

[Cite as *In re Britt*, 2015-Ohio-1605.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF THE ESTATE OF )

WILLIAM E. BRITT )

CASE NO. 14 CO 20

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Probate Court of  
Columbiana County, Ohio  
Case No. 2012ES00199

JUDGMENT:

Affirmed

APPEARANCES:

For-Appellants  
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Cathleen Britt

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For Appellee  
Beverly Britt

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JUDGES:

Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: April 22, 2015

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DONOFRIO, P.J.

{¶1} Plaintiffs-appellants, Christine Lerussi and Cathleen Britt, appeal from a Columbiana County Probate Court decision dismissing their complaint, which contested the last will and testament of William E. Britt.

{¶2} William E. Britt died on June 3, 2012. He left his wife, appellee Beverly Britt. He also left seven children and at least five grandchildren. Beverly is not the mother of any of William's children. William also left four stepchildren (Beverly's children). William's children are Christine Lerussi and Cathleen Britt (appellants), Colleen Britt, Patrick Britt, Michael Britt, Christopher Britt, and William E. Britt, Jr. William's known grandchildren are Janel Britt, Leanna Britt, and Timothy Britt, Jr. (the children of William's son Timothy Britt who predeceased him) and Shannon Britt and Erica Griffin (the children of Patrick Britt who died shortly after William).

{¶3} Christine filed an application for authority to administer her father's estate on July 17, 2012. A week later, Beverly filed an application to probate William's will and attached the will. Beverly also filed an application for authority to administer William's estate.

{¶4} Christine then withdrew her application for authority to administer the estate. The court granted Beverly's application and named her the executrix of William's estate. It also admitted William's will to probate.

{¶5} On November 8, 2012, appellants filed a will contest complaint naming Beverly, Beverly's children (Patrick Burcham, Stanley Paul Jackson, Jr., Candace Taylor, and Paula Schell), and the Britt descendants as defendants. They alleged that William's will, which the court admitted into probate, was not actually his will because at the time the instrument was purportedly executed, William lacked testamentary capacity. They also attached a copy of a prenuptial agreement executed by William and Beverly in September 2007, which they alleged controlled Beverly's rights.

{¶6} Appellants attempted service on all defendants. Notice of failure of service was returned as to Timothy Britt, Jr., Leanna Britt, and the heirs and unknown heirs of Patrick Britt.

{¶7} The court held several pretrials between January 2013, and January 2014. After the January 31, 2014 pretrial, the court put on a judgment entry finding that notices of failure of service on Timothy Britt, Jr., the heirs and unknown heirs of Patrick Britt, and Leanna Britt were forwarded to appellants' counsel in November 2012. It stated that as of this date, the court had not received any further instructions to perfect service on these defendants. The court then put on an order that appellants' counsel provide the court with further instructions to perfect service on these defendants within 14 days.

{¶8} On February 14, 2014, appellants' counsel filed a notice of death with the court stating that Timothy Britt, Jr. was deceased and that he left two children, Janel and Leanna. The notice also stated that Patrick Britt was also deceased and that he left a spouse (Mary Britt nka Mary Staggers), and two daughters Shannon Britt (a minor) and Erica Griffin. Counsel then filed a praecipe for service requesting service on these individuals. Appellants also requested a continuance of the scheduled trial to allow time to complete service and allow for any answers.

{¶9} On February 26, 2014, the trial court conducted a "private review" of the case. It stated that as of that date, service had not been perfected on Erica Griffin, Leanna Britt, or Janel Britt. It also stated that appellants never provided it with an address for service upon Timothy Britt, Jr. The court noted that pursuant to Civ.R. 3, a civil action is commenced by filing a complaint and obtaining service within one year on the named defendant. It found that appellants had failed to obtain service on multiple defendants in the 16 months since filing their complaint. It also noted that pursuant to Civ.R. 4(E), if service is not perfected within six months of filing the complaint, the court may dismiss the complaint as to any unserved defendants. And the court stated that the unserved defendants in this case were necessary and indispensable parties in the prosecution of a will contest. Finally, the court pointed out that it had received filings seeking to dismiss the will contest for appellants' failure to timely answer discovery and failure to comply with the disclosure of witnesses. The court opined "there has been a lapse of reasonable and due diligence" by

appellants. Therefore, the court dismissed the will contest, acting “on its own initiative and pursuant to the Court’s duty to police the proceedings before the Court for compliance with the cited Rules of Civil Procedure.”

{¶10} Appellants filed a timely notice of appeal on March 21, 2014.

{¶11} Appellants raise two assignments of error, the first of which states:

THE DISMISSAL OF PLAINTIFFS’ WILL CONTEST COMPLAINT UNDER RULE 3 AND RULE 4(E) OF THE OHIO RULES OF PROCEDURE IS CONTRARY TO LAW.

{¶12} Persons who are necessary parties to a will contest action include: (1) anyone designated in a will to receive a testamentary disposition of real or personal property; (2) heirs who would take property pursuant to R.C. 2105.06 had the testator died intestate; and (3) the executor or the administrator. R.C. 2107.73(A)(B)(C).

{¶13} Appellants argue that once one of the interested and necessary parties described in each class set forth in R.C. 2107.73 is properly served with the will contest, the action is commenced as to each defendant of the class and service upon the remaining members of the class can be completed sometime thereafter.

{¶14} Appellants rely on *Draher v. Walters*, 130 Ohio St. 92, 196 N.E. 884 (1935), for this proposition. The *Draher* Court held:

Service of summons upon one of the legatee-devisee defendants, in an action to contest the validity of a will, is to be deemed commencement of the action as to each of the defendants of that class and also the executor. Actual service of summons can thereafter be made upon the remainder of the defendants of that class.

*Id.* at the syllabus. In reaching this holding, the Court was considering Section 11230 of the General Code, which provided: “An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him or on codefendant who is a joint contractor, or otherwise

united in interest with him.”

{¶15} The *Draher* Court also held that service on one of the legatee-devisees constituted service on the executor. *Id.* at 96. This portion of the Court’s holding was expressly overruled in *Peters v. Moore*, 154 Ohio St. 177, 93 N.E. 2d 683 (1953), at paragraph five of the syllabus, where the Court held that the executor must be made a party and served.

{¶16} Appellants argue that their will contest complies with the “united in interest” doctrine created in *Draher*. They point out that they perfected service on members of each class of necessary parties.

{¶17} Civ.R. 3(A) provides that “[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant.”

{¶18} Appellants point out that Civ.R. 3(A) provides that an action is commenced if service is obtained on “a” named defendant within one year of filing. Therefore, they argue, service on one person in each class of necessary parties should be deemed as commencement of the action as to each defendant of that class.

{¶19} A trial court’s decision to dismiss for lack of subject-matter jurisdiction raises questions of law; thus, an appellate court reviews the decision de novo. *Morway v. Durkin*, 181 Ohio App.3d 195, 2009-Ohio-932, 908 N.E.2d 510, ¶18 (7th Dist.).

{¶20} In this case, the trial court stated appellants failed to serve Erica Griffin, Leanna Britt, and Janel Britt. Because appellants failed to obtain service on these necessary and indispensable parties, the trial court dismissed the complaint.

{¶21} The court also stated that appellants failed to provide the court with an address for service upon Timothy Britt, Jr. However, appellants filed a Notice/Suggestion of Death on February 14, 2014, putting the court on notice that Timothy Britt, Jr. died on February 20, 2005, and that he left two children Leanna Britt and Janel Britt. Thus, any issue concerning service on Timothy was resolved.

{¶22} In this assignment of error, appellants rely solely on *Draher's* “united in interest” doctrine. In addressing whether the “united in interest” doctrine set out in *Draher*, supra, was still viable, the Tenth District observed:

The ‘united in interest’ doctrine was predicated upon an interpretation of G.C. 11230 (later R.C. 2305.17). R.C. 2305.17 was amended in 1965 (131 Ohio Laws 646) and the language upon which the ‘united in interest’ doctrine was predicated was deleted from the section. The civil rules contain no provision similar to that formerly contained in R.C. 2305.17 upon which the ‘united in interest’ doctrine was predicated. Accordingly, it is doubtful that the ‘united in interest’ doctrine, as such, is still a viable doctrine.

*Hirsch v. Hirsch*, 32 Ohio App. 2d 200, 209, 289 N.E.2d 386 (10th Dist.1972).

{¶23} Later, the Eighth District explained:

[T]he ‘united in interest’ doctrine in will contest actions appears to have been completely overruled, first by *Peters v. Moore* (1950), 154 Ohio St. 177, 180-181, 93 N.E.2d 683, which required that the executor specifically be made a party and served, and later by *Gravier v. Gluth* (1955), 163 Ohio St. 232, 239-240, 126 N.E.2d 332, and *Fletcher v. First Nat'l Bank of Zanesville* (1958), 167 Ohio St. 211, 214-215, 147 N.E.2d 621 which required that all necessary parties under the statute (R.C. 2741.02) must be named and made parties within the six month limitation period (R.C. 2741.09).

*Holland v. Carlson*, 40 Ohio App. 2d 325, 328, 319 N.E.2d 362 (8th Dist.1974).

{¶24} More recently, the Tenth District was faced with the united in interest doctrine in *Crosby-Edwards v. Morris*, 10th Dist. No. 09AP-152, 2009-Ohio-2994. In that case, the appellant, like the appellants here, relied on *Draher*, 130 Ohio St. 92, for the proposition that service upon one of the legatee-devisee defendants in a will

contest is sufficient to commence the action as to each of the defendants of that class. *Id.* at ¶13. The Tenth District, cited its earlier decision in *Hirsch*, *supra*, and its holding in *Hall v. Ohio Natl. Bank*, 10th Dist. No. 77AP-330 (Oct. 4, 1977), that in a will contest, the failure to serve one of the necessary parties constitutes a failure to commence the action within the prescribed time limits and results in a lack of jurisdiction. *Id.* at ¶¶11, 14. The court refused to apply the united in interest doctrine based on *Hirsch*, *Hall*, and the express language of the applicable statutes. *Id.* at ¶14.

{¶25} Based on the case law over the years and the amendment to R.C. 2305.17, *Draher's* united in interest doctrine upon which appellants rely is no longer good law. Pursuant to Civ.R. 3(A) and R.C. 2107.73(A)(B)(C), appellants were required to perfect service on all necessary and indispensable parties to the will contest.

{¶26} Accordingly, appellants' first assignment of error is without merit.

{¶27} Appellants' second assignment of error states:

THE TRIAL COURT ERRED WENT [sic.] IF [sic.] FAILED TO GIVE NOTICE AND AN OPPORTUNITY TO BE HEARD TO PLAINTIFFS BEFORE IT SUA SPONTE DISMISSED THE PLAINTIFFS' COMPLAINT FOR LACK OF SERVICE.

{¶28} Here appellants contend the trial court did not give them any notice of its intent to dismiss their complaint. Therefore, they assert, they had no opportunity to address the issues on which the court based its dismissal. Appellants point out that the Civil Rules, upon which the court relied in dismissing their action, do not provide for sua sponte dismissal. They also note the court's judgment entry states that they had not requested an extension of time for service. But they point out that less than a month before dismissing the action, the court granted them 14 days to file additional service instructions. And just two weeks before the court dismissed the action, they filed a motion to continue the trial and a request for service on those

parties the court stated they needed to join. Appellants urge the trial court erred in failing to provide them with notice and an opportunity to be heard before dismissing their complaint.

**{¶29}** Civ.R. 4(E) provides in pertinent part:

If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

**{¶30}** And Civ.R. 41(B)(1) provides: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim."

**{¶31}** Civ.R. 12(H)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action." Civ.R. 12(H)(3) does not require notice before dismissal as do Civ.R. 4(E) and Civ.R. 41(B)(1).

**{¶32}** In this case, appellant failed to serve several of William's heirs, who were necessary parties to the will contest pursuant to R.C. 2107.73, within the one-year time period specified in Civ.R. 3(A). The trial court did not have jurisdiction because several necessary parties were not joined and served. Therefore, the trial court was able to sua sponte dismiss the action pursuant to Civ.R. 12(H)(3).

**{¶33}** Accordingly, appellants' second assignment of error is without merit.

{¶34} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.