

OHIO COURT OF APPEALS

In re Estate of Marshall, 78 Ohio App. 455

66 N.E.2d 280 (Ohio Ct. App. 1945) · Decided November 23, 1945

SUMMARY

The court overruled the appellee's motion to dismiss an appeal from an estate proceeding based on the appellant's delayed filing of assignments of error, briefs, and a bill of exceptions. The court held that dismissal was unwarranted because the appellant had exercised due care and some alleged errors could be shown by the record without a bill of exceptions, and it granted additional time to file the assignments of error and brief.

CASE DETAILS

COURT	Ohio Court of Appeals
WRITING FOR THE COURT	Hornbeck, P.J.; Miller, J.; Wiseman, J.
JURISDICTION	Ohio
DECIDED	November 23, 1945
DISPOSITION	other
PROCEDURAL POSTURE	Appellee moved to dismiss the appeal for failure to timely file assignments of error and briefs under Rule VII and for failure to timely file a bill of exceptions after denial of the motion for new trial.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Mary M. Von Schmidt v. John L. Marshall

TOPICS

- probate procedure
- appellate procedure
- preservation of error
- civil procedure

PRACTICE AREAS

- Probate
- Appellate procedure
- Civil procedure

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because appellant failed to timely file assignments of error and briefs under Rule VII.

2. Whether the expiration of the statutory period for filing a bill of exceptions required dismissal of the appeal.

HOLDINGS

1. Dismissal was not required because Rule VII permits additional time when good cause is shown, and the court determined that appellant had exercised due care and was entitled to the approved extension.
2. The expiration of the time for filing a bill of exceptions did not, by itself, require dismissal because some assigned errors could be exemplified by the record independently of the bill of exceptions.

KEY QUOTATIONS

“The spirit of Rule VII is not to penalize a party who has exercised due care in attempting to comply with the rule.” (456)

“This alone, however, does not require a dismissal of the appeal as the errors assigned, or some of them, may be exemplified upon the record independent of the bill.” (456-457)

FACTUAL BACKGROUND

Appellant Mary M. Von Schmidt sought to pursue an appeal but had not filed assignments of error and briefs within the period specified by Rule VII. The statutory period for filing a bill of exceptions had also elapsed, although the appellate court concluded that some assigned errors could be shown by the existing record without a bill of exceptions.

PROCEDURAL HISTORY

The appeal was before the Ohio Court of Appeals on appellee's motion to dismiss. The appellate court had previously approved an entry extending appellant's time to file assignments of error, a brief, and a bill of exceptions, subject to filing by December 1, 1945, but the entry had not yet been journalized because appellee objected. The court overruled the motion and journalized the extension.

DISPOSITION

other

OPINION

PER CURIAM.

This cause is submitted on motion of appellee to dismiss the appeal for two reasons: First, because appellant, Mary M. Von Schmidt, failed to file her assignments of error and briefs in accordance with Rule VII of the rules of this court, and, second, because of failure to file a bill of exceptions in the trial court within 40 days after the overruling of the motion for new trial. *Page 456 The motion will be overruled.

Rule VII provides for dismissal for failure to file brief within the time fixed, unless good cause is shown why the appeal should not be dismissed. Sometime since, counsel for appellant tendered an entry granting leave to file assignments of error, brief and bill of exceptions, in which we interpolated, "if duly filed in the trial court" on or before the first day of December 1945.

That entry has been approved by two members of the court, but has not been spread upon the record because counsel for appellee had objected to such action. The objection was followed by the motion under consideration.

The spirit of Rule VII is not to penalize a party who has exercised due care in attempting to comply with the rule. The court determined, when it approved the aforementioned entry, that counsel for appellant had complied with Section 12223-8, General Code, respecting the preparation and filing in this court of the transcript of the docket or journal entries and original papers or transcript thereof as are necessary to exhibit the error complained of.

The clerk at the time of the approval of the entry extending time for filing of brief had not filed the transcript in this court. In such situation, it is our opinion that it is only fair to appellant that she be given additional time, pursuant to the entry, within which to file briefs, etc. It appears that a bill of exceptions may not be filed because the time within which, under the statute, it is required to be filed has elapsed.

This alone, however, does not require a dismissal of the appeal as the errors assigned, or some of them, may be exemplified upon the record independent of the bill. The motion will, therefore, be overruled and the entry, which we have heretofore approved, will be journalized, granting appellant until December 1, 1945, *Page 457 within which to file her assignments of error and brief.

Exceptions will be saved to counsel for appellee. Motion overruled. HORNBECK, P.J., MILLER and WISEMAN, JJ., concur.