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No. 3-10-0864

Order filed June 15, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

<i>In re</i> ESTATE OF WALTER VINCKUS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Deceased)	Will County, Illinois
)	
(Rosalie Conzachi,)	
)	
Plaintiff-Appellant,)	
)	
v.)	Nos. 08-CH-3685 and 08-P-293
)	
Tammy Lynn Vinckus Wilkerson, Individually)	
and as Executor of the Estate of Walter)	
Vinckus, Crazy Rock, Inc., All World Storage,)	
First Midwest Bank as Trustee under Trust Nos.)	
802, 6930, and 5231,)	Honorable
)	Richard J. Siegel,
Defendants-Appellees).)	Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

Held: When the evidence indicated that delays in the performance of the executor's duties were not solely attributable to the executor and when much of the evidence was conflicting, the appellate court held that the circuit court's decision to deny the plaintiff's petition to remove executor was not against the manifest weight of the evidence.

The plaintiff, Rosalie Conzachi, filed a petition to remove the defendant, Tammy Lynn Vinckus Wilkerson, as executor of the estate of Walter Vinckus. The circuit court denied the petition after a hearing. On appeal, Rosalie argues that the court's decision was erroneous.

FACTS

Walter Vinckus died on March 31, 2008. His will appointed his daughter, Tammy, as executor. She also received the entirety of Walter's estate, save a portion of one of Walter's businesses, All World Storage. The will directed that Rosalie, Walter's sister, was to receive 50% of the net income of All World Storage. If the business was sold, Rosalie was to receive 50% of the net proceeds. The will did not specify any time frame within which Rosalie was to receive her 50% share of the net income or net proceeds.

On July 17, 2008, Rosalie filed a petition to remove Tammy as executor.¹ The petition alleged that Rosalie sent two letters to Tammy, dated June 3, 2008, and June 10, 2008, which requested monthly reports regarding the operation of All World Storage. Rosalie alleged that Tammy did not respond to her requests and that Tammy was therefore "incapable of and unsuitable for the discharge of her representative duties."

On June 21, 2010, the circuit court held a hearing on the petition. Tammy testified that the Letke accounting firm (the Letke firm) performed accounting services for Walter and his businesses. Tammy continued to use the Letke firm for All World Storage until September 2009, when she hired Greg Severson of Cordano, Severson and Associates. Tammy also switched attorneys in October 2009.

¹ Rosalie also filed a petition to terminate Tammy's independent administration of the estate.

Tammy further stated that she was late paying the taxes for All World Storage for tax year 2008, but those taxes have since been redeemed. In addition, the W-2s for tax years 2008 and 2009 were mailed late to employees. Tammy blamed the Letke firm for this delay.

Rosalie's attorney presented four letters sent in 2009. These letters all requested additional financial information on All World Storage from 2008 and 2009. Three of the letters were from a Letke firm accountant to Tammy. Tammy had no recollection of these letters. The other letter was from an attorney from the Letke firm, Christopher Galloway, to Tammy's attorney at the time. Tammy claimed that she sent letters to the Letke firm, but did not bring copies with her to court.

Galloway testified that he had sent a letter to Severson on October 28, 2009, which stated that the Letke firm would not release financial documents pertaining to All World Storage until the fees for producing and completing those documents were paid. While Galloway had indicated to Tammy's new attorney in early 2010 that the documents had already been delivered to Tammy's prior attorney, the Letke firm mistakenly withheld some of the documents and did not complete the delivery to Tammy's new attorney until April 15, 2010. The Letke firm was aware of previous court orders that required Tammy to produce these documents.²

The circuit court had also ordered Tammy several times to complete an inventory and an accounting of the estate. A partial inventory was filed in December 2008, but a full inventory was not filed. As of the date of the hearing, Tammy had not filed an accounting. Severson

² One such court order, dated October 8, 2009, ordered an accounting to be completed within 60 days and ordered Tammy to pay Rosalie \$100,000 from All World Storage's profits, "said amount to act as a credit toward monies due [Rosalie], to be reconciled [at] a later date."

testified that Tammy had requested him to prepare the accounting approximately three days before the June 21, 2010, hearing.

Also at the hearing, Rosalie took issue with several checks that Tammy had written from All World Storage to Mark Roan and Corey Nobles. The checks appeared “unusual” to Jerrold Jacks, Rosalie’s personal accountant, because several of them had been issued on the same date. Rosalie’s attorney also argued that the checks to Roan appeared to be improper because they appeared to have been issued after Tammy allegedly fired him. Further, an All World Storage employee testified that Nobles was never employed by All World Storage. Tammy testified that she never used All World Storage funds to pay non-employees.

In addition, Tammy also testified that she knew she was prohibited from using All World Storage funds for any non-All World Storage purposes, but she had to shift money around after Walter died. She claimed that Rosalie “took all the money out. So I had no choice but to go back and forth with the money. But all moneys [sic] are getting put back into the correct spots.”

Rosalie’s attorney also raised an issue as to whether Rosalie had in fact been paid 50% of All World Storage’s net income. Rosalie’s attorney argued that the checks issued to Rosalie, which totaled \$365,000, did not constitute 50% of All World Storage’s net income for 2008 and 2009. Tammy testified that she “guessed” at the amounts in the checks because the Letke firm had not given her information related to the actual sums owed to Rosalie. Given recently delivered information, however, Tammy believed that she overpaid Rosalie.

Jacks testified that he saw numerous irregularities and unusual entries in the financial documents from All World Storage, which had the effect of diminishing the net income of All World Storage, and, in turn, Rosalie’s interest in the estate. Severson testified that there was

nothing improper in the documents reviewed by Jacks, which had been prepared by the Letke firm. Severson believed that Rosalie did in fact receive 50% of All World Storage's net income for 2008-09. Severson also testified that the only possible waste he perceived was in an issue with payroll taxes, but that issue was attributable to the large tax of approximately \$4,000,000 levied upon Walter's estate.

Rosalie's attorney also attempted to present evidence on matters outside of the estate, but the circuit court found that to allow that type of evidence "would require a substantial investigation" into matters unrelated to the estate. Accordingly, the court excluded such evidence.

At the close of the hearing, the circuit court found that "this is a very close case. It is complicated by the fact that we have behind the scenes what appear [sic] to be two dueling accountant firms, both of whom were not exactly responsive to the Court's requests over a period of time in this case." The court noted that legitimate questions were raised with regard to checks written from All World Storage funds and that the estate needed to be closely supervised to ensure that W-2s were promptly mailed and taxes were promptly paid. However, the court stated that it understood the reasons for the late filings because of the budgeting and management required by the situation. Further, the court terminated Tammy's independent administration of the estate and indicated that it believed the resulting court supervision would be sufficient to avoid future problems. Accordingly, the court denied the petition.

Rosalie filed a motion to reconsider in which she argued that she had newly discovered evidence, which related to Tammy's administration of another of Walter's former businesses. She also argued that the circuit court erred when it excluded the evidence unrelated to estate

matters, but she could not provide any case law in support of her attempt to have this evidence considered. Rosalie also argued that the court’s decision on the evidence presented was erroneous. At the hearing on the motion, the court recalled its ruling in that court supervision would be sufficient to avoid future problems, and pointed out that no problems had arisen between that ruling and the hearing on the motion to reconsider. After finding that Rosalie failed to meet her burden, the court denied the motion. Rosalie appealed.

ANALYSIS

On appeal, Rosalie argues that the circuit court erred when it denied her petition to remove Tammy as executor.

In relevant part, Section 23–2(a) of the Probate Act of 1975 provides that:

“(a) On petition of any interested person or on the court’s own motion, the court may remove a representative if:

* * *

(4) the representative wastes or mismanages the estate;

* * *

(7) the representative fails to file an inventory or accounting after being ordered by the court to do so;

* * *

(9) the representative becomes incapable of or unsuitable for the discharge of the representative duties; or

(10) there is other good cause.” 755 ILCS 5/23–2(a) (West 2008).

The petitioner bears the burden of establishing reasonable grounds to support removal. *In re Estate of Lucas*, 71 Ill. 2d 277, 281-82 (1978). If the petitioner meets this burden, the burden shifts to the representative to establish his or her fitness to remain in office. *Estate of Lucas*, 71 Ill. 2d at 282. We review the circuit court’s decision on a petition to remove a representative under the manifest weight of the evidence standard. *In re Estate of Debevec*, 195 Ill. App. 3d 891, 897 (1990). A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident. *In re Estate of Wilson*, 238 Ill. 2d 519, 570 (2010).

The record in this case does not indicate that the circuit court’s decision is such that the opposite conclusion is clearly evident. While there have in fact been delays in filing the inventory, accounting, and tax-related documents, the evidence indicates that this was a complex situation, not the least of reasons being the switch in attorneys and accounting firms and the sizeable estate tax levied upon the estate. As the court noted, the evidence indicated a shared responsibility between Tammy and the accounting firms for the delays. Additionally, because much of the testimony was conflicting—including the testimony related to checks issued from All World Storage funds—we grant deference to the circuit court’s ruling on these matters and may not substitute our judgment for that of the circuit court. See *McGrew v. Pearlman*, 304 Ill. App. 3d 697, 706 (1999) (“[w]here the evidence is conflicting and the evaluation or credibility of the evidence was made by the trial judge, a reviewing court will not substitute its judgment for that of the trier of fact unless the evidence is so unreasonable, improbable or unsatisfactory that a different conclusion is clearly required”). Although the court arguably could have ruled the opposite way and appointed a substitute executor, this is not a case in which we can say the court’s decision was against the manifest weight of the evidence.

Lastly, we note that Rosalie also argues that the circuit court erred when it denied her motion to reconsider. When a party brings a motion to reconsider based on newly discovered evidence, we review the court's decision on that motion for an abuse of discretion. *Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc.*, 337 Ill. App. 3d 501, 508 (2003). The “newly discovered evidence” Rosalie presented in her motion related to Tammy’s administration of one of Walter’s other former businesses; specifically, a bar whose liquor license had been revoked for failure to pay taxes, which occurred two days after the court denied Rosalie’s petition for removal. However, the court was unpersuaded by Rosalie’s argument. The court found that Rosalie failed to meet her burden on the motion, and we find nothing in the record to indicate that the court’s ruling constituted an abuse of discretion. See, e.g., *Davis v. Kraft*, 405 Ill. App. 3d 20, 28 (2010) (noting that an abuse of discretion occurs when no reasonable person would agree with the position taken by the circuit court).

CONCLUSION

For the foregoing reasons, we hold that the circuit court properly denied Rosalie’s petition to remove Tammy as executor.

The judgment of the circuit court of Will County is affirmed.

Affirmed.