2014 IL App (1st) 130777-U

FOURTH DIVISION
March 31, 2014

No. 1-13-0777

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF HELEN K. SORGATZ, Deceased,	)	Appeal from the
(John A. Sorgatz, Petitioner-Appellant,	)	Circuit Court of
	)	Cook County
	)	
v.	)	No. 11 P 4232
	)	
Stephen E. Sorgatz, as Executor of the Estate	)	
of Helen K. Sorgatz, Respondent-Appellee).	)	Honorable
	)	Mary Ellen Coghlan,
	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court followed the proper procedure in denying petitioner's petition to remove executor of estate and its decision was not against the manifest weight of the evidence. We therefore affirm the circuit court's judgment.

¶ 2 This case comes to us on appeal from an order of the probate division of the Circuit Court of Cook County denying petitioner John A. Sorgatz's (John) petition to remove respondent Stephen E. Sorgatz (Stephen) as executor of their mother's estate. John timely filed his appeal

from that order pursuant to Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010). For the reasons that follow, we affirm the decision of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The decedent, Helen K. Sorgatz (Helen), passed away on November 23, 2005. When she died, Helen had a living trust (the Trust) and a "pour over" will (the Will) that devised her residuary estate to the Trust. Helen is survived by four children, who are named as beneficiaries under both the Will and the Trust. Article IV of the Will named Helen's son John as executor, and in the event that he failed or ceased to act, Helen's other son Stephen was named as successor executor. As for the Trust, Helen was trustee during her life, and after her death the position of trustee succeeded to John.

¶ 5 Although the Will named John as executor, the record is silent as to whether John ever assumed that role or filed the Will. However, six years after Helen's death, on August 2, 2011, Stephen had the Will admitted to probate, and letters of office issued appointing Stephen as independent executor.

¶ 6 Almost a year and a half later, on January 22, 2013, John filed a petition pursuant to section 23-2 of the Illinois Probate Act (755 ILCS 5/23-2 (West 2007)) asking the court to issue a citation directing Stephen to show cause why he should not be removed as executor. In his petition, John alleged five statutory grounds for removing Stephen, including claims that Stephen had obtained his letters of office by false pretenses and that he had committed waste or mismanagement of estate assets. Stephen did not file a response to the petition, but did move to strike, arguing that John did not have "standing" to file the petition in the first place. At a hearing on February 5, 2013, the probate court heard arguments and denied both the petition and the motion. John now appeals from that order.

¶ 7 We also note that, at the time of this appeal, John and Stephen were opposing parties in a case pending in the Chancery Division of the Circuit Court of Cook County, in which they are litigating over the disposition of assets from the Trust and John's conduct as trustee. In that suit, Stephen is suing both on his own behalf and in his capacity as executor in order to recover trust property and estate property that John allegedly misappropriated. Litigation in that case began on November 3, 2010, and is still pending.

¶ 8 ANALYSIS

¶ 9 I. Jurisdiction

¶ 10 We first address Stephen's argument that this court lacks jurisdiction to hear this appeal. As a general rule, only final judgments are appealable, and Illinois courts of appeal "[are] without jurisdiction to review judgments, orders or decrees which are not final." *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). A final judgment is one that "terminates the litigation and disposes of the parties' rights on either the entire controversy or some definite and separate part of it" (*Baldassone v. Gorzelanczyk*, 282 Ill. App. 3d 330, 333 (1996)) so that "all which remains to be done . . . is to execute [the judgment]." *Gay v. Dunlap*, 279 Ill. App. 3d 140, 144 (1996). Furthermore, Illinois Supreme Court Rule 304 allows appeals from certain kinds of final judgments, even where, as here, the order appealed from does not dispose of all the claims in the case. Rule 304(b) applies to, *inter alia*, "[a] judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b)(1).

¶ 11 It has long been the law in Illinois that an order removing or appointing an executor is a final order. *In re Estate of Moses*, 13 Ill. App. 3d 137, 145 (1973). The same is true of an order *denying a petition* to remove an executor. *In re Estate of Kime*, 95 Ill. App. 3d 262, 267-68

(1981) (discussing the committee comments to 304(b)(1) and using the denial of a "motion [*sic*] to remove an executor" as an example of a final, appealable order). The comment to rule 304(b)(1) gives an illustrative but nonexhaustive list of final orders that are appealable under the rule, including those "admitting or refusing to admit a will to probate, appointing or removing an executor, or allowing or disallowing a claim." Ill. S. Ct. R. 304(b), Committee Comments (rev. Sept. 1988). The *Kime* court further elaborated on subsection (b)(1), explaining that it is predicated on the desire for adjudicatory efficiency. *Id*. at 68. If a party could not appeal an order determining the executor of an estate, then the party would have to wait until the end of the estate proceedings to file its appeal. *Id.* At that point, if the appellant was successful on appeal, then administration of the estate would have to start over again with a new representative. *Id.* *Kime* recognized that a final order denying a petition for removal of executor is of the same type as those contemplated by Supreme Court Rule 304(b)(1). This court has jurisdiction over this appeal.

¶ 12 II. Standard of Review

¶ 13 We next address the appropriate standard of review. In Illinois, it is well settled that "[t]he standard of review for removal of an executor under section 23-2 of the [Probate] Act is whether the decision of the trial court is against the manifest weight of the evidence." *In re Estate of Debevec*, 195 Ill. App. 3d 891, 897 (1990); *In re Estate of Kirk*, 242 Ill. App. 3d 68, 74 (1993); *In re Estate of Hubbard*, 54 Ill. App. 3d 238, 241 (1977). "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, 247 (2009).

¶ 14 III. The Probate Court's Denial of John's Petition

¶ 15 *A. Removal Procedure*

¶ 16 John argues that the probate court failed to follow the proper removal procedure, because it did not require Stephen to prove his fitness to retain the office of executor. We disagree. An interested person may petition the court for issuance of a citation directing an executor to show cause why he should not be removed from office. 755 ILCS 5/23-3 (West 2007). "The purpose of the citation is to notify the respondent about the alleged causes for removal and to give him an opportunity to defend at a hearing." *In re Estate of Austwick*, 275 Ill. App. 3d 665, 671 (1995).

¶ 17 The respondent-executor bears no burden of defending against the grounds for removal stated in the citation unless the petitioner first establishes, *prima facie*, that the court should remove the executor. *Kirk*, 242 Ill. App. 3d at 73. There are two ways the petitioner can satisfy this requirement, depending on whether the respondent-executor admits or denies the allegations in the citation: (1) if the respondent-executor admits, then the allegations must show reasonable grounds for removal; or (2) if the respondent-executor denies, then the court must hold a hearing and the petitioner must adduce evidence showing reasonable grounds for removal. *Id.* Only after the petitioner meets his initial burden of establishing, *prima facie*, that the executor should be removed does the burden shift to the respondent-executor. *In re Estate of Lucas*, 71 Ill. 2d 277, 282 (1978).

¶ 18 In this case, the probate judge did not order the issuance of a citation, so Stephen was not required to respond to the allegations in the petition. Nonetheless, Stephen did move to strike, challenging John's "standing" to file a petition. The probate court correctly rejected this argument, as John is a legatee under the Will and therefore qualifies as an "interested person" who may petition for removal.[1] *See* 755 ILCS 5/1-211 (West 2007).

[1] Stephen contended in his motion, and again in his response brief, that John did not have the

¶ 19 Instead of issuing a citation, the probate judge held a hearing on the petition. At the hearing, the judge evaluated the petition and supporting exhibits, and both parties were permitted to make oral arguments. Afterwards, the judge concluded that no good cause existed for removing Stephen as executor and declined to issue a citation. Accordingly, the burden never shifted to Stephen to show cause why he should not be removed. *See Kirk*, 242 Ill. App. 3d at 73. The fact that the court held a hearing prior to issuing the citation, instead of after, is not reversible error. *Austwick*, 275 Ill. App. 3d at 61 (finding that trial court substantially followed the procedural requirements of the Probate Act even though no citation was issued); *Estate of Abbott*, 38 Ill. App. 3d 141, 144-45 (1976) (same). Substantial compliance with section 23-3 is sufficient to meet the removal procedure requirements of the Probate Act, (*In re Estate of Denaro*, 112 Ill. App. 3d 872, 877-888 (1983)), and here the court substantially complied even though it did not issue a citation.

¶ 20 *B. Good Cause for Removal*

¶ 21 Having decided that the probate judge followed the proper removal procedure, we now turn to the issue of whether the probate judge correctly found that there was no good cause to remove Stephen. A court may only remove an executor for good cause. *Lucas*, 71 Ill. 2d at 281. Section 23-2(a) of the Probate Act enumerates the ten grounds for which a court may remove an executor. 755 ILCS 5/23-2(a) (West 2007). The list is exhaustive—a court may only remove an executor for the reasons stated in the statute. *Estate of Hubbard*, 54 Ill. App. 3d 238, 242 (1977); *In re Estate of Kuhn*, 87 Ill. App. 2d 411, 416 (1967).

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power to file a petition for removal because he was acting in his individual capacity, and therefore was not an "interested person" under the statute. This is incorrect. It does not matter whether John filed the petition on behalf of himself individually or as trustee for the Trust because in either case he would be a legatee of the Will and qualified as an interested person.

¶ 22 John's petition alleged five grounds for removal. We consider John's allegations, mindful that the trial court's holding should not be disturbed unless against the manifest weight of the evidence.

¶ 23 1. False Pretenses

¶ 24 John alleged that Stephen was appointed under false pretenses. The court may remove an executor if he obtained his letters of office by false pretenses. 755 ILCS 5/23-2(a)(1) (West 2007). The Probate Act does not expressly define false pretenses, but the phrase is well-defined elsewhere and in the common law as "any designed misrepresentation of an existing fact or condition." *People v. Gould*, 363 Ill. 348, 352 (1936). In the past, Illinois courts have upheld the removal of a representative on the basis of false pretenses where, for example, an executrix obtained letters of office by misrepresenting herself as the decedent's widow. *In re Estate of Panico*, 268 Ill. App. 585, 589 (1932). Similarly, in *In re Estate of Klock* the court stated that an administratrix was subject to removal after she misrepresented the value of the decedent's estate. 282 Ill. App. 245, 251 (1935).

¶ 25 Here, there is no evidence in the record that Stephen misrepresented any fact in order to procure his letters of office. John argues that Stephen should not have been issued letters of office because the Will appoints John first, and John is able and willing to act. While John is named first, there is nothing in the record that shows that John fulfilled that responsibility or filed the Will. John had a duty to admit the Will for probate after Helen died in November 2005. 755 ILCS 5/6-3 (West 2007). John's failure to fulfill that duty could supply a legitimate basis for the court to allow Stephen to serve as executor. We will not speculate further without facts showing otherwise. John failed to allege or establish that he filed the Will, as was his duty.

¶ 26 2. Waste or Mismanagement

¶ 27 An executor may also be subject to removal if he "wastes or mismanages the estate." 755 ILCS 5/23-2(a)(4). In prior cases, Illinois courts have removed an executor for waste or mismanagement where the executor's inexperience, carelessness, or misfeasance or nonfeasance diminished the value of the estate. *See, e.g.*, *In re Estate of Chapman*, 104 Ill. App. 3d 794, 797 (1982) (executor wrote checks from decedent's bank account to himself personally and made no effort to obtain assistance of counsel); *In re Estate of O'Brien*, 166 Ill. App. 3d 285, 288 (1988) (executrix set aside $75,000 of estate assets for herself without going through probate proceedings and incurred $35,000 in penalties for failing to timely file federal income tax returns); *Abbott*, 38 Ill. App. 3d at 144 (executor neglected to pay attention to the business of the estate, allowed taxes and insurance to go unpaid, and failed to account for a missing $33,500). Furthermore, pecuniary loss to the estate is not necessary for a finding of waste or mismanagement if there is the potential for mismanagement in the future. *In re Glenos Estate*, 50 Ill. App. 2d 89, 97 (1964) (executor retained an unlicensed and inexperienced acquaintance to sell the decedent's real estate and ignored offers to buy the property). Nonetheless, an executor will not necessarily be removed due to lack of experience alone as long as he obtains assistance from counsel and other experienced business or financial professionals to manage the estate. *Kuhn*, 87 Ill. App. 2d at 422-23.

¶ 28 Here, the decedent's probate estate is not of substantial size and the Trust held much of her property at the time she died. The Will simply gave her personal effects to her children and bequeathed her residual estate to the Trust. Stephen's report, filed in January 2013, showed that there were no assets in the estate other than the ongoing suit against John. John makes conclusory allegations that Stephen has committed waste or mismanagement by improperly prosecuting that suit. The merits of the suit currently pending in the chancery division are not

before us, and therefore we cannot say that Stephen is mismanaging Helen's estate in prosecuting it. As the probate court correctly noted, to the extent that Stephen is successful in recovering assets that belonged to Helen's estate he will be fulfilling his duties as executor. *See also In re Estate of Lis*, 365 Ill. App. 3d 1, 9 (2006) (executor's duty to conserve estate assets). John offers no other evidence that Stephen has depleted assets of the estate or otherwise failed to maintain estate property. We hold that the probate judge's decision rejecting waste and mismanagement as a grounds for removal was not against the manifest weight of the evidence.

¶ 29 3. Failure to File an Inventory or Accounting

¶ 30 Subsection 23-2(a)(7) of the Probate Act provides that "the court may remove a representative if: *** the representative fails to file an inventory or accounting *after being ordered by the court to do so*," 755 ILCS 5/23-2(a)(7) (West 2007) (emphasis added); *see O'Brien*, 166 Ill. App. 3d at 288. The statute explicitly states that a court order is a condition precedent to the executor's removal. *Id.*; *Kuhn*, 87 Ill. App. 2d at 418 ("We do not interpret [section 23-2] to provide for the removal of an executor for failure to file a complete inventory *** absent a court order to do so, in that subparagraph (a)(7) specifically requires such prior court order."). Here, nothing in the record shows that the probate court ordered Stephen to file an inventory or accounting of estate assets. Even if the court had ordered Stephen to file an inventory, he did file a report on January 24, 2013. While that report came nearly a year and a half after Stephen's appointment, and two days after John filed the petition for removal, tardiness alone is not grounds for removal. *Chapman*, 104 Ill. App. 3d at 796.

¶ 31 4. Other Good Cause for Removal

¶ 32 In addition to the more specific causes for removal enumerated in subsections 23-2(a)(1)-(8), the court may also remove an executor if he "becomes incapable of or unsuitable for the

discharge of [his] duties" or "there is other good cause." 755 ILCS 5/23-2(a)(9), (10) (West 2007). Subsections (a)(9) and (a)(10) are "two distinct and additional grounds permitting removal," and are not redundant with those already listed in the Act. *Kuhn*, 87 Ill. App. 2d at 416.

¶ 33 In this case, John makes two other allegations under the more general causes stated in subsections (a)(9) and (10). Both of the allegations concern another, ongoing chancery division case against John, where Stephen initially brought suit in his personal capacity and later intervened as executor. First, John alleges that Stephen is unsuitable for discharge of his duties as executor because his dual role in that case creates a conflict of interest. Second, John asserts that there is other good cause for removing Stephen, because he is only using the office of executor to gain a strategic advantage in the chancery case, and not to carry out his duties as executor.

¶ 34 In support of his arguments, John cites to *In re Estate of Gerbing*, 61 Ill. 2d 503 (1975) and *Savio*, 388 Ill. App. 3d at 249-50. *Gerbing* was a suit to construe a will, not a case involving the removal of an executor, and for that reason it does not control here. 61 Ill. 2d at 506. Furthermore, the language from *Gerbing* that John cites in his brief is *dicta*. *Id.* *Savio*, the other case John cites, is also factually distinguishable. In *Savio*, the court upheld the removal of an executor who had relinquished all of the decedent's interest in marital property stemming from divorce proceedings, and agreed to turn over that property to the decedent's ex-husband individually. The *Savio* court held that the executor had acted contrary to the best interests of the estate.

¶ 35 Here, the mere fact that Stephen stands to gain personally in the other lawsuit as a beneficiary under the Trust or as a legatee under the Will does not create a conflict of interest

with his duties as executor. Courts recognize that "the executor normally will have a personal interest in the estate," and the executor's involvement in litigation that may also benefit him personally does not render him unfit for office. *Kuhn*, 87 Ill. App. 2d at 419. Any issues raised in the parties' other case, such as the exclusion of certain evidence, or the propriety of Stephen's intervening as executor on the side of the plaintiffs, should be resolved in the court hearing that case and not in probate proceedings. As the probate court correctly observed, "That's between [John] and [the judge] in the Chancery Division."

¶ 36 John's second argument is also unconvincing. Even if it were true that Stephen was only motivated to attain the office of executor in order to gain a strategic advantage in the Chancery litigation, it would not show good cause to remove him. To the extent that Stephen's motive is ascertainable, or even relevant, we will not substitute our assessment of Stephen's motives for that of the probate court. *See Chapman*, 104 Ill. App. 3d at 796-97. In denying John's petition to remove Stephen, the probate judge opined that "[Stephen] would be derelict in his duties were he not pursuing this claim [against John]." We cannot say the probate court's view and its denial of the removal petition is against the manifest weight of the evidence under either section 23-2(a)(9) or (10).

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we hold that the probate court followed the proper removal procedure, and we affirm its decision denying John's petition for removal of the Estate of Helen K. Sorgatz, Deceased.

¶ 39 Affirmed.