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2013 IL App (4th) 120548-U

NO. 4-12-0548

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 1, 2013
Carla Bender
4th District Appellate
Court, IL

In re: the Estate of JAMES D. LEVITT, Deceased,)	Appeal from
MEREDITH A. CARGILL and EDITH BARNES,)	Circuit Court of
Petitioners-Appellants,)	Sangamon County
v.)	No. 09P104
MARCIA J. FIDLER,)	
Respondent-Appellee.)	Honorable
)	Leslie J. Graves,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where (1) petitioner neglected his duties as executor, the trial court's decision to remove him as executor was not against the manifest weight of the evidence; (2) petitioner neglected his duties as trustee, the court's decision to remove him as trustee was not an abuse of discretion; (3) the court erred in naming respondent as successor executrix and successor trustee, remand is required.

¶ 2 In February 2009, petitioner, Meredith A. Cargill, was appointed executor of the estate of James D. Levitt and trustee of a scholarship fund established by decedent's will.

Petitioner, Edith Barnes, was listed as a successor executrix and trustee. In November 2011, respondent, Marcia J. Fidler, filed a petition to show cause, alleging Meredith failed to account and to fund the trust. In May 2012, the trial court removed Meredith as executor/trustee and appointed Marcia as successor executrix/trustee.

¶ 3 On appeal, petitioners argue the trial court erred in removing Meredith as executor

of the estate and trustee of the scholarship trust and appointing Marcia as successor executrix and trustee instead of Edith. We affirm in part, reverse in part, and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 On February 6, 2009, James Levitt died leaving no surviving spouse or descendants. On February 20, 2009, Meredith filed a petition for probate of will and for letters testamentary. On February 24, 2009, the trial court entered an order admitting the will to probate and issuing letters of office to Meredith as executor.

¶ 6 In his will, decedent stated all of his property, with certain limited exceptions, was to be sold by his executor. Decedent nominated Meredith, his nephew, to serve as executor with Edith Barnes and Bank of Springfield to follow, respectively, if necessary. Decedent's will also established a scholarship trust "to provide scholarships for the undergraduate or graduate education of persons selected by the Trustee including [decedent's] relatives and friends." Decedent nominated Meredith to serve as trustee with Edith and Bank of Springfield to follow, if necessary.

¶ 7 In March 2009, Marcia, decedent's sister, filed a petition to require formal proof of the will. Marcia claimed the will was admitted to probate before notice in accordance with section 6-10 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/6-10(a) (West 2008)). In May 2009, the trial court heard testimony and admitted the will to probate.

¶ 8 In November 2011, Marcia filed a petition to show cause for failure to account and to fund the scholarship trust under decedent's will. Marcia claimed Meredith, the duly appointed executor, failed to account and fund the trust created under decedent's will. Marcia also claimed Meredith would not have registered the trust as a charitable trust with the attorney

general's office absent her efforts. Marcia sought a hearing to show cause as to why Meredith should not be removed from the office of executor.

¶ 9 In March 2012, Meredith filed a petition to sell real estate. Therein, Meredith indicated decedent's will provided for the funding of the scholarship trust out of the net proceeds of the estate. The trial court entered an order approving of the sale.

¶ 10 In April 2012, Meredith filed claims for services as power of attorney and other services and expenses prior to decedent's death, for services contracted by the estate, for services as executor of the estate and trustee of the scholarship trust. Meredith also filed a final account for the estate.

¶ 11 In May 2012, Marcia filed an objection to the final account and proposed distribution of the executor. Marcia claimed Meredith did not attempt to liquidate the estate's assets until late 2011 and the first quarter of 2012. From the net estate of \$34,269.58, Meredith and decedent's sister, Edith Barnes, claimed fees as attorneys-in-fact and/or as executrix of \$17,400.96. Marcia stated her fear that if Meredith were allowed to continue as trustee, his claim for trustee fees would heavily impact what little remained to be used as funds in the educational trust.

¶ 12 Meredith filed an answer to the petition to show cause, stating removing him as executor would be of no benefit to the estate because few tasks remained to be undertaken.

¶ 13 At the hearing on these matters on May 4, 2012, Marcia appeared with counsel. Meredith appeared *pro se*. Meredith testified he had an auction sale of decedent's house in the spring of 2012. He did not sell it sooner because it was not ready to sell. Six grants out of the educational trust were made in 2012. He did not make any disbursements in the previous three

years because he was using capital of the estate to improve the property to maximize its sale value. Meredith admitted he had proceeded "slowly and haphazardly" getting the property ready for sale.

¶ 14 On examination by the trial court, Meredith stated he was decedent's nephew. During the first year in which the house sat dormant, Meredith stated he spent most of his time cleaning out trash. He did the same "off and on" the next year. Meredith received funds from the estate for the work he performed.

¶ 15 After Marcia's counsel indicated he had nothing further, the trial court allowed Meredith time to respond to Marcia's petition. Meredith made a motion that Marcia had no legal standing as an interested person to bring the petition. The court denied the motion. Meredith then relied on his written response.

¶ 16 The trial court granted Marcia's motion. The court found Meredith's work was "sloppy" and did not enhance the best interest of the estate. The court then asked the name of the successor as named in the will. Meredith interjected an objection to being removed as trustee of the trust, claiming he could continue as trustee even if not the executor of the estate. The court disagreed. The named successor in the will was Edith, decedent's sister. The court stated it would not appoint the named successor based on what the court saw "in the documentation that it would be better to have a person that has not been involved in the neglect of taking care of business." The court believed that since Edith's name appeared in several places as it related to being paid, naming her would not be in the best interest of the estate and the trust.

¶ 17 Meredith told the trial court that the second successor named in the will was Bank of Springfield. When the court asked counsel what the bank charged for its services, counsel

stated the minimum fee would be \$1,500 plus the fee structure. Marcia did not think she would charge anything. In naming Marcia as successor, the court found it best for potential recipients of the scholarship trust that the money not be spent on lawyers and banking fees.

¶ 18 In its written order, the trial court made its finding that Meredith failed to show good cause for failing to account for more than three years since decedent's death until the sale of the real estate and the administration was not pursued with due diligence. Further, the charitable trust was not funded in a diligent manner. The court found it in the best interests of the estate that Meredith be removed as executor/trustee and that the successor executrix/trustee not be appointed because of her involvement with Meredith. The court also found the corporate successor "would be too great an expense for a trust of this size" such that a new successor executor/trustee should be appointed. The court appointed Marcia as successor executrix of the estate and successor trustee of the trust.

¶ 19 On May 31, 2012, the trial court held a settlement conference on any outstanding estate claims. The court found claims for fees by Meredith and Edith were barred by the statute of limitations. In June 2012, petitioners filed a notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 In their 50-page brief, petitioners claim the trial court made 10 "erroneous, reversible decisions," which included 22 "alleged errors in judicial reasoning," as well as exhibited 4 "kinds of deficiencies of judicial conduct," including 17 "different alleged errors of word or conduct." In reality, this case boils down to three issues—whether the court erred in (1) removing Meredith as executor of the estate, (2) removing Meredith as trustee of the scholarship trust, and (3) appointing Marcia as successor executrix and successor trustee instead of Edith or

Bank of Springfield. We address each in turn.

¶ 22 A. Removal of Meredith as Executor

¶ 23 In his will, decedent nominated Meredith to be the executor of his estate followed by Edith and Bank of Springfield, respectively. Section 23-2 of the Probate Act (755 ILCS 5/23-2(a) (West 2008)) states a court may remove a representative if:

"(1) the representative is acting under letters secured by false pretenses;

(2) the representative is adjudged a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code or is adjudged a disabled person;

(3) the representative is convicted of a felony;

(4) the representative wastes or mismanages the estate;

(5) the representative conducts himself or herself in such a manner as to endanger any co-representative or the surety on the representative's bond;

(6) the representative fails to give sufficient bond or security, counter security or a new bond, after being ordered by the court to do so;

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

(8) the representative conceals himself or herself so that process cannot be served upon the representative or notice cannot

be given to the representative;

(9) the representative becomes incapable of or unsuitable

for the discharge of the representative's duties; or

(10) there is other good cause."

A court's decision to remove an executor will not be disturbed on appeal "unless it is against the manifest weight of the evidence." *In re Estate of Kirk*, 242 Ill. App. 3d 68, 74, 611 N.E.2d 537, 541 (1993). "A trial court's ruling is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on evidence, or when the opposite conclusion is clearly evident from the record." *In re Estate of Savio*, 388 Ill. App. 3d 242, 249, 902 N.E.2d 1113, 1120 (2009).

¶ 24 In the case *sub judice*, Meredith does not argue it was error that he was removed as executor based on section 23-2(a)(4). He concedes "he spent too many days doing other things" and his "neglect was detrimental to the timely liquidation of the estate's assets."

However, Meredith argues the trial court's decision to remove him at that point in the proceedings was a mistake because "it did not solve any problem, did not protect the estate from any danger, and unnecessarily added significantly to the time and costs of closing the estate."

¶ 25 Here, the trial court found the administration of the estate had not been pursued with due diligence. In a similar case involving the removal of an executor, this court once found that "the trial court properly concluded that yesterday's conduct provides the pattern for tomorrow's activities." *In re Estate of Gullett*, 92 Ill. App. 2d 405, 411, 234 N.E.2d 551, 554 (1968). So too here. While the administration of the estate may have been in its final days, the court found Meredith's previous conduct did not enhance the best interests of the estate. No matter

how much time was left, any remaining issues could be in peril given Meredith's previous conduct. We find the court's decision to remove Meredith as executor at that point of the proceedings was not against the manifest weight of the evidence.

¶ 26 B. Appointment of Marcia as Successor Executrix

¶ 27 Petitioners also argue the trial court erred in rejecting the decedent's nomination for successor executrix, *i.e.*, Edith. We note it does not appear that Edith officially entered her appearance in this case or responded to Marcia's petition. Marcia filed her petition for rule to show cause against Meredith, and he responded *pro se*. At the hearing on the petition, Marcia appeared with her attorney, and Meredith appeared *pro se*. It does not appear Edith spoke at the hearing (a "Ms. Barnes" that spoke up was said to be Dessa Barnes in petitioners' brief). Edith did not file a motion to intervene or petition the court to reconsider its decision to protect the interests she now argues on appeal.

¶ 28 Normally, "[o]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Buntrock v. Terra*, 348 Ill. App. 3d 875, 884, 810 N.E.2d 991, 999 (2004). However, "[e]ven a nonparty has standing to appeal if he has a direct, immediate, and substantial interest in the subject matter that would be prejudiced by the judgment or benefitted by its reversal." *In re Nitz*, 317 Ill. App. 3d 119, 122, 739 N.E.2d 93, 97 (2000). Thus, because Edith would benefit from a reversal in this case, she has standing to appeal the trial court's decision.

¶ 29 Section 6-9(a) of the Probate Act (755 ILCS 5/6-9(a) (West 2008)) states that "if one of several executors named in the will fails or refuses to qualify and accept the office, letters testamentary shall be issued to the executor who qualifies and accepts the office[.]" "A person

who has attained the age of 18 years and is a resident of the United States, is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a felony, is qualified to act as executor." 755 ILCS 5/6-13(a) (West 2008).

¶ 30 As stated, Edith was next in line as successor executrix according to decedent's will. The trial court found it was not in the best interests of the estate that Edith be appointed because of her involvement with Meredith. At the hearing, the court stated, based on documentation, that "it would be better to have a person that has not been involved in the neglect of taking care of business, the business that should have been taken care of since February of 2009." Further, the court stated it saw Edith's name "in several places as [it] relates to being paid for certain things." Thus, the court concluded it was not in the best interest of the estate or the trustee to name Edith as successor executrix.

¶ 31 Our supreme court has held "it is mandatory to have letters testamentary issued to the executor named in a will if he is ready, willing and qualified to act after the will is proved and admitted to probate." *Nonnast v. Northern Trust Co.*, 374 Ill. 248, 268, 29 N.E.2d 251, 262 (1940). "A testator has the right to designate by will who shall act as his personal representative, and a court may not ignore his directions and appoint someone else to act in that capacity." *In re Estate of Faught*, 111 Ill. App. 3d 1043, 1045, 445 N.E.2d 54, 56 (1983); see also *In re Estate of Kuhn*, 87 Ill. App. 2d 411, 423, 231 N.E.2d 97, 103 (1967) ("The person whose estate is being administered, has designated, for reasons which may be obvious or unknown, the individual or corporate executor that he or she wants to take charge of their responsibility."); *Belleville Savings Bank v. Schrader*, 214 Ill. App. 388, 393 (1919) (stating "the testator who accumulated the estate has by law the right to designate by will who shall act as the executor of his will, and we have no

right under the law to ignore his directions and find that some one [*sic*] else shall act in that capacity"). Thus, the selection of an executor named in a will "should not be set aside lightly." *Kuhn*, 87 Ill. App. 2d at 423, 231 N.E.2d at 103.

¶ 32 Here, decedent named Edith as the successor executrix, and nothing indicates she was not qualified to serve. The trial court mentioned Edith being paid, but that was a claim against the estate for services as power of attorney. Without more, it cannot be said to grant the court authority to go against decedent's wishes. Moreover, Edith was not heard from at the hearing, although it appears that she was there, and so it was not determined whether she was ready, willing, and qualified to act. We find the court erred in passing over Edith as successor executrix. Accordingly, we remand for a hearing on whether Edith can serve as executrix. If she cannot perform the duties of executrix or refuses to do them, the court shall designate the next successor in line, Bank of Springfield.

¶ 33 C. Removal of Meredith as Trustee

¶ 34 Petitioners argue the trial court erred in removing Meredith as trustee of the scholarship trust. "The appointment and removal of trustees is a matter of the trial court's discretion, and the court's judgment will not be reversed absent an abuse of that discretion." *In re Estate of Mercier*, 2011 IL App (4th) 110205, ¶ 14, 961 N.E.2d 958. Whether it was appropriate to remove a trustee depends on the facts and circumstances of each case. *Mercier*, 2011 IL App (4th) 110205, ¶ 14, 961 N.E.2d 958.

¶ 35 Here, the evidence indicated Meredith, as executor of the estate, had not funded the scholarship trust as of the timing of Marcia's petition to show cause. The trial court also heard testimony regarding Meredith's failure to register the charitable trust with the Attorney

General's office. Meredith, in his dual roles as executor and trustee, was in an inherent conflict of interest because the trustee should have been demanding funding and distribution of the charitable trust well within the three years of decedent's death, but Meredith, as trustee, did not do so. Meredith also failed to register the trust with the Attorney General for some time based simply on his own interpretation of the tax code.

¶ 36 "A trustee is to exercise the same degree of care in managing a trust as persons of prudence and intelligence in their own affairs." *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 463, 898 N.E.2d 744, 751 (2008). Meredith's failure to act responsibly as executor did not bode well for the management of his duties as trustee. Although the trial court found no malicious intent on Meredith's part, his neglect amounted to an abuse of the office of trustee. We find no abuse of discretion in the court's decision to remove Meredith as trustee of the scholarship trust.

¶ 37 D. Appointment of Marcia as Successor Trustee

¶ 38 Petitioners argue the trial court erred in appointing Marcia as successor trustee to the scholarship trust. Decedent's will established the scholarship trust and appointed Meredith as trustee. If Meredith could not perform his duties, Edith was listed as the successor trustee followed by Bank of Springfield.

¶ 39 "[A] court of equity possesses very broad discretion in the appointment of successor trustees." *In re Estate of Wasson*, 117 Ill. App. 3d 368, 371, 453 N.E.2d 120, 123 (1983). In making a new appointment, the court "should consider the intention of the creator of the trust, the interests and wishes of the various beneficiaries, and the promotion of the proper administration of the trust." *Wasson*, 117 Ill. App. 3d at 371, 453 N.E.2d at 123. The court's

decision on the naming of a successor trustee will not be overturned on appeal absent an abuse of discretion. *Wasson*, 117 Ill. App. 3d at 372, 453 N.E.2d at 123.

¶ 40 Like our finding pertaining to the successor executrix, we find the trial court erred in bypassing Edith and/or Bank of Springfield in favor of Marcia. The decedent's will clearly set forth his intention as to whom he wanted to act as trustee of the scholarship trust as well as successor trustees if Meredith could not act. No clear evidence indicated Edith was unqualified to serve as trustee. Further, as to Bank of Springfield, while the court indicated it was considering the best interests of the trust and trying to prevent the remaining fund from being eaten by banker's fees, decedent made his intention clear that Bank of Springfield was to succeed Edith as trustee if she could not perform the duties. It was not the court's prerogative, no matter how well intentioned, to disregard decedent's wishes absent evidence of fraud, waste, or mismanagement. Accordingly, we remand for a hearing on whether Edith can serve as trustee. If she cannot perform the duties of trustee or refuses to do them, the court shall designate Bank of Springfield as successor trustee.

¶ 41 E. Judicial Conduct and *Pro Se* Litigation

¶ 42 Petitioners go to great lengths in discussing the actions of the trial court in this case and the tribulations of *pro se* litigants in general. We note this court "may not pass judgment on abstract propositions of law, render advisory opinions or give legal advice as to future events." *National City Corp. & Subsidiaries v. Department of Revenue*, 366 Ill. App. 3d 37, 47, 851 N.E.2d 224, 232 (2006). That said, and since we are remanding this case for further proceedings, we find it necessary to make several comments on the proceedings at issue and those to come.

¶ 43 In one instance, petitioners point out the problem of having a lay litigant preserve errors for appeal and argue for the appointment of assistant counsel to help them in their legal endeavors. "*Pro se* litigants are entitled to equal access to the courts, and the court has an obligation not to undermine that access by interjecting confusion into the process." *Cole v. Hoogendoorn, Talbot, Davids, Godfrey & Milligan*, 325 Ill. App. 3d 1152, 1157, 759 N.E.2d 110, 114 (2001). That said, "*pro se* litigants are presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys." *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067, 916 N.E.2d 45, 57 (2009). While litigants are allowed to represent themselves without an attorney, they are not entitled to special treatment or to have their arguments made or issues preserved for them.

¶ 44 Petitioners also claim the trial court engaged in judicial misconduct in its treatment of them and others. As an example, petitioners claim the court told Meredith not to interrupt. But that was because he interrupted. Another time the court told a nonparty in the gallery to sit down, but that was only after the woman felt the need to express her feelings about the proceedings.

¶ 45 "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Ill. S. Ct. R. 63(3) (eff. Apr. 16, 2007). However, "a trial judge [also] has a duty to maintain order and decorum in the courtroom." *People v. Bell*, 276 Ill. App. 3d 939, 947-48, 658 N.E.2d 1372, 1378 (1995); see also *People v. Ray*, 126 Ill. App. 3d 656, 664, 467 N.E.2d 1078, 1084 (1984) (stating a judge "is vested with power to compel courtroom decorum and must conduct proceedings in a manner

such as will inspire respect for the law and administration of justice").

¶ 46 Having read the transcripts and the parties' briefs, we are fully confident the trial court will treat the litigants in a fair and impartial manner in this case. We trust also that the parties and interested observers will comport themselves in a manner befitting the dignified courtrooms of the State of Illinois.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm in part, reverse in part, and remand with directions.

¶ 49 Affirmed in part and reversed in part; cause remanded with directions.