

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

No. 32844

FILED
March 17, 2006
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LINDA J. HAINES, M.D.,
BENEFICIARY OF THE ESTATE OF RALPH W. HAINES, DECEASED,
Petitioner Below, Appellant

v.

PAMELA K. KIMBLE,
EXECUTRIX OF THE ESTATE OF RALPH W. HAINES, DECEASED,
Respondent Below, Appellee

Appeal from the Circuit Court of Hampshire County
Honorable John Henning, Judge
(sitting by special designation)
Civil Action No. 03-C-128

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: March 1, 2006
Filed: March 17, 2006

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.
JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

2. “The paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy.” Syllabus Point 1, *Farmers and Merchants Bank v. Farmers and Merchants Bank*, 158 W.Va. 1012, 216 S.E.2d 769 (1975).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Hampshire County entered November 19, 2004.¹ In that order, the circuit court affirmed the Hampshire County Commission's refusal to remove the appellee and respondent below, Pamela K. Kimble, as the executrix of the estate of the testator, Ralph W. Haines. The appellant and petitioner below, Linda J. Haines, who is the daughter of the testator, appeals the order and contends that the circuit court erred in denying her motion for removal of the appellee as executrix of her father's estate. The appellant is the sole beneficiary of her father's estate and argues that the hostile relations between her and the appellee have already seriously damaged the testator's estate and will continue to damage it unless the appellee is removed as executrix. After reviewing the facts of the case, the issues presented, and the relevant statutory and case law, this Court reverses the decision of the circuit court.

¹Randolph County Circuit Judge John L. Henning was appointed to preside over this case following the voluntary recusal of Hampshire County Circuit Judge Donald H. Cookman.

I.
FACTS

On May 3, 2002, the testator, Ralph W. Haines, died. Prior to his death, the testator was a practicing member of the West Virginia State Bar and had been for a period of more than sixty years. He was well versed in the law of estates in West Virginia and as a member of the West Virginia Board of Bar Examiners, he wrote the test questions on wills and estates. At the time of his death, the testator had accumulated an estate believed to be worth more than \$10 million.

Pursuant to his will dated March 16, 1993, which was admitted to probate before the County Commission of Hampshire County on May 13, 2002, the testator named the appellee, Pamela K. Kimble, as executrix of his estate. The appellee had been a secretary/legal assistant to the testator for a period of twenty-six years prior to his death. According to his will, the appellant, Linda Haines, who is also the testator's daughter and only child, was the sole beneficiary of his estate.

On August 1, 2002, the appellant filed a petition for removal of the appellee as executrix of the testator's estate. Following the appellant's petition, the Hampshire County Commission referred the matter to William H. Judy, III, a fiduciary commissioner from Hardy County, West Virginia. After an October 23, 2002, hearing, Commissioner Judy

issued his Order/Recommendation denying the relief requested. Specifically, he found that the appellee had not failed nor refused to perform her duties as executrix. On July 17, 2003, the county commission affirmed the findings of the fiduciary commissioner. On August 21, 2003, the appellant filed a motion for reconsideration and clarification of the county commission's order. On September 10, 2003, the appellant asserted additional allegations in support of removal of the appellee as executrix, but the county commission affirmed its prior decision.

On November 5, 2003, the appellant filed a petition for appeal in the circuit court from the rulings of the county commission's order. On December 9, 2003, the appellant then filed a motion for preliminary relief in the circuit court seeking the temporary removal of the appellee as executrix of the estate pending the final adjudication of the appeal. On January 22, 2004, the circuit court denied the appellant's motion and ordered the parties to appear for mediation. The mediation, conducted on May 14, 2004, did not result in a settlement of the matter. Then, on October 4, 2004, the circuit court held hearings with regard to the underlying issues and on November 19, 2004, it affirmed the prior order of the county commission.

In its November 19, 2004, order, the circuit court found that the appellant interfered and refused to cooperate with the proper administration of the estate and that such

actions compounded the already difficult job of the appellee as executrix. Moreover, the circuit court stated that the testator appointed the appellee because she had intimate knowledge of his affairs and could be relied upon to carry out his wishes and that she had well performed her duties in the complex administration of the testator's estate. The circuit court also concluded that the hostility between the appellee and the appellant resulted from the actions of the appellant and not based upon any action of the appellee adverse to the interest of the appellant. Finally, the circuit court found that the appellee reasonably took into consideration the requests and desires of the appellant subject to her paramount duty to administer the estate in accordance with the requirements of the Internal Revenue Service. This appeal followed.

II.

STANDARD OF REVIEW

As explained in Syllabus Point 4 of *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996), “[t]his Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.”

III.

DISCUSSION

We begin our review in this appeal with the appellant's argument that the rules for removal of a fiduciary, announced by this Court in *Highland v. Empire National Bank of Clarksburg*, 114 W.Va. 498, 172 S.E. 551 (1933), control the outcome in this case. The appellant states that this Court's holding in *Highland* established an unambiguous principle that, "[w]here inharmonious or unfriendly relations exist between the trustees, or between them and the *cestui que trust* [the beneficiaries], there may be sufficient reason for removal." Thus, the appellant contends that *Highland* makes it clear that an executrix can be removed for something other than failure to perform her fiduciary duty. The appellant further argues that *Highland* stands for the proposition that carrying out the primary purposes of a testator's will must supercede keeping a particular fiduciary when the two objectives conflict.

Likewise, the appellant argues that in *Welsh v. Welsh*, 136 W.Va. 914, 69 S.E. 2d 34 (1952), this Court held that the general mandate to give effect to the testator's intent "should not prevent the prompt removal of a personal representative who is incompetent or who fails or refuses to perform his clear duties." Moreover, the appellant believes that the primary intent of the testator in this case was to pass his entire estate to the appellant, while his secondary and subordinate intent was to name the appellee as executrix. Finally, the appellant states that regardless of which party is responsible for the hostile interpersonal relations between the parties, *Highland* provides that, "it is not essential how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct or not."

Conversely, the appellee responds that the *Highland* case stands for the proposition that when you have co-executors and co-trustees who must act jointly and work together, but who cannot do so, then there may be cause for removal of one or more of the fiduciaries. In this case, however, since the appellee is the sole executrix of the estate, she contends that there is no possibility of such a conflict and thus this situation is distinguishable from *Highland*. We must disagree with the appellee's interpretation of *Highland* and hold that it is directly applicable to this case.

In this case, while there may be facts in dispute as to the specific reasons surrounding the hostile relations between the appellee and the appellant, there is no dispute that such hostile relations in fact do exist and that the parties cannot work together with any sense of civility or common purpose. We believe that such hostile relations, regardless of who is at fault, necessarily have already damaged, and in the future will continue to damage, the estate and the appellant's interest in it.

This disharmony between the appellant and the appellee has brought to light numerous troubling allegations surrounding the administration of the testator's estate. For instance, the appellant maintains that the record is replete with examples of how the appellee's actions have hindered the proper administration of the estate. Specifically, she contends that the appellee made extensive corrections to the initial lists of the decedent's property to the detriment of the appellant and the estate and that the appellee appropriated

\$200,000 of the testator's bearer bonds in alleged contemplation of his imminent death and concealed those bonds for several months prior to giving them to the appellant. With regard to those bonds, the appellant maintains that the appellee initially filed a federal estate tax return reporting that the appellant contributed funds for the acquisition of the bearer bonds, but later reversed herself and filed a "supplemental" federal estate tax return indicating that the testator died owning the bonds solely and the appellant had no pre-mortem interest in them. The appellant argued such action resulted in her owing significant additional federal taxes.

The appellant further declares that in spite of evidence that the testator had given her a collection of antique firearms in 1967, the appellee filed tax returns with the IRS reporting the guns as a part of the testator's estate. She also charges that the appellee persistently inflated appraisals on the testator's property to bolster her expected commission, that the estate unreasonably had to incur fees for the services of three different law firms at a cost of several hundred thousand dollars, and that the appellee unnecessarily obtained a wasteful loan purportedly to pay a portion of the federal estate taxes. Finally, the appellant states that the appellee mishandled the closing of the testator's law practice including the maintenance of his clients' files in a manner contrary to governing legal and ethical practices and that the appellee failed to maintain, secure, and insure the testator's property subject to the claims of creditors of his estate including his extensive real estate holdings.

Conversely, the appellee states that the appellant's contentions are not supported by the record, specifically denies them, and states that there has been absolutely no showing of damage to the estate occasioned by her actions. Moreover, the appellee maintains that there was no reappraisal of the testator's real estate and that the retention of counsel experienced in tax and real estate law was prudent and necessary to comply with IRS regulations concerning the testator's complex estate. Next, the appellee explains that there is no issue with regard to her handling of the testator's law office files because another secretary from the testator's former law practice has assumed the role of closing down the law practice and making proper provision for the files. Finally, the appellee contends that it was the appellant who presented a loan proposal from the Bank of Romney days before the estate tax remittance was due and that she complied with the appellant's wishes in this regard.

In the instant case, it is not necessary to inquire into how these controversies and disputes arose or who may be responsible for creating a particular controversy because there are no joint fiduciaries or co-executrixes and there are no multiple or joint heirs. In this case, there is only one executrix and one heir so there are no competing interests in the same classification. However, we do not mean to say that there can never be a case wherein a court or fiduciary commissioner should inquire into such issues. For example, in an appropriate case where co-executrixes or joint fiduciaries or multiple heirs are in a dispute over the administration of a given estate it may be appropriate and necessary to determine

if one fiduciary or heir intentionally and deliberately created the controversy solely for the purpose of causing the removal of an executrix or administratrix. That is simply not the case here where there is only one heir.

Thus, regardless of the truth or veracity in the disputed items above and without determining blame or responsibility for the dispute, there are clear issues that simply cannot be ignored with regard to the administration of the testator's will. We have consistently held that decisions involving the construction of a will always begin with the recognition that: "The paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy." Syllabus Point 1, *Farmers and Merchants Bank v. Farmers and Merchants Bank*, 158 W.Va. 1012, 216 S.E.2d 769 (1975); *see also* Syllabus Point 4, *Weiss v. Soto*, 142 W.Va. 783, 98 S.E.2d 727 (1957); *In re Conley*, 122 W.Va. 559, 561, 12 S.E.2d 49, 50 (1940). In this case, while the testator intended to make the appellee the executrix of his estate, there is no dispute that he also clearly intended to leave all of his worldly possessions to the appellant as his sole heir.

Furthermore, the relationship between an estate and its sole beneficiary, as is the situation here, must be seen as having an identity of interest. Irrespective of the testator's initial intent that the appellee act as executrix, it is obvious that the testator did not intend nor contemplate that there would be such aggressive and acrimonious battles between the

appellee and the appellant in the administration of his estate. Likewise, we believe that had the testator envisioned the massive amounts of money being spent in legal fees alone, now estimated to approach \$1 million, it is more likely than not that he would have handled the matter of his estate in a different manner. It is clear to us that the testator's primary intention of leaving his entire estate to the appellant as his only child and sole heir must be the overriding factor and primary consideration and consequently requires the removal of the appellee as executrix.

Thus, after fully reviewing the evidence, we believe that the circuit court erred in denying the appellant's request for removal of the appellee as executrix of the testator's estate. The circuit court based much of its conclusion in denying the appellant's request for removal of the appellee on the fact that: "the hostility between the executrix and the beneficiary herein is a result of the actions of the beneficiary and not based upon action of the executrix adverse to the interest of the beneficiary." As discussed above, irrespective of who created the hostility, there is no dispute that the estate has had to incur significant costs due to the animosity between the two parties. As provided herein, we also disagree with the circuit court's finding that *Highland* was not dispositive of this case.

Given the specific facts of this case, we believe that the appropriate remedy is the immediate removal of the appellee as executrix of the testator's estate and the appointment of the sole-heir appellant as the substitute executrix. The appellee, therefore,

should at once cease any contact and/or control with regard to any and all aspects of the administration of the testator's estate and transfer all assets immediately to the substitute executrix. Consequently, we remand this case to the Circuit Court of Hampshire County for the immediate entry of an order removing the appellee as executrix of the testator's estate. The circuit court shall further direct the Hampshire County Commission to immediately appoint the appellant as the new substitute executrix to handle the administration of the testator's estate. Moreover, in view of the controversy which has arisen in connection with the probate of this will, and in accordance with W.Va. Code § 44-3-7 (1982), the Hampshire County Commission, through its appointed fiduciary commissioner, shall review the appellee's services rendered in her administration of the testator's estate and shall determine the appropriate and reasonable amount of compensation for those services as provided by W.Va. Code § 44-4-12 (2002).

In summary, we reverse the circuit court's denial of the appellant's petition for removal of the appellee as executrix of the testator's estate and remand this case to the Circuit Court of Hampshire County to award the appellant relief consistent with this opinion. We further hold that such relief shall be provided to the appellant immediately and therefore issue the mandate of this Court contemporaneously herewith.

IV.

CONCLUSION

For the reasons set forth above, the November 19, 2004, final order of the Circuit Court of Hampshire County is reversed. We also remand the matter to the Circuit Court of Hampshire County for the immediate entry of an order as provided herein and for further proceedings consistent with this opinion.

Reversed and Remanded With Directions.