

OHIO COURT OF APPEALS, FIFTH APPELLATE DISTRICT

In re Estate of Tullos

2012 Ohio 1114 (Ohio Ct. App. 2012) · No. 11CAF090084 · Decided March 16, 2012

SUMMARY

The Fifth District Court of Appeals held that the appointment of an estate administrator was premature because the surviving spouse and next of kin were not provided the notice required by Ohio Revised Code sections 2113.06 and 2113.07. The court reversed the probate court's judgment and remanded for notice and a determination regarding priority to administer the estate. It also held that the filing of the application was not void and did not deprive the probate court of jurisdiction.

CASE DETAILS

COURT	Ohio Court of Appeals, Fifth Appellate District
WRITING FOR THE COURT	Sheila G. Farmer; W. Scott Gwin, P.J.; William B. Hoffman, J.; Sheila G. Farmer, J.
JURISDICTION	Ohio
DECIDED	March 16, 2012
DOCKET	11CAF090084
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the Delaware County Court of Common Pleas, Probate Division, after the probate court denied the surviving spouse's and next of kin's motion to set aside the appointment of an administrator.
STANDARD OF REVIEW	The court reviewed the probate court's legal determination concerning statutory notice and the validity of the administrator's appointment as a matter of law.
PRECEDENTIAL VALUE	Published intermediate appellate opinion
PARTIES	Shirley Tullos, William Tullos v. J. Michael Evans, Administrator, American Postal Workers' Union

TOPICS

- probate procedure
- estate administration
- probate
- appellate procedure
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the probate court erred by appointing an administrator without giving the surviving spouse and next of kin the notice required by Ohio Revised Code 2113.07 or obtaining a waiver of notice.
2. Whether the failure to provide statutory notice made the appointment premature and required reversal and remand.
3. Whether the filing of the application for authority to administer the estate was void or deprived the probate court of jurisdiction.

HOLDINGS

1. Under R.C. 2113.07, before appointing an executor or administrator, the probate court must obtain a waiver from persons having priority to administer or serve those persons with notice for the purpose of determining whether they wish to accept or renounce administration.
2. Because the surviving spouse and next of kin were not given the notice required by statute, the appointment of the administrator had to be reversed and the matter remanded for notice and a determination under R.C. 2113.06 and 2113.07.
3. The filing of the application for authority to administer the estate was not void and did not deprive the probate court of jurisdiction; the defect was the premature appointment without statutory notice.

KEY QUOTATIONS

“Because appellants were not given notice as required by statute, the appointment of the administrator was premature.” (§18)

“the filing of the application for authority to administer the estate was not void because the commencement of the action began with the December 30, 2010 filing and did not divest the trial court of jurisdiction to determine the appointment of the administrator.” (§19)

FACTUAL BACKGROUND

William Lawrence Tullos died on July 10, 2010. On December 30, 2010, J. Michael Evans applied for authority to administer the estate based on a creditor's claim, but the application did not list or provide notice to Tullos's surviving spouse and next of kin. The probate court appointed Evans administrator on January 3, 2011, without notice or a waiver of notice. Tullos's wife and son later moved to set aside the appointment.

PROCEDURAL HISTORY

After William Lawrence Tullos died, J. Michael Evans applied for authority to administer the estate based on a creditor's claim. The probate court appointed Evans administrator without listing or notifying the surviving spouse and next of kin. The surviving spouse and son moved to set aside the appointment, but the probate court denied the motion. The court of appeals reversed and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand to the Delaware County Probate Court to provide notice to the surviving spouse and next of kin and determine the appointment under Ohio Revised Code §§ 2113.06 and 2113.07.

OPINION

PER CURIAM.

[Cite as In re Estate of Tullos, 2012-Ohio-1114.] COURT OF APPEALS DELAWARE COUNTY, OHIO FIFTH APPELLATE DISTRICT IN THE MATTER OF THE ESTATE OF:: JUDGES:: Hon. W. Scott Gwin, P.J. WILLIAM LAWRENCE TULLOS: Hon. William B. Hoffman, J.: Hon. Sheila G. Farmer, J.: Case No. 11CAF090084: OPINION CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas Court, Probate Division, Case No. 210772-E JUDGMENT: Reversed and Remanded DATE OF JUDGMENT: March 16, 2012 APPEARANCES: For Appellants For Estate ARNOLD L. JACK AARON R. FALVO 572 East Rich Street 261 West Johnstown Road Columbus, OH 43215 Columbus, OH 43230 Administrator For American Postal Workers' Union J. MICHAEL EVANS JAY E. MICHAEL 261 West Johnstown Road 729 South Front Street Columbus, OH 43230 Columbus, OH 43206 Delaware County, Case No. 11CAF090084 2 Farmer, J. {¶1} On July 10, 2010, William Lawrence Tullos died.

On December 30, 2010, appellee, J. Michael Evans, filed an application for authority to administer the estate pursuant to a creditor's claim (American Postal Workers' Union). The surviving spouse and next of kin were not listed or notified.

On January 3, 2011, the trial court granted the application. {¶2} On March 3, 2011, Mr. Tullos's wife and son, Shirley and William Tullos, appellants herein, filed a motion to set aside the appointment of appellee as administrator. By judgment entry filed August 24, 2011, the trial court denied the motion. {¶3} Appellants filed an appeal and this matter is now before this court for consideration.

Assignment of error is as follows: I {¶4} "THE PROBATE COURT ERRED AS A MATTER OF LAW BY OVERRULING APPELLANTS' MOTION TO SET ASIDE THE APPOINTMENT OF THE ADMINISTRATOR WHEN APPELLANTS HAD NO NOTICE AND NO OPPORTUNITY TO BE HEARD BEFORE THE COURT APPOINTED THE ADMINISTRATOR." I {¶5} Appellants claim the trial court erred in denying their request to set aside the appointment of the administrator.

Specifically, appellants claim appellee's failure to list the "names of the surviving spouse and all the next of kin of the deceased" pursuant to R.C. 2113.07 invalidated the trial court's appointment of the administrator.

We agree. Delaware County, Case No. 11CAF090084 3 ¶6 Appellee filed an application for authority to administer the estate under R.C. 2109.02 and 2109.07, but failed to list the surviving spouse and next of kin. Contemporaneously with this filing was a separate form (Form 1.0) listing the "surviving spouse and next of kin." ¶7 Without notice to the surviving spouse and next of kin, and without a waiver of notice, the trial court proceeded to appoint appellee as administrator on January 3, 2011.

Appellants filed their motion to set aside the appointment on March 3, 2011, claiming the appointment was void and the matter should be dismissed. ¶8 It is undisputed that R.C. 2113.07 governs the matter in this case and it requires either waiver or notice by the probate court for the "purpose of ascertaining whether they desire to take or renounce administration": ¶9 "Before being appointed executor or administrator, every person shall make and file an application that shall contain the names of the surviving spouse and all the next of kin of the deceased known to the applicant, their addresses of usual residence if known, a statement in general terms of what the estate consists and its probable value, and a statement of any indebtedness the deceased had against the applicant. ¶10 "The application may be accompanied by a waiver signed by the persons who have priority to administer the estate, and, in the absence of a waiver, those persons shall be served notice for the purpose of ascertaining whether they desire to take or renounce administration.

Minors who would have been entitled to priority to administer the estate except for their minority also shall be served notice pursuant to the Rules of Civil Procedure. Delaware County, Case No. 11CAF090084 4 ¶11 "Letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed a statement indicating that the person has no knowledge of a will of the intestate." ¶12 R.C.

2113.06 provides the following: ¶13 "(A) Administration of the estate of an intestate shall be granted to persons mentioned in this division, in the following order: ¶14 "(1) To the surviving spouse of the deceased, if resident of the state; ¶15 "(2) To one of the next of kin of the deceased, resident of the state. ¶16 "(B) If the persons entitled to administer the estate under division (A) of this section fail to take or renounce administration voluntarily, the matter shall be set for hearing and notice given to the persons. ¶17 "(C) If there are no persons entitled to administration, if they are for any reason unsuitable for the discharge of the trust, or if without sufficient cause they neglect to apply within a reasonable time for the administration of the estate, their right to priority shall be lost, and the court shall commit the administration to some suitable person who is a resident of the state, or to the attorney general or the attorney general's designee, if

the department of job and family services is seeking to recover medical assistance from the deceased pursuant to section 5111.11 or 5111.111 of the Revised Code.

The person granted administration may be a creditor of the estate." {¶18} Because appellants were not given notice as required by statute, the appointment of the administrator was premature. Therefore, this court remands the matter to the trial court for the fulfillment of the mandates of R.C. 2113.06 and 2113.07. Delaware County, Case No. 11CAF090084 5 {¶19} For clarification, because appellants argued the trial court lacked jurisdiction, we find that under Civ.R.

7(A) and 73(A), the filing of the application for authority to administer the estate was not void because the commencement of the action began with the December 30, 2010 filing and did not divest the trial court of jurisdiction to determine the appointment of the administrator. {¶20} The sole assignment of error is granted. {¶21} The judgment of the Court of Common Pleas of Delaware County, Ohio, Probate Court is hereby reversed, and the matter is remanded to said court for notice to the surviving spouse and next of kin and for determination under R.C.

2113.06 and 2113.07. By Farmer, J. Gwin, P.J. and Hoffman, J. concur. s/ Sheila G. Farmer_____ s/ W. Scott Gwin _____ s/ William B. Hoffman_____ JUDGES SGF/sg 307 [Cite as In re Estate of Tullos, 2012-Ohio-1114.] IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO FIFTH APPELLATE DISTRICT IN THE MATTER OF THE ESTATE OF:: WILLIAM LAWRENCE TULLOS: JUDGMENT ENTRY: CASE NO. 11CAF090084 For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, Probate Division is reversed, and the matter is remanded to said court for notice to the surviving spouse and next of kin and for determination under R.C.

2113.06 and 2113.07. Costs to appellee. s/ Sheila G. Farmer_____ s/ W. Scott Gwin _____ s/ William B. Hoffman_____ JUDGES