

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

ESTATE OF	:	OPINION
MARION C. RYAN, DECEASED	:	
	:	CASE NO. 2010-L-075
	:	

Civil Appeal from the Lake County Court of Common Pleas, Probate Division, Case No. 08 ES 0333.

Judgment: Affirmed.

Patricia J. Schraff and John P. Thomas, Schraff & King Co., L.P.A., 2802 S.O.M. Center Road, #200, Willoughby Hills, OH 44094 (For Appellant-Michael J. Ryan).

Russell J. Meraglio and Franklin C. Malemud, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Appellee-Patricia M. Janowicz).

Gerald R. Walker, Redmond, Walker & Murray, 174 North St. Clair Street, Painesville, OH 44077 (Other).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Michael J. Ryan, Jr. (“Ryan”), appeals the Judgment of the Lake County Court of Common Pleas, Probate Division, overruling objections to the Magistrate’s Decision, and so denying the Application for Authority to Administer Estate filed by Gerald R. Walker, Esq. For the following reasons, we affirm the decision of the court below.

{¶2} On June 3, 2008, defendant-appellee, Patricia M. Janowicz, filed an Application to Probate Will, for the Estate of Marion C. Ryan, who died on April 17, 2008. The decedent had no surviving spouse and two children, Michael Ryan and

Patricia Janowicz. The following was identified as the sole vested beneficiary in decedent's will: "Ryan Living Trust, dated June 8, 1995 as amended, Patricia M. Janowicz, Successor Trustee." The decedent's Last Will made the following provision for the distribution of her property: "I give all of my property of whatever nature and kind and wherever located to my revocable living trust of which I am a Trustor: known as: MARION C. RYAN, Trustee, or her successors in trust, under the RYAN LIVING TRUST dated JUN[E] 08 1995 and any amendments thereto."

{¶3} On June 6, 2008, the Will was admitted to probate.

{¶4} On June 17, 2008, the case was closed.

{¶5} On February 12, 2009, Janowicz filed an Application for Authority to Administer Estate. The estate was reported as having no assets. A letter from Janowicz' attorney, accompanying the Application, explained that Ryan (the son) filed suit against her, individually and as Trustee of the Ryan Living Trust, in Lake County Court of Common Pleas Case No. 08 CV 0097, and that "[i]n defense of the claim it is necessary that we obtain the appointment of Patricia M. Janowicz as executrix of the estate of Marion C. Ryan."

{¶6} On March 17, 2009, Janowicz, represented by new counsel, filed a Notice of Withdrawal of Application for Authority to Administer Estate. As a basis for the withdrawal, the Notice stated that "[t]here are no assets to be administered through the Estate and no other reason for the Application to Administer to be filed."

{¶7} On March 18, 2009, the case was again closed.

{¶8} On May 4, 2009, Ryan filed an Application for Authority to Administer Estate. Again, the estate was reported as having "no known assets." In a brief in support of the Application, Ryan explained that he sought to be appointed executor of

the decedent's estate in order to have standing to pursue claims against Janowicz for conversion, breach of fiduciary duty, undue influence, unjust enrichment, and accounting. Ryan stated that he had voluntarily dismissed his civil action against Janowicz without prejudice on May 1, 2009.

{¶9} On June 4, 2009, a hearing was held on Ryan's Application.

{¶10} On September 14, 2009, the probate court issued a Judgment Entry, denying Ryan's Application to Administer. The court explained: "Based upon the fact that Michael previously attempted to file a complaint against Patricia as trustee of the decedent's inter vivos trust, the apparent hostility and distrust between both children, and their conflicting interests, the Court finds that Michael is not suitable to serve as executor. Michael and Patricia are both the decedent's children and an executor has the duty to administer an estate for the benefit of all beneficiaries."

{¶11} On the same date, the probate court again closed the case.

{¶12} On January 19, 2010, Attorney Gerald Walker filed an Application for Authority to Administer Estate. Still, the estate was described as having "no known assets."

{¶13} On March 5, 2010, a hearing was held on Walker's Application before a magistrate of the probate court. At this hearing, Walker explained the reason for applying for Authority to Administer the Estate:

{¶14} Your Honor, perhaps I'm not the one to go into too much detail because, as they say on the street, I'm not sure I have a dog in the fight, other than I have been asked to apply for the Court to consider appointing me as administrator of the estate of the decedent, Marion Ryan. *** [Counsel for Michael Ryan] has asked me -- whether I would consider being a neutral applicant, as her client had previously applied and been denied and the right or the adversarial position is between the decedent's two children, Michael Ryan and Patricia Janowicz, and it appeared that there might very well be a need for somebody who is more neutral to be appointed to administer the estate if, in fact, there is a need for someone to

be appointed administrator. So, therefore, I applied for the Court to consider appointment.

{¶15} On March 25, 2010, the Magistrate's Decision was issued, denying Walker's Application. The magistrate stated that she was "in no way questioning the integrity of attorney Walker," and that there was a "practical issue" regarding the payment of Walker's fees when there were no assets in the estate. The magistrate concluded: "If the estate merely involved the appointing of an independent administrator to administer the assets, the undersigned would be inclined to recommend attorney Walker's appointment. However, this case is much more complicated and would likely require attorney Walker to file suit against Patricia. Therefore, the undersigned recommends the Court deny the Application for Authority to Administer Estate filed by Gerald R. Walker, Esq."

{¶16} On April 8, 2010, Ryan filed Objection[s] to Magistrate's Decision. In the objections, Ryan moved the probate court to appoint an independent administrator if it should adopt the Magistrate's Decision. Ryan asserted that the appointment of an independent administrator was necessary "to perform due diligence in determining whether to file suit on behalf of the Estate." Further, in the absence of an estate fiduciary, "a party in interest cannot initiate claims on behalf of the Estate via R.C. 2107.46."¹ Thereafter, Janowicz filed Cross-Objections to the Magistrate's Decision.

{¶17} On June 9, 2010, the probate court issued its Judgment Entry, overruling the Objections and Cross-Objections and denying Walker's Application for Authority to Administer.

1. R.C. 2107.46 provides: "Any fiduciary may maintain an action in the probate court against creditors, legatees, distributees, or other parties, and ask the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest. If any fiduciary fails for thirty days to bring such an action after a written request from a party in interest, the party making the request may institute the suit."

{¶18} On July 6, 2010, Ryan filed his Notice of Appeal. On appeal, Ryan raises the following assignments of error:

{¶19} “[1.] The probate court erred by denying the Application for Authority to Administer the Estate of Marion C. Ryan filed by Gerald Walker, Esq.”

{¶20} “[2.] In the alternative, the probate court erred in denying the Motion to Appoint an Independent Fiduciary for the Estate of Marion C. Ryan.”

{¶21} We will first consider Ryan’s second assignment of error, as it is dispositive of the appeal. If the probate court’s decision not to appoint an independent administrator for the estate is affirmed, the issue of whether Walker was a suitable fiduciary is rendered moot.

{¶22} Although the probate court did not expressly rule on Ryan’s Motion to Appoint an Independent Fiduciary, it is presumed that the Motion was overruled. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶13 (“[a] motion not expressly decided by a trial court when the case is concluded is ordinarily presumed to have been overruled”); *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, at paragraph four of the syllabus.

{¶23} In matters regarding the appointment or removal of administrators, or, in the present case, the failure to appoint an administrator, the probate court’s judgment is reviewed under an abuse of discretion standard. *In re Estate of Henne* (1981), 66 Ohio St.2d 232, at paragraph one of the syllabus (“an order granting or refusing letters of appointment is reversible only upon a finding of an abuse of discretion”); *Driggers v. Osdyke*, 11th Dist. No. 96-P-0004, 1996 Ohio App. LEXIS 5264, at *5 (“[t]he appointment of fiduciaries by the probate court is reviewable on an abuse of discretion basis”).

{¶24} Ryan relies on R.C. 2113.05 for the proposition that the probate court was required to appoint an executor and/or administrator for the decedent's estate. The statute provides, in relevant part: "When a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will," or, if there is no suitable executor, "the court shall grant letters of administration with the will annexed to some other suitable person." R.C. 2113.05.

{¶25} The obligation to administer an estate, however, is not absolute.² The Ohio Supreme Court has stated that "[t]he principal function of the fiduciary of an estate under a will is to protect, preserve and pay out the assets according to law and the will." *Hecker v. Schuler* (1967), 12 Ohio St.2d 58, 61. Accordingly, "[w]here one has a claim against an estate, it is incumbent upon him, if no administrator has been appointed, to procure the appointment of an administrator against whom he can proceed." *Wrinkle v. Trabert* (1963), 174 Ohio St. 233, at paragraph two of the syllabus. Likewise, a probate court "may appoint a special administrator to collect and preserve the effects of the deceased," where there has been a delay in the granting of letters testamentary or of administration. R.C. 2113.15.

{¶26} Where, however, there are "neither creditors of the estate nor beneficiaries of the will," and where there are no assets or property belonging to the estate, there is "no purpose to be served by the appointment of a fiduciary." *Hecker*, 12 Ohio St.2d at 61; *In re Estate of Odebrecht*, 10th Dist. No. 05Ap-250, 2006-Ohio-381, at ¶8 (the probate court properly closed an estate where "there was no practical reason to keep the estate open," "there were no probate assets in [the decedent's] estate," and

2. R.C. 2113.02 allows the probate court "twenty years from the death of the testator" in which to grant letters of original administration. Additionally, R.C. 2113.03 and 2113.031 exempt estates of small monetary value from administration, although these statutes were not invoked in the present case.

the only argument for keeping the estate open was “so that appellants could obtain service of process in the unrelated [trust] litigation on *** the executor of the estate”).

{¶27} In the present case, there are neither creditors of the estate nor assets in the estate and the only beneficiary under the Will is the Ryan Living Trust.³

{¶28} At the March 5, 2010 hearing, counsel for Ryan stated his position that Janowicz, serving as the decedent’s attorney-in-fact, had acted inappropriately with regard to the decedent’s assets. It was believed “that there are claims of the decedent that *** should be pursued.” No evidence was presented in support of the allegations. Ryan’s counsel admitted: “The fact is that we don’t know what all -- we don’t have enough discovery in place to know what the nature and extent of her assets were, what things were changed.”

{¶29} There was no abuse of discretion in the probate court’s failure to appoint an independent administrator for the decedent’s estate. As an initial matter, Ryan cites to no authority that only the executor and/or administrator may investigate the administration of an estate. On the contrary, the Revised Code provides: “Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, *** may have a declaration of rights or legal relations in respect thereto *** [t]o determine any question arising in the administration of the estate or trust.” R.C. 2721.05(C). Accordingly, Ryan was able to bring suit in the probate court to determine the validity of inter vivos transfers between the decedent and

3. “A testator may by will devise, bequeath, or appoint real or personal property or any interest in real or personal property to a trustee of a trust that is evidenced by a written instrument signed by the testator ***. The property or interest so devised, bequeathed, or appointed to the trustee shall become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of the trust, and shall be administered in accordance with the terms and provisions of the instrument creating the trust ***.” R.C. 2107.63. At the hearing, it was indicated that Ryan is a beneficiary of the Ryan Living Trust.

Janowicz, as a fiduciary of the decedent, provided that the assets transferred related to the administration of the estate. *Sayer v. Epler* (1997), 121 Ohio App.3d 329, 333, citing *Corron v. Corron* (1988), 40 Ohio St.3d 75, 78; *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653, at ¶19 (citations omitted).

{¶30} Secondly, Ryan presented no evidence of any wrongdoing by Janowicz and/or actual claims that could be brought on behalf of the estate.⁴ Cf. *In re Estate of Elersic*, 11th Dist. No. 2008-L-181, 2009-Ohio-4803, at ¶40 (the probate court did not abuse its discretion in failing to reopen an estate where the “appellant *** failed to offer any plausible evidence relating to the discovery of assets which could potentially trigger a reopening”).

{¶31} For these reasons, Ryan has failed to demonstrate the necessity of appointing an administrator for the decedent’s estate. The assignments of error are without merit.

{¶32} The Judgment of the Lake County Court of Common Pleas, Probate Division, denying Walker’s Application for Authority to Administer and declining to appoint an independent estate administrator, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

4. At the hearing, counsel for Ryan referred to a “partial deposition” in which Janowicz purportedly “indicated she was mixing her monies with [the decedent’s] monies.” The deposition itself was not produced or proffered.