STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 03 MO 9
	)	
THE ESTATE OF LEROY HYER,	)	
	)	OPINION
DECEASED	)	
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas, Probate Division of Monroe County, Ohio Case No. 8427
JUDGMENT:	Affirmed.
APPEARANCES:	
For Rita Zesiger and Rose Hyer:	Atty. Jack J. Kegerl 157 East Main Street P.O. Box 248 St. Clairsville, Ohio 43950
For Rebecca Miracle:	Atty. James W. Peters 107 West Court Street Woodsfield, Ohio 43793
For Richard and Patty Hyer:	Atty. Paul F. Wenker Rendings, Fry, Kiely & Dennis Suite 900, 4th and Vine Tower Cincinnati, Ohio 45202

JUDGES:
Hon. Cheryl L. Waite

[Cite as *In re Hyer*, 2004-Ohio-5359.]

Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 27, 2004

WAITE, P.J.

{¶1} Appellants, Rita Hyer Zesiger and Rose Hyer, filed this interlocutory appeal from the Monroe County Probate Court's September 3, 2003, journal entry, which confirmed the sale of real estate by Appellee Rebecca Miracle ("Miracle").

{¶2} Leroy Hyer, decedent, died testate on May 14, 2000, and his will was admitted to probate court on September 22, 2000. Decedent named Appellants, two of his daughters, as joint executrixes in his will. (Last Will and Testament of Leroy Hyer, Item IV.)

{¶3} On September 22, 2000, Rita filed an application to relieve the estate from administration since the decedent's assets did not exceed the statutory limits. The probate court subsequently issued an order relieving the estate from administration and appointing Rita as Commissioner in order to execute all of the requisite conveyance documents within sixty days. (Oct. 16, 2000, Entry Relieving Estate from Administration.)

{¶4} Important for purposes of this matter, neither Rita nor Rose ever requested or received the requisite letters of authority appointing them as executrixes consistent with the decedent's will.

{¶5} On May 22, 2001, the probate court cited Rita for failing to file the Report of Distribution.

{¶6} Thereafter, Miracle, the decedent's other daughter, applied for authority to administer the estate in order to investigate whether assets were missing. On September 11, 2001, she was appointed by the Monroe County Probate Court as administrator with the will annexed, e.g., the administrator appointed to administer the estate if the named executor is either incapable of performing or unwilling to perform the duties.

{¶7} The September 11, 2001 entry, appointing Miracle states in part:

{¶8} "The Court therefore appoints applicant as such fiduciary, with the power conferred by law to fully administer decedent's estate. This entry of appointment constitutes the fiduciary's letters of authority. These letters are issued for the purpose of investigating if assets have been omitted from the estate." (Sept. 11, 2001, Entry Appointing Fiduciary; Letters of Authority.)

{¶9} Appellants now argue that the probate court only intended Miracle to be an administrator for the limited purpose of investigating the estate assets. However, Appellants did not object to Miracle's appointment as Administrator with the will annexed, and the appointing entry did not limit Miracle's duties to investigating assets. (Sept. 11, 2001, Entry Appointing Fiduciary; Letters of Authority.)

{¶10} Further, and consistent with an administrator's duties, Miracle filed an inventory and appraisal of the decedent's property alleged to be estate assets in January, 2002. Appellants filed exceptions and objections to the inventory and appraisal, and it has yet to be approved by the probate court.

{¶11} Thereafter, on February 12, 2003, Miracle filed a report of newly discovered assets, which identified two small parcels of real property. The newly

discovered parcels are apparently adjacent to the decedent's residence, which was previously sold to the decedent's only son.

{¶12} The probate court subsequently issued "orders to administer" approving the report of newly discovered assets and ordering Miracle, as administrator, to, "administer, account for, and distribute such assets in a like manner as if received prior to the filing of the original Inventory without being required to make an Inventory or Appraisement of the same." (February 13, 2003, Entry, Orders to Administer.)

{¶13} Miracle subsequently sold those parcels to her brother and sister-in-law by administrator's deed dated February 24, 2003. Miracle filed a motion to confirm the sale of real estate on June 3, 2003. Appellants filed supplemental objections to the sale of real property asserting first that Miracle lacked the authority to convey the property because she did not have the power of sale of the designated executrixes. Secondly, Appellants asserted that Miracle did not secure the requisite consent from the court to convey the property, and as such, they requested that the conveyance be set aside.

{¶14} Following a hearing on this issue and the parties' supplemental briefs, the probate court approved Miracle's motion to confirm the sale of real estate on September 3, 2003. Appellants appeal from this entry.

{¶15} As set forth in the trial court's entry, the question before it was, "whether the Administrator w.w.a. [with the will annexed] has the same power to sell the assets of the estate as is given to the Executor named in the Will." (Sept. 3, 2003, Journal Entry.)

{¶16} Based on the language repeatedly employed by the trial court as well as its decision approving the sale by Miracle, the trial court appointed Miracle as the administrator of the estate for all purposes, and not just as administrator for investigating estate assets as urged by Appellants. If the probate court had intended to appoint her as administrator simply for the limited purpose of investigating estate assets, then the court would not have generally and repeatedly referred to her as the administrator. Further, the court would not have directed her to, "administer, account for, and distribute such assets * * *." (February 13, 2003, Entry, Orders to Administer.) Thus, Appellants' assigned errors are examined based on the fact that Miracle is the administrator of the estate for all purposes.

{¶17} Appellants assert three assigned errors on appeal. Their first alleged error claims:

{¶18} "THE TRIAL COURT ERRED IN CONFIRMING THE SALE OF REAL ESTATE BY THE ADMINISTRATOR WITH THE WILL ANNEXED WHERE NO HEARING OR FINDING UPON THE HEARING (APPROVAL OR DISAPPROVAL) OF THE INVENTORY AND APPRAISEMENT HAS BEEN ENTERED ON THE COURT'S JOURNAL AS REQUIRED IN SECTION 2115.16 OHIO REVISED CODE."

{¶19} In this assigned error Appellants assert that the sale of the additional two parcels by Miracle to their brother and sister-in-law was invalid. Appellants claim that the report of newly discovered assets should have been filed as an amended inventory and appraisal and that all of the inventory should then have been subject to a hearing pursuant to R.C. §2115.16.

{¶20} However, the probate court's February 13, 2003, Entry, Orders to Administer authorizes Miracle, "to administer, account for, and distribute such assets in a like manner as if received prior to the filing of the original Inventory without being required to make an Inventory or Appraisement of the same." (February 13, 2003, Entry, Orders to Administer.)

{¶21} Further, Appellants rely on R.C. §2115.16, which provides that a probate court shall conduct a hearing on the inventory and appraisal. Appellants assert that the newly discovered assets should have been included in the inventory or in an amended inventory, and that the assets should have been subject to a R.C. §2115.16 hearing.

{¶22} R.C. §2113.69 provides:

{¶23} "When newly discovered assets come into the hands of an executor or administrator after the filing of the original inventory required by section 2115.02 of the Revised Code, he shall administer, account for, and distribute such assets in like manner as if received prior to the filing of such inventory. Within thirty days, he shall file in the probate court an itemized report of such assets, with an estimate of the value thereof, *but shall not be required to make an inventory or appraisement of the same unless ordered to do so by the court*, either upon its own motion or upon the application of any interested party." (Emphasis added.)

{¶24} Since the probate court appointed Miracle as the administrator of the estate, and Miracle had already filed the inventory and appraisal, the probate court's decision was appropriate under R.C. §2113.69.

{¶25} Miracle's and the probate court's actions were consistent with R.C. §2113.69. The probate court's September 3, 2003, decision fails to reference R.C. §2113.69. Notwithstanding, Appellants' first assigned error lacks merit and is overruled.

{¶26} Appellants' second claimed error asserts:

{¶27} "THE TRIAL COURT ERRED IN CONFIRMING THE SALE OF REAL PROPERTY HEREIN BY THE ALLEGED FIDUCIARY WHO HAS FAILED TO PROPERLY QUALIFY AS A FIDUCIARY WITH THE POSTING OF A BOND AS REQUIRED IN SECTION 2109.04 OHIO REVISED CODE."

{¶28} R.C. §2109.04 provides:

{¶29} "(A)(1) Unless otherwise provided by law, every fiduciary, prior to the issuance of his letters as provided by section 2109.02 of the Revised Code, shall file in the probate court in which the letters are to be issued a bond with a penal sum in such amount as may be fixed by the court, but in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary. * * *

{¶30} "(2) Except as otherwise provided in this division, if the instrument creating the trust dispenses with the giving of a bond, the court shall appoint a fiduciary without bond, unless the court is of the opinion that the interest of the trust demands it. If the court is of that opinion, it may require bond to be given in any amount it fixes. * * *.

{¶31} "* * *

{¶32} "(C) When letters are granted without bond, at any later period on its own motion or upon the application of any party interested, the court may require bond to be given in such amount as may be fixed by the court. On failure to give such bond, the defaulting fiduciary shall be removed.

{¶33} "No instrument authorizing a fiduciary whom it names to serve without bond shall be construed to relieve a successor fiduciary from the necessity of giving bond, unless the instrument clearly evidences such intention.

{¶34} "The court by which a fiduciary is appointed may reduce the amount of the bond of such fiduciary at any time for good cause shown."

{¶35} It is undisputed that Miracle in the instant cause never secured a bond as administrator. Further, while the decedent's will clearly does away with the bond requirement for the named joint executrixes, it does not eliminate the bond requirement for any other or subsequent estate fiduciaries. Thus, pursuant to R.C. §2109.04(C), the court should not construe the will to eliminate an additional fiduciary's bond requirement just because it was not required of named executrixes. Thus, Miracle should have been required to secure a bond, "in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary[,]" unless otherwise provided by law. R.C. §2109.04(A)(1).

{¶36} The purpose of requiring bonds is to ensure against fiduciary misconduct or failures. *In re Bonner* (June 25, 1998), 8th Dist. No. 73506, 3.

{¶37} Appellants fail to provide any law in support of their assertion that Miracle's actions in selling the two parcels of real estate while she was not bonded

should be deemed invalid. While Miracle should have obtained a bond as an estate administrator, there are no allegations of malfeasance against Miracle.

{¶38} Further, the two parcels were appraised by a court-approved appraiser and sold at their appraised values. (September 3, 2003, Journal Entry, p. 2.)

{¶39} In a comparable case, the Ohio Supreme Court held that a probate court's order for sale of real property by a guardian who did not secure the statutorily imposed bond was erroneous, but that the sale was not void. *Mauarr v. Parrish* (1875), 26 Ohio St. 636; *Arrowsmith v. Harmoning* (1884), 42 Ohio St. 254. The guardian in *Mauarr* had apparently originally been bonded, but was required to secure new bonds prior to the sale of real estate. Id. at 638.

{¶40} The trial court's failure to require Miracle to be bonded as administrator was in error, but it does not invalidate or void the court-approved sale at the appraised values. There are no allegations of malfeasance. Thus, this assigned error is overruled.

{¶41} Appellant's third claimed error asserts:

{¶42} "THE TRIAL COURT ERRED IN APPROVING THE SALE OF REAL PROPERTY HEREIN BY THE ADMINISTRATOR WITH THE WILL ANNEXED WHO LACKED AUTHORITY TOSELL [sic] REAL PROPERTY AND FAILED TO COMPLY WITH SECTION 2127.011 OHIO REVISED CODE ENTITLED, 'CONDITIONS FOR DISPOSAL OF REAL ESTATE.'"

{¶43} This assigned error consists of two arguments. First, Appellants assert that the trial court erred in finding that the power of sale authorized in the decedent's will for the named executrixes also authorizes a subsequent court-appointed

administrator to sell estate real property. Appellants also aver that the sale of real property by Miracle required the written consent of all the decedent's devisees under R.C. §2127.011.

{¶44} The probate court's September 3, 2003, Journal Entry held that the administrator with the will annexed has the same powers to sell the estate assets as those granted to the named executor in the will.

{¶45} In making its decision, the court relied on two court of appeals decisions as well as R.C. §2113.39, which provides:

{¶46} "If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him. A power to sell authorizes a sale for any purpose deemed by such executor, administrator, or testamentary trustee to be for the best interest of the estate, unless the power is expressly limited by such will."

{¶47} Thus, in order for the administrator to have had the power of sale, the property's sale must have first been authorized in the will.

{¶48} While the decedent's will fails to specifically devise these two parcels, it does generally devise the residue and remainder of his real and personal property to his four children, absolutely and in fee simple. (Last Will and Testament of Leroy Hyer, Item III.) Thereafter, the will authorizes the named executrixes to sell all or part of the estate as deemed proper without a court order. (Last Will and Testament of Leroy Hyer, Item IV.)

{¶49} Since this authority is extended in the will to the executrixes, it follows that the administrator likewise has the power of sale pursuant to R.C. §2113.39. At no point did Appellants properly make application to execute the will. Because of this failure, we see no error in the trial court's naming of an administrator. Miracle was properly standing in the place of the executrixes. Neither R.C. §2113.39 nor the decedent's will limits a subsequent executor or court-appointed administrator's power of sale.

{¶50} The probate court, in its journal entry, also relies on *Holly v. Phares* (1936), 32 N.E.2d 64, 22 Ohio Law Abs. 162, in which the First District Court of Appeals concluded that the administrator with the will annexed has the same authority to sell the estate assets as the named executor.

{¶51} The second case relied upon by the probate court is *Hoffman v. Hoffman* (1939), 61 Ohio App. 371. In *Hoffman* the named executor was appointed by the probate court; however, he was thereafter found incompetent and removed. Id. at 372. Thereafter, the court appointed an administrator de bonis non with the will annexed. *Hoffman* concluded that "the administrator de bonis non with the will annexed retains and has the power to act under the will [and] conclude the sale * * *." Id. at 375.

{¶52} Further, a court, in construing a will, "should make every effort to give effect to every provision of the will and to reconcile any apparent inconsistencies." *Holmes v. Hrobon* (1951), 93 Ohio App. 1, 16, 50 O.O. 178, 103 N.E.2d 845. Thus, in the instant case, the broad and full power of sale extended to the executrixes should

be upheld. This full power of sale, in turn, authorizes the same by a properly named administrator. R.C. §2113.39.

{¶53} R.C. §2113.39 authorizes an administrator or an executor to carry out the actions authorized in the will without a court order. Since Miracle was acting consistent with the decedent's will and R.C. §2113.39, Appellants' first part of this assignment of error lacks merit and is overruled.

{¶54} Appellants next assert that sale of the two parcels must have been approved by all of the devisees pursuant to R.C. §2127.011. However, R.C. §2127.01, sale of lands by executors, administrators, and guardians, provides:

{¶55} "All proceedings for the sale of lands by executors, administrators, and guardians shall be in accordance with section 2127.01 to 2127.43, inclusive, of the Revised Code, *except where the executor has testamentary power of sale, and in that case the executor may proceed under such sections or under the will*." (Emphasis added.)

{¶56} It is undisputed that Miracle did not secure the consent of the other devisees, i.e., Appellants, prior to the sale at issue herein.

{¶57} R.C. §2127.011 provides:

{¶58} "(A) In addition to the other methods provided by law or in the will and unless expressly prohibited by the will, an executor or administrator may sell at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose of any parcel of real estate belonging to the estate at any time at prices and upon terms as are consistent with this section and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:

{¶59} "(1) The surviving spouse, all of the legatees and devisees in the case of testacy, and all of the heirs in the case of intestacy, give written consent to a power of sale for a particular parcel of real estate or to a power of sale for all the real estate belonging to the estate. Each consent to a power of sale provided for in this section shall be filed in the probate court.

{¶60} "(2) Any sale under a power of sale authorized pursuant to this section shall be made at a price of at least eighty per cent of the appraised value, as set forth in an approved inventory."

{¶61} Reading R.C. §2127.011(A)(1) alone, it appears as though the written consent of the devisees is required in advance of any sale by the administrator. However, R.C. §2127.01 only mandates compliance with the R.C. §2127.011(A)(1) consent requirement where the executor does not have the testamentary power of sale. The executrixes were granted a full power of sale herein. (Last Will and Testament of Leroy Hyer, Item III.)

{¶62} Based on the extension of the power of sale to the properly appointed administrator and R.C. §2127.01, Appellants' third assigned error lacks merit. R.C. §2127.011(A)(1)'s consent requirement is inapplicable. Thus, Appellants' third assigned error is also overruled.

{¶63} All of Appellants' assigned errors lack merit, and the probate court's journal entry confirming the sale of the two parcels is hereby affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.

[Cite as *In re Hyer*, 2004-Ohio-5359.]