks standing as an aggrieved party to bring the appeal. *See In re Emery*, 59 Ohio App.2d 7, 14, 391 N.E.2d 746 (1st Dist.1978). Accordingly, we dismiss this appeal for lack of standing. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.