[Cite as *In re Estate of Amoroso*, 2015-Ohio-3352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102484

IN RE: ESTATE OF DOLORES AMOROSO

[Appeal By Lina DiLallo]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Court Division
Case No. 2014 EST 199140

BEFORE: Blackmon, J., Jones, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 20, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Lina DiLallo ("DiLallo") appeals the probate court's denial of her application to be the administrator of the estate of Dolores Amoroso and assigns the following two errors for our review:

> I. The trial court erred in rejecting the appellant's application for appointment to administer estate; the hearing in the probate court was mishandled.
>
> II. The trial court erred in failing to find that appellant has priority to serve as fiduciary.

{¶2} After reviewing the record and relevant law, we affirm the probate court's decision. The apposite facts follow.

{¶3} Dolores Amoroso ("Amoroso") passed away on May 6, 2014. DiLallo is her niece and applied to be the administrator of Amoroso's estate pursuant to R.C. 2113.05. DiLallo was not named as a beneficiary in Amoroso's will. Florine Silvaggio ("Silvaggio"), Amoroso's power of attorney, who was also Amoroso's husband's cousin, also applied to be named the administrator.[1] A hearing was conducted on the matter before a magistrate where the following evidence was presented.

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[1]Silvaggio filed an appellee's brief in support of the probate court's adoption of the magistrate's decision requiring the appointment of an independent administrator. Silvaggio does not file a cross-appeal regarding the court's denial of her application. Therefore, because Silvaggio is not a party to the probate case, next of kin, or beneficiary under the will, she has no standing in this appeal because she has no present interest in Amoroso's estate. *In re Estate of Jones*, 4th Dist.

{¶4} Amoroso left no surviving spouse or children. She is survived by her sister, Angelina Amoroso, and nieces, Carmelina Marinelli, Antonietta Marinelli, Santina Amoroso, and DiLallo.

{¶5} Amoroso's 2005 Last Will and Testament was probated on July 16, 2014. Amoroso named her husband, Manilo Amoroso, a.k.a. Tony ("Tony"), to be her executor, however he predeceased her by six months. No alternate was named in the will to succeed Tony. As a result, DiLallo and Silvaggio both filed applications to be appointed administrator.

{¶6} Silvaggio testified that she was Tony's cousin and that Tony appointed her as his power of attorney when he was placed in a rehabilitation home for physical therapy. She was also appointed as Amoroso's power of attorney, who was in a nursing home. According to Silvaggio, the couple had $800,000 in their bank account when she became power of attorney. At the time of the hearing, according to Silvaggio, the account was valued at approximately 1.2 million dollars.

{¶7} Fernando Amoroso testified that Tony was his uncle by blood. Fernando is a named beneficiary in the will. He rarely saw his aunt and uncle because they lived in different states, however he did see them at holidays. He said that his aunt and uncle had told him that they no longer spoke to DiLallo as a result of an argument. He did not want DiLallo to be appointed as the administrator because he believed there was a reason that

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Adams No. 09CA879, 2009-Ohio-4457, ¶ 22 and 23. We, therefore, disregard her brief.

his aunt excluded her from her will. He also claimed that DiLallo had falsely accused him of stealing Tony's car.

{¶8} Josephine Sidalieri testified that she and her husband were close friends with Tony and Dolores Amoroso; in 1954 they emigrated from Italy to the United Stated with them. She stated that the Amorosos got into an argument with DiLallo, and they refused to speak to her for a long time. DiLallo came to Sidalieri's house to pay her respects when Sidalieri's father died in 2003. According to Sidalieri, the Amorosos, who were also at her house, became upset when they saw DiLallo and left.

{¶9} Santina Amoroso testified that DiLallo is her older sister. According to Santina, she and DiLallo visited Amoroso in the nursing home at least five times. She stated that although her sister had stopped speaking with her uncle and aunt for "a while," that for the last few years they were again communicating. Santina admitted that she had suffered a stroke, and since then she was dependent on DiLallo. She said she trusted DiLallo to be the administrator.

{¶10} DiLallo testified that she was "a little upset" and "surprised" that she was not named as a beneficiary in her aunt's will. She claimed that 39 years ago, Amoroso showed her her will in which DiLallo was listed as a beneficiary. She intended to search for the old will and felt that Amoroso was tricked into signing the new will. She stated that in spite of this belief, if she was appointed the administrator, she would treat the current will as valid. DiLallo argued that she had priority over Silvaggio because DiLallo was a blood relative of Amoroso.

{¶11} The magistrate concluded that pursuant to R.C. 2113.06,[2] because DiLallo was not entitled to anything under the Will, she was not "next of kin," and therefore, she had no priority over Silvaggio. Relying on *In re Estate of Henne*, 66 Ohio St.2d 232, 421 N.E.2d 506 (1981), the magistrate continued to determine which of the two applicants was a suitable candidate based on which one was "reasonably disinterested and in a position to reasonably fulfill the obligation of a fiduciary." Regarding DiLallo, the magistrate found the following:

> On cross-examination * * * Ms. DiLallo admitted that she "was a little upset that she was left out of her aunt's will." More troubling, however, Ms. DiLallo further testified that she believes that the decedent had been tricked, duped, or conned into signing her 2005 Last Will and Testament. When further examined on this point, Ms. DiLallo testified that she thought her aunt's 39 year old Last Will and Testament was really her aunt's valid Last Will and Testament and that she would search for the older will wherein she was included as a beneficiary.
>
> On this very issue, the *Henne* court stated "a fiduciary * * * has an obligation to impartially carry out the provisions of the will * * * and should not be placed in the position of conflict with that obligation by becoming the petitioner in an action to set aside the will under which the fiduciary has accepted appointment and is serving as co-executor." *Henne*,

[2] Although R.C. 2113.06 deals with persons who have died intestate, it has been held that R.C. 2113.05 should be read in pari materia with R.C. 2113.06 when determining the suitability of an administrator. *Driggers v. Osdyke*, 11th Dist. Portage No. 96-P-0004, 1996 Ohio App. LEXIS 5264 (Nov. 22, 1996). We, therefore, disregard her brief.

at 235, citing *Steinberg v. Central Trust Co.*, 18 Ohio St.2d 33 [247 N.E.2d 303] (1969).

{¶12} As to Silvaggio, the magistrate noted that Silvaggio was not a blood relative of Amoroso and that she had served as Amoroso's power of attorney from September 2013 until Amoroso's death in May 2014. The magistrate found as follows:

> This magistrate is troubled by the lack of a complete accounting prepared by the power of attorney for this hearing. There is no evidence before this court to support [Silvaggio's] self-serving testimony that the decedent's assets have grown from over Eight Hundred Thousand Dollars ($800,000) to over One Million Two Hundred Thousand Dollars ($1,200,000) while she served as power of attorney. A complete accounting will have to be provided to the estate fiduciary documenting her activities as [power of attorney]. Appointing Ms. Silvaggio as the estate fiduciary may not provide the beneficiaries with the assurance that the fox isn't guarding the henhouse.

{¶13} The magistrate subsequently concluded that neither applicant was "reasonably disinterested." The magistrate found that DiLallo's questioning the validity of the will "brings into serious question her ability to defend and uphold the Last Will and Testament." As for Silvaggio, the magistrate found that Silvaggio's "failure to present a complete accounting of her six month's activities as power of attorney brings into question her suitability to handle Amoroso's sizeable estate." Because neither applicant was found to be suitable, the magistrate concluded an "independent" administrator should be appointed.

{¶14} DiLallo filed objections to the magistrate's report, and detailed the reasons why she would be a suitable administrator of the will and claimed she had preference over Silvaggio. The trial court overruled the objections and adopted the magistrate's decision.

Denial of DiLallo's Application

{¶15} In her first assigned error, DiLallo argues that the trial court erred by adopting the magistrate's decision recommending that an independent administrator be appointed. DiLallo contends that the evidence supported her application of appointment.

{¶16} Pursuant to R.C. 2113.05 the administration of the will should be conferred to a "suitable person or persons" who would have been entitled to administer the estate if the person died intestate. "R.C. 2113.05 grants the probate court the authority to exercise reasonable discretion in determining if an applicant for letters testamentary is a competent and suitable person, and an order granting or refusing letters is reviewable for abuse of discretion." *In re Estate of Young*, 4 Ohio App.2d 315, 320, 212 N.E.2d 612 (10th Dist.1964).[3] We conclude the probate court did not abuse its discretion by concluding DiLallo was not suitable to administer the will.

{¶17} A suitable person under R.C. 2113.05 has been defined as one who "is reasonably disinterested and in a position to reasonably fulfill the obligations of a fiduciary." *Henne*, 66 Ohio St.2d 232, 421 N.E.2d 506, paragraph two of the syllabus. In determining whether an applicant is reasonably disinterested, the court may consider "(1) the nature and extent of the hostility and distrust among the parties; (2) the degree of conflicting interests and obligations, both personal and financial; and (3) the underlying and aggregate complexities of the conflict." *Id.* at paragraph three of the syllabus.

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[3]An applicant for letters testamentary is a request to be named executor of a will under certain circumstances, such as here, where the named executor in the will is deceased. *See* R.C. 2113.05.

{¶18} When asked whether she believed that the 2005 will was the Last Will and Testament of her aunt, DiLallo responded, "I don't know." In addition, when asked if she believed that her aunt had been "tricked, duped, or conned" into signing the will, she stated, "Yeah. Oh yeah." She was again asked if in fact she believed that to be the case, she replied, "yep." DiLallo also stated that her aunt showed her another will 39 years before in which DiLallo was named as one of the beneficiaries. When asked if it was her intent to search for a copy of that will, she responded, "yeah." DiLallo than claimed, in spite of these statements, that she would treat the current will as valid if she were appointed administrator. The trial court obviously did not believe her.

{¶19} In determining credibility, we defer to the factfinder who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Accordingly, it was within the probate court's discretion whether it believed DiLallo. Given the probate court's concerns regarding DiLallo's allegiance to the validity of the will, we conclude it did not abuse its discretion by concluding she would not be a suitable administrator. Accordingly, DiLallo's first assigned error is overruled.

DiLallo's Priority Over Silvaggio

{¶20} In her second assigned error, DiLallo argues the probate court erred by concluding that DiLallo did not have priority over Silvaggio in making its determination regarding who should be administrator.

{¶21} This assigned error is moot because the trial court did not appoint Silvaggio as administrator. Nonetheless, we conclude that DiLallo's argument would be without merit even if Silvaggio was appointed.

{¶22} DiLallo relies on the decision in *In Re: Estate of Vickers*, 110 Ohio App. 499, 170 N.E.2d 85 (4th Dist.1959), to support her argument that next of kin is preferred to a stranger regarding the appointment of an administrator of a will. However, in *Vickers*, the court held that next of kin is preferable to a stranger unless the next of kin is unsuitable. "Next of kin" as used in R.C. 2113.06 had been defined to "mean only those persons who are entitled to inherit some portion of the estate." *In re Estate of Kelly*, 102 Ohio App. 518, 519, 144 N.E.2d 130 (10th Dist.1956), citing *In re Estate of Fields*, 44 Ohio Law Abs. 284, 65 N.E.2d 70 (2d Dist.1944); *Wimmer v. DeWeese*, 62 Ohio Law Abs. 577, 108 N.E.2d 165 (2d Dist.1951). Amoroso did not name DiLallo in the will; therefore, she is not entitled to inherit and is not considered "next of kin" under the statute. As a result, DiLallo was not entitled to preference over Silvaggio. Accordingly, DiLallo's second assigned error is overruled.

{¶23} Judgment affirmed.

It is ordered that appellant pay her respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN T. GALLAGHER, J., CONCUR