2015 IL App (3d) 140176-U

Order filed April 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

In re ESTATE OF LAVERN J. MORGAN, Deceased	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
(Terrance O'Connor, Dennis O'Connor, and Lisa Hicks,	)	
Plaintiffs-Appellants,	)	Appeal No. 3-14-0176 Circuit No. 10-P-456
v.	)	
Thomas O'Connor, Steven Brockman, Paul Hicks, and Michael Hicks,	)	Honorable Paula Gomora Judge, Presiding.
Defendants-Appellees).	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of an amended petition to contest a will, filed by the heirs of a deceased disabled adult, was reversed on appeal because the amended petition related back to the timely-filed original petition to contest the will. The filing of the original petition in the individual name of the disabled adult, rather than by her guardian on her behalf, was a procedural error that did not render the original petition a nullity.

¶ 2 The plaintiffs, Terrance O'Connor, Dennis O'Connor, and Lisa Hicks, relatives of the deceased, appealed from an order of the probate court dismissing their complaint to contest the last will and testament of the deceased, Lavern J. Morgan.

¶ 3 FACTS

¶ 4 On July 2, 2010, the will of Lavern Morgan (Lavern) was admitted to probate and defendant, Thomas J. O'Connor, was appointed as independent executor. The petition to admit the will listed Ellen June O'Connor (June), Lavern's sister, as Lavern's sole heir, and Thomas, Paul Hicks, Michael Hicks, Lisa Hicks, and Debra Brockman as legatees. Lavern had no children; June was his only sister. June had five children: Thomas O'Connor, Terrance O'Connor, Debra Brockman, Dennis O'Connor, and Maureen Hicks. Maureen predeceased Lavern; Paul, Michael, and Lisa Hicks were Maureen's children. In this action, two of June's sons, Terrance and Dennis, along with her granddaughter, Lisa, were the plaintiffs. Along with Thomas as a defendant were Steven Brockman (as the executor of his late wife Debra Brockman's estate), and the other two Hicks' children, Paul and Michael.

¶ 5 On August 17, 2010, June was adjudicated a disabled adult, and her son, Terrance, was named as plenary guardian of her estate and her person. Thereafter, on November 22, 2010, June, Terrance, and Dennis filed a complaint to contest Lavern's will, alleging that Lavern was of unsound mind when the will was executed and it was executed under duress and because of undue influence. Thomas, as the executor and a legatee, and Debra, as a legatee, filed two motions to dismiss the will contest, one pursuant to section 2-615 (735 ILCS 5/2-615 (West 2010)) and one pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). On July 18, 2011, the probate court granted the section 2-619 motion, finding that Dennis and Terrance were not heirs, and they did not allege that they were legatees under a prior

will wrongfully revoked, and that June was an heir, but a disabled adult, and her guardian did not seek court approval to contest the will on her behalf.

¶ 6 Thereafter, on August 19, 2011, Terrance filed a petition in Lavern's probate case, as guardian for June, requesting court approval to contest the will and for issuance of a citation to discover assets. Then, on September 6, 2011, Terrance and Dennis filed an amended complaint to contest Lavern's will, alleging that they believed that they were legatees under a prior will wrongfully revoked. A motion to strike Terrance's petition requesting court approval to contest the will as June's guardian was granted, based partially on the finding that the petition should have been filed in June's guardianship case, not Lavern's probate case.

¶ 7 On January 3, 2012, Terrance, as June's guardian, filed an amended petition in June's guardianship case for court approval to contest Laverne's will. On October 5, 2012, Thomas O'Connor filed a motion for leave to file a second amended petition for the probate of Laverne's will. June died on December 18, 2012. Terrance's petition was dismissed as moot by the court in June's guardianship case on January 11, 2013.

¶ 8 On April 18, 2013, Terrance, Dennis, and Lisa filed a petition to contest Laverne's will. Thomas and Steven Brockman filed a motion to strike and dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure, alleging that the petition was untimely, which the circuit court granted. A motion to reconsider was denied, and Terrance, Dennis and Lisa appealed.

¶ 9 ANALYSIS

¶ 10 The plaintiffs argue that a disabled heir's right to institute a will contest is not personal and does not terminate at her death, and the will contest filed on April 18, 2013, was timely because it related back to the original will contest filed on November 22, 2010. The defendants

argue that the circuit court correctly granted the motion to dismiss because the April 18, 2013, petition to contest the will was filed more than two years after the end of the applicable six-month statute of limitations.

¶ 11 "[T]he right to contest the validity of a will is purely statutory. It must be exercised by the person or persons, in the manner, and within the time prescribed by the Probate Act." *In re Estate of Mohr*, 357 Ill. App. 3d 1011, 1013 (2005) (quoting *In re Estate of Schlenker*, 209 Ill.2d 456, 461–62 (2004)). The Illinois Probate Act provides that a will contest must be brought by any interested person within six months after the admission of the will to probate. 755 ILCS 5/8-1(a) (West 2010); *In re Estate of Mohr*, 357 Ill. App. 3d 1011, 1014 (2005). An "interested person" is defined by the Probate Act as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." 755 ILCS 5/1-2.11 (West 2010). An interested person needs to have a direct, pecuniary, existing interest which would be detrimentally affected by the probate of the will. *Matter of Estate of Keener*, 167 Ill. App. 3d 270, 271 (1988). This includes legatees under a prior will who stand to inherit if the contested will is set aside. *Id.* at 272. It also includes heirs at law, which is anyone who would take from a person's estate under the statute of descent and distribution if that person died without leaving a will. *Schlenker*, 209 Ill. 2d 456, 462 (2004). The parties both agree that June was Lavern's only heir at law, making her an interested person under the statute.

¶ 12 The time limit proscribed for filing a will contest is a jurisdictional statute, and failure to comply with the applicable time limit causes the trial court to lose jurisdiction to hear the will contest. See *Mohr*, 357 Ill. App. 3d at 1014 (the trial court lacked jurisdiction because the will

contest was filed six months and four days after the will was admitted to probate). The defendants correctly note that Laverne's will was admitted to probate on July 2, 2010. Thus, a complaint to contest the will had to be filed by January 2, 2011. The plaintiffs argue that they filed a complaint to contest the will within the six-month period, the complaint filed by June, Terrance, and Dennis on November 22, 2010. That complaint was dismissed without prejudice on July 11, 2011, however, on the grounds that none of the plaintiffs had standing. Terrance and Dennis were not heirs, and they did not allege that they were legatees under a prior will. June was an heir, but she was disabled with an appointed guardian, and the complaint was not brought by the guardian nor did the guardian seek permission to file the contest. The defendants argue that, since none of the plaintiffs had standing, the filing was a nullity and, effectively, no complaint was filed within the relevant six-month period. The plaintiffs counter that they filed within the relevant time period, putting the estate on notice, and the April 2013 complaint related back to that filing. We review *de novo* the grant of a motion to dismiss under section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)). *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248 (2004).

¶ 13 The defendants cite to the case of *Vaughn v. Speaker*, 126 Ill. 2d 150 (1988), for the proposition that the original petition to contest the will was a nullity, so there could be no relation back. In *Vaughn*, however, our supreme court acknowledged the lower court's finding that the original complaint in a personal injury action against a deceased person was a nullity, but the supreme court specifically declined to label the original complaint a nullity. *Vaughn*, 126 Ill. 2d at 157. Instead, the supreme court analyzed the different statutory provisions that arguably would allow relation back, and it found that none of the provisions allowed relation back under the circumstances. *Vaughn*, 126 Ill. 2d at 158-61. Specifically, the supreme court found that an

amended complaint against the executors of a deceased's estate did not relate back to the original action against the deceased under section 2-616(d) of the Code (formerly Ill. Rev. Stat.1987, ch. 110, ¶ 2-616(d), now 735 ILCS 5/2-616(d) (West 2010)) because the executors did not have notice of the action within the statutory period. *Vaughn*, 126 Ill. 2d at 159.

¶ 14 In this case, it was the plaintiff that was named incorrectly in the original petition, so we need to determine if relation back was available under section 2-616(b) of the Code. See 735 ILCS 5/2-616 (West 2010); *Vaughn*, 126 Ill. 2d at 160-61 (Section 616(b) applies to situations wherein a plaintiff seeks to add or amend claims against defendants already parties to the action, while section 2-616(d) applies when a plaintiff seeks to substitute or add distinct defendants). 735 ILCS 5/2-616(b) (West 2010). Section 616(b) provides:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held

to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2-616(b) (West 2010).

¶ 15 In this case, it is clear that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence as alleged in the original pleading, specifically, a will contest by the deceased's only heir, June.[1] Bringing the action in June's name as an individual, rather than by Terrance as her guardian, was a procedural error that should not prevent the cause from being decided on the merits. See *Pavlov v. Konwall*, 113 Ill. App. 3d 576 (1983) (the fact that an administrator of a decedent's estate was not properly named administrator until after the limitations period had run in a wrongful death action was a "technical consideration" that did not prevent relation back); see also *Redmond v. Central Community Hospital*, 65 Ill.App.3d 669, 21 (1978) (an amended complaint by a plaintiff as the administratrix of her deceased husband's estate in a wrongful death action, which made substantially similar allegations as the original complaint which was brought by the plaintiff in her individual capacity, related back to the original complaint). Thus, we reverse the circuit court's order granting the defendants' motion to dismiss the amended petition to contest Laverne's will. We remand the action to the circuit court for further proceedings consistent with this order.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Will County is reversed and remanded.

¶ 18 Reversed and remanded.

[1] The plaintiffs also make the argument that the circuit court held that the right to institute a will contest was personal to the heir and terminated upon her death. We do not agree, nor do we find that the circuit court made such a ruling. The right to contest a will descends to the heirs upon the contestant's death. 755 ILCS 5/8-1(d) (West 2010).