

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Alan B. Bookman, as Successor Personal Representative of the Estate of Deborah E. Irby, Deceased, Appellant, v. Dale Davidson, Appellee.

Alan B. Bookman, as Successor Personal Representative of the Estate of Deborah E. Irby, Deceased, Appellant, v. Dale Davidson, Appellee., 139 So. 3d 332 (Fla. 1st DCA 2014) (Fla. 1st DCA 2014) · No. 1D13-3086

SUMMARY

A successor personal representative has the same powers as the original representative under Florida Statute § 733.614, and thus has standing to sue the prior representative’s attorney for legal malpractice on behalf of the estate without establishing privity. The court also held that a claim for disgorgement of excessive attorney’s fees is part of estate administration, but the circuit court has subject matter jurisdiction to hear it and may, in its discretion, consolidate it with the malpractice claim on remand.

CASE DETAILS

COURT	District Court of Appeal of Florida, First District
WRITING FOR THE COURT	Swanson; Benton; Osterhaus
JURISDICTION	Florida
DOCKET	1D13-3086
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Interlocutory appeal from summary judgment in part and dismissal in part.
STANDARD OF REVIEW	De novo for summary judgment and statutory interpretation.
PRECEDENTIAL VALUE	published
PARTIES	Alan B. Bookman, as Successor Personal Representative of the Estate of Deborah E. Irby, Deceased v. Dale Davidson

TOPICS

- probate procedure
- civil procedure
- attorney fees
- professional negligence
- standing

PRACTICE AREAS

- Estate Planning and Probate
- Professional Malpractice
- Civil Procedure

QUESTIONS PRESENTED

1. Whether a successor personal representative has standing to bring a legal malpractice action against the attorney hired by the prior personal representative.
2. Whether the trial court properly dismissed the claim for disgorgement of attorney's fees when the estate proceedings were still pending.

HOLDINGS

1. A successor personal representative has the same power and duty as the original personal representative, including the right to bring a malpractice suit against the prior representative's attorney, by operation of section 733.614, Florida Statutes.
2. The trial court did not abuse its discretion in finding it more appropriate for the disgorgement claim to be heard in the probate proceedings, but it has subject matter jurisdiction to hear the claim in the civil case on remand.

KEY QUOTATIONS

“A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate as expeditiously as possible, but shall not exercise any power made personal to the personal representative named in the will without court approval.” (at 334–35)

“In essence, appellant stepped into the shoes of Dana Ford when he became the successor personal representative. Consequently, the trial court erred when it entered summary judgment in favor of appellee, claiming appellant lacked standing.” (at 335)

“All circuit court judges have the same jurisdiction within their respective circuits. . . . The internal operation of the court system and the assignment of judges to various divisions does not limit a particular judge's jurisdiction.” (at 336)

FACTUAL BACKGROUND

Dana Ford was appointed personal representative of the estate of Deborah Irby and hired attorney Dale Davidson to advise her in estate administration, paying him \$195,000 from estate funds. After Ford resigned in 2010, Alan Bookman was appointed successor personal representative. He then sued Ford and Davidson, alleging Davidson improperly advised Ford to disclaim or transfer estate assets needed to pay creditors.

PROCEDURAL HISTORY

Appellant, successor personal representative of an estate, filed a legal malpractice and disgorgement action against the attorney hired by the prior personal representative. The trial court granted summary judgment for the attorney on the malpractice claim for lack of standing and dismissed the disgorgement claim as better heard in probate court.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remanded for further proceedings consistent with the opinion; the trial court may, in its discretion, hold a joint trial of all claims if no prejudice results.

CASES CITED

- Petty v. Fla. Ins. Guar. Ass'n, 80 So. 3d 313 (Fla. 2012)
- Srygley v. Capital Plaza, Inc., 82 So. 3d 1211 (Fla. 1st DCA 2012)
- In re A.G., 40 So. 3d 908 (Fla. 3d DCA 2010)
- Sessions v. Willard, 172 So. 242 (Fla. 1937)
- Onofrio v. Johnston & Sasser, P.A., 782 So. 2d 1019 (Fla. 5th DCA 2001)
- In re Winston, 610 So. 2d 1323 (Fla. 4th DCA 1992)
- Maugeri v. Plourde, 396 So. 2d 1215 (Fla. 3d DCA 1981)
- Fort v. Fort, 951 So. 2d 1020 (Fla. 1st DCA 2007)
- In the Interest of Peterson, 364 So. 2d 98 (Fla. 4th DCA 1978)
- Weaver v. Hotchkiss, 972 So. 2d 1060 (Fla. 2d DCA 2008)
- Yost v. Am. Nat'l Bank, 570 So. 2d 350 (Fla. 1st DCA 1990)

OPINION

ALAN B. BOOKMAN, AS SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF DEBORAH E. IRBY, DECEASED, Appellant, v. DALE DAVIDSON, Appellee. IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED CASE NO. 1D13-3086 _____/ Opinion filed May 5, 2014.

An appeal from the Circuit Court for Walton County. David W. Green, Judge. John H. Adams, P. Michael Patterson, and Cecily M. Welsh of Emmanuel, Sheppard, and Condon, Pensacola, for Appellant. W. David Jester and Jonathan B. Minchin of Galloway, Johnson, Tompkins, Burr & Smith, Pensacola, for Appellee. SWANSON, J. Appellant, Alan B. Bookman, as successor personal representative of the estate of Deborah E. Irby, appeals the trial court's "Summary Final Judgment as to Count II and Order Dismissing Count III." In it, the court found, as a matter of law, that appellant does not have standing to bring a legal malpractice action against appellee, Dale Davidson, the attorney who was hired by the initial personal representative to aid her in the administration of the estate.

The court also granted appellee's motion to dismiss appellant's claim for disgorgement of attorney's fees paid by the estate to appellee on the basis they were excessive. It concluded that while appellant had a right to pursue that claim, it would be more appropriately heard in the estate proceedings, which were still pending.

We reverse the trial court's summary final judgment based on a plain reading of section 733.614, Florida Statutes. We affirm on principle, however, the trial court's dismissal of the claim for disgorgement, but hold the court may, in its discretion on remand, exercise its subject matter jurisdiction to hear that issue along with the other counts of the civil case.

According to the undisputed facts, on January 4, 2007, Dana Ford, through appellee, filed a petition for the administration of the estate of Deborah Irby in the Walton County circuit court. On January 24, 2007, Ford was appointed personal representative of the estate and Letters of Administration were issued. Ford engaged the legal services of appellee to advise her concerning her administrative duties until shortly before she resigned as personal representative on February 12, 2010.

During the course of his representation of Ford, appellee was paid from estate funds the sum of \$195,000. 2 On February 17, 2010, appellant was appointed successor personal representative of the state. After his appointment, appellant filed a civil suit against Ford and appellee.

In his Second Amended Complaint, appellant alleged that Ford, through appellee's guidance, improperly disclaimed or transferred out of the estate certain assets belonging to the estate that could have been used to pay its creditors. Appellant sought damages based on allegations that appellee had improperly advised Ford in regards to her responsibilities as personal representative, as well as damages from Ford, personally, for breach of fiduciary duty, defalcation, malfeasance, and devastavit, and also sought disgorgement of personal representative fees paid to her.

Ford, in turn, filed an answer raising affirmative defenses, including the defense that her actions were done in good faith and in reliance on the advice of legal counsel. She also filed a cross-claim against appellee for legal malpractice, breach of fiduciary duty, and contribution. Appellee moved for summary judgment against appellant, in part claiming the undisputed facts established a lack of any attorney-client relationship between appellee and appellant such that appellant, as successor personal representative, could not file a suit against him for malpractice.

Primarily, appellee argued a successor personal representative is not in privity with the original personal representative's attorney, a necessary prerequisite to maintaining a malpractice claim under Florida law. He also moved to dismiss appellant's count for 3 disgorgement of the portion of attorney's fees paid to him, urging the probate court had exclusive jurisdiction, or, at least, was the proper court, to review the compensation of professionals involved with the administration of the estate.

The trial court granted appellee's motion for summary judgment, finding appellant lacked standing to sue appellee because he was not in privity with appellee. It also dismissed the claim for disgorgement, concluding that while appellant might have a right to pursue a claim for

disgorgement of excessive attorney's fees, it was more appropriate that such claim be made in the then- pending estate proceedings.

Appellant now challenges these findings and conclusions. This case presents a question of first impression in Florida, that being whether a successor personal representative of an estate may bring a cause of action for legal malpractice against an attorney hired by her or his predecessor to provide services necessary to the administration of the estate.

In reaching our decision to reverse the summary final judgment, we conclude we need not address the privity issue. Instead, our decision is informed by the plain meaning of the language of the relevant statutes in the Florida Probate Code, sections 733.601- 733.620, Florida Statutes. See *Petty v. Fla. Ins. Guar. Ass'n*, 80 So. 3d 313, 316 n. 2 (Fla. 2012); *Srygley v. Capital Plaza, Inc.*, 82 So.

3d 1211, 1212 (Fla. 1st DCA 2012); *In re A.G.*, 40 So. 3d 908 (Fla. 3d DCA 2010) (holding where the statute's language is clear and unambiguous, courts need not employ principles of statutory construction). Sections 733.601 through 733.620 set forth the powers, duties, and obligations of the personal representative as regards not only the estate, but an assemblage of other individuals related to the estate's administration, including its beneficiaries, creditors, contractors, accountants, and attorneys.

Section 733.602(1), Florida Statutes, prescribes the general duties of the personal representative by providing that the personal representative is a fiduciary who shall observe the standards of care applicable to trustees... [and] is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and [the Florida Probate Code] as expeditiously and efficiently as is consistent with the best interests of the estate.

To accommodate the personal representative's exercise of her or his duties, section 733.612, Florida Statutes, governs the transactions authorized by the personal representative, including the employment of an attorney. See § 733.612(19), Fla. Stat. Most significantly, section 733.614 addresses the "[p]owers and duties" of a successor personal representative: A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate as expeditiously as possible, but shall not exercise any power made personal to the personal representative named in the will without court approval.

5 Therefore, the powers granted to the original personal representative flow to the successor personal representative. Within this context, the Florida Probate Code expressly granted to Dana Ford, as personal representative of the estate of Deborah E. Irby, the power to engage appellee to represent her and to pay appellee from estate funds. See §§ 733.612(19) & 733.6171(1), Florida Statutes.

The Code also grants to the personal representative the power to prosecute lawsuits or proceedings for the protection of the estate and the benefit of interested parties. See § 733.612(20), Fla. Stat. Furthermore, Ford, as personal representative, had the duty to act within “the best interests of the estate” and in “the best interests of all interested parties, including creditors.” §§ 733.602 & 733.603, Fla. Stat. This means the personal representative is required by law to pursue assets and claims of the estate, with value, including those assets which are in the hands of a former personal representative or her or his agents.

See *Sessions v. Willard*, 172 So. 242, 245, 46 (Fla. 1937). Thus, there is no dispute that Ford, as the estate’s personal representative, had standing to bring suit against appellee for legal malpractice. Yet, by virtue of the plain language of section 733.614, we hold all of the power and rights Ford possessed, including the right to bring suit against appellee on behalf of the estate, likewise transferred to appellant as the successor personal representative.

In essence, appellant stepped into the shoes of Dana Ford when he became the successor personal representative. Consequently, the trial court erred when it entered summary judgment in favor of appellee, claiming appellant lacked standing. Appellant, as successor personal representative, has every right and duty under the Florida Probate Code to pursue legal action for malpractice against appellee on behalf of the estate.

Cf. *Onofrio v. Johnston & Sasser, P.A.*, 782 So. 2d 1019 (Fla. 5th DCA 2001). The cause is therefore remanded for further proceedings. Appellant’s remaining point concerns the trial court’s decision to dismiss his count for disgorgement of attorney’s fees against appellee.

The court ruled: “While [appellant] may have the right to pursue a claim for disgorgement of excessive fees allegedly charged by [appellee], it is more appropriate that such claim be made in the estate proceedings, which currently remain pending.” Section 733.6175(2), Florida Statutes, provides that “[c]ourt proceedings to determine the reasonable compensation of the personal representative or any person employed by the personal representative, if required, are a part of the estate administrative proceedings....” (Emphasis added.)

Accordingly, it has been held that “the Florida probate court has exclusive jurisdiction [over the matter of compensation] and is obligated to review estate fees upon the petition of a proper party.” In re *Winston*, 610 So. 2d 1323, 1325 (Fla. 4th DCA 1992).

The trial court, then, did not abuse its discretion in holding it was “more appropriate” for the disgorgement claim to be heard in the probate proceedings. Nonetheless, the trial court did not lack subject matter jurisdiction to consider the claim for disgorgement.

The “court” for purposes of the Florida Probate Code is defined generally as “the circuit court.” § 731.201, Fla. Stat. Any circuit court has “exclusive original jurisdiction” over “proceedings relating to the settlement of the estates of decedents and minors, the granting of letters

testamentary..., and other jurisdiction usually pertaining to courts of probate.” § 26.012(2)(b), Fla. Stat. In this respect, “every judge of the circuit court possesses the full jurisdiction of that court in his or her circuit and [] the various divisions of that court operate in multi- judge circuits for the convenience of the litigants and for the efficiency of the administration of the circuits’ judicial business.” *Maugeri v. Plourde*, 396 So.

2d 1215, 1217 (Fla. 3d DCA 1981) (holding, however, in the case before it, the clear language of section 744.387(3)(a), Florida Statutes (1977), mandated that “the only court having jurisdiction to approve the settlement of a minor's claim in a pending action is the court in which the action is pending”). See also *Fort v. Fort*, 951 So. 2d 1020, 1022 (Fla. 1st DCA 2007) (citing *Maugeri*, and also citing *In the Interest of Peterson*, 364 So.

2d 98, 99 (Fla. 4th DCA 1978), for the holding: “All circuit court judges have the same jurisdiction within their respective circuits.... The internal operation of the court system and the assignment of judges to various 8 divisions does not limit a particular judge's jurisdiction.”) (internal quotations omitted). Accord *Weaver v. Hotchkiss*, 972 So. 2d 1060, 1062 (Fla.

2d DCA 2008). Unlike the statutory language addressed in *Maugeri*, we do not read section 733.6175(2) as precluding a circuit court of general jurisdiction from hearing, in a related civil suit, the issue of compensation of a person who was employed by the personal representative of an estate as a part of the estate’s administration.

On remand, the trial court, in its discretion and for the convenience of the court and the parties, may hold a joint trial of all the claims if it is shown that a joint trial will not prejudice a party or cause inconvenience. See *Yost v. Am. Nat’l Bank*, 570 So. 2d 350, 352 (Fla. 1st DCA 1990). AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

BENTON and OSTERHAUS, JJ., CONCUR. 9