[Cite as *Bogar v. Baker*, 2019-Ohio-1762.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

CHARLES A. BOGAR,

Plaintiff-Appellant,

v.

MARK BAKER ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0041

Civil Appeal from the
Court of Common Pleas, Probate Division of Mahoning County, Ohio
Case No. 2015 CI 00041

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Adam Fried, and *Atty. Timothy Gallagher*, Reminger Co., LPA, 101 West Prospect Avenue, Suite 1400, Cleveland, Ohio 44115, for Plaintiff-Appellant, and

Atty. David Powers, Stacey & Powers Co., LPA, 33 Pittsburgh Street., P.O. Box 255, Columbiana, Ohio 44408, for Mark Baker, Defendant-Appellee.

Dated:
April 29, 2019

Donofrio, J.

{¶1} Plaintiff-appellant, Charles Bogar, appeals the judgment of the Mahoning County Common Pleas Court, Probate Division, that a specific bequest in a will does not include farm equipment and vehicles.

{¶2} On June 20, 2014, Thomas Bogar died testate. Thomas's will has only two bequests: one specific and one residuary. The specific bequest reads, in its entirety: "I give, devise, and bequeath to my brother, CHARLES A. BOGAR, if he shall survive me, the real estate at 13300 Diagonal Road, Salem, Ohio, together with all contents of said real estate, if owned by me at the time of my death." The residuary bequest left the remainder of Thomas's property to defendant-appellees, Abraham Alexander, Benjamin Alexander, Brandon Beeson, Susan Bogar, Jennifer Bogar (now Jennifer Walker), and Mark Baker. Appellee Baker is also the executor of Thomas's estate.

{¶3} During the administration of Thomas's will, a dispute arose between appellant and Baker concerning the specific bequest in the will. Appellant contended that the specific bequest entitled him to all physical items located on the real estate, including farm equipment. Baker contended that Thomas's specific bequest pertained only to the contents of the residential house on the property such as family heirlooms, valuables, and household goods. Specifically, the parties disputed who inherited farm equipment and vehicles on the property. The parties agreed that appellant is entitled to the real property.

{¶4} In lieu of an evidentiary hearing, the parties submitted a stipulation of facts to the probate court for adjudication. The probate court agreed with Baker that the specific bequest did not include farm equipment or vehicles.

{¶5} Appellant appealed to this court arguing that the probate court's judgment was in error because the plain language of Thomas's will was not followed. We reversed the probate court's judgment finding the phrase "contents of said real estate" in the specific bequest of the will was a latent ambiguity. *Bogar v. Baker*, 7th Dist. No. 16 MA 0138, 2017-Ohio-7766, ¶ 24-27. We remanded the matter for the probate court to review extrinsic evidence to determine Thomas's intent of the phrase "contents of said real estate." *Id.* at ¶ 27.

{¶6} On remand, the probate court held an evidentiary hearing where appellant and Atty. Frederic Naragon testified. Appellant is a farmer and has been for over 40 years. (Tr. 5-6). Appellant testified that he and Thomas kept in touch and talked almost every Sunday. (Tr. 15). Thomas wanted to transform the property from a livestock farm to a hay and grain farm. (Tr. 16). But appellant did not have any conversations with Thomas about how Thomas wanted his property distributed after his death. (Tr. 17).

{¶7} Atty. Naragon drafted Thomas's will. Atty. Naragon was also Baker's counsel at the evidentiary hearing. Atty. Naragon testified that Thomas's intention was for appellant to have the real estate at 13300 Diagonal Road. (Tr. 36-38). As for the word "contents," Atty. Naragon testified that Thomas wanted appellant to have "the items in the home that were family things like pictures and books and heirlooms[.]" (Tr. 38). Atty. Naragon testified that Thomas did not consider the farm equipment and vehicles to be part of the contents of the real estate. (Tr. 38-39). Instead, Atty. Nargon testified that Thomas wanted the farm equipment and vehicles to be part of the residuary to his other beneficiaries. (Tr. 38-39).

{¶8} On April 2, 2018, the probate court awarded appellant the real estate and the contents of the main house on the property only. The trial court awarded appellees all other tangible and intangible personal property, which included the farm equipment. Appellant timely filed this appeal on April 2, 2018. Appellant now raises two assignments of error.

{¶9} Because the resolution of appellant's second assignment of error affects his first assignment of error, we will address appellant's assignments of error out of order. Appellant's second assignment of error states:

> THE PROBATE COURT ERRED BY CONSIDERING THE TESTIMONY OF FREDERIC NARAGON BECAUSE ATTORNEY NARAGON HAD A CLEAR CONFLICT OF INTEREST AND WAS ENGAGING IN ADVOCACY.

{¶10} Appellant argues that it was inappropriate for the probate court to consider testimony from Atty. Naragon for two reasons. First, appellant argues that the probate court erred when it did not administer Atty. Naragon an oath prior to testifying. Second,

appellant argues that Atty. Naragon should not have been permitted to testify because he was Baker's counsel in this matter.

{¶11} Addressing the probate court not administering Atty. Naragon an oath, appellant made no objection to the lack of an oath. "[A] party may not, upon appeal, raise a claim that the oath of a witness was omitted or defective, unless objection thereto was raised at trial." *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Standards and Bldg. Appeals*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Because appellant made no objection with the probate court, this argument is waived. Moreover, "[a]n attorney is an officer of the court and is always under oath when speaking to matters within his personal knowledge[.]" *State v. Ayers*, 8th Dist. No. 79134, 2002-Ohio-4773, ¶ 116. Thus, Atty. Naragon was under oath when he testified to the court.

{¶12} As for Atty. Naragon being permitted to testify, appellant argues that it was improper because Atty. Naragon's testimony created a conflict of interest. Atty. Naragon drafted Thomas's will. (Tr. 35-36). In this proceeding, Atty. Naragon represented Baker who was the executor of Thomas's estate as well as a residuary beneficiary under the will. Appellant argues that if Atty. Naragon's testimony was detrimental in any way to Baker, his testimony would have violated the rules of professional conduct.

{¶13} In support of this argument, appellant cites the Eleventh District's decision in *Byron v. Carlin*, 11th Dist. No. 2000-L-169, 2001-Ohio-8716. But *Byron* is distinguishable because the main issue was the presumption of undue influence when an attorney who helped draft the will was also a beneficiary under the will. *Id.* at 1. In this case, Naragon is not a beneficiary under Thomas's will.

{¶14} The issue of whether an attorney may testify as a witness when that attorney represents a party in the same action was answered by the Ohio Supreme Court. In *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 510 N.E.2d 379 (1987), Albert Nozik, Mentor Lagoons' counsel, sought to testify at trial. *Id.* at 256. The trial court did not allow Nozik to testify and continued the trial. *Id.* The court of appeals reversed the trial court and held that Nozik should have been allowed to testify. *Id.* at 257.

{¶15} The Ohio Supreme Court affirmed the court of appeals and held that neither the Ohio nor the Federal Rules of Evidence barred an attorney from testifying on behalf of his own client. *Id.* at 259. The Court then developed a process governing when counsel

for a party may testify as a witness. First, the court determines the admissibility of counsel's testimony. *Id.* at 260. Second, if the testimony is admissible, the testifying attorney, opposing counsel, or the court sua sponte are to make a motion to have the testifying attorney disqualified or withdrawn from the case. *Id.* Third, the court determines if any exceptions to the Rules of Professional Conduct apply which would allow the attorney to testify. *Id.*

{¶16} In this case, neither party disputed the admissibility of Atty. Naragon's testimony. As for a motion to disqualify, neither appellant, Atty. Naragon, nor the probate court made such a motion. In fact, appellant was the one who called Atty. Naragon to testify at the evidentiary hearing. (Tr. 32-33). Because appellant did not move to disqualify Atty. Naragon, the probate court did not err in allowing him to testify

{¶17} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶18} Appellant's first assignment of error states:

> THE PROBATE COURT ERRED BY CONSTRUING THE THOMAS'S WILL IN CONTRADICTION TO THE PLAIN LANGUAGE USED WITHIN THE WILL.

{¶19} Appellant argues that the trial court's ruling that "contents of said real estate" is limited to the contents of the main residence of the property goes against the expressed intention of Thomas's will.

{¶20} In our prior ruling, we found the phrase "contents of said real estate" in the specific bequest to be a latent ambiguity. *Bogar*, 2017-Ohio-7766 at ¶ 25-26. We remanded the matter to allow the trial court to consider extrinsic evidence in order to resolve the latent ambiguity. *Id.* at ¶ 27.

{¶21} "It is well settled that the interpretation of wills is a question of law, and, thus, when determining a testator's intent and the terms of her testamentary trust, we apply a de novo standard of review." *Vaughn v. Huntington Natl. Bank Tr. Div.*, 5th Dist. No. 2008 AP 03 0023, 2009-Ohio-598, ¶ 19, citing *Summers v. Summers*, 121 Ohio App.3d 263, 267, 699 N.E.2d 958 (1997) citing *McCulloch v. Yost*, 148 Ohio St. 675, 677, 76 N.E.2d 707 (1947).

{¶22} Appellant and Atty. Naragon were the only witnesses to testify. Appellant testified that he and Thomas talked almost every Sunday. (Tr. 15). Thomas wanted to transform his property from a livestock farm to a hay and grain farm. (Tr. 16). But appellant did not have any conversations with Thomas about how Thomas wanted his property distributed after his death. (Tr. 17).

{¶23} Atty. Naragon testified that Thomas intended appellant to have "the items in the home that were family things like pictures and books and heirlooms * * *." (Tr. 38). He also testified that Thomas did not consider farm equipment and vehicles to be "contents" of the real estate. (Tr. 38-39). Atty. Naragon stated Thomas wanted the farm equipment and vehicles to be a part of the residuary. (Tr. 38-39).

{¶24} But appellant argues that the farm equipment logically should be considered "contents of said real estate." Appellant is a farmer and has been for over 40 years. (Tr. 5-6). Thomas was trying to transform the farm from a livestock operation into a hay and grain operation. (Tr. 16-17). Thomas purchased a new tractor in 2005 to help him farm the land. (Tr. 25). Appellant argues that these facts, coupled with the fact that Thomas's intention was for the real estate (a farm) to transfer to appellant (a farmer) indicates that the farm equipment should have also been transferred to him.

{¶25} Appellant's argument does not address the latent ambiguity of "contents of said real estate" in Thomas's will. Thomas's usage of the farm equipment does not aid us in determining Thomas's intent. But Atty. Naragon's testimony that Thomas did not intend for "contents of said real estate" to include the farm equipment and vehicles does resolve the latent ambiguity.

{¶26} Appellant also argues that because Atty. Naragon represents Baker, his testimony is self-serving and should not be considered. In support of this argument, appellant cites this court's decision in *Ochsenbine v. Cadiz*, 166 Ohio App.3d 719, 2005-Ohio-6781, 853 N.E.2d 314 (7th Dist.) In *Ochsenbine*, we held that the non-moving party in a summary judgment filing may not solely rely on self-serving affidavits. *Id.* at ¶ 25. Appellant also cites several cases where self-serving testimony was not persuasive in will contest cases where undue influence was an issue. See *Gothhardt v. Candle*, 131 Ohio App.3d 831, 723 N.E.2d 1144 (7th Dist.1999), *Rae v. Geir*, 2d Dist. No. 1393, 1996 WL

531591 (Sept. 20, 1996), *Fields v. Brackney*, 2d Dist. No. 23852, 2011-Ohio-1128, *Bayes v. Dornan*, 2d Dist. No. 2014-CA-129, 2015-Ohio-3053.

{¶27} All of the cases appellant cites are distinguishable. *Ochsenbine* is distinguishable because it concerned a self-serving affidavit in a response to a summary judgment motion. The probate court in this case entered judgment after an evidentiary hearing. *Gothhardt*, *Rae*, *Fields*, and *Bayes* are distinguishable because they concerned a claim of undue influence. In this case, the there is no claim of undue influence. Thus, appellant's argument that the probate court should not have considered Atty. Naragon's testimony is meritless.

{¶28} Accordingly, appellant's first assignment of error lacks merit and is overruled.

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

Waite, P. J., concurs.
Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Probate Division of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.