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July 15, 2016

VIA HAND DELIVERY

Honorable John L. Phillips
NORTH COUNTY COURTHOUSE
3188 PGA Boulevard, Room 1414
Palm Beach Gardens, FL 33410

Re: Estate of Simon L. Bernstein; Case No.: 502012CP004391XXXXNB (IH)

Dear Judge Phillips:

With regard to the hearing on *Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Funds* set for hearing on **July 27, 2016 at 10:00 a.m.**, enclosed please find the following documentation:

1. Notice of Hearing;
2. Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Funds; and,
3. Case law cited in the Motion and additional Florida Statutes and case law to be presented at the hearing:

   A. *In re Estate of Wejanowski*, 920 So. 2d 190 (Fla. 2d DCA 2006)
   B. *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005)
   C. § 733.612(20), Fla. Stat.
   D. *Bookman v. Davidson*, 136 So. 3d 1276 (Fla. 1st DCA 2014)
   E. *In re Paine's Estate*, 174 So. 430 (Fla. 1937)
   F. *Sherrell v. Shepard*, 19 Fla. 300 (Fla. 1882)
   G. *Harris v. Byard*, 501 So.2d 730, 734 (Fla. App. 1st DCA, 1987)

Thank you for your consideration of this matter.

Respectfully submitted,
PETER M. FEAMAN, P.A.

By: _____
Peter M. Feaman

PMF/tr
Enclosures
cc: Alan Rose, Esq. (via email w/enclosures)
Brian O'Connell, Esq. (via email w/enclosures)
John Morrissey, Esq. (via email w/enclosures)
Gary R. Shendell, Esq. (via email w/enclosures)
Eliot Bernstein (via email w/enclosures)

Filing # 41997452 E-Filed 05/26/2016 09:59:09 AM

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502012CP 004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,

Deceased.

_____/

NOTICE OF HEARING

(Special Set)

PLEASE TAKE NOTICE that the undersigned attorney for William E. Stansbury, "Interested Person" in the Estate of Simon Bernstein, has called up for hearing the following matter:

Matter: **Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Funds**

Date: **July 27, 2016**

Time: **10:00 a.m. (30 Minutes)**

Place: **Honorable John L. Phillips**
NORTH COUNTY COURTHOUSE
3188 PGA Boulevard, Courtroom 3
Palm Beach Gardens, Florida 33410

✓ Counsel has conferred with all parties who may be affected by the relief sought in the motion in a good faith effort to resolve or narrow the issues raised.

_____ Counsel has made reasonable efforts to confer with all parties who may be affected by the relief sought in the motion but has been unable to do so.

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 20th day of May, 2016.

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Carley Friedstein, Minors
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"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Germaine English, Americans with Disabilities Act Coordinator, Palm Beach County Courthouse, 205 North Dixie Highway West Palm Beach, Florida 33401; telephone number (561) 355 4380 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."

"Si usted es una persona minusválida que necesita algún acomodamiento para poder participar en este procedimiento, usted tiene derecho, sin tener gastos propios, a que se le provea cierta ayuda. Tenga la amabilidad de ponerse en contacto con Germaine English, 205 N. Dixie Highway, West Palm Beach, Florida 33401; teléfono número (561) 355-4380, por lo menos 7 días antes de la cita fijada para su comparecencia en los tribunales, o inmediatamente después de recibir esta notificación si el tiempo antes de la comparecencia que se ha programado es menos de 7 días; si usted tiene discapacitación del oído o de la voz, llame al 711."

"Si ou se yon moun ki enfim ki bezwen akomodasyon pou w ka patisipe nan pwosedi sa, ou kalifye san ou pa gen okenn lajan pou w peye, gen pwovizyon pou jwen kèk èd. Tanpri kontakte Germaine English, kòòdonatè pwogram Lwa pou ameriken ki Enfim yo nan Tribinal Konte Palm Beach la ki nan 205 North Dixie Highway, West Palm Beach, Florida 33401; telefòn li se (561) 355 4380 nan 7 jou anvan dat ou gen randevou pou parèt nan tribinal la, oubyen imedyatman apre ou fin resevwa konvokasyon an si lè ou gen pou w parèt nan tribinal la mwens ke 7 jou; si ou gen pwoblèm pou w tande oubyen pale, rele 711."

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE:

Case No.: 502012CP004391XXXXNB (IH)
JUDGE JOHN L. PHILLIPS

ESTATE OF SIMON
BERNSTEIN,
Deceased.
_____/

MOTION OF CREDITOR, WILLIAM E. STANSBURY, FOR DISCHARGE FROM FURTHER RESPONSIBILITY FOR THE FUNDING OF THE ESTATE'S PARTICIPATION IN THE CHICAGO LIFE INSURANCE LITIGATION AND FOR ASSUMPTION OF RESPONSIBILITY BY THE ESTATE AND FOR REIMBURSEMENT OF ADVANCED FUNDS

COMES NOW, William E. Stansbury ("Stansbury"), Creditor of the Estate of Simon Bernstein (the "Estate"), by and through his undersigned counsel, and moves this Court for an Order discharging Stansbury from further responsibility for the funding of the Estate's participation in the "Chicago life insurance litigation", and for the Estate to assume responsibility for funding the Chicago life insurance litigation, and states:

1. At the time of Simon Bernstein's death it was determined that there existed a life insurance policy on the life of Simon Bernstein issued by Heritage Union Insurance Company ("Heritage"). The policy proceeds are approximately $1.75 million, which, if included in the Estate, would more than double its assets. The policy was allegedly payable to a Simon Bernstein Irrevocable Insurance Trust as its beneficiary (the "Insurance Trust").

2. The alleged Insurance Trust submitted a death claim to Heritage and demanded that Heritage pay the policy proceeds to the so-called "trustee" of the Insurance Trust the former Co-Personal Representative of the Estate. If paid to the Insurance Trust, the death benefit would

not be included as an asset of the Estate. However, neither the original nor a copy of the "Insurance Trust" exists.

3. Heritage refused to pay the death benefit of $1.7 million to anyone without a court order. The alleged Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois. The case was subsequently removed to the U.S. District Court for the Northern District of Illinois. (The "Life Insurance Litigation") *See* Simon Bernstein Irrevocable Trust DTD 6/21/95 v. Heritage Union Life Insurance Company, Case No. 13 cv 3643 (N.D. Ill., E. Div.) A copy of the Amended Complaint filed in U.S. District Court is attached as **Exhibit "1."** Heritage ultimately deposited the entire $1.75 million death benefit of the policy into the registry of the court in Chicago.

4. The Estate of Simon Bernstein was not made a party to the Life Insurance Litigation, even though the Estate will clearly be affected by the outcome of the case. The original co-personal representatives of the Estate, Donald Tescher and Robert Spallina, either failed or refused to intervene on behalf of the Estate. In fact, they actively participated in trying to prevent the death benefit from being paid to the Estate at a time when they were Co-Personal Representatives of the Estate!

5. In December of 2013, Stansbury filed a Motion to Intervene in the Life Insurance Litigation as an Interested Party. The Court denied the Motion and thus Stansbury was unable to Intervene in his own right.

6. Thereafter, Stansbury brought the Life Insurance Litigation to the attention of Benjamin Brown ("Brown"), who had been appointed Curator of the Estate following the resignation of Tescher & Spallina as co-personal representatives. By Order dated May 23, 2014, pursuant to a Petition filed by Stansbury, this Court appointed Brown as Administrator Ad Litem

to pursue intervention in the Life Insurance Litigation in order to protect the interests of the Estate.

7. More importantly, as a creditor of the Estate, Stansbury volunteered to initially fund the Life Insurance Litigation despite being under no legal obligation to do so. While Stansbury does stand to benefit from a successful outcome in the Life Insurance Litigation, his funding of the case on behalf of the Estate will clearly benefit the Estate and the Simon Bernstein Trust, who is the residuary legatee of the Estate. As a consequence of Stansbury's offer of initial funding, this Court accordingly ordered that all fees and costs incurred in the Life Insurance Litigation, "including for the Curator in connection with this work as Administrator Ad Litem and any counsel retained by Administrator Ad Litem, will initially be borne by William Stansbury." A copy of the May 23, 2014 Order is attached as **Exhibit "2."**

8. On June 5, 2014, the Estate, by and through counsel in Chicago, James J. Stamos, Esq., filed a Motion to Intervene on behalf of the Estate.

9. On July 28, 2014, the United States District Court for the Northern District of Illinois **granted** the Estate's Motion to Intervene. In granting the Motion, the court stated at page 3 of the Order:

> It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the policy proceeds must be paid to the Estate as a matter of law. (*citing* Harris v. Byard, 501 So.2d 730, 734 (Fla. App. 1st DCA, 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than the decedent's estate for administration and distribution.")

The Court concluded that the Estate demonstrated a sufficient interest justifying intervention. A copy of the Order of the District Court Order is attached as **Exhibit "3."**

10. Thereafter, James J. Stamos ("Stamos"), the attorney in Chicago hired by the Estate to represent it in the Life Insurance Litigation, opines that the Estate has a meritorious case, and has a reasonable likelihood of success on the merits. Stamos believes in the merits of the Estate's position so strongly that his firm has offered to continue representing the Estate on a contingency fee basis. In that event, there will be no further out of pocket expenses to the Estate for legal fees unless and until there is a recovery, either through settlement or judgment. To date the Estate has not yet brought the contingency fee offer by Stamos before the Court for approval.

11. As a result of the foregoing, Stansbury respectfully submits that due to his actions on behalf of the Estate, he has enabled the Estate to intervene and advance a meritorious position in the pending Life Insurance Litigation. There is now created a realistic expectation that the assets in the Estate could be more than doubled should the Estate's position prevail.

12. As such, Stansbury, who volunteered to initially fund the Life Insurance Litigation, despite being under no legal obligation to do so, should be discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation. The Estate, through a contingent fee arrangement, can now proceed without paying legal fees out of pocket. Any fees would only be paid if there is a recovery.

WHEREFORE, Petitioner, William E. Stansbury, requests that this Court issue an Order stating that: a) Stansbury is hereby discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation; b) the responsibility to pay future attorney fees and costs in the case are hereby to be assumed by the Estate and the Estate is hereby authorized to proceed; and c) that the Court order that the Estate reimburse Stansbury for fees advanced in the amount to be determined at a subsequent hearing, together with any other relief this court deems just and proper.

Respectfully submitted,

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 4th day of May, 2016.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

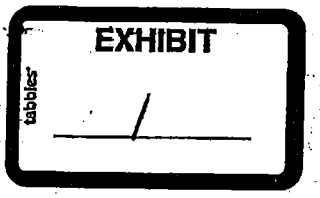
SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland



Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

BACKGROUND

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.

2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").

3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.

4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.

5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

COUNT I

BREACH OF CONTRACT

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE's refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds $1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of $1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

COUNT II

DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;

ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,

iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and

iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;

b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;

c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;

e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;

f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;

g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and

h) for such other relief as this court may deem just and proper.

COUNT III

RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and

b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein

c) and for such other relief as this court may deem just and proper.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE:

ESTATE OF SIMON L. BERNSTEIN,
Deceased.

CASE NO.: 50 2012 CP 004391 XXXX SB
PROBATE DIV.

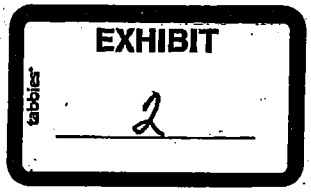
/

ORDER APPOINTING ADMINISTRATOR AD LITEM TO ACT ON BEHALF OF THE ESTATE OF SIMON L. BERNSTEIN TO ASSERT THE INTERESTS OF THE ESTATE IN THE ILLINOIS LITIGATION (CASE NO. 13CV3643, N.D. ILL. E. DIV.) INVOLVING LIFE INSURANCE PROCEEDS ON THE DECEDENT'S LIFE

THIS CAUSE came before this Honorable Court on May 23, 2014 upon the Curator's Amended Motion for Instructions/Determination regarding Estate Entitlement to Life Insurance Proceeds and upon the Petition for Appointment of Administrator Ad Litem filed by William Stansbury, in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, currently pending in the United States District Court for the Northern District Court of Illinois, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED that

1. The Court appoints Benjamin P. Brown, Esq., who is currently serving as Curator, as the Administrator Ad Litem on behalf of the Estate of Simon L. Bernstein to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, pending in the United States District Court for the Northern District Court of Illinois.



2. For the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the Curator in connection with his work as Administrator Ad Litem and any counsel retained by the Administrator Ad Litem, will initially be borne by William Stansbury.

3. The Court will consider any subsequent Petition for Fees and Costs by William Stansbury as appropriate under Florida law.

DONE AND ORDERED in Palm Beach County, Florida this 23 day of May, 2014.

MARTIN COLIN
Circuit Court Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Plaintiff, v. HERITAGE UNION LIFE INSURANCE COMPANY, Defendant.	Case No. 13 C 3643 Judge Amy St. Eve

ORDER

The Court grants Benjamin P. Brown's motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) [110].

STATEMENT

On May 20, 2013, Defendant Jackson National Life Insurance Company ("Defendant" or "Jackson"), as successor in interest to Heritage Union Life Insurance Company ("Heritage"), filed an amended notice of removal pursuant to 28 U.S.C. § 1441 removing the present lawsuit from the Circuit Court of Cook County, Illinois, based on the Court's diversity jurisdiction. *See* 28 U.S.C. § 1332(a). In the Complaint filed on April 5, 2013, Plaintiff Simon Bernstein Irrevocable Insurance Trust ("Bernstein Trust") alleged a breach of contract claim against Heritage based on Heritage's failure to pay Plaintiff proceeds from the life insurance policy of decedent Simon Bernstein. On June 26, 2013, Defendant filed a Third-Party Complaint and Counter-Claim for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14 seeking a declaration of rights under the life insurance policy for which it is responsible to administer. Plaintiffs filed a First Amended Complaint on January 13, 2014.

Before the Court is Benjamin P. Brown's ("Brown") motion to intervene both as of right and permissibly under Federal Rule of Civil Procedure 24(a)(2) and Rule 24(b)(1)(B). Brown is the Administrator Ad Litem of the Estate of Simon Bernstein. For the following reasons, the Court grants Brown's motion brought pursuant to Rule 24(a)(2).

BACKGROUND

In their First Amended Complaint, Plaintiffs, who are the Bernstein Trust and four of the five adult children of decedent Simon Bernstein, allege that at all times relevant to this lawsuit,

EXHIBIT
tabbies 3

the Bernstein Trust was a common law trust established in Chicago, Illinois by Simon Bernstein. (R. 73, Am. Compl. ¶¶ 1, 7.) Plaintiffs assert that Ted Bernstein is the trustee of the Bernstein Trust and that the Bernstein Trust was a beneficiary of Simon Bernstein's life insurance policy. (*Id.* ¶¶ 2, 4.) In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. (*Id.* ¶ 5.) According to Plaintiffs, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy. (*Id.* ¶ 20.) Following Simon Bernstein's death on September 13, 2012, the Bernstein Trust, by and through its counsel in Palm Beach County, Florida, submitted a death claim to Heritage under the life insurance policy at issue. (*Id.* ¶ 22.)

In its Counter-Claim and Third-Party Complaint for Interpleader, Jackson alleges that it did not originate or administer the life insurance policy at issue, but inherited the policy from its predecessors. (R. 17, Counter ¶ 2.) Jackson further alleges that on December 27, 1982, Capitol Bankers Life Insurance Company issued the policy to Simon Bernstein and that over the years, the owners, beneficiaries, contingent beneficiaries, and issuers of the policy have changed. (*Id.* ¶¶ 15, 16.) At the time of the insured's death, the policy's death benefits were $1,689,070.00. (*Id.* ¶ 17.) It is undisputed that no one has located an executed copy of the Bernstein Trust. (*Id.* ¶ 19.)

In the present motion to intervene, Brown maintains that after Simon Bernstein, a resident of Florida, died in September 2012, his estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Brown further alleges that on May 23, 2014, a judge in the Probate Court of Palm Beach County appointed him as Administrator Ad Litem of the Estate of Simon Bernstein ("Estate"). According to Brown, the probate judge directed him to "assert the interests of the Estate in the Illinois Litigation involving the life insurance proceeds on the Decedent's life." Brown contends that because no one can locate an executed copy of the Bernstein Trust, and, in absence of a valid trust and designated beneficiary, the insurance policy proceeds at issue in the present lawsuit are payable to the Estate, and not Plaintiffs.

LEGAL STANDARD

"Rule 24 provides two avenues for intervention, either of which must be pursued by a timely motion." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013). Intervention as of right under Rule 24(a)(2) states that "the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed.R.Civ.P. 24(a)(2); *see also Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (citation omitted). "Intervention as of right requires a 'direct, significant[,] and legally protectable' interest in the question at issue in the lawsuit." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (citation omitted). "That interest must be unique to the proposed intervenor." *Id.*

ANALYSIS

At issue in this lawsuit is who are the beneficiaries of Simon Bernstein's life insurance policy. In their First Amended Complaint, Plaintiffs allege that there is a common law trust, namely, the Bernstein Trust, and that the Bernstein Trust is the beneficiary of Simon Bernstein's life insurance policy. In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. In short, according to Plaintiffs' First Amended Complaint, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy.

It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the insurance policy proceeds must be paid to the Estate as a matter of law. *See, e.g., New York Life Ins. Co. v. Rak* 24 Ill.2d 128, 134, 180 N.E.2d 470 (Ill. 1962); *see Harris v. Byard,* 501 So.2d 730, 734 (Fla. Ct. App. 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than decedent's estate for administration and distribution.").

In response to the present motion to intervene, Plaintiffs maintain that there is a designated beneficiary of the insurance proceeds. In support of their argument, Plaintiffs set forth an affidavit averring that "on the date of death of Simon Bernstein, the Owner of the Policy was Simon Bernstein, the primary beneficiary was designated as LaSalle National Trust, N.A. as Successor Trustee, and the Contingent Beneficiary was designated as the Simon Bernstein Irrevocable Insurance Trust dated June 21,1995. (R. 116-2, Sanders Aff. ¶ 62.) By submitting Sanders' affidavit, Plaintiffs have contradicted their own allegations in their First Amended Complaint by contending that the primary beneficiary of the insurance policy is LaSalle National Trust, N.A., and not the Bernstein Trust. Nevertheless, the Court cannot view this averment in a vacuum without more information about the insurance policy's provisions and any additional extrinsic evidence. To clarify, under Illinois law, "[t]he designation of a beneficiary is solely a decision of the insured and when a controversy arises as to the identity of a beneficiary the intention of the insured is the controlling element. If such intention is dependent on extrinsic facts which are disputed the question, of course, must be resolved as one of fact." *Reich v. W. F. Hall Printing Co.,* 46 Ill.App.3d 837, 844, 361 N.E.2d 296, 5 Ill.Dec. 157 (2d Dist. 1977); *see also Estate of Wilkening,* 109 Ill.App.3d 934, 941, 441 N.E.2d 158, 163, 65 Ill.Dec. 366, 371 (1st Dist. 1982) ("Evidence to establish a trust must be unequivocal both as to its existence and to its terms and conditions.") Moreover, Plaintiffs' contradiction illustrates why Brown has a competing interest in the insurance proceeds justifying intervention.

Further, Plaintiffs take issue with the fact that William E. Stansbury, who brought an unsuccessful motion to intervene in January 2014, filed a petition in the Florida probate court for an administrator ad litem and is paying costs and legal fees for the present motion to intervene. Based on Stansbury's conduct, Plaintiffs argue that the law of the case doctrine and collateral estoppel apply. In denying Stansbury's motion, the Court concluded that his interest as an

unsecured creditor of the Estate was too remote for purposes of Rule 24(a)(2). *See Flying J, Inc.*, 578 F.3d at 571 ("the fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit — maybe you're a creditor of one of them — does not entitle you to intervene in their suit.").

Plaintiffs' law of the case doctrine argument fails because "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Here, Brown, as the Administrator Ad Litem, is protecting the Estate's interest in the insurance proceeds, which is different from Stansbury's remote interest as an unsecured creditor of the Estate. *See Walker*, 705 F.3d at 658; *see also Tallahassee Mem. Reg'l Med. Ctr., Inc. v. Petersen*, 920 So.2d 75, 78 (Fla. Ct. App. 2006) ("Florida Probate Rule 5.120(a) provides for discretionary appointment of a guardian ad litem in estate and trust proceedings where ... the personal representative or guardian may have adverse interests.").

Furthermore, the doctrines of collateral estoppel or issue preclusion do not apply under the facts of this case because there was no separate, earlier judgment addressing the issues presented here. *See Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014) ("'collateral estoppel' or 'issue preclusion'—applies to prevent relitigation of issues resolved in an earlier suit."). Therefore, this argument is unavailing.

Dated: July 28, 2014

AMY J. ST. EVE
United States District Court Judge

3.A.

920 So.2d 190
District Court of Appeal of Florida,
Second District.

In re ESTATE OF Peter WEJANOWSKI.
Richard MacDonald, as Personal Representative of the Estate of Peter Wejanowski, Appellant,
v.
Donna Mauriello, as Personal Representative of the Estate of Karen A. Stacy, Appellee.

No. 2D04-3853. | Feb. 15, 2006.

Synopsis
Background: Executor of estate filed motion seeking authority to expend estate funds to prosecute an appeal in a wrongful death action brought against estate. The Circuit Court, Pinellas County, George W. Greer and Ray E. Ulmer, Jr., JJ., denied motion without prejudice to resubmit it after the appeal upon a showing of a monetary benefit to the estate. Executor appealed.

[Holding:] The District Court of Appeal, Casanueva, J., held that trial court could not require executor to demonstrate a monetary benefit before allowing the expenditure of estate funds.

Reversed.

Villanti, J., filed specially concurring opinion.

West Headnotes (5)

[1] **Executors and Administrators**
Resisting Claims Against Estate

Trial court could not require executor of estate to demonstrate a monetary benefit to estate before allowing the expenditure of estate funds for the prosecution of an appeal in a wrongful death action against estate; benefit to estate was the presentation of a good faith appeal, and executor could be held accountable if appeal were subsequently determined to have been frivolous. West's F.S.A. §§ 733.602(1, 2), 733.609.

Cases that cite this headnote

[2] **Attorney and Client**
Frivolous, Vexatious, or Meritless Claims

An appellate attorney has an ethical duty not to prosecute a baseless or frivolous appeal.

Cases that cite this headnote

[3] **Executors and Administrators**
Counsel Fees and Costs

Payment by an estate of appellate fees and costs incurred in an appeal involving the estate cannot be contingent upon prevailing on appeal because neither party can guarantee the outcome.

Cases that cite this headnote

[4] **Executors and Administrators**
Counsel Fees and Costs

The true benefit to an estate provided by an appellate attorney, for purposes of entitlement to payment of appellate fees and costs out of estate assets, is the presentation of a good-faith appeal and its ultimate resolution.

Cases that cite this headnote

[5] **Constitutional Law**
Courts in General
Constitutional Law
Appeal or Other Proceedings for Review

The judicial system affords litigants the right to

resolve disputes with due process, safeguarded by appellate review of the trial court's decisions. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

*190 Thomas C. Jennings, III of Repka & Jennings, Clearwater, for Appellant.

Alan M. Gross of Powell, Carney, Gross, Maller & Ramsay, P.A., St. Petersburg, for Appellee.

Opinion

CASANUEVA, Judge.

Richard MacDonald, as personal representative of the estate of Peter Wejanowski, appeals an order of the probate court that effectively denies him an opportunity *191 to pursue this or three other appeals stemming from the events surrounding the deaths of Mr. Wejanowski and Karen Stacy. The three other pending appeals, 2D04-1493, 2D04-2113, and 2D04-2374, have been abated to await the outcome of this appeal. We reverse.

Mr. Wejanowski and Ms. Stacy lived together unmarried for almost twenty years before their relationship began to deteriorate several months before their deaths. Mr. Wejanowski's health was rapidly declining because he was suffering from end-stage cancer of the throat, Ms. Stacy was romantically involved with another man while living with Mr. Wejanowski, and acrimony permeated their relationship. On the day of his death, Mr. Wejanowski called his friend Mr. MacDonald and requested that he visit him, which Mr. MacDonald did, accompanied by his girlfriend. After a short visit, Mr. Wejanowski excused himself and retired to another room. The couple then heard a gunshot. Responding to the sound, they discovered Mr. Wejanowski, who had committed suicide, lying next to the body of Ms. Stacy. She had been fatally shot four times and had sustained several superficial stab wounds.

Donna Mauriello, as personal representative of Ms. Stacy's estate, filed a wrongful death suit against Mr. Wejanowski's estate. Mr. MacDonald, as personal representative of the Wejanowski estate, hired one lawyer to handle probate matters and another to handle the civil litigation. Ms. Mauriello ultimately prevailed in the wrongful death suit, and Mr. MacDonald filed the first of his now-abated appeals, challenging that judgment for damages.[1] Ms. Mauriello claimed that the appeal was frivolous and that he was wasting estate assets and reducing the estate's ability to pay her judgment. In response to her claims, Mr. MacDonald filed a motion in the trial court to approve costs and fees associated with appeal. The trial court denied his motion without prejudice to resubmit the request at the conclusion of the appeal upon a showing of monetary benefit to the estate and ordered him not to expend estate funds for prosecution of the appeal, to include attorney's fees and costs. It is this order that we reverse.

[1] [2] [3] [4] [5] Requiring Mr. MacDonald to show a monetary benefit to the estate before he is entitled to reimbursement for appellate expenses narrows the definition of "benefit to the estate" to an unworkable level in this appellate context. An appellate attorney has an ethical duty not to prosecute a baseless or frivolous appeal. Payment of appellate fees and costs cannot be contingent upon prevailing on appeal because neither party can guarantee the outcome. The true benefit to an estate provided by an appellate attorney is the presentation of a good-faith appeal and its ultimate resolution. Our system affords litigants the right to resolve disputes with due process, safeguarded by appellate review of the trial court's decisions. *Cf. Brake v. Murphy*, 693 So.2d 663 (Fla. 3d DCA 1997) (reversing an order that required the personal representative and her husband to post a bond in order to file further pleadings in a surcharge proceeding because the order violated the access to the courts provision and due process clause of the state constitution).

Because section 733.602(2), Florida Statutes (2002), removes liability for any act of administration if the act was authorized at the time, personal representatives often *192 attempt to protect themselves from future liability by obtaining pre-approval, i.e., immunity, from the probate court for actions they undertake which do not need court approval. Section 733.602 provides that the personal representative "shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified by this code or ordered by the court, shall do so without adjudication, order, or direction of the court." Among the transactions authorized for the personal representative are hiring attorneys and others to aid him in his duties and prosecuting or defending claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative. § 733.612(19), (20). As a fiduciary, *see* section 733.602(1), if the personal representative breaches

his fiduciary duty, he may be liable to the interested persons for damage or loss resulting from that breach. *See* § 733.609; *see also Landon v. Isler,* 681 So.2d 755 (Fla. 2d DCA 1996) (holding that a personal representative does not breach his or her fiduciary duty, and thus become personally subject to damages, by opposing a debatable claim that later proves valid). When asked by Mr. MacDonald in this case for pre-approval to expend estate monies to prosecute these appeals, the trial court was understandably cautious given the circumstances surrounding the couple's deaths and Ms. Mauriello's objections. It would have been a better course of action to neither give nor withhold permission to expend estate monies for these appeals, rather than to give it with conditions that unduly hampered the personal representative in the exercise of his authority. If prosecuting these appeals is later determined to have been frivolous, the personal representative, as any other fiduciary, can be held accountable.

We reverse the order of the trial court that precluded Mr. MacDonald from expending estate monies to prosecute the pending appeals. Should the trial court determine, upon proper motion and after full review of the completed appellate proceedings, that the appeals were not taken in good faith or were frivolous, it has other remedies available to it. *See* § 733.609.

Reversed.

SALCINES, J., Concurs.

VILLANTI, J., Concurs specially.

VILLANTI, Judge, Specially concurring.

I fully concur in the majority opinion but take this opportunity to expound on what I perceive to be an overused and overrated probate procedure-requesting and receiving court approval when it is not necessary or legally required. I suspect this superfluous procedure is used because it is viewed as a means of obtaining a harbor safe from criticism or consequence for the future actions so "authorized." As this case demonstrates, this assumption is incorrect.

Pursuant to section 733.612, Florida Statutes (2002), the personal representative "acting reasonably for the benefit of the interested persons" may perform the "transactions authorized" "without court order." If done, then the personal representative is entitled to the protection afforded by section 733.602(2). Obtaining court approval for actions already authorized by statute does not insulate the personal representative from personal liability, nor does it eliminate the requirements of section 733.612 that the personal representative act reasonably and for the benefit of the interested persons. Additionally, the unnecessary solicitation of court approval itself may arguably even be perceived as a dissipation of estate assets.

All Citations

920 So.2d 190, 31 Fla. L. Weekly D473

Footnotes

1 The two other abated appeals challenge an order of disbursement from the estate and an order denying attorney's fees.

End of Document

3.B.

909 So.2d 340
District **Court** of Appeal of Florida,
Fifth District.

Paula MILLS, Appellant,
v.
Emanuel MARTINEZ, Appellee.

No. 5D04–2877.
|
July 8, 2005.
|
Rehearing Denied Sept. 2, 2005.

Synopsis

Background: Plaintiff filed post-trial motion in breach-of-contract action, seeking award of attorney fees based on offer of settlement. The Circuit **Court**, St. Johns County, J. Michael Traynor, J., denied motion. Plaintiff appealed.

Holdings: The District **Court** of Appeal, Orfinger, J., held that:

[1] trial **court** had **authority** to **change** or **modify** its previous **order** on plaintiff's entitlement to attorney fees, but

[2] failure to comply with provision of offer-of-judgment rule stating that proposal shall not be filed unless necessary to enforce provisions of the rule was immaterial, and thus premature filing of proposal would not preclude award of attorney fees.

Reversed; conflict certified.

West Headnotes (11)

[1] **Costs**
⇐Determination of taxing officer

Trial **court** had **authority** to **change** or **modify** its previous **order** on plaintiff's entitlement to attorney fees regarding offer of settlement in breach-of-contract action, although previous **order** was included in final judgment on damages; **order** was not final for appellate purposes because amount of fees had yet to be set. West's F.S.A. § 768.79(3); West's F.S.A. RCP Rule 1.442(d).

4 Cases that cite this headnote

[2] **Motions**
⇐Amendment of **orders**

Order that merely grants or denies a motion does not resolve the issue conclusively, and thus trial **court** has **authority** to **modify order** before entering final judgment.

2 Cases that cite this headnote

[3] **Appeal and Error**
⇐Relating to costs

Award of attorney fees does not become final and, therefore, appealable until the amount is set by the trial **court**.

3 Cases that cite this headnote

[4] **Appeal and Error**
⇐Determination of Controversy

Final judgments or **orders** determine the rights and liabilities of all parties with reference to the matters in controversy and leave nothing of a judicial character to be done.

Cases that cite this headnote

[5] **Costs**
⇐Effect of offer of judgment or pretrial deposit or tender

Plaintiff's failure to comply with provision of offer-of-judgment rule stating that proposal shall not be filed unless necessary to enforce provisions of the rule was immaterial, and thus premature filing of proposal would not preclude award of attorney fees in breach-of-contract action. West's F.S.A. RCP Rule 1.442(d).

2 Cases that cite this headnote

[6] **Costs**
⇐Effect of offer of judgment or pretrial deposit or tender

Offer-of-judgment statute and rule are in derogation of the common law rule that each party pay **its own** fees and are, therefore, strictly construed. West's F.S.A. § 768.79(3); West's F.S.A. RCP Rule 1.442(d).

Cases that cite this headnote

[7] **Costs**
⇐Effect of offer of judgment or pretrial deposit or tender

While offer-of-judgment rule is punitive in nature, its purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorney fees. West's F.S.A. RCP Rule 1.442.

1 Cases that cite this headnote

[8] **Courts**
⇐Construction and application of rules in general

Procedural rules should be given a construction calculated to further justice, not to frustrate it.

Cases that cite this headnote

[9] **Courts**
⇐**Modification**, amendment, suspension, or disregard of rules

When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties.

Cases that cite this headnote

[10] **Statutes**
⇐Mandatory or directory statutes

Generally, where the word "shall" in a statute refers to some required action preceding a possible deprivation of a substantive right, the word is given its literal meaning.

Cases that cite this headnote

[11] **Statutes**
⇐Mandatory or directory statutes

Only when a particular statutory provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, **orderly**, and prompt conduct of business is the provision using the word "shall" generally regarded as directory.

Cases that cite this headnote

Attorneys and Law Firms

*341 Glenn K. Allen, of Glenn K. Allen, P.A., Jacksonville, for Appellant.

Steven J. Guardiano, Daytona Beach, for Appellee.

Opinion

ORFINGER, J.

Paula Mills appeals the trial **court's order** denying her request for attorney's fees based on a finding that her proposal of settlement was filed prematurely with the **court** contrary to section 768.79(3), Florida Statutes (2004), and Florida Rule of Civil Procedure 1.442(d). For the reasons discussed hereafter, we reverse.

After obtaining a favorable verdict in her breach of contract action against Emanuel Martinez, Mills filed a post-trial motion seeking attorney's fees based on an offer of judgment or settlement proposal she had served on Martinez pursuant to section 768.79 and rule 1.442. The trial judge entered an "**Order** on Post Trial Motions," concluding that Mills was entitled to an award of attorney's fees pursuant to section 768.79 and rule 1.442, while noting that both the amount and the entitlement to attorney's fees were disputed by Martinez. At the same time, the trial judge entered a final judgment against Martinez, reserving jurisdiction to "determine the amount of attorney's fees awardable to the Plaintiff pursuant to Florida Statutes Chapter 768 and Florida Rule of Civil Procedure 1.442." Subsequently, the trial **court**, *sua sponte,* reversed itself and entered an **order** denying Mills's entitlement to attorney's fees on her proposal for settlement because it had been filed with the **court** prematurely. This appeal followed.

[1] Mills first argues that the trial **court** lacked jurisdiction to **change** the **order** on attorney's fees, *sua sponte,* because, based on Florida Rule of Civil Procedure 1.530(d),[1] the **court** lost jurisdiction to reconsider the merits of its original **order** ten days after the **order** has been filed. Mills also argues that Florida Rule of Civil Procedure 1.540[2] cannot be applied *342 to the **order** on attorney's fees in this case because rule 1.540(a) permits action by the trial **court** on **its own** initiative only to correct clerical mistakes and errors arising from oversight or admission. In addition, Mills argues that jurisdiction may not be established under rule 1.540(b) because judicial error, such as a "mistaken view of law," is not one of the circumstances contemplated by the rule, and the rule may only be applied "[o]n motion and upon such terms as are just."

In response, Martinez argues that the trial **court** had jurisdiction to **change** or **modify** the previous **order** on entitlement to attorney's fees, as the **order** was not a final judgment or **order**, and, therefore, not subject to the time limitations set forth in either rule 1.530 (motions for new trial and rehearing; amendments of judgments) or the subject matter of rule 1.540 (relief from final **orders** and judgments). We agree.

[2] [3] [4] An **order** that merely grants or denies a motion does not resolve the issue conclusively. It has long been established that a trial judge has the right and **authority**, at any time before entering final judgment, to **change** prior interlocutory rulings. *Bravo Elec. Co., Inc., v. Carter Elec., Co.,* 522 So.2d 480, 480–81 (Fla. 5th DCA 1988). We are not dissuaded from this view by the fact that the **order** determining Mills's entitlement to attorney's fees was included in the final judgment on damages. At least in regard to attorney's fees, the **order** was non-final. An award of attorneys' fees does not become final, and, therefore, appealable until the amount is set by the trial **court**. *Sanders v. Palmieri,* 849 So.2d 417, 417 (Fla. 5th DCA 2003) (citing *Montanez v. Montanez,* 697 So.2d 184 (Fla. 2d DCA 1997)).

> It is well settled that a judgment attains the degree of finality necessary to support an appeal when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment. *Gore v. Hansen,* 59 So.2d 538 (Fla.1952). Final judgments or **orders** "determine the rights and liabilities of all parties with reference to the matters in controversy and leave nothing of a judicial character to be done." *Id.* at 539.

*343 *McGurn v. Scott,* 596 So.2d 1042, 1043–44 (Fla.1992).

[5] Mills also argues that the trial **court's** use of rule 1.442(d) and section 768.79(3) as a sanction to deny her attorney's fees was error. Rule 1.442(d) provides:

> (d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but *shall not be filed unless necessary to enforce the provisions of this rule.*

Fla. R. Civ. P. 1.442(d) (emphasis added). Section 768.79(3) provides:

> (3) The offer shall be served upon the party to whom it is made, but it *shall not be filed unless it is*

> *accepted or unless filing is necessary to enforce the provisions of this section.*

§ 768.79(3), Fla. Stat. (2004) (emphasis added).

[6] The offer of judgment statute and rule are in derogation of the common law rule that each party pay **its own** fees and are, therefore, strictly construed. *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 277 (Fla.2003); *see Major League Baseball v. Morsani*, 790 So.2d 1071, 1077–78 (Fla.2001) (holding that "a statute enacted in derogation of the common law must be strictly construed ..."); *Dade County v. Pena*, 664 So.2d 959, 960 (Fla.1995) ("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' ") (quoting *Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n*, 539 So.2d 1131, 1132 (Fla.1989)).

It is undisputed that Mills's proposal for settlement was timely served, but prematurely filed with the **court**, some two years prior to trial.[3] We recognize that *Bottcher v. Walsh*, 834 So.2d 183 (Fla. 2d DCA 2002), holds that because the time requirements of rule 1.442 are to be strictly construed, a prematurely filed offer is void. That holding was, at least in part, premised on *Schussel v. Ladd Hairdressers, Inc.*, 736 So.2d 776, 778 (Fla. 4th DCA 1999), which construed the provisions of section 768.79 and rule 1.442 to be punitive in nature and, therefore, subject to strict construction.

[7] [8] [9] [10] [11] While rule 1.442 is punitive in nature, its purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorney's fees. *See Loy v. Leone*, 546 So.2d 1187 (Fla. 5th DCA 1989). "Procedural rules should be given a construction calculated to further justice, not to frustrate it." *Singletary v. State*, 322 So.2d 551 (Fla.1975); *see also Eastwood v. Hall*, 258 So.2d 269 (Fla. 2d DCA 1972). "When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties." *In re Rutherfurd's Estate*, 304 So.2d 517, 520 (Fla. 4th DCA 1974).

> "Generally, where the word 'shall' refers to some required action preceding a possible deprivation of a substantive right, the word is given its literal meaning." *Stanford v. State*, 706 So.2d 900, 902 (Fla. 1st DCA 1998) (relying on *S.R. v. State*, 346 So.2d 1018, 1019 (Fla.1977), and *Neal v. Bryant*, 149 So.2d 529, 532 (Fla.1962)). In *Neal*, we explained that in its normal usage, "shall" has a mandatory connotation. ***344** *Id. Only when a particular provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, **orderly** and prompt conduct of business is the provision generally regarded as directory. Id.* (quoting *Reid v. Southern Dev. Co.*, 52 Fla. 595, 42 So. 206 (1906)).
>
> *DeGregorio v. Balkwill*, 853 So.2d 371, 374 (Fla.2003) (citations omitted) (emphasis added).

We believe Mills's error in prematurely filing her proposal to settle to be such an immaterial matter. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the Supreme **Court** stated that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal **courts** will not in the ordinary course impose their **own** coercive sanction." *Id.* at 63, 114 S.Ct. 492 (citations omitted). The **Court** reasoned that, when Congress had included various "promptness" requirements in certain statutes but included no penalty for failure to meet those requirements, the **Court** would not impose **its own** sanction of dismissal. *Id.* at 64–65, 114 S.Ct. 492.[4] We find that analysis to be compelling here, because it furthers, not frustrates, the purpose of the rule and statute. We believe Mills's violation of rule 1.442(d) was immaterial and certainly not prejudicial. The trial **court** followed *Bottcher*, as it was required to do. However, we disagree with *Bottcher* because such an interpretation of the rule defeats its very purpose.

For these reasons, we reverse the **order** denying Mills's fee request and certify conflict with *Bottcher*.

REVERSED; CONFLICT CERTIFIED.

PLEUS, C.J., and PETERSON, J., concur.

All Citations

909 So.2d 340, 30 Fla. L. Weekly D1672

Footnotes

1 Florida Rule of Civil Procedure 1.530(d) provides:

> (d) On Initiative of **Court**. Not later than 10 days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party, the **court** of **its own** initiative may **order** a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

2 Florida Rule of Civil Procedure 1.540 provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the **court** at any time on **its own** initiative or on the motion of any party and after such notice, if any, as the **court orders**. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is docketed in the appellate **court**, and thereafter while the appeal is pending may be so corrected with leave of the appellate **court**.
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the **court** may relieve a party or a party's legal representative from a final judgment, decree, **order**, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, **order**, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a **court** to entertain an independent action to relieve a party from a judgment, decree, **order**, or proceeding or to set aside a judgment or decree for fraud upon the **court**....

3 The record discloses that Martinez served Mills with a proposal to settle several months before Mills's proposal was served. Ironically, Martinez also filed his offer with the **court** in violation of the rule and statute.

4 Other federal **courts** have reached similar results when considering time periods established in other statutes. *See, e.g., Shenango Inc. v. Apfel,* 307 F.3d 174, 193 (3d Cir.2002) (statutory deadline does not, by itself, establish that Congress intended to strip an agency's **authority** to act after the deadline has passed); *Friends of Aquifer, Inc. v. Mineta,* 150 F.Supp.2d 1297 (N.D.Fla.2001) (holding that group was not entitled to writ of mandamus, given that it was not clear that Congress intended deadlines for meeting the standards to be mandatory, even though the statute provided that the Secretary "shall" prescribe certain regulations not later than given deadlines); *Bhd. of Ry. Carmen Div. v. Pena,* 64 F.3d 702, 704 (D.C.Cir.1995); *Canadian Fur Trappers Corp. v. United States,* 12 Ct. Int'l Trade 612, 615, 691 F.Supp. 364, 367 (1988) (holding that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provisions), *aff'd,* 884 F.2d 563 (Fed.Cir.1989).

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3.C.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 733. Probate Code: Administration of Estates (Refs & Annos)
Part VI. Duties and Powers of Personal Representative

West's F.S.A. § 733.612

733.612. Transactions authorized for the personal representative; exceptions

Effective: January 1, 2002

Currentness

Except as otherwise provided by the will or court order, and subject to the priorities stated in s. 733.805, without court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent, pending distribution or liquidation, including those in which the personal representative is personally interested or that are otherwise improper for fiduciary investments.

(2) Perform or compromise, or, when proper, refuse to perform, the decedent's contracts. In performing the decedent's enforceable contracts to convey or lease real property, among other possible courses of action, the personal representative may:

(a) Convey the real property for cash payment of all sums remaining due or for the purchaser's note for the sum remaining due, secured by a mortgage on the property.

(b) Deliver a deed in escrow, with directions that the proceeds, when paid in accordance with the escrow agreement, be paid as provided in the escrow agreement.

(3) Receive assets from fiduciaries or other sources.

(4) Invest funds as provided in ss. 518.10-518.14, considering the amount to be invested, liquidity needs of the estate, and the time until distribution will be made.

(5) Acquire or dispose of an asset, excluding real property in this or another state, for cash or on credit and at public or private sale, and manage, develop, improve, exchange, partition, or change the character of an estate asset.

(6) Make ordinary or extraordinary repairs or alterations in buildings or other structures; demolish improvements; or erect new party walls or buildings.

(7) Enter into a lease, as lessor or lessee, for a term within, or extending beyond, the period of administration, with or without an option to renew.

(8) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

(9) Abandon property when it is valueless or so encumbered, or in a condition, that it is of no benefit to the estate.

(10) Vote, or refrain from voting, stocks or other securities in person or by general or limited proxy.

(11) Pay calls, assessments, and other sums chargeable or accruing against, or on account of, securities, unless barred by the provisions relating to claims.

(12) Hold property in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the property so held.

(13) Insure the assets of the estate against damage or loss and insure against personal and fiduciary liability to third persons.

(14) Borrow money, with or without security, to be repaid from the estate assets or otherwise, other than real property, and advance money for the protection of the estate.

(15) Extend, renew, or in any manner modify any obligation owing to the estate. If the personal representative holds a mortgage, security interest, or other lien upon property of another person, he or she may accept a conveyance or transfer of encumbered assets from the owner in satisfaction of the indebtedness secured by its lien instead of foreclosure.

(16) Pay taxes, assessments, and other expenses incident to the administration of the estate.

(17) Sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) Employ persons, including, but not limited to, attorneys, accountants, auditors, appraisers, investment advisers, and others, even if they are one and the same as the personal representative or are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act upon the recommendations of those employed persons without independent investigation; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary. Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative's compensation.

(20) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative.

(21) Sell, mortgage, or lease any personal property of the estate or any interest in it for cash, credit, or for part cash or part credit, and with or without security for the unpaid balance.

(22) Continue any unincorporated business or venture in which the decedent was engaged at the time of death:

(a) In the same business form for a period of not more than 4 months from the date of appointment, if continuation is a reasonable means of preserving the value of the business, including good will.

(b) In the same business form for any additional period of time that may be approved by court order.

(23) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(24) Satisfy and settle claims and distribute the estate as provided in this code.

(25) Enter into agreements with the proper officer or department head, commissioner, or agent of any department of the government of the United States, waiving the statute of limitations concerning the assessment and collection of any federal tax or any deficiency in a federal tax.

(26) Make partial distribution to the beneficiaries of any part of the estate not necessary to satisfy claims, expenses of

administration, taxes, family allowance, exempt property, and an elective share, in accordance with the decedent's will or as authorized by operation of law.

(27) Execute any instruments necessary in the exercise of the personal representative's powers.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 78; Laws 1976, c. 76-172, § 3; Laws 1977, c. 77-87, § 31; Laws 1977, c. 77-174, § 1; Laws 1979, c. 79-400, § 271. Amended by Laws 1997, c. 97-102, § 1009, eff. July 1, 1997; Laws 2001, c. 2001-226, § 135, eff. Jan. 1, 2002.

Notes of Decisions (104)

West's F. S. A. § 733.612, FL ST § 733.612
Current with chapters from the 2016 2nd Regular Session of the 24th Legislature in effect through May 10, 2016

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3.D.

136 So.3d 1276
District Court of Appeal of Florida,
First District.

Alan B. BOOKMAN, as Successor Personal Representative of the Estate of Deborah E. Irby, Deceased, Appellant,
v.
Dale DAVIDSON, Appellee.

No. 1D13–3086.
|
May 5, 2014.

Synopsis
Background: Successor personal representative of estate filed suit against estate's original personal representative for breach of fiduciary duty, defalcation, malfeasance, devastavit, and for disgorgement of fees, and against estate's former attorney for legal malpractice and for disgorgement of legal fees. Original personal representative filed cross-claim against attorney for legal malpractice, breach of fiduciary duty, and contribution. The Circuit Court, Walton County, David W. Green, J., granted summary judgment in favor of attorney on malpractice claim and dismissed claim for disgorgement against attorney. Successor representative appealed.

Holdings: The District Court of Appeal, Swanson, J., held that:

[1] as a matter of first impression, successor representative had standing and duty to pursue legal malpractice claims against attorney retained by original personal representative, and

[2] although trial court acted within its discretion when it dismissed disgorgement claim on ground that claims should be heard in probate proceedings, court had subject matter jurisdiction over claim.

Affirmed in part, reversed in part, and remanded.

West Headnotes (6)

[1] **Executors and Administrators**
⚭Administrators De Bonis Non
Executors and Administrators
⚭Personal or representative capacity

Successor personal representative of estate had standing and duty, pursuant to statute governing power and rights of successor representatives, to bring legal malpractice suit against attorney who had been retained by estate's original personal representative alleging that the original representative, through attorney's guidance, improperly disclaimed or transferred estate's assets; original representative had power to engage attorney and to pay attorney from estate funds and duty to pursue assets of the estate, and successor representative stepped into the shoes of original representative. West's F.S.A. §§ 733.602, 733.603, 733.612(20), 733.614.

Cases that cite this headnote

[2] **Executors and Administrators**
⚭Administrators De Bonis Non

The powers granted to the original personal representative of an estate flow to a successor personal representative. West's F.S.A. §§ 733.602(1), 733.612(19), 733.614.

Cases that cite this headnote

[3] **Executors and Administrators**
⚭Property in possession of or claimed by heirs, distributees, and others

A personal representative of an estate is required by law to pursue assets and claims of the estate, with value, including those assets which are in the hands of a former personal representative or her or his agents. West's F.S.A. §§ 733.602, 733.603, 733.612(20).

1 Cases that cite this headnote

[4] **Executors and Administrators**
Jurisdiction

Although trial court acted within its discretion when it dismissed disgorgement claims, brought by successor representative of estate against estate's former attorney, on the ground that the claims should be heard in pending probate proceedings, the probate statute governing proceedings for review of compensation for persons employed by estate's personal representative did not preclude trial court's subject matter jurisdiction over disgorgement claim, and thus trial court, in its discretion on remand, could exercise subject matter jurisdiction to hear that issue. West's F.S.A. § 733.6175(2).

1 Cases that cite this headnote

[5] **Judges**
Judicial powers and functions in general

Every judge of the circuit court possesses the full jurisdiction of that court in his or her circuit.

Cases that cite this headnote

[6] **Executors and Administrators**
Decisions reviewable

Statute governing proceedings for review of compensation of personal representatives and employees of estates does not preclude circuit court of general jurisdiction from hearing, in a related civil suit, the issue of compensation of a person who was employed by the personal representative of an estate as a part of the estate's administration. West's F.S.A. § 733.6175(2).

1 Cases that cite this headnote

Attorneys and Law Firms

*1277 John H. Adams, P. Michael Patterson, and Cecily M. Welsh of Emmanuel, Sheppard, and Condon, Pensacola, for Appellant.

W. David Jester and Jonathan B. Minchin of Galloway, Johnson, Tompkins, Burr & Smith, Pensacola, for Appellee.

Opinion

*1278 SWANSON, J.

Appellant, Alan B. Bookman, as successor personal representative of the estate of Deborah E. Irby, appeals the trial court's "Summary Final Judgment as to Count II and Order Dismissing Count III." In it, the court found, as a matter of law, that appellant does not have standing to bring a legal malpractice action against appellee, Dale Davidson, the attorney who was hired by the initial personal representative to aid her in the administration of the estate. The court also granted appellee's motion to dismiss appellant's claim for disgorgement of attorney's fees paid by the estate to appellee on the basis they were excessive. It concluded that while appellant had a right to pursue that claim, it would be more appropriately heard in the estate proceedings, which were still pending. We reverse the trial court's summary final judgment based on a plain reading of section 733.614, Florida Statutes. We affirm on principle, however, the trial court's dismissal of the claim for disgorgement, but hold the court may, in its discretion on remand, exercise its subject matter jurisdiction to hear that issue along with the other counts of the civil case.

According to the undisputed facts, on January 4, 2007, Dana Ford, through appellee, filed a petition for the administration of the estate of Deborah Irby in the Walton County circuit court. On January 24, 2007, Ford was appointed personal representative of the estate and Letters of Administration were issued. Ford engaged the legal services of appellee to advise her concerning her administrative duties until shortly before she resigned as personal representative on February 12, 2010. During the course of his representation of Ford, appellee was paid from estate funds the sum of $195,000.

On February 17, 2010, appellant was appointed successor

personal representative of the estate. After his appointment, appellant filed a civil suit against Ford and appellee. In his Second Amended Complaint, appellant alleged that Ford, through appellee's guidance, improperly disclaimed or transferred out of the estate certain assets belonging to the estate that could have been used to pay its creditors. Appellant sought damages based on allegations that appellee had improperly advised Ford in regards to her responsibilities as personal representative, as well as damages from Ford, personally, for breach of fiduciary duty, defalcation, malfeasance, and devastavit, and also sought disgorgement of personal representative fees paid to her. Ford, in turn, filed an answer raising affirmative defenses, including the defense that her actions were done in good faith and in reliance on the advice of legal counsel. She also filed a cross-claim against appellee for legal malpractice, breach of fiduciary duty, and contribution.

Appellee moved for summary judgment against appellant, in part claiming the undisputed facts established a lack of any attorney-client relationship between appellee and appellant such that appellant, as successor personal representative, could not file a suit against him for malpractice. Primarily, appellee argued a successor personal representative is not in privity with the original personal representative's attorney, a necessary prerequisite to maintaining a malpractice claim under Florida law. He also moved to dismiss appellant's count for disgorgement of the portion of attorney's fees paid to him, urging the probate court had exclusive jurisdiction, or, at least, was the proper court, to review the compensation of professionals involved with the administration of the estate.

The trial court granted appellee's motion for summary judgment, finding appellant lacked standing to sue appellee because he ***1279** was not in privity with appellee. It also dismissed the claim for disgorgement, concluding that while appellant might have a right to pursue a claim for disgorgement of excessive attorney's fees, it was more appropriate that such claim be made in the then-pending estate proceedings. Appellant now challenges these findings and conclusions.

[1] This case presents a question of first impression in Florida, that being whether a successor personal representative of an estate may bring a cause of action for legal malpractice against an attorney hired by her or his predecessor to provide services necessary to the administration of the estate. In reaching our decision to reverse the summary final judgment, we conclude we need not address the privity issue. Instead, our decision is informed by the plain meaning of the language of the relevant statutes in the Florida Probate Code, sections 733.601–733.620, Florida Statutes. *See Petty v. Fla. Ins. Guar. Ass'n,* 80 So.3d 313, 316 n. 2 (Fla.2012); *Srygley v. Capital Plaza, Inc.,* 82 So.3d 1211, 1212 (Fla. 1st DCA 2012); *In re A.G.,* 40 So.3d 908 (Fla. 3d DCA 2010) (holding where the statute's language is clear and unambiguous, courts need not employ principles of statutory construction).

[2] Sections 733.601 through 733.620 set forth the powers, duties, and obligations of the personal representative as regards not only the estate, but an assemblage of other individuals related to the estate's administration, including its beneficiaries, creditors, contractors, accountants, and attorneys. Section 733.602(1), Florida Statutes, prescribes the general duties of the personal representative by providing that the personal representative

> is a fiduciary who shall observe the standards of care applicable to trustees ... [and] is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and [the Florida Probate Code] as expeditiously and efficiently as is consistent with the best interests of the estate.

To accommodate the personal representative's exercise of her or his duties, section 733.612, Florida Statutes, governs the transactions authorized by the personal representative, including the employment of an attorney. *See* § 733.612(19), Fla. Stat. Most significantly, section 733.614 addresses the "[p]owers and duties" of a successor personal representative:

> A successor personal representative has *the same power and duty as the original personal representative* to complete the administration and distribution of the estate as expeditiously as possible, but shall not exercise any power made personal to the personal representative named in the will without court approval.

Therefore, the powers granted to the original personal representative flow to the successor personal representative.

[3] Within this context, the Florida Probate Code expressly

granted to Dana Ford, as personal representative of the estate of Deborah E. Irby, the power to engage appellee to represent her and to pay appellee from estate funds. *See* §§ 733.612(19) & 733.6171(1), Florida Statutes. The Code also grants to the personal representative the power to prosecute lawsuits or proceedings for the protection of the estate and the benefit of interested parties. *See* § 733.612(20), Fla. Stat. Furthermore, Ford, as personal representative, had the duty to act within "the best interests of the estate" and in "the best interests of all interested parties, including creditors." §§ 733.602 & 733.603, Fla. Stat. This means the personal representative is ***1280** required by law to pursue assets and claims of the estate, with value, including those assets which are in the hands of a former personal representative or her or his agents. *See Sessions v. Willard,* 172 So. 242, 245–46 (Fla.1937).

Thus, there is no dispute that Ford, as the estate's personal representative, had standing to bring suit against appellee for legal malpractice. Yet, by virtue of the plain language of section 733.614, we hold all of the power and rights Ford possessed, *including the right to bring suit against appellee on behalf of the estate,* likewise transferred to appellant as the successor personal representative. In essence, appellant stepped into the shoes of Dana Ford when he became the successor personal representative. Consequently, the trial court erred when it entered summary judgment in favor of appellee, claiming appellant lacked standing. Appellant, as successor personal representative, has every right and duty under the Florida Probate Code to pursue legal action for malpractice against appellee on behalf of the estate. *Cf. Onofrio v. Johnston & Sasser, P.A.,* 782 So.2d 1019 (Fla. 5th DCA 2001). The cause is therefore remanded for further proceedings.

[4] [5] Appellant's remaining point concerns the trial court's decision to dismiss his count for disgorgement of attorney's fees against appellee. The court ruled: "While [appellant] may have the right to pursue a claim for disgorgement of excessive fees allegedly charged by [appellee], it is more appropriate that such claim be made in the estate proceedings, which currently remain pending." Section 733.6175(2), Florida Statutes, provides that "[c]ourt proceedings to determine the reasonable compensation of the personal representative *or any person employed by the personal representative,* if required, are *a part of the estate administrative proceedings* ...." (Emphasis added.) Accordingly, it has been held that "the Florida probate court has exclusive jurisdiction [over the matter of compensation] and is obligated to review estate fees upon the petition of a proper party." *In re Winston,* 610 So.2d 1323, 1325 (Fla. 4th DCA 1992). The trial court, then, did not abuse its discretion in holding it was "more appropriate" for the disgorgement claim to be heard in the probate proceedings. Nonetheless, the trial court did not lack subject matter jurisdiction to consider the claim for disgorgement. The "court" for purposes of the Florida Probate Code is defined generally as "the circuit court." § 731.201, Fla. Stat. Any circuit court has "exclusive original jurisdiction" over "proceedings relating to the settlement of the estates of decedents and minors, the granting of letters testamentary ..., and other jurisdiction usually pertaining to courts of probate." § 26.012(2)(b), Fla. Stat. In this respect, "every judge of the circuit court possesses the full jurisdiction of that court in his or her circuit and [ ] the various divisions of that court operate in multi-judge circuits for the convenience of the litigants and for the efficiency of the administration of the circuits' judicial business." *Maugeri v. Plourde,* 396 So.2d 1215, 1217 (Fla. 3d DCA 1981) (holding, however, in the case before it, the clear language of section 744.387(3)(a), Florida Statutes (1977), mandated that "the only court having jurisdiction to approve the settlement of a minor's claim in a pending action is the court in which the action is pending"). *See also Fort v. Fort,* 951 So.2d 1020, 1022 (Fla. 1st DCA 2007) (citing *Maugeri,* and also citing *In the Interest of Peterson,* 364 So.2d 98, 99 (Fla. 4th DCA 1978), for the holding: "All circuit court judges have the same jurisdiction within their respective circuits.... The internal operation of the court system and the assignment of judges to various divisions ***1281** does not limit a particular judge's jurisdiction.") (internal quotations omitted). *Accord Weaver v. Hotchkiss,* 972 So.2d 1060, 1062 (Fla. 2d DCA 2008).

[6] Unlike the statutory language addressed in *Maugeri,* we do not read section 733.6175(2) as precluding a circuit court of general jurisdiction from hearing, in a related civil suit, the issue of compensation of a person who was employed by the personal representative of an estate as a part of the estate's administration. On remand, the trial court, in its discretion and for the convenience of the court and the parties, may hold a joint trial of all the claims if it is shown that a joint trial will not prejudice a party or cause inconvenience. *See Yost v. Am. Nat'l Bank,* 570 So.2d 350, 352 (Fla. 1st DCA 1990).

AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

BENTON and OSTERHAUS, JJ., concur.

All Citations

136 So.3d 1276, 39 Fla. L. Weekly D932

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3.E.

128 Fla. 151
Supreme Court of Florida.

In re PAINE'S ESTATE.
WILLIAMS
v.
GARNETT.

May 1, 1937.
|
Rehearing Denied June 2, 1937.

Action by W. J. Garnett, as administrator de bonis non of the estate of Maggie G. Paine, deceased, against C. H. Williams. From an order of the circuit court which affirmed a judgment of the county judge's court for plaintiff, and denied defendant's petition for rehearing, defendant appeals.

Reversed and remanded, with directions.

West Headnotes (10)

[1] **Executors and Administrators**
Forfeiture or Deprivation of Compensation

Only commissions on sale of estate property, not compensation of administrator and other charges, are forfeited by administrator by failure to file annual returns. Comp.Gen.Laws 1927, §§ 5541, 5546.

Cases that cite this headnote

[2] **Executors and Administrators**
Forfeiture or Deprivation of Compensation

Where administrator does not give proper attention to his duties, court has discretion to refuse to allow him compensation for services. Comp.Gen.Laws 1927, §§ 5541, 5546.

Cases that cite this headnote

[3] **Executors and Administrators**
Services

Administrator may employ counsel when necessary or proper to protect estate or to enable administrator properly to manage estate, and where suits are instituted in good faith against administrator in his representative capacity, he must employ counsel to defend such suits.

1 Cases that cite this headnote

[4] **Executors and Administrators**
Counsel Fees and Costs

Attorneys' fees, where determined by court to be reasonable in amount and rendered for services necessary or proper to protection of estate, will be paid out of estate in settlement of administrator's account unless suits in which services were rendered were collusive or not properly defended, even where administrator has mismanaged estate, since mismanagement may be penalized by denying administrator compensation.

1 Cases that cite this headnote

[5] **Executors and Administrators**
Actions Against Foreign Executors or Administrators

Ordinarily, executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction.

2 Cases that cite this headnote

[6] **Executors and Administrators**

Actions Against Foreign Executors or Administrators

Where administrator was appointed in Florida for woman who died in Florida, but administrator moved to Kentucky and took estate property with him, including property in which deceased had only life estate, remaindermen held entitled to sue administrator in Kentucky courts for return of specific property to which remaindermen had title and proceeds of sale thereof, since property was subject of jurisdiction of Kentucky courts, and hence administrator was entitled to credit for money paid in satisfaction of consent judgment entered in such action.

Cases that cite this headnote

[7] **Executors and Administrators**
Actions Against Foreign Executors or Administrators

In action brought in Kentucky against administrator appointed in Florida, to recover specific property and proceeds of sale thereof, Kentucky law governed as to whether suit might be maintained, but Florida law governed as to liability of administrator.

Cases that cite this headnote

[8] **Executors and Administrators**
Accounting and Settlement

Administrator appointed in Florida held not entitled to credit on final accounting for money paid on consent judgment entered in Kentucky action against him for waste committed by decedent as life tenant of realty, since such action was a "local action" for damages by general creditor of estate, and maintainable in Kentucky only if ancillary administration had been taken out.

1 Cases that cite this headnote

[9] **Life Estates**
Timber

Tenant for life without impeachment for waste may cut wood to same extent as owner of fee, provided tenant does not cut trees planted for ornament or shelter, or commit equitable waste, or cut willfully or maliciously.

1 Cases that cite this headnote

[10] **Executors and Administrators**
Compromises by Creditors

Administrator may compromise claim or suit brought against estate if compromise is fair, beneficial to estate and free from fraud, negligence, or misconduct, but not suit brought in court of state which had no jurisdiction thereof.

Cases that cite this headnote

***152 **431** Appeal from Circuit Court, Pinellas County; John I. Viney, judge.

Attorneys and Law Firms

***153** McKay, Macfarlane, Jackson & Ramsey and Chester H. Ferguson, all of Tampa, for appellant.

Baskin, Jordan & Richard, of Clearwater, for appellee.

Opinion

PER CURIAM.

This is an appeal from an order of the circuit court affirming certain orders of the county judge's court, and denying a petition for rehearing. The orders of the county judge's court appealed to the circuit court were those

orders sustaining certain objections made to the report of C. H. Williams, as administrator of the estate of Maggie G. Paine, deceased, denying a rehearing and entering judgment in favor of the estate against C. H. Williams former administrator, in the sum of $4,269.17.

It appears that the First National Bank of St. Petersburg, Fla., was, on May 26, 1930, appointed administrator of the estate of Maggie G. Paine, deceased. Thereafter the First National Bank of St. Petersburg became insolvent, and Gertie M. Dickinson, Carrie M. Barker, George A. McElwain, Elizabeth T. Graves, Mamie T. Bassett, Lulu L. Goff, Nell O. Garnett, and Jimmie Graves Thompson, nieces and nephews and next of kin of the deceased, petitioned the county judge to remove the First National Bank of St. Petersburg as administrator of the estate and to appoint C. H. Williams of Hopkinsville, Ky., as administrator. Whereupon the county judge, on September 10, 1930, entered an order appointing C. H. Williams administrator de bonis non of the estate of Maggie G. Paine, deceased, and letters of administration were issued to him. Edgar H. Dunn of St. Petersburg was designated as the resident agent for the administrator. Upon his appointment, C. H. Williams returned to his domicile in Kentucky, and carried with him or had forwarded to him the entire estate, consisting of cash, notes, bonds, and jewelry, and ***154** there proceeded to administer it without taking out ancillary proceedings.

On May 17, 1934, Lulu L. Goff, Florence De Bar, Elizabeth T. Graves, Jimmie G. Thompson, Nell Garnett, Mamie T. Bassett, George F. Thompson, James G. Thompson, Rebecca T. Crockett, Ruth T. Wilson, and Rachel T. Griffin, heirs at law of Maggie G. Paine, deceased, filed their petition praying that the court remove C. H. Williams as administrator of the estate and appoint W. J. Garnett of Pembroke, Ky., administrator de bonis non of the estate; that C. H. Williams be required to give an accounting; that he be required to pay the legal rate of interest on the money retained in his hands for an unreasonable period of time; that he be denied compensation as administrator of the estate because of his failure to properly administer it and file the proper reports.

The petition alleged that C. H. Williams, as administrator, has in his hands, after payment of all debts and costs of the estate, a substantial sum of money and certain articles of personal property, consisting of shares of stock, jewelry, notes, and other articles; that petitioners and other interested parties have repeatedly requested him to convert said assets into money so that it might be distributed, or that distribution be made in kind, but he has refused and still refuses to do either; that part of said property consists of stock in the Planter's Bank & Trust Company of Hopkinsville, Ky., which petitioners and others frequently requested him to sell while market conditions were favorable, but he refused and still refuses to sell said stock, with the result that it is worth only about half of what it was worth when he was first requested to sell it; that said administrator has failed to take steps to collect certain notes and money due the estate, which collection may become ***155** impossible by reason of delay; that although more than three years have elapsed since said administrator was appointed and received his letters of administration, yet he has not filed any report whatever; that his failure to properly administer the estate and file his reports as required by law are without just cause or excuse; that upon his appointment he received approximately $9,000 in cash, which has been in his hands since that time; that upon information and belief petitioners allege that said administrator paid out a substantial part of that money without receiving proper authority from this court or otherwise; that petitioners ****432** believe said administrator has paid out money on certain proper charges against the estate, but have no knowledge of the amount because of his failure to file any reports; that said administrator has had in his hands for more than three years a large sum of money belonging to the estate.

The answer of the administrator set up affirmative matter of defense by averring that although he was appointed administrator in September, 1930, the money did not come into his hands until September, 1931, because of long-drawn-out litigation to establish the fact that the funds of the estate on deposit with the defunct First National Bank of St. Petersburg were trust funds; that he made an effort to sell the stock of the Planter's Bank & Trust Company of Hopkinsville, Ky., but at that time a bitter campaign was going on between that bank and the other bank of Hopkinsville, the financial structure at Nashville, Tenn., broke down, the National Bank of Kentucky at Louisville failed, and all demand for bank stock was cut off. The answer then alleged that Maggie G. Paine had, by a former marriage, been the wife of V. A. Garnett, who died and willed the major portion of his estate, both real and personal, ***156** to his widow, Maggie G. Paine, for life, and also made her executrix of his will; that title could be traced from the intangibles of Garnett's estate to much of the assets that came into the hands of C. H. Williams as administrator of the Paine estate; that said widow afterwards married a Mr. Paine; that on December 23, 1930, a writ of garnishment was served on C. H. Williams as administrator of the estate, and concurrently a suit was filed attacking the validity of the claim of the Paine estate to any of the property, contending that all assets in the hands of C. H. Williams, as administrator of the Paine estate, was in fact property of the remaindermen under the will of V. A. Garnett, and it was found during

the course of the litigation that Maggie G. Paine had not filed with the court a settlement showing what portion of the property came into her hands through the will of V. A. Garnett, which after her death was to go to other persons; that in this case a judgment of $2,500 was rendered in favor of plaintiffs against C. H. Williams as administrator of the Paine estate; that the attorney's fees were not decided upon until the current year, after final disposition of the matter; that plaintiffs contended in that case that the moneys on deposit in the First National Bank of St. Petersburg to the credit of the Paine estate were proceeds from the sale of stock in the bank of Hopkinsville, Ky., which originally belonged to V. A. Garnett, this contention being substantiated by the records of said bank as to fourteen of said shares, but the status of the remaining shares of stock were somewhat indefinite; that the status of fourteen shares of the stock of the Planter's Bank & Trust Company was also doubtful and it is contended that they were bought with money belonging to the Garnett estate. The answer then set up the defense that another suit was filed against C. H. Williams as administrator of the estate of Maggie G. *157 Paine, deceased, alleging that Maggie G. Paine, during her life tenancy of certain lands, cut timber therefrom, which was not for the upkeep of the property, and a judgment for $425 was entered in favor of the remaindermen under the Garnett will. The answer set up the further defense that C. H. Williams made an earnest effort to sell the various properties and collect the debts due the estate, but without avail; that prior to the filing of the petition herein, suit was instituted against Mamie T. Bassett to foreclose a lien on certain property for the amount of $7,500; that the administrator is anxious to close the estate and recently determined to get a court order directing him to sell the stocks belonging to the estate, but ran into difficulties and was blocked from carrying out that plan.

Then followed the administrator's reports, listing the assets of the estate that he received and that have come in since his appointment, and the expenditures and disbursements made from those assets.

The heirs of Maggie G. Paine then filed their exceptions to the report of the administrator, objecting to certain items given in the report. General objections were filed to the report as an entirety because C. H. Williams, as administrator, paid the vouchers without any authority from the county judge of Pinellas county; that he never applied to the court for authority to make any of the disbursements; that he did not file his report within the time allowed by law; that he made each of the payments arbitrarily with a total disregard for the laws of the state of Florida and the authority of the county judge's court of Pinellas county; that from September, 1930, to June, 1934, the estate had a cash balance running as high as $9,000, and at present amounting to $2,388.33, according **433 to the report; that if this money was deposited so as to draw interest, the receipts *158 should show it, and if not so deposited, the administrator is properly chargeable with the amount the estate should have received as interest on said funds.

Trial of the issues was had before the county judge of Pinellas county on September 12, 1934, after which the court entered its order approving the report of the administrator except as to the following items, which were not followed:

"Voucher

No.	To whom Paid	Amount
19	C. H. Williams	$ 350.00
23	James Breathitt, Jr.	250.00
24	James Breathitt, Jr.	250.00
25	John C. Duffy, attorney and Helen	

	Morehead Layne	106.25
26	John C. Duffy and Clarence G. Morehead	212.50
27	John C. Duffy and James W. Morehead	106.25
29	S. Y. Trimble, Trustee	2500.00
30	R. A. Craft, Circuit Clerk	41.17
31	Mrs. Mary W. Keller	3.00
33	James Breathitt, Jr.	200.00
40	White & Clark	250.00

'All other objections are overruled, and the report otherwise approved.'

The administrator filed his petition for rehearing in which he set out in detail what each voucher disallowed by the court was spent for. He requested the order, disallowing these payments, be vacated, because the payments accrued either directly or indirectly by reason of actions instituted in Kentucky, upon which valid judgments were obtained against petitioner-administrator; because *159 said payments were not made from the assets of the estate of Maggie G. Paine, but from assets in petitioner's hands belonging to certain beneficiaries named in the last will and testament of V. A. Garnett, the husband of Maggie G. Paine, prior to her marriage to Dr. Paine; because said order attempts to require petitioner to pay his successor in trust, funds that do not comprise part of the estate of Maggie G. Paine; and because said order is contrary to law.

The court denied the petition for rehearing and ordered that final judgment for $4,269.17 be entered in favor of the petitioning heirs against C. H. Williams, former administrator; and directing him to pay over to W. J. Garnett, the administrator, the sum of $4,269.17.

C. H. Williams took an appeal to the circuit court, which

court affirmed the orders of the county judge's court appealed from.

Petition for rehearing and reargument of the cause was denied by the circuit court.

From these two orders of the circuit court the former administrator, C. H. Williams, took an appeal to the Supreme Court.

The first question presented is whether an administrator forfeits all of the compensation allowed to him by law because he fails to file his annual returns as required by statute?

The court, in denying C. H. Williams compensation for his services stated that under section 5546, C.G.L., the administrator precluded himself from receiving any compensation for his services and forfeited all commissions by reason of the fact that he did not make annual accountings as required by law.

[1] Section 5546, C.G.L. provides that administrators, unless ***160** otherwise ordered by the court, shall make their annual returns on the first day of June in every year, unless appointed after January first and before June first, then the first annual return may not be filed until the first of June of the second year after the appointment. Then the statute provides:

'If they fail to make such returns before such time, they shall forfeit all commissions on such returns so to be made.'

Section 5541, C.G.L. provides as follows:

'Executors and administrators shall be allowed all reasonable charges on account of disbursement for funeral expenses, and in the administration of the estate of the person deceased, and shall also be allowed a just and fair compensation for their services, and also a compensation not exceeding six per cent. on money arising from the sale of personal property and lands of the deceased.'

In the case of Shepard's Heirs v. Shepard's Administrator, 19 Fla. 300, this statute was construed to give to the administrator four different kinds of allowances or compensation, which are as follows: (1) Reasonable charges on account of funeral expenses; (2) reasonable charges incurred in the administration of the decedent's estate; (3) fair and just compensation for his services; and (4) compensation not exceeding 6 per cent. on money arising from the sale of real and personal property of the decedent.

In the case of Sanderson's Administrators v. Sanderson, 20 Fla. 292, the statute, now section 5546, C.G.L., forfeiting the ****434** commissions of the administrator, upon his failure to file his annual report, was interpreted. The court said at page 319:

'We do not understand the statute to provide for any forfeiture except in the case of the neglect of the administrator 'to render' his annual account to the County Court, and the ***161** forfeiture there does not extend beyond commissions on amounts collected or disbursed and approved and allowed.'

[2] Thus only the fourth class of compensation is forfeited when the administrator fails to file his report pursuant to the provisions of section 5546, C.G.L. The administrator would be entitled to receive compensation or allowances under the first three heads enumerated, even though he failed to file his annual report on time, unless there be other legal reasons why he should not be so entitled. The report of the administrator showed and the testimony likewise revealed that the administrator was entitled to some compensation for his services in procuring by court action the sum of $8,971.37 as a preferred claim from the receiver of the defunct First National Bank of St. Petersburg. There may have been other services such as the sale of Hopkinsville Milling Company stock for $675, the receipt of a cash balance in the Bank of Pembroke, Pembroke, Ky., of $426.03, and the receipt of refund on farm insurance of $3.30, for which the administrator should be compensated. Then there is the consideration to be taken into account by the court, that the administrator did not give proper attention to his duties, so that the value of his services in the first instance would be nullified. In that event, it is in the discretion of the court of refuse to allow him compensation for his services. See Eppinger, Russell & Co. v. Canepa, 20 Fla. 262; Schouler on Wills, Executors & Administrators (6th Ed.) vol. 4, § 3049.

The second question presented is whether the amounts paid by the administrator as fees to attorneys to defend suits brought against him should be allowed as a credit to him.

[3] [4] An administrator may employ counsel, when necessary or proper to protect the estate, or to enable him properly to ***162** manage it, and the reasonable charges for such service will be paid out of the estate, in the settlement of the administrator's account. Brickell v. McCaskill, 90 Fla. 441, 106 So. 470. This allowance should be made when these facts exist, even though the administrator has mismanaged the estate, where the element of mismanagement may be taken care of by the court in determining as above set forth in Eppinger, Russell & Co. v. Canepa, 20 Fla. 262, that the administrator is not entitled to any compensation.

The county judge refused to allow the administrator credit for any sum paid to attorneys who represented him in the handling of the estate's affairs. It seems that where suits are instituted, in good faith, against an administrator in his representative capacity, he has no alternative than to employ counsel to defend those suits. However, if the court finds that the suits were collusive and not properly defended, but were part of a prearranged transaction between both parties and attorneys to have the record show that a judgment was entered against the defendant, then the attorneys would not be entitled to any compensation, and the administrator would not be entitled to allowance for the amounts so paid. The trial court must determine whether, under the circumstances, the employment of counsel was for the purpose of protecting the estate, and, if so, whether the fees paid were reasonable for the services rendered.

The third, fourth, and fifth questions presented are argued together and present the query as to whether judgments rendered against a foreign administrator in the courts of the state of his residence instead of the courts of the state of his appointment, determining the ownership of property within the state of his residence, are entitled to recognition in the state of his appointment, under the full ***163** faith and credit clause of the Constitution of the United States?

Payments by the administrator that were disallowed by the county judge were disallowed under the theory that judgments rendered in Kentucky against an administrator appointed by a Florida court, though a resident of Kentucky, were void, and that there was no duty on the part of the administrator to discharge them by payment, and that such conduct on his part was waste of the assets of the estate.

The record shows that the residuary devisees under the Garnett will brought their bill of complaint in Kentucky against C. H. Williams, as administrator of the estate of Maggie G. Paine, deceased, to recover assets in his possession purporting to belong ****435** to the Paine estate, but which were alleged to belong to the devisees under the Garnett will. Williams was served with process and later filed his answer thereto. Thereafter it was stipulated by the parties that certain assets in the hands of Williams constituted property of the Garnett estate, and a consent judgment for $2,500 was entered in favor of plaintiffs against Williams as administrator of the Paine estate. The court also decreed that James Breathitt, Jr., and the firm of White and Clark be paid $250 each as counsel fees. These amounts were paid by Williams from the assets of the Paine estate. For the alleged waste of timber lands by Maggie G. Paine during her lifetime, when she had only a life interest therein, another consent judgment for $425 was entered in favor of the heirs under the Garnett will against Williams as administrator of the Paine estate, and he also paid this judgment from the assets of the Paine estate.

In each of these cases the petition contained a false statement in alleging that C. H. Williams was appointed ***164** administrator of the Paine estate by the Christian county court in Kentucky, when in fact he was appointed such administrator by the county judge's court of Pinellas county, Fla. This allegation was inserted in the petitions to confer jurisdiction on the Kentucky courts.

In the suit resulting in entry of consent judgment in the amount of $2,500 against the Paine estate, the administrator did not deny the allegation of the petition that he was appointed administrator of the Paine estate in Kentucky. This lax conduct on the part of the administrator has the appearance of an attempt on his part to jeopardize the interests of the Paine estate by permitting the assets of the estate to be bargained away by consent judgments rather than have the issues tried by the court.

[5] The petition in the case resulting in entry of a consent judgment against the Paine estate in the amount of $425 alleged that Mrs. Paine died in Kentucky, whereas she died in Florida, and also alleged that there was no property in the estate subject to execution and that the estate is probably insolvent, all of which allegations were untrue.

'The general rule is that an executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction.' 24 C.J. 1136, § 2720.

Exceptions to the above rule have been made in a number of cases, but the exceptions are not universally recognized.

Practically all of these exceptions to the general rule have been in suits in equity involving peculiar circumstances, Finley v. Keinningham, 79 S.W. 236, 25 Ky.Law Rep. 1955; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Laws Rep. 315; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330; Baker v. Smith, 3 Metc.(Ky.) 264; ***165** Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; Atchison's Heirs v. Lindsey, 6 B.Mon. (Ky.) 86, 43 Am.Dec. 153; Curle v. Moor, 1 Dana(Ky.) 445; Dorsey's Ex'r v. Dorsey's Adm'r, 5 J.J.Marsh.(Ky.) 280, 22 Am.Dec. 33, where the suit was permitted, of necessity, to prevent a failure of

justice. Colbert v. Daniel, 32 Ala. 314; Bergmann v. Lord, 194 N.Y. 70, 86 N.E. 828; Montgomery v. Boyd, 78 App.Div. 64, 79 N.Y.S. 879; McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627.

[6] Such suits have been maintained where a foreign representative came into another jurisdiction and brought with him assets from the jurisdiction of his appointment, McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627; Calhoun v. King, 5 Ala. 523; Julian v. Reynolds, 8 Ala. 680, or where he left the jurisdiction of his appointment and became a resident of another jurisdiction. Courtney v. Pradt (C.C.A.) 160 F. 561; Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330. In such case a bill in equity will lie to compel him to account for such assets to the persons lawfully entitled thereto, where but for the interference of the court of equity there would manifestly be a failure of justice. Colbert v. Daniel, 32 Ala. 314; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Law Rep. 315. To authorize this proceeding, it must appear that the administrator has assets within the jurisdiction of the court, and is accountable to the complaining party under a will or as a trustee ex maleficio. Lewis v. Parrish, 155 F. 285, 53 C.C.A. 77; Marcy v. Marcy, 32 Conn. 308; Campbell v. Tousey, 7 Cow.(N.Y.) 64; Dillard v. Harris, 2 Tenn.Ch. 196. But a creditor is not entitled to sue under such circumstances. **436 Baker v. Smith, 3 Metc.(Ky.) 264; Hedenberg v. Hedenberg, 46 Conn. 30, 33 Am.Rep. 10.

'The principle that executors and administrators are not *166 liable to actions as such in States where they have obtained no letters is not permitted to protect them against the consequences of their own wrong or default. Thus where an executor or administrator removes the property of the estate in his charge, without having completed the administration, to another State, and fails to obtain new letters of administration there, a court of equity will grant relief to any person whose interest is thereby jeopardied, on the ground that, where a trust fund is in danger of being wasted or misapplied, the court of chancery, on the application of those interested, will interfere to protect the fund from loss. The exercise of this authority is in no way inconsistent with the general principle announced as governing the powers and liabilities of executors and administrators, who, as such, derive their powers from, and are amenable only to, the forum of the State under whose laws they hold office. They are in such proceeding treated, not in their official capacity, which is coextensive only with the State in which they receive their appointment, but as persons who, by withdrawing themselves from the jurisdiction of the court having power over them, are unlawfully in possession of the property which is to be protected or adjudged to its lawful owner. 'This is not a suit against the administrator for a debt due from the estate, but it is an assertion of title to the property itself, which, being found in this State, will give the court jurisdiction.'' Woerner-The American Law of Administration, vol. 1, § 164, p. 571 (3d Ed.).

An administrator or executor who is appointed or qualified in another state and there receives assets in his hands may be sued in the tribunals of the state of Kentucky by persons entitled to such assets if he shall have removed to and settled in Kentucky. *167 Manion's Administrators v. Titsworth, 18 B.Mon. 582; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Law Rep. 315; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330. Where suit against a foreign administrator is allowed, his liability will be determined by the laws of the state of his appointment and not of the state in which he was sued. Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627.

[7] Under the rules as laid down above, it appears that the suit instituted for the purpose of having certain property in the hands of C. H. Williams, as administrator of the Paine estate, declared to be property of the Garnett estate, might properly have been instituted and maintained in the courts of the state of Kentucky, because the property, ownership of which is claimed by the remaindermen under the Garnett will, and the administrator were both physically in the state of Kentucky, and the suit was against the administrator and the bank, whose stock was involved; provided the final decree in that case was for the return of the property in specie or the payment of the amount of money received from the sale of that property, if it had in fact been sold, and the money had been reasonably identified as being the proceeds from the sale. Otherwise the courts of Kentucky would not have jurisdiction of the case. The laws of Kentucky govern as to whether the suit may be brought or maintained; but the laws of Florida govern as to the liability of the administrator. The payment of this judgment by the administrator should have been allowed on the final accounting if these facts were found to exist.

[8] [9] The suit instituted against the administrator to recover damages for the conduct of the life tenant, Mrs. Maggie G. *168 Paine, cutting timber from certain lands, which timber was not used for the upkeep of the place, the suit terminating in a consent judgment in favor of the heirs under the Garnett will, was not a claim maintainable in the state of Kentucky under any of the foregoing rules. It was not a claim made under any will that was being administered by Williams, was not a claim against Williams as trustee ex maleficio, was not a claim for specific property in the hands of Williams in the state of

Kentucky; but was, on the contrary, a claim for damages for the conduct of the life tenant, Mrs. Maggie G. Paine, which was a claim by a creditor of the Paine estate, and such case, under the Kentucky law, was not, in these circumstances, maintainable in the courts of Kentucky as an exception to the general rule. This was a local action because it was for damages to the freehold and was maintainable, if at all, only by taking out ancillary administration of the Paine estate in Kentucky.

**437 'A tenant for life without impeachment for waste may cut wood though such cutting would otherwise, at the common law, amount to waste. In other words, he may do any act with reference to woodland that the owner of the fee might do, being restrained only from the commission of willful and malicious waste. He may thin out the timber of a wood's pasturage, or cut off all the timber and cultivate it as a field. If the cutting is not wanton or malicious, and does not amount to equitable waste, it cannot be restrained by the owner of the fee, even if he sells the timber. But even a tenant for life without impeachment for waste may not cut down trees left or planted for ornament or shelter, the question whether the particular timber does answer that description being one of fact, and effect being *169 given to the design of the testator as to what is ornamental.' 27 R.C.L. 1030, § 19.

Therefore the entry in this case of the consent judgment against Williams as administrator of the Paine estate was without authority of law of the Kentucky courts, and the county judge of Pinellas county, Fla., correctly refused to allow payment of this judgment as a proper charge against the Paine estate.

Appellant argued the sixth and seventh questions together, which present the question as to whether an administrator may compromise and settle a valid and subsisting indebtedness against the estate, especially when authorized to do so by the beneficiaries of the estate.

This question embodies two separate propositions: First, that the administrator had the power in these circumstances to compromise the two suits instituted against him in his representative capacity and agree to the entry of judgments in conformity with the compromise; and, second, that the heirs of Maggie G. Paine agreed to accept the consent judgments as binding on the estate in both cases.

In support of the proposition that the heirs had agreed to the compromises made, appellant quotes testimony in his brief, which he states is all of the evidence on the subject. This evidence shows that Mr. Breathitt, attorney for appellant in Kentucky, testified that Dr. Bassett, in undertaking to speak for a great number of heirs, agreed to the settlement. Mr. Richeson said, while cross-examining Mr. Breathitt, that he was induced to agree to this because he was informed that C. H. Williams was administering the Paine estate in Kentucky, which information Mr. Breathitt did not recall. Mr. Richeson stated that he and Mrs. Lulu Goff were in the office of Mr. Breathitt in Kentucky in September, 1932, and had a conversation about this suit. *170 There is no showing made by this evidence that all or even a majority of those interested in the matter agreed to the entry of a compromise judgment in either suit that would bind them. The most that is shown is that Mr. Breathitt referring to the $2,500 judgment testified that Dr. Bassett, who was representing a great number of the heirs, agreed to the entry of that judgment.

[10] The power of an administrator or executor to compromise claims is stated in the following language in 11 R.C.L. 202, § 225:

'At common law the executor and administrator, having an absolute power of disposal over the whole of the personal effects of a decedent, had authority to compromise or accept any composition or otherwise settle any debt, claim, or thing whatsoever in regard thereto. And he still has such powers in this connection that his compromise of a claim against the estate will be upheld if it is *fair, beneficial to the estate*, and *free from fraud, negligence* or *misconduct*. The same is true as to claims belonging to the estate.' (Italics supplied.)

Thus it is seen that the administrator had the power to compromise these suits if such compromises were fair, beneficial to the estate, and free from fraud, negligence, or misconduct. Under this rule, the administrator had no authority to compromise the suit in which judgment for $425 was entered against him in his representative capacity, because it would not be beneficial to the estate to have a judgment entered against it, when the courts of the state of Kentucky were without jurisdiction to entertain suit upon which the judgment was entered. In the other suit in which a consent judgment was entered against the administrator in his representative capacity for $2,500, the administrator had authority to compromise that claim *171 if it was fair, beneficial to the estate, and free from fraud, negligence, and misconduct.

The trial court must determine this, after it has determined whether the suit is maintainable against the administrator in Kentucky, in these particular circumstances, **438 under the rules as set forth in another part of this opinion.

The orders of the circuit court appealed from are reversed, and the cause is remanded, with directions that the circuit

court order the county judge's court to entertain such further proceedings as will conform to the views expressed in this opinion.

It is so ordered.

ELLIS, C. J., and WHITFIELD, TERRELL, BROWN, BUFORD, and DAVIS, JJ., concur.

All Citations

128 Fla. 151, 174 So. 430

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3.F.

19 Fla. 300
Supreme Court of Florida.

MARY SHERRELL ET AL., (HEIRS OF ALFRED SHEPARD,) APPELLANTS,
v.
ELIJAH S. SHEPARD, ADMINISTRATOR OF A. SHEPARD, APPELLEE.
ELIJAH S. SHEPARD, ADMINISTRATOR, APPELLANT,
v.
MARY SHERRELL ET AL., APPELLEES.

June Term, 1882.

**1 *300 1. Upon a sale of personal property of an estate it is the duty of the administrator to take a promissory note or bond with good security for the credit extended. He is not chargeable with the amount immediately when he acts in good faith and with ordinary care. He becomes liable at the expiration of the time of credit, and to discharge himself he must show that the money, if not received, was lost without any default or negligence on his part. The burden of proof is upon him to show, first, that he took good security, and second, that the subsequent loss was not attributable to his laches or neglect.

2. The Judge of the County Court is not authorized by the statute to approve securities to obligations for sales of personal property by administrators. Taking good security is a personal duty of the administrator. The simple approval of the surety by the Judge of the County Court is not sufficient. The administrator must prove that the personal security taken was good.

3. Such notes when taken are not to be treated as investments. The administrator should be diligent in their collection, and if an investment is then proper it must be of such character as the law sanctions.

4. An administrator receives a gold receipt from the decedent. This receipt is executed to the deceased in his lifetime by a person engaged in trade, with whom the gold is deposited for safe-keeping. The depositary after the qualification of the administrator always denies his liability to the estate. The administrator delays suit for over two years, and sues at a time when a recovery of a judgment in due course of law would not have resulted in realizing the money. The depositary died before the institution of the suit, and up to the time of his death was considered solvent. Under these circumstances the administrator is liable for the debt.

*301 5. An administrator receives a note from the decedent. The maker thereof is a person engaged in trade. He was reputed solvent, paid the interest, and the administrator, had he insisted upon payment, could have realized the amount before his death. The administrator, after a delay of more than two years, and after the death of the maker, sues and the estate is found insolvent. The evidence shows that the purpose of the administrator was to hold the note until distribution, and to treat it as cash or an investment. He is liable for the loss. It is the duty of an administrator to collect the debts of an estate within a reasonable time after his qualification. He must act as a discreet business man would whose duty it was to collect and distribute the estate within the time required by law. He must call in such debts. He cannot treat them as investments upon personal security.

6. An allowance for sums paid an auctioneer for the sale of personal property is proper; so, also, is a bill for advertising time and place of sale.

7. The administrator in deference to, and at the request of the heirs, has a partition of the lands of the estate by the County Court, each person entitled taking his share. The parties thus availing themselves of and consentlng to such proceedings are estopped from refusing to pay their share of all legitimate expenses incurred thereby, or in connection therewith, and cannot set up a want of jurisdiction in the court, and thereby have the administrator, who acted in deference to them, charged with the entire expense.

**2 8. The administrator is entitled to a fair and just compensation for all services rendered in connection with the estate. When a per diem of from $2 to $2.50 is allowed for services in the absence of controlling and clear evidence, showing that it is too much, it should not be disturbed by the Circuit Court or by this court.

9. An administrator is not entitled to commissions on the gross amount for which the personal property sold. He is entitled to commissions on the amount of the *money* received at the sale, and on all sums of *money* thereafter realized from the credits extended. A commission of six per cent. on the money thus collected is a reasonable allowance.

10. A like commission on money collected by the administrator from notes and accounts left by the deceased is a reasonable compensation for the service.

*302 11. The sum of $1,942.25 cash comes into the hands of the administrator from the deceased. He retains it on hand about two months and then disburses it. A commission of three per cent. and an allowance for per diem is a sufficient allowance for the service. It is not too much.

12. Manner of accounting.--On all moneys received the interest at the annual balances is added to the principal. On notes or other securities lost by the neglect or laches of the administrator, only simple interest is charged except under special and peculiar circumstances, showing something more than simple neglect.

13. An administrator is entitled to compensation for services *bona fide* rendered in endeavoring to collect and in investigating the condition of notes, the makers of which were reputed to be insolvent.

14. An administrator is not to be debited as of course with costs and charges attending unsuccessful suits brought by him upon the paper belonging to the estate. If, under the circumstances, the litigation was just and proper, and apparently for the benefit of the estate, and brought *bona fide,* he is entitled to credits for costs and charges, and for services rendered in connection with the litigation.

15. Upon the institution of a suit against him, the administrator may relieve himself of liability for interest by paying the money into court, otherwise the legal rate of interest on each class of debts existing at the commencement of the suit continues according to law.

16. To the extent that charges paid by the administrator to the Judge of the County Court are illegal, to that extent should the administrator be charged therewith.

Appeal from the Circuit Court for Gadsden county.

The facts of the case are stated in the opinion.

West Headnotes (12)

[1] **Estoppel**
⇐Requests

An administrator, at the request of the heirs, procured a partition by the county court of the lands left by deceased; each person receiving his proper share. Held, that such heirs were estopped from refusing to pay their share of all legitimate expenses incurred in such partition, and from setting up a want of jurisdiction in the court, so as to charge the administrator with the entire costs.

1 Cases that cite this headnote

[2] **Executors and Administrators**
⇐Authority and Duty in General

In an action by heirs and distributees against an administrator for an account, it appeared that defendant received from the decedent a gold certificate of deposit given by a person in trade, with whom it was deposited for safe keeping; that such person, after defendant qualified, always denied his liability; that the administrator delayed suit for over two years, and then sued when a judgment could not be collected against such person or his estate; that such person died before the suit was commenced, and up to the time of his death he was considered solvent. Held, that the administrator was liable for the amount of the deposit, and interest from the time suit was commenced.

2 Cases that cite this headnote

[3] **Executors and Administrators**
⇐Authority and Duty in General

If the administrator, for more than two years, delays attempting to collect a note taken by him for personal property sold, and because of the delay fails to collect, the maker having in the meantime become insolvent, the administrator must bear the loss.

Cases that cite this headnote

[4] **Executors and Administrators**
⇐Failure to Collect

In an accounting by an administrator, on notes

or other securities lost by the negligence or laches of the administrator only simple interest is chargeable, except under special circumstances showing something more than simple neglect.

Cases that cite this headnote

[5] **Executors and Administrators**
⇐Services

An administrator is entitled to an allowance for sums paid an auctioneer for the sale of personal property, and for advertising the time and place of sale.

Cases that cite this headnote

[6] **Executors and Administrators**
⇐Counsel Fees and Costs

Where suits brought by an administrator to enforce the collection of paper belonging to the estate are just and proper and for the benefit of the estate, such administrator is entitled to credit for costs and expense of conducting the same.

Cases that cite this headnote

[7] **Executors and Administrators**
⇐Counsel Fees and Costs

An administrator is chargeable with illegal fees or charges paid to a judge of the county court.

Cases that cite this headnote

[8] **Executors and Administrators**
⇐Terms and Conditions

An administrator who takes a note for personal property of the estate sold, and who carelessly takes poor and insufficient security, is chargeable with the loss; and he cannot shield himself by showing that the probate judge approved the security, in the absence of any law conferring such power on the probate judge.

Cases that cite this headnote

[9] **Executors and Administrators**
⇐For What Services Allowed

Where the makers of notes belonging to an estate are reputed to be insolvent, the administrator is entitled to compensation for services rendered in good faith in endeavoring to collect them, in investigating the condition of the makers, and for bringing suits thereon, where the same were brought in good faith, and were for the benefit of the estate, though the suits were unsuccessful.

Cases that cite this headnote

[10] **Executors and Administrators**
⇐Amount and Computation of Compensation

An administrator, in settling an estate, is entitled to his reasonable charges, to a fair compensation for his services, and to not more than 6 per cent. on money collected on sales and on notes and accounts left by decedent.

2 Cases that cite this headnote

[11] **Executors and Administrators**
⇐Amount and Computation of Compensation

An administrator received from deceased about $2,000 cash, and retained it about two months, when he properly disbursed it. Held, that a commission of 3 per cent., and a per diem

allowance for his services, were proper.

Cases that cite this headnote

[12] **Interest**
⇐Suspension

Where suit is brought against an administrator, he may avoid liability for interest by paying the money into court; otherwise, the legal rate of interest on each class of debts existing when the suit is brought continues according to law.

Cases that cite this headnote

Attorneys and Law Firms

John W. Malone for Shepard's Heirs.

The first exception of the plaintiffs embraces two items, to-wit: the McAlpin note and the gold certificate, which we will consider in their order.

The McAlpin Note.--The defendant in his answer says that he realized from the sale of the personal property of ***303** said Alfred the amount of $1,727.35 as per his account sales, less $22, the amount of the McAlpin account not collected.

It appears from the evidence that H. McAlpin purchased a portion of the personal property of the said Alfred at the sale thereof by the defendant, and afterwards, on the 20th of December, 1870, made his promissory note with J. J. Martin as surety in the sum of $22 payable twelve months after the date thereof, and delivered the same to the defendant for the price of said property. This note was not paid at maturity, and the defendant made no effort to collect it until the 4th of March, 1874, when he put it in suit. Judgment was rendered against McAlpin and Martin on the 5th of May, 1874, for $27.80 and costs, execution issued on said judgment on the 25th of May, 1874, and was returned by the sheriff "*nulla bona*" on the 6th of April, 1878. The surety was approved by the Judge of Probate who thought him good. The said Judge always made inquiry as to the pecuniary standing of parties before he approved notes.

The defendant has failed to show that either the principal or surety of this note was good and solvent at the time it was made and the credit given, and that they have since become insolvent. The onus is upon the defendant to prove these facts in order to relieve himself from liability for the amount of this note. (Thomp. Dig., 202.) Besides it appears that the defendant failed and neglected to make any effort to collect this note until more than two years had elapsed after it became due, and that it has become worthless and uncollectable.

Under these circumstances we think the defendant should not have been allowed the amount of this note, but should have been charged with the full amount of the sales.

The gold certificate of $673.78 was made by John T. Seegar on the first day of January, 1867, delivered to Alfred Shepard and came into the possession of the defendant immediately upon his qualifying as administrator.

***304** And no effort was made to collect it until the 29th of March, 1873, more than two years after it came into the defendant's possession and sometime after the death of John T. Seegar.

The defendant himself testifies that John T. Seegar always denied his liability under this certificate of deposit. That he brought suit on it, to collect it, on the 29th of March, 1873, and the presiding Judge ruled that it could not be admitted in evidence for want of a proper United States revenue stamp, and consequently he failed to collect it. At the time the suit was instituted John T. Seegar had become insolvent and died. But up to the time of his death his credit was considered good in the community, and he was regarded as solvent.

The defendant allows this claim to go out of date, which was a devastavit. Wms. on Extrs., 1805.

It is apparent from the foregoing facts that by proper diligence the defendant might have collected this claim, but he neglected for several years to make any effort whatever to collect it. Indeed, he waited until the claim had gone out of date, and until Seegar had become insolvent and died, before he moved in the matter. Under these circumstances we insist that the defendant should be charged with the debt. Long's Estate, 6 Watts, 46; 9 B. Monroe, 540; 11 Wendell, 361; 5 Vesey, 839; 4 Florida Reps., 118.

To relieve himself from liability on this claim the defendant relies upon the ruling of the Circuit Court for Gadsden county that this certificate was not admissible in evidence in said court, because it was not stamped with

the proper United States internal revenue stamp.

This, we insist, ought not to avail him for that purpose, because, first, at the time said ruling was made the defendant had full power and authority under the laws of the United States to affix the proper United States internal *305 revenue stamp to said instrument, and thus comply with the ruling of said court. Second, at the time the said ruling was made the honorable, the Supreme Court of Florida, had decided the contrary of said ruling to be the law of the State of Florida, and the defendant should have excepted to said ruling and prosecuted his appeal to this honorable court instead of attempting to use it as a cloak to cover the liability which he had already incurred by his negligence in not collecting said claim. U. S. Rev. Statutes, Sec. 3422; also Supplement to Rev. Stat. U. S., pp. 102 and 201; 14 Fla. Repts., 239.

The second exception embraces a number of items, which we will consider in their order. The disbursement of ten dollars to W. J. Gunn was for his services as auctioneer in selling the personal property of the said Alfred. Gunn was engaged one day in doing it, and the compensation paid to him was fair and reasonable according to the defendant's testimony. The law imposed upon the defendant the duty of selling this property, and allowed him compensation for this service. Thomp. Dig., 202 and 208. This disbursement, therefore, was not a proper charge against the estate, but was a personal debt of the defendant's which should be paid out of the compensation allowed to the defendant for this particular service, otherwise the estate will pay twice for this service--once to Gunn and a second time to the defendant.

The disbursement of $19 to Owens & May was for advertising the time and place of sale of this personal property.

This service was connected with and constituted an essential part of the sale itself, hence the same objection which was made to the allowance of the disbursement to Gunn will apply with equal force against the allowance of it.

*306 The disbursement of $9 to Commissioners, $3 to R. P. Green, and $6.55 to J. E. A. Davidson were for costs which accrued in a partition suit before the Probate Court for Gadsden county between the defendant and plaintiff.

This proceeding was entirely disconnected with the administration of the estate. Wms. on Extrs., 1575. Besides, the said Probate Court had no jurisdiction to grant partition of real estate, and the said proceedings in that behalf were void, and the costs incurred an unnecessary expense. Therefore these disbursements ought not to have been allowed defendant.

The disbursement of $50 to Stephens & Love, attorneys, was for professional services in the conduct of said partition suit, and is subject to the same objection that is made to the three preceding disbursements.

The allowance of $24 is for services as specified in voucher 44.

Many of the items of service mentioned in this voucher are disconnected with the administration of the estate and were performed by the defendant voluntarily for his own personal advantage and benefit; besides, the allowance is exorbitant in this, that defendant is allowed for a day's service when he was engaged for a few moments only.

The allowance of $125.85, a commission of 6 per cent. on $2,097.32, amount of sales of the personal property, is for compensation for the sale of said property.

The defendant was engaged one day in the performance of this service. The sale was made by Gunn, an auctioneer whom the defendant employed for that purpose, at the price of ten dollars. This was a fair and reasonable price for the service. The notes, which, taken for the purchase money of this property, were written and taken by J. E. A. Davidson, to whom the defendant paid sixteen dollars for this service.

*307 The care and preservation of the property prior to and subsequent to the sale, and up to the delivery thereof to the purchaser, was entrusted to S. S. Strange, whom the defendant employed for that purpose.

The defendant employed S. S. Strange soon after qualifying as administrator to finish gathering the crop, to assist in paying off and dividing with the hands, to superintend the ginning, to take care of the stock and gather them for sale and deliver the property to purchasers. S. S. Strange was engaged in this service for two months and found himself during this time, and defendant paid him twenty dollars for his services.

He performed the service in a very satisfactory manner and the compensation was very reasonable.

The notice of the time and place of sale was advertised by Owens & May, to whom the defendant paid for this service $12.50.

The defendant's services for one day with his buggy and horse are reasonably and fairly worth $2.50. And the defendant charged the estate with $2.50 for this service of selling the personal property.

Under this state of facts we think that such a per cent. on the gross amount of the sales of the personal property as would pay all expenses necessarily incurred in and about said sale by the defendant, and in addition thereto would pay the defendant for the value of his time and service as proved by the testimony, would meet the intention of the statute. The law certainly does not contemplate that the administrator shall make a profit out of the estate entrusted to his care, but simply contemplates the allowance of a fair and reasonable compensation.

The allowance of $58.26, a commission of (3) three per cent. on $1,942.25 coin and currency, of which said Alfred died possessed, and also $15.60, a commission of six per *308 cent. on $263.56, seem to be gratuitous and not as compensation for any service performed by the defendant.

The allowance of commissions to an administrator on money of which the intestate died possessed, and upon money which the administrator collects, is illegal. 7 Fla. Reps., 44.

It appears that the defendant came into the possession of the above sum of $1,942.25 when he qualified as administrator, and deposited it with William Munroe for about two months, when he disbursed it to the next of kin.

He was engaged a part of a day only in disbursing this money, was put to no expense whatever in and about the same, and charged $2 for this service, which was allowed to him. The defendant thought the allowance of two dollars for this service reasonable and fair, and the Probate Court allowed it to him. If, therefore, the master allowed the defendant the above commissions as a compensation for the custody and disbursement of these moneys he has gone contrary to the order of reference and the evidence in the case.

There is no evidence whatever that the defendant collected $263.56, or any other sum of money.

The Third Exception.--The allowance of $24.58, a commission of three per cent. on $819.40, the amount of the note against John T. Seegar, which was charged to defendant, seems to be gratuitous also, and not as a compensation for any service performed by the defendant.

The defendant is charged with a liability incurred by him for his inexcusable omission of duty, and the master allows him a commission of (3) three per cent. upon this liability as a compensation for his omission of duty.

This is a new principle, and one of first impression, which we think unsound both in law and ethics and ought not to be sustained.

*309 The allowance of $15 is for compensation to defendant in attending the Circuit Court in Liberty county to collect some worthless claims. At the time the defendant performed this service he knew these claims to be utterly worthless and uncollectable, and that any expense incurred upon them would be useless.

Besides it does not appear that defendant made any effort toward collecting these claims, other than attending the Circuit Court for Liberty county several times. On these occasions he saw none of these debtors, had no reason to expect to meet them at court, never communicated with any of them, and never sued any of them, because he knew them to be insolvent. Under these circumstances we think this compensation ought not to have been allowed.

The disbursement of $5 to R. S. Tucker, $8 to J. E. DuPont and $4.35 to S. E. Stewart were for costs incurred in the suit against McAlpin and Martin, and should not have been allowed for the same reason urged against the allowance of the McAlpin note.

Besides the costs paid to Tucker and $5 of the costs paid to DuPont are for the same service and a double charge against the estate.

Defendant's Exceptions.--The testimony touching the subject-matter of the defendant's first exception is to the effect that the defendant qualified as administrator of the said Alfred on the 8th of November, 1870, and immediately thereafter took possession of the Seegar note. More than two years afterwards, to-wit: on the 13th of December, 1872, John T. Seegar departed this life in Gadsden county, and letters of administration on his estate were granted to H. B. Seegar on the 23d of December, 1872. The credit of John T. Seegar up to the time of his death was considered good, and he was regarded as solvent.

The note was overdue and unpaid when it came into the *310 possession of the defendant, and no action was taken to collect it until the 29th of March, 1873, a period of more than two years after it came to his possession.

A suggestion of the insolvency of the estate of Seegar was made in the Probate Court for Gadsden county on the 24th of April, 1874, and the note has not been collected in consequence thereof.

The defendant testifies in regard to this note as follows: The indebtedness of Seegar originated in loan made to him by Alfred Shepard in his lifetime. In the summer following the death of said Alfred (who died in November, 1870,) the defendant called on Seegar for payment, who informed defendant that he was hard

pressed for money, but would pay him as soon as cotton commenced moving. *As defendant had no immediate use for the money at that time, and as Seegar was regarded by defendant and the whole community as perfectly safe,* defendant deemed it most advisable for the interest of the estate not to sue immediately. Defendant called on Seegar again the ensuing fall, and Seegar informed him that he had shipped cotton to pay the debt, and would settle the same on a certain day, or sooner if return of sales should be received, and manifested a great desire for a speedy settlement, and would undoubtedly have met the payment promptly according to promise but for his unfortunate death which occurred a few days prior to the time appointed for payment.

The defendant never instituted suit for collection, because Seegar always acknowledged the claim and promised to pay. Seegar was regarded as a safe man, *was paying interest on the money,* and defendant thought it best to wait until Seegar could raise the money and thereby save the cost and expense of a suit.

Among the papers turned over to defendant, as administrator of Alfred Shepard, was a note on John T. Seegar for ***311** $1,000. In June, 1872, the defendant notified Seegar that he held this note as administrator, and wanted it paid by the following February, as he wanted then to make his final settlement. Seegar then told defendant to put it off until in the fall of that year, and he would pay it as soon as cotton began to stir.

Defendant called on Seegar again in October for payment of said note, and Seegar then told him that he had cotton in Savannah to pay the debt, and that as soon as it was sold he would pay the note. Seegar then told defendant that if he was pushed for the money he would draw on the cotton, but it was no use as the defendant would get the money as soon by a sale as a draw. Defendant then told Seegar not to disappoint him, as he was arranging to make his final settlement in February following. And Seegar told him not to be uneasy as he would pay it as soon as the money came. Defendant's object in calling on Seegar in June, 1872, was to notify him that the note must be paid by the following February so that defendant's final settlement should not be delayed. Defendant had not previously notified Seegar to pay the note. This was the first time defendant named it to him. The note came into the defendant's possession on the day Alfred Shepard's estate was appraised.

The defendant in October, after the June above stated, called on Seegar and told him he must certainly pay the note by the following February, and that defendant was willing that Seegar keep the money until the February, provided that he would certainly pay it at that time.

John T. Seegar in October, 1872, told S. S. Strange to push up defendant to collect said note as he was ready to pay it, and the defendant did not care to collect it. S. S. Strange repeated the above statement of Seegar's to the defendant about a week afterwards, and the defendant then ***312** said that he did not care to collect this note until he knew that all the heirs were ready for a final settlement, as he did not want to pay interest on it. The defendant further said that the note was good, and he was going to hold on to it until the last day in the morning, as he did not know what might turn up.

It is apparent from the foregoing facts that the note could have been collected of John T. Seegar in his lifetime by proper diligence on the part of the defendant, and that it has become uncollectable and worthless on account of and through the negligence and delay of the defendant in enforcing the collection thereof, hence he was properly charged with it. 4 Fla. Repts., 118; 11 Wendell Repts., 361; 5 Vesey Repts., 839; 6 Watts Repts., 46; 9 B. Mon. Repts., 540; 4 Hayw Repts., 134; 2 Y. Col. C. C., 634; 2 Green Ch., 300; Williams on Extrs., 1806 and 1815 (last Edition); 31 La. An., 311; Stone vs. Creditors.

The testimony touching the subject-matter of the defendant's second, third and fourth exceptions is that the defendant *got mad,* retained attorneys and brought suit on the Seegar note and gold certificate against Seegar's administratrix within six months after the granting of letters of administration to her.

Under these circumstances the law imposes the costs upon this defendant, (Thomp. Dig., 205,) and he ought not to be allowed them against the estate. Besides he had waited until these claims became worthless before taking any action on them, and even then brought the suit to soothe his ruffled feelings. These disbursements were an unnecessary expense, or made necessary by the laches of defendant and should not be allowed to him. Taylor vs. Glanville, 3 Madd. Repts., 178, 2 Madd. Repts., 159; Caffrey vs. Darley, 6 Vesey Repts., 497; O'Callaghan vs. Cooper, 5 Vesey Repts., 117, note 2; Jones vs. Lewis, 1 Cox Repts., 199.

***313** The testimony touching the subject matter of the defendant's sixth exception is that these costs were in excess of the fees allowed by law, and that the master allowed as much of them only as was authorized by the statute. Chap. 1815.

The objection urged against the allowance of a commission of 3 per cent. upon the $1,942.35 will apply to defendant's seventh exception, and the objection to the allowance of a commission of 3 per cent. upon the amount of the Seegar note will apply to defendant's

eighth exception.

The defendant's ninth exception was properly disallowed and overruled. Young Admr. vs. McKinne Admrs., 5 Fla. Repts., 542.

Stephens & Love for the Administrator.

In this case the administrator was one of the heirs, and both in his individual and representative character he deemed it best for the interests of all parties that the money should remain as it was placed by deceased, as it would not be needed until final settlement and was drawing interest, and deemed both by the deceased and himself as a safe investment; and it was not deemed advisable to subject the estate to attorneys fees in bringing suit when the money was not then required. And though an administrator will be personally liable for gross neglect in failing to collect a debt due the estate, yet he is not liable for neglecting to sue unless he act in bad faith or is guilty of wilful default or gross negligence. Thomas vs. White, 3 Little, p. 177; 14 Am. Decis., p. 56.

Where the administrator exercises a sound discretion with regard to the collection of the assets of the estate he will not be held personally liable-- all that a court of equity requires from the trustees is common skill, common prudence and caution. Executors, administrators and guardians ***314** are not liable beyond what they actually receive unless guilty of gross negligence, for when they act as others do with their own goods, and with good faith and guiltless of gross negligence, they are not liable. Note, Am. Dec,, 14, pp. 65, 66; Calhoun's Estate, 6 Watts, 183; Crist vs. Brindle, 2 Rawle, 122.

The general rule for the guidance of executors and administrators in administering their trusts is clearly and sufficiently laid down by Judge Stanard in delivering the opinion of the court in Kee vs. Kee, 2 Gratt., 116-128, and approved in Southall vs. Taylor, 14 Id., 221: "The duties of the executor are to be performed under the obligations of sound judgment, acting on those considerations of wordly prudence which affect the safety of the pecuniary interests confided to his care. When such judgment, so governed, is fairly exercised and (tested by the facts *existing* and *known* at the *time* it is exercised), is such as would probably be formed by a judicious man managing his affairs with reference to consideration of mere wordly prudence, the executor is justified in acting on such judgment, and so acting is not responsible for alleged losses resulting from his conduct." See Note Am. Dic., 14, 65 and 66.

In view of the facts existing at the time, defendant exercised a sound discretion. It was both his duty and interest so to do, as he was both administrator and heir, and entitled to one-fourth interest in the estate.

An administrator is not chargeable with the consequences of a disastrous exercise of his discretion unless it be accompanied with negligence so gross as to raise presumption of willful misconduct. Willbough's Estate, 4 Wharton, 177; 1 Wharton Dig., p. 747, par. 119.

There is a distinction between the liabilities of executors with respect to creditors and those with respect to legatees, and there are many cases in which they would be discharged ***315** as against the latter though not as to creditors. McNair's Appeal, 4 R., 148; 1 Wharton Dig., 749, pars. 139-40.

These authorities support the principle that so long as executors manage the estate of their testator in accordance with the ideas which testator himself entertained of it, and do nothing but what there is reason to believe he would have approved could he have been consulted, it would seem unreasonable to make executors responsible for losses as respects legatees. The investment was made by deceased and considered safe in the hands of one possessing not only his unlimited confidence, but also that of the community in which he lived.

Compensation of administrators:

The statute governing the matter of compensation of administrators is found in Thompson's Digest, p. 208, Sec. 4, and was construed by this court in the case of Moore *et al.* vs. Felkel, 7 Fla., 44.

This statute and the construction thereof do not prescribe any measure or gauge of compensation for administrators, &c., save on money arising from sale of personal property, lands, &c., on which 6 per cent. commission is allowed in addition to a fair, just and reasonable compensation for their services.

What is fair, just and reasonable is to be judged by the court auditing their accounts, and may be more or less than 6 per cent., according to the circumstances of each particular case; and a Court of Chancery will not interfere with the exercise of the discretion vested by law in the Probate Court in the allowance of commissions to an administrator except in case of manifest and flagrant abuse, but on the contrary will be governed by the decisions of the Court of Probate as the safest guide. 2 Am. Chan. Dig., p. 206, Sec. 619; Powell *et al.* vs. Burruss, 35 Miss., 605.

It has never been adjudged in the court of any State that ***316** administrators and executors are not to be compensated for the trouble, anxiety and responsibility of

collecting debts and disbursing the assets of the estate. The principal responsibility of an administrator or executor is incurred in making disbursements; he is responsible for every dollar he pays out. No allowance is made to him for any deception which may have been practiced upon him, or for any error or mistake he may make. In all things he is held to the strict hard letter of the law that is often obscure and difficult of application, and if, in the judgment of the court, he has made a mistake, however honestly, he is held responsible *de bonis propriis,* can it be contended by heirs and legatees that for all this responsibility, care, loss of time and anxiety on the part of the administrators that they are entitled to no compensation other than the per cent. on the sale of the personal and real estate.

In this country it is generally considered just that a trustee should receive compensation for his services, which is gauged by a percentage on amount of estate. 2 Abbott's National Dig., p. 501, sec. 153, and citations.

Executors and administrators are entitled to commission in paying legacies as well as debts, and if the income be insufficient their compensation must be made from the principal of the estate. West vs. Smith, 8 How., 402; 2 Abbott's National Dig., 501, sec. 154; 14 Ga., 416; Millen's Dig., p. 32, sec. 16; Millen's Dig., 33, sec. 26.

And this allowance of commission is not alone to compensate for the labor and trouble expended in administering estate, but also to reward the administrator for the responsibility incurred and his fidelity in discharge of the trust. 33 Miss., p. 605.

The costs paid by defendant to the Judge of Probate it is charged are greater in amount than authorized by law, and it is claimed that defendant is chargeable with the surplus thus paid.

***317** It is the duty of the County Judge as Court of Probate to audit and pass the annual settlements of administrators and to protect and guard the estate against improper charges. For these duties the Judge is allowed certain fees, and is given the power to enforce payment. Administrators generally are not learned in the law, but rely upon the integrity and competency of the officer appointed by the State, and deeming the charges just and right in good faith pay the charges demanded. Indeed it is almost impracticable for the administrator to resist, and such payments may be said to be paid under order of court. The excess is not large enough to authorize an appeal and the administrator is compelled to pay. The administrator should not be compelled to refund in such cases where he acts in good faith without fraud or collusion.

Where there has been no fraud or improper conduct on the part of administrators, and the money has been disbursed *bona fide* in the performance of their duties, the court will not critically examine their disbursements in contesting or prosecuting claims, although such contest has been entered into partly for their own interest. 1 Wharton Dig., p. 760, secs. 216, 217; 1 Am. Chan. Dig., p. 383, sec. 22; 1 Paige, 82.

Executors are not chargeable with interest on funds in their hands during the pendency of their case in the orphans court on exceptions to the report of the auditors. Hooper vs. Brinton, 8 Wharton, (Penn.) 73; 1 Wharton Dig., p. 762, sec. 236.

In this case the master should not have charged the administrator with compound interest on an alleged balance due the estate after the commencement of this suit, and after the administrator, in consequence of its institution, ceased to make his annual returns to Probate Court. If by reason of its institution the defendant is prevented from ***318** making a final settlement with the heirs, and is forced to hold all moneys subject to the result of this suit, he should not be compelled to pay compound interest on such balance in his hands, more especially when such balance consists wholly of insolvent papers charged to administrator.

Power of County Court to sell real estate for distribution. Statute of Fla., 1862, Chap. 1358; Richard Wilson vs. Matthison, 17 Fla., p. 630; Statute of Fla., 1870, Chap. 1732.

Opinion

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Mary Sherrell and the other parties named above filed their bill in the Circuit Court for Gadsden county against Elijah S. Shepard, administrator of the estate of Alfred Shepard, deceased. The plaintiffs and the defendant are the heirs at law and distributees of the estate of Alfred Shepard. Plaintiffs prayed a discovery of the estate, both real and personal, of the decedent which came to the hands of the administrator, for an account of that portion disposed of, a discovery of what remains on hand, that the annual settlements of the administrator may be opened and set aside, that upon said accounting the assets might be applied in due course of administration, and that the portion of the residue due plaintiffs be decreed to be paid to them.

After answer denying in many respects the liability of the

administrator as charged, and setting up various matters of defence, and after replication thereto, the Chancellor entered an order appointing a commissioner to take testimony in the cause. Upon the coming in of the report of the commissioner containing the testimony taken, there was an interlocutory decree passed appointing a master to state an account, giving general directions as to the method of stating it, and to take further testimony touching the ***319** matters referred. The master reported an indebtedness of the administrator of nineteen hundred and eighty-seven dollars and fifty-four cents.

To this report both the plaintiffs and the defendant filed exceptions, and from the order of the court made upon the hearing of the exceptions both parties appealed. We consider each of the appeals in this opinion.

We take up first the exceptions of the plaintiffs as insisted upon in their petition of appeal.

The first exception is: "Because the master failed to charge the defendant with the full amount realized from the sale of the personal property of the said Alfred, to-wit: $1,727.35, and also with the amount of a certificate of deposit in gold which was made by John T. Seegar, and delivered to the said Alfred in his lifetime, to-wit: $637.78."

The objection to the first item is upon the ground that the master failed to charge the defendant with the amount of the note of McAlpin for personal property purchased.

The statute requires the administrator when giving credit upon a sale of the personal property of the decedent to take a bond or promissory note with good security of the purchaser. In this case he did take a promissory note with one surety. The Judge of the County Court testifies that he "approved the note of McAlpin and Martin, which was a joint and several note, and when he approved the said note he" (here a word is evidently omitted. We presume it was thought) "it good for the amount, and always made inquiry as to the pecuniary standing of parties before he approved notes."

This is not sufficient to excuse the administrator. We know of no statute which gives the Judge of the County Court any power in the matter of this approval; and the question of sufficiency is not referred to him for enquiry, ***320** making his judgment an excuse for laches or neglect upon the part of the administrator. While the Judge of the County Court is a competent witness, yet his conclusions, omitting *all facts* which constituted the basis of them, cannot be accepted as proof. There is nothing that discloses the nature or the extent of his enquiry, the facts he ascertained, the actual or reported pecuniary standing of the party in the community, or anything which would enable the Chancellor to conclude that the administrator discharged his duty by taking a note with good security in this instance as required by law. Conclusions as to this fact are to be found by the Chancellor upon proof of the circumstances. This is not a matter left to the judicial judgment of the Judge of the County Court. If a person accepts the office of administrator he "must use due diligence and not suffer the estate to be injured by his neglect," and in case of a loss, accompanied by unexplained delay, he must show facts of such character as in law excuse it. Two years and several months transpired here without suit, and we see no effort to obtain security for the amount or to collect it during this time, and when sued the return was *nulla bona.* Unexplained delay and loss being shown, the burden of proving the taking good security or the exercising of reasonable caution, prudence and care in the matter of taking the security and collecting the debt, devolved upon the administrator. Under all the circumstances stated the administrator should have been charged, and this exception should have been sustained. To hold otherwise here would be equivalent to legislation authorizing the administrator to sell personal property upon security to be approved by the Judge of the County Court, for all that appears is the statement of the Judge that he approved the security, and that his custom was to enquire as to the pecuniary standing of parties before he approved notes.

***321** The sale of personal property authorized by the statute does not contemplate that the notes taken for it are to be treated as an investment for the benefit of either creditors or distributees. Credit is allowed in view of the fact that such a course is calculated to realize a better price for the property.

It is the duty of the administrator to be diligent in the collection of personal property notes when due, and if an investment of the funds realized is proper under the then existing circumstances of the estate such investment must be of that character as the law sanctions. In this case it does not appear that the administrator took security of the character required by the statute, and there is unexplained delay to sue for two years or more.

In England such sales are made for cash, and the executor is immediately chargeable with the price. The rule in Pennsylvania, as it is in South Carolina and Georgia, upon the general subject of the liability of administrators, is certainly as liberal as in most of the other States. (Neff's Appeal, 57 Penn. State, 95, by Judge Sharswood.) The case of Johnston's Estate, 9 Watts & Sergeant, 108, is in principle this case. In that State the rule was to sell the

personal property at a short credit, taking notes with security. The Supreme Court of that State, in Johnston's Estate, 9 Watts & Sergeant, 108, says: "When this method is adopted he" (the administrator) "is not chargeable when he acts with good faith and ordinary care immediately on the sale, but he becomes liable at the expiration of the time of credit, and to discharge himself he must show that the money, if not received, was lost without any default or negligence on his part. Thus if he is able to prove the solvency of the purchaser and surety at the time of sale, and that in the intermediate time he became insolvent, or that he used ordinary diligence to obtain payment and failed, he is entitled ***322** to an exoneration. But this it is incumbent on the executor to prove, as he is *prima facie* liable and the burthen of proof is thrown on him." The court, after reciting the facts, say: "It is conceded that the debtor and security were good at the time of the sale, so that the case depends on the question whether the administrator has shown that the loss has arisen from circumstances over which he had no control, and not in consequence of any default of his. The facts are that he gives a credit of six months, and so far as appears takes no further steps to collect the amount due. He neither commences suit nor does he even demand payment until six months after the note arrived at maturity and after the time given for the settlement of the estate. It is a case not of ordinary care, but of gross negligence, for he has failed to show that he made any efforts whatever in proper time to recover the money." See also Scharborough vs. Watkins *et ux.*, 9 B. Mon., 540; Brazeale's Admr. vs. Brazeale's Distributees, 9 Ala., 497; Starke vs. Hunton, 2 Green's Chancery, 300. The administrator here should have been charged by the master with the amount of this note, principal and interest, as of the date it became due. Southall's Admr. vs. Taylor *et als.*, 14 Grat., 283.

The next exception is because the master failed to charge the defendant with the amount of a receipt of John T. Seegar for $637.78. This receipt was given by Seegar to the deceased on the first of January, 1867, for that amount of gold deposited with him.

Alfred Shepard died in November, A. D. 1870, and the defendant obtained letters of administration on his estate on the eighth of November of the same year. This sum was charged to the administrator as so much cash in his account filed 17th January, 1871. In his account of 1876 a credit for this sum and interest is entered in the words ***323** following: "Gold receipt against the estate of John T. Seegar failed to recover in court and interest $916.66." The administrator testifies that Seegar always denied his liability upon the receipt. On the 29th of March, 1873, the administrator instituted suit against Hester B. Seegar, the administratrix of John T. Seegar, he, J. T. S., having died on the 13th December, A. D. 1872. On the 24th of April, 1874, the administratrix of Seegar filed a suggestion of insolvency in the County Court. The administrator failed to obtain judgment upon the receipt, because, as he states: "The Judge presiding ruled that the certificate could not be introduced as evidence of the debt for want of the proper U. S. revenue stamp." On the same day that the suit was instituted on the gold receipt the administratrix of Seegar was sued upon a promissory note of Seegar for $1,000. A suggestion of the insolvency of the estate of Seegar was filed in the Probate Court on the 24th of April, 1874. A judgment was obtained on this note for $1,147.90 on the 12th of April, 1875. It is admitted by the parties that the credit of John T. Seegar up to the time of his death was considered good in the community, and that he was regarded as solvent, and it appears from the record that he was a merchant in the town of Quincy, Florida.

The question is whether to the extent a loss has occurred to the estate the administrator is responsible.

The defendant here obtains letters of administration on the eighth (8th) of November, 1870, charges himself with this receipt as cash in January, 1871, and neglects to bring suit against its maker, a solvent merchant in good standing, who at all times denied his liability, until the 29th of March, 1873, over two years and three months after his appointment, and at a time at which a suit could not have resulted in its recovery, as is shown by the result of the suit upon the promissory note of Seegar instituted at the ***324** same time. Independent of any question of the matter of the neglect to place a stamp upon the certificate, or the necessity for so doing, we think the facts here show a degree of negligence which no prudent man would practice, and in view of the admitted denial of the liability by Seegar the case is one of careless indifference and gross negligence. Why suit under these circumstances should have been so delayed we cannot see. For over two years he neglects to make even a demand for this money so far as the records disclose. Indeed he seems to have desired to treat it as an investment, when the laws of this State prohibit such an investment upon personal security.

"In the case of Lawson vs. Copeland, 2 Brown's C. C., 156, an executor was charged with a bond debt for neglecting to take legal steps to collect it, in consequence of which it was lost. So in Powell vs. Evans, 5 Ves., 843, he was charged for neglecting to call in money lent out by the testator on personal security, and the debtor became insolvent." Says Mr. Justice Nelson in Schultz vs. Pulner, 11 Wend., 366: "If debts are not collected within a reasonable time after letters testamentary or administration, either by personal application or suit, which by such means may have been collected, whether

the debts have been lost by such delay or not, or whether their motives may have been pure or not, the law holds them personally responsible to the creditors and distributees. There is nothing hard or unjust in this principle. It is only exacting of these representatives that diligence and attention to the business of others voluntarily assumed upon themselves which they should and which every discreet man would bestow upon his own." See also Stark vs. Hutton, 3 N. J. Eq., 306, 307.

In determining what is reasonable diligence in such matters it must be remembered also that an administrator's duty is ***325** to wind up the estate at as early a day as practicable. As remarked by Judge Sharswood in Neff's Appeal, 57 Penn. State, 97, "an administrator is under obligation to diligence in preparing for distribution." It is also the fact that in this case this debt was due by one engaged in mercantile pursuits subject to the incidents and hazards of trade. Such obligation should be collected as soon as practicable. See remarks upon this subject in Southall's Administrator vs. Taylor, 14 Grat., 279, 282; 31 La. Ann., 312.

The case of Kee's Executors vs. Kee's Creditors, 2 Grat., 116, cited by appellant and defendant, will be found upon examination to present facts of a peculiar character entirely unlike the facts in this case.

The case of Southall's Administrator vs. Taylor, 14 Grat., 283, cited by appellant and defendant, does not support the view that in this matter the administrator here under the circumstances of this case would be excused. In that case one of the questions was, whether the administrator was bound for the amount of a bond. The court say: "It seems that Southall is clearly bound for the amount of the bond in question on the ground that he did not use ordinary diligence in respect to it after it fell due. He suffered nearly twelve months to elapse after its maturity without (so far as the record shows) making any demand for its payment." The case of Thomas vs. White, 3 Little, 177, was where under very peculiar circumstances and contrary to the general rule, an administrator was not charged with a loss occasioned by his not bringing suit until the act of limitations opposed a bar to recovery. The rule in South Carolina, as announced by its courts in 1841, cannot prevail in this State to its full extent, as there personal security was what was usually required for investments. See Glover vs. Glover, McMullen's Equity, 154, but as applicable ***326** to the subject-matter of this case we think that the principles announced sustain our conclusions. Taveau vs. Ball, 1 McCord's Chancery, 464; Mikell vs. Mikell, 5 Rich. Eq., 225. No interest was due here until demand made.

Seegar was simply a depositary of this gold. The transaction was not a loan. Payne vs. Gardner, 20 N. Y., 170. Under the circumstances we think that interest should be allowed only from the time when the suit was commenced for its recovery.

The next exception which we examine is that of the defendant to the charge of the administrator with the amount of the Seegar note. This note was dated January 1, 1867, due one day after date, and went into the possession of the administrator about the 8th November, 1870. On the 13th December, 1872, Seegar, the maker, died, and on the 23d December Hester B. Seegar qualified as his administratrix. The administrator sued the administratrix of Seegar on the 29th March, 1873. A suggestion of the insolvency of the estate was filed on the 24th April, 1874, and the note has not been collected in consequence thereof. There was delay to sue here therefore, an over-due note of over two years during the life-time of its maker, and when his administratrix is sued three months afterwards insolvency is suggested. During the life of the maker he was believed to be solvent, his credit was good, and he was paying interest on the money. The note represented a loan made by Alfred Shepard to Seegar.

The evidence disclosing the circumstances attending this transaction is substantially as follows: The administrator testifies that in June, 1872, he notified Seegar that he held the note as administrator, and told him that he wanted it paid by the following February (1873), as he wanted then to make his final settlement; that Seegar then told him to ***327** put it off until the fall of that year and he would pay it as soon as cotton began to stir; that in October he called on him again for the payment of said note, and Seegar told him that he had the cotton in Savannah to pay the debt, and as soon as it was sold he would pay the note. He (Seegar) also then told him that if he (Shepard) was pushed for the money he would draw on the cotton, but that it was no use as he would get the money as soon by a sale as by a draft. He (Shepard) then told Seegar not to disappoint him as he was making his arrangements to make his final settlement in February following. Seegar said to him not to be uneasy as he would pay it as soon as the money came; that this interview took place in Seegar's store, and it was the last time that he saw Seegar, as he (Seegar) died soon afterwards. He afterwards called frequently at Seegar's store, but did not see him as he was confined by sickness. After Seegar's administratrix had qualified he called upon John W. Malone, her attorney, who told him that the note would be paid as soon as the estate was somewhat settled. In his cross-examination he states that he understood him to mean that he would pay the note as soon as the condition of the estate could be rightly ascertained if the assets were sufficient to do so;

that subsequently he told him the estate was unable to pay more than seventy-five cents on the dollar; that afterwards he told him the estate could only pay fifty cents, and offered to compromise at that sum in notes and lands at a price stated. This he refused, deeming the valuations too high. No interest on claims against the Seegar estate was to be paid. He then sued the note, and a suggestion of insolvency was made at the same time that he obtained judgment. Seegar had been a prominent merchant in Quincy for years, and was in good standing and credit. The above is substantially the direct examination. Upon the cross he stated in substance, in addition to what ***328** is above written, that he had not notified Seegar to pay the note before June, 1872, as his object was to notify him to pay by February so that his final settlement would not be delayed, and that he called in the following October and told him that he must certainly pay by the following February; that he (Shepard) "was willing that Seegar should keep the money until February, provided he would certainly pay it at that time, and Seegar told him that he was going to pay as soon as he sold the cotton, and did not want to keep it until February; that he looked upon Seegar as good as the bank and he wanted to be lenient with him; that he had paid out all the money he had collected to the heirs, and was not going to pay out any more until he made his final settlement in February, and, therefore, did not want the money until February, 1873."

S. S. Strange, one of the heirs of Shepard, testifies that about October, 1872, he had a conversation with John T. Seegar relative to said note, in which conversation Seegar told him to push up E. S. Shepard to collect the note, as he was ready to pay it; that the said Shepard did not care to collect it at present; that a week or so after this conversation he met Shepard at Shepard's gin-house and repeated to him what Seegar had said about the note, and that Shepard said he did not care to collect it until he knew that all the heirs were ready for a final settlement, as he did not want to pay the interest on the note; that the note was good, and that he was going to hold on to it "until the last day in the morning," as he did not know what might turn up. The witness, on cross-examination, says that when Shepard told him this he neither objected nor consented to it.

Summing this testimony up it amounts to this: That the administrator deeming the maker of this note solvent such being his reputation in the community, and being a ***329** merchant subject to the vicissitudes of risks and dangers of trade, instead of using any special effort to collect the note, holds it as an investment waiting the time for distribution of the estate; that shortly before that time the maker dies, his estate turns out to be insolvent, and the money is either wholly or in part lost, the time which the note is retained being over two years. Can any case be found in any State where the law as to investments by administrators of the moneys of an estate is similar to the law of Florida which sanctions such action by the administrator? Such investments are here required to be made upon such mortgage security as the court may allow, the day of payment of the money or other security not to exceed one year from the date of the obligation. Moore & Montford vs. Felkel, 7 Fla. 44. There are, it is true, other obligations in the shape of bonds which are now authorized investments, but the general statute above stated fixes the policy of the law upon the subject.

In South Carolina, Glover vs. Glover, McMullen's Equity Reports, 154, a distinction is based upon their policy as to investments of such funds. As ordinary personal security alone is there required the court enquire what motive there could be for calling in what is thought to be a good investment, as all the object to be obtained would be again to invest it upon like or other security. A different rule it is true controls the investment of funds in hand and the collection of sums due an estate. The rule is much more strict as to investments, but the rule as to the collection of notes due an estate is not that the administrator may, because of reputed solvency, postpone the collection of the note of one engaged in trade to the date when a distribution is to be had. An administrator who extends credit up to the time of distribution neglects to collect the asset for as long a time as he can neglect this duty. If it is his duty to collect it ***330** he should do so as soon as he reasonably can. Says the Master of the Rolls in Powell vs. Evans, 5 Ves., 844: "I desire to be understood that debts due upon personal security are what executors without great reason ought not to permit to remain longer than is absolutely necessary." In this case we think that he could have done so if he had endeavored to do it, and that his treating the note as an investment cannot be sanctioned. In the case of Moore & Montford vs. Hamilton, 4 Fla., 118, this court remark "that if an executor without good reason leave money due upon personal security, which though good at the time, afterwards fails, he will be responsible," citing 5 Ves., 839; 1 Mad., 298. The note to the case of Powell vs. Evans, 5 Ves., 844, we think gives a very correct statement of the rule so far as applicable in this State: "There may be cases in which it would be injurious to the parties interested if trustees were to press on all the remedies for the recovery of a demand, Sitwell vs. Bernard, 6 Ves., 535, but as a general rule executors are under the necessity of getting in their testators property by all possible remedies; if any securities seem proper to be continued the court alone, it has been said, must judge of that and give the proper directions; executors who take upon themselves to exercise a discretion on such points

must as in the principal case be responsible for any loss sustained in consequence of their misplaced confidence however good their intention may have been; Gaskell vs. Harman, 11 Ves., 498, for though it is never the inclination of courts of equity to discourage persons from acting as executors, or to throw difficulties in their way, (Freeman vs. Fairlee, 3 Meriv., 42; Tebbs vs. Carpenter, 1 Mad., 298,) still persons accepting a trust of that kind must use reasonable diligence; if, by their default, any loss arise they must make it good to their testator's estate. Lawson vs. Copeland, 2 Brown, 157; Tebbs ***331** vs. Carpenter, *ubi supra;* see also note 4 to Tew vs. Winterton, 1 V., 451. An executor however like any other trustee or agent will be exempted from responsibility when he has transacted business in the regular and usual manner; though the loss sustained might by a more than ordinary degree of caution have been avoided; (see the concluding part of the note to Rowth vs. Howell, 3 Ves., 565,) and that the rule above stated which requires a trustee or executor to call in all outstanding debts or securities at least admits qualifications and restrictions of its generality. See note to Sitwell vs. Bernard, 6 Ves., 520." See also Harris vs. Parker, 41 Ala., 624; Bondurant vs. Thompson, 15 Ala., 202; Dean vs. Rathbone, 15 Ala., 328; 2 Perry on Trusts, Sec. 440.

In this case the administrator was bound to call in this note in a reasonable time and reinvest the proceeds or otherwise dispose of them according to law. We think if he had so desired he could have collected it, and failing so to do he must take the risk of treating it as an investment and continuing it without any sufficient reason as he did. The rule is that for worthless paper an administrator is not chargeable and need not sue, and if it be also true that he need not take measures to collect solvent notes, and can postpone action looking to their collection until distribution, then he is practically required to do nothing in the matter of collections, and all the risk falls upon the estate.

The remaining exceptions are based upon allowances made under the provisions of the statute of February 17th, 1833, which is as follows: "Executors and administrators shall be allowed all reasonable charges on account of disbursement of funeral expenses, and in the administration of the estate of the person deceased, and shall also be allowed a fair and just compensation for their services, and also a compensation not exceeding six per cent. on money arising ***332** from the sale of personal property * * and lands of the deceased." McC.'s Dig., p. 98, Sec. 78. This statute was construed in part in the case of Moore & Montford, Executors, vs. Felkel & Wife, 7 Fla., 63. As we understand the statute and the interpretation there given it provides that he be allowed:

First. All reasonable charges on account of funeral expenses.

Second. All reasonable charges incurred in the administration of the estate of the person deceased.

Third. A fair and just compensation for his services.

Fourth. A compensation not exceeding six per cent. on money arising from the sale of real and personal property of the deceased.

In view of this statute we examine the action of the court when controlled by its provisions. An allowance for a sum paid an auctioneer for selling the personal property, we think is a proper credit to the administrator. It is a reasonable charge and disbursement for the benefit of the estate. Sale of the personal property by an experienced auctioneer will result generally in great benefit to the estate. The presence of the administrator is also necessary to see that good security is taken when credit is extended.

****3** The next allowance objected to is on account of a sum for advertising the time and place of sale of the personal property. This is a reasonable and proper charge against the estate.

The next allowances objected to are amounts paid commissioners, cost of court and attorneys' fees in a proceeding for partition had before the Probate Court between the defendant and the plaintiffs. [These items are given in Mr. Malone's brief on page 306.--REP.] It appears that in deference to the heirs the lands were not sold, but were divided among them by an order of the County Court, each heir receiving ***333** his portion without any dissent to the division, but assented thereto, each party drawing for his portion. These parties are here seeking equity against this unfortunate administrator, and yet they urge the rejection of this allowance made for expenses incurred for their benefit with their consent and in deference to them. This is not right upon the part of these heirs. They were here not only "silent when conscience required them to speak," but they profited by this silence, and they cannot now be heard to speak when not only "conscience requires them to be silent," but when they wish to profit by their speaking. They are estopped from making this objection. Seeking equity they must do equity.

The next allowance excepted to is the sum of $24.50. The objections made here to the items composing this charge are so general that we are unable to determine what is the precise position of the plaintiffs. [Mr. Malone's brief,

page 306.] They say many of the items are disconnected with the administration and were for personal benefit. Some of the charges are in connection with the partition suit before mentioned. Our views as to these we have expressed. The administrator, it appears, did not live at the county site. This voucher embraces a number of charges for going from his place of residence in the country to the county site in town. Some of them are for a single service which evidently consumed but a short time in their performance. The administrator furnished his own horse and buggy in making the trips, and the charge is usually two dollars. We are inclined to think that the charge in some cases is too much, but we have nothing before us to sustain such a conclusion. We do not know the distance traveled. We do not know but that he was occupied some time in finding those persons with whom he had business, or the length of time he had ***334** to wait after finding them. These and many other considerations must enter into any fair determination of this matter. The allowance must stand, as we cannot say it "is not a fair and just compensation for the service rendered."

The next credit allowed, which was excepted to, is an allowance of $125.85, a commission of 6 per cent. on $2,097.32, amount of sales of the personal property. We cannot find sales to this amount. We find sales of personal property to the amount of $1,999.57. If this sum represents the amount of ""*money arising from the sale of personal property*" the allowance is within the law, and we will not disturb it. If it represents promissory notes or bonds received from purchasers at such sale it is not a commission on "money," and cannot be allowed. The administrator is entitled to commissions on the cash received at such sale, but where credit is extended he is not entitled to a commission except as he collects the note or security. In the case of Moore & Montford, Executors, vs. Felkel and Wife, 7 Fla., 63, the Circuit Court instructed the jury that they should not allow commissions on the *value* of lands and slaves, and this court sustained the instruction, holding that the purpose of the act was "to restrict to a percentage on money arising from sales." To the extent that the allowance conflicts with the views expressed the exception should have been sustained.

****4** The next objection is to an allowance as follows:

"Commissions on $263.56, collections on certain notes and accounts, @ 6 per cent., $15.60. Commissions on $1,942.25, coin and currency, @ 3 per cent., $58.26.""

We cannot understand these allowances otherwise than as being for accounts and money left by deceased. This being so, we are not prepared to say that the allowance of six per cent. for services rendered in collecting the notes and accounts is improper. This is not commissions upon ***335** moneys received from sales, but as a general rule the trouble and time involved in the collection of the moneys due upon the one is the same as collecting the moneys due upon the other. Indeed, as the statute requires security upon notes for personal property sales, and the probability is that what is left by the deceased are simple open accounts and notes unsecured, there would probably be more trouble in collecting the notes and accounts so left than those given upon sales. By analogy to the allowance made by law for the one service the sum allowed here by the court is not excessive. Again, as to this matter, we are in no condition to review this exercise of discretion by the court. We do not know what were the incidents in the matter of expenditure of time and incurring trouble in the collections.

It appears that the sum of $1,942.25 came into the possession of the administrator when he qualified; that he deposited it with William Munroe for about two months, when he disbursed it to those entitled. He was allowed two dollars for his services in going to town to disburse it, and a compensation of three per cent. for his responsibility in taking care of and paying it out.

The length of this opinion forbids our entering upon the discussion of the general subject of the matter of compensation to trustees, executors, administrators and others occupying similar fiduciary relations. The whole subject is fully and ably presented in the third edition of Perry on Trusts, §§ 918, 919, and notes.

The question in a case of this character is not the cost of safe keeping and labor alone, but a compensation for responsibility also. Looking to the decisions in the several States the commission and per diem here allowed is reasonable. In Bendall's Distributees vs. Bendall's Admr., 24 Ala., 306, five per cent. on the amount of cash which came to his hands was allowed the administrator. In Virginia ***336** five per cent. upon receipts have been allowed. The same amount is allowed in Pennsylvania. We do not think, however, that a larger sum than three per cent. should be allowed in this State upon a receipt and disbursement of this character.

The next objection is to an allowance of twenty-four dollars and fifty-eight cents as commission on the amount of the Seegar note which was charged to the administrator as a loss occasioned by his non-performance of duty. This matter should be treated we think in the same way in which an improper investment is. Under the general principles of equity the distributees are entitled to receive all such sums, principal and interest, as were paid upon this note, the administrator being entitled to compensation

for his services in collecting. This is the extent of the service he rendered. The rest was neglect and carelessness, not as a matter of course criminal, but neglect in a business sense. These sums will be charged to him in his yearly account and will enter into his yearly balances. For the sum remaining due the administrator will be charged simple interest. This we understand to be the rule adopted as to the Lockerman & Craig note in Moore & Montford vs. Felkel, 7 Fla., pp. 54, 60. See also Sanderson's Administrators vs. Sanderson, 17 Fla., 862; Perry on Trusts, 471.

**5 The next objection is to an allowance of fifteen dollars ($15). We are unable to see from the master's report where such a distinct entry was made for this service. The testimony of the defendant is all we find upon the subject. He states that the memorandum of claims "in Exhibit B. were utterly worthless, or he so regarded them, that he went to Liberty county, Florida, during the sitting of the Circuit Court three several times and tried to collect the claims but could not do so." An administrator, notwithstanding common report of insolvency of a debtor to *337 the estate, is entitled to reasonable compensation for services in investigating the facts and ascertaining the truth. As we understand the matter, the administrator is here paid for this service, and upon his ascertaining that nothing could be recovered of the parties he claimed and received credit for the notes with which he had been charged. Had he failed to make such enquiry, and the fact had turned out to be that a recovery might have been had of some of the parties and the money realized, then there would have been a charge for gross negligence in trusting to common rumor and not making an honest enquiry into the matter. The credit was properly allowed.

The next exception was to an allowance for five dollars paid R. S. Tucker, eight dollars to J. E. DuPont and four thirty-five one-hundredth dollars to S. E. Stewart. We find nothing upon this subject in the record except an entry of a credit in the master's account for the sum of $5 paid R. S. Tucker. Referring to voucher number one, upon reference thereto we find it is for sheriff's costs. As to the other items we find a simple entry of $4.35 paid S. E. Stewart, costs on execution against McAlpin and Martin, insolvent. As to the charge of $8 for amount paid to J. E. DuPont we find a receipt for that amount of costs by him as sheriff. The Judge of the County Court having the accounts before him and having allowed them, the presumption before the Circuit Court and here is that the charge is not for the same service. We find nothing in this record to rebut this presumption, except that the receipts are for sheriffs' costs by two different sheriffs. We presume one succeeded the other to the office, and that the charge was for different services by different officers. If the charges are for the same service as a matter of course only one charge can be allowed. The fact that the suit in which these costs were incurred was unsuccessful is not alone sufficient ground to *338 disallow the costs. If the administrator acted in good faith in bringing the action the costs fall upon the estate in case of failure. In the matter of Horace Grout, 15 Hun., 22 N. Y., Sup. Ct. Repts., 364; Collins vs. Hoxie, 9 Paige, 81; Moses vs. Murgatroyd, 1 John. Chy., 473. The administrator "is presumed to have acted in good faith, and in the absence of evidence of bad faith on his part is entitled to be reimbursed."

**6 This disposes of the plaintiffs' exceptions in the Circuit Court to the master's report.

The first exception of the defendant in the Circuit Court to the master's report was on account of the charge of the Seegar note to the administrator. That matter has been already disposed of.

The second exception is to the refusal of the master to credit the defendant with the sum of thirty-two fifty one-hundredths dollars, being per diem in attending court in prosecuting the suit against the administratrix of J. T. Seegar. This exception it is insisted should not be allowed because the service was rendered necessary by the laches of the defendant in not collecting the note. It is true that this court has felt constrained to hold, as the Circuit Court did, that this administrator should be charged with this note because looking to all of the circumstances we think such is the law.

It does not necessarily follow, however, that the administrator is not entitled to compensation for his services rendered in connection with this suit or an allowance for costs therein. These services and costs were not incurred in case of a suit between trustee and *cestuis que trust.* The suit here is by the administrator against a stranger debtor to the estate upon a contract with the deceased intestate overdue when it came to his hands. The rule is that if the litigation here in connection with which these expenses and *339 costs were incurred was just and proper, and apparently for the benefit of the estate, the administrator should be allowed them, notwithstanding the suit did not result in producing the money. In Gouverneur vs. Titus, 1 Edw. Chy., 482, where the defense of the administratrix was unsuccessful, the court say "she must pay the costs of the suit to be taxed. Nevertheless she stands in a representative capacity, * * * and inasmuch as it appears she has not acted otherwise than with a view to benefit the estate she represents the costs must be charged upon the estate and not against her

personally. This was done in Moses vs. Margatroyd, 1 John. Chy. Repts., 473." Says Kennedy, J., in Mumper's Appeal, 3 Watts & Sergeant, 443: "Generally I take it that the ordinary costs and expenses incurred by him (the executor) in either prosecuting or defending a suit as executor for the benefit of the estate are to be paid out of it." Day vs. Day, 2 Green Chy., 557; Hardy vs. Call, 16 Mass., 530; Connally vs. Pardon, 1 Paige, 291; Roosevelt vs. Ellithorpe, 10 Paige, 415.

In this case the administrator, during the life-time of the debtor, instead of collecting the debt as was his duty, relied upon the promise of the debtor to pay when he needed it for distribution. The debtor dies, the administrator calls upon the attorney of the estate, and the administrator leaves with the idea that all will be right; that when the assets are made available the debt due his intestate will be paid. He calls again. He is told that the estate cannot or will not pay more than seventy-five cents on the dollar. He calls again. He then finds it doubtful whether it will pay fifty cents, and there is to be no interest allowed on his debt. In the meantime no declaration of insolvency is filed in the County Court by the debtor. Considerably vexed, if not angered, and properly so, we think, from the record here, he sued before the expiration of six months after the ***340** qualification of the administratrix of the deceased debtor, thus relieving the defendant in the suit of costs under the statute. Under the then existing circumstances it was eminently proper for him to sue, and sue at once. It was time for him to act. The estate was growing less and less in value according to the representations of those entitled to speak for it. Every time he called he was told he could get less, and yet no declaration of insolvency. He sued. He found his heretofore admitted claim resisted, and finally a declaration of insolvency is filed, and so far as this record discloses the entire debt is lost.

****7** As to the matter of costs paid the Judge of the County Court. The exception as to this matter is general. We do not propose in this or any other case to examine all the bills of costs filed during a lengthy administration and cull out what we think are illegal charges. To the extent that they have been pointed out here we have examined them. Wherever the charges are illegal they must be disallowed to the extent they are illegal and charged to the administrator. His remedy is not against the estate.

As to the exception in the matter of the commission allowed on $1,942.25 cash received, we have already disposed of the matter.

The only remaining exception to be considered is to the charge of the defendant by the master with compound interest on $1,514.22 for four years after the commencement of this suit and after defendant had ceased making settlements with the Court of Probate.

We know of no rule which authorizes a difference in the rate of interest after the commencement of the suit. Money received and not re-invested according to law is presumed to be money "retained" by the administrator, and the rule of the statute is that the interest must be added to the principal annually. The administrator can ***341** relieve himself of this liability by paying the money into court upon the institution of the suit, (Perry on Trusts, 3 Edition, Sec. 468, and cases cited;) "but so long as litigation is pending over the fund, and the money is not brought into court, the trustee is bound to keep it invested," and he is liable for the statutory interest. Merritt vs. Jenkins *et ux.*, 17 Fla., 598. This rule, as a matter of course, is subject to the exception of the statute, which is when no good security can be found on which to put out the money at interest. As to the interest on the liability incurred by the failure to discharge his duty as administrator in the matters of the receipt for the gold and the promissory note, we have already indicated our views.

The decree in each appeal is reversed, and the case will be remanded with directions to the Circuit Court to recommit the report to the master with instructions to reform his report in accordance with this opinion and with the principles of equity in this behalf prevailing.

All Citations

19 Fla. 300, 1882 WL 3070

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3.G.

501 So.2d 730
District Court of Appeal of Florida,
First District.

Juno HARRIS, Personal Representative of the Estate of Walter Byard, deceased, Appellant,
v.
Gloria J. BYARD, as Natural Guardian of Belden Byard and Benita Byard, Appellee.

No. BI-57.
|
Jan. 30, 1987.

Mother of two of decedent's children sought to have her children determined as sole beneficiaries of decedent's life policy, to exclusion of claims of decedent's estate, where designated beneficiary of policy predeceased decedent. The Circuit Court, Duval County, Lawrence D. Fay, J., held for mother, and appeal was taken. The District Court of Appeal, Zehmer, J., held that provision in divorce decree, requiring husband to maintain major medical and life insurance policy naming minor children as beneficiaries, did not mean that the two children of that marriage were sole beneficiaries of after-acquired life policy, to exclusion of husband's other children, absent evidence husband acquired policy to comply with terms of decree or that other children could not be named as beneficiaries and still comply with decree.

Reversed and remanded.

West Headnotes (1)

[1] **Insurance**
⇐ Divorce or Separation;Agreements and Settlements

Provision in divorce decree, requiring husband to maintain major medical and life policy naming minor children as beneficiaries, did not mean that the two children of that marriage were sole beneficiaries of after-acquired life policy, to exclusion of husband's other children and estate, absent evidence husband acquired policy to comply with terms of decree or that other children could not be named as beneficiaries and still comply with decree; husband's designated beneficiary had predeceased him and no contingent beneficiary was named.

1 Cases that cite this headnote

Attorneys and Law Firms

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W. Benjamin Kyle, Jacksonville, for appellee.

Opinion

ZEHMER, Judge.

This is an appeal from an order entitled "Final Judgment" entered in the administration of the estate of Walter Byard, deceased. Byard's designated beneficiary of his group life insurance predeceased him, and no contingent beneficiary was named. The order determined that two of Byard's children, Belden Byard and Benita Byard, should be treated as sole beneficiaries of the life insurance policy, to the exclusion of the claims of Byard's estate and his remaining children who are beneficiaries of the estate. We conclude that the court misapplied the cited rule of law, and reverse.

The proceedings in the trial court were not reported; therefore, counsel for the parties filed an agreed statement of facts in this court, which reveals the following events.

This dispute arises out of conflicting claims against the $12,000 proceeds of a employer's group life insurance policy covering Byard as an employee at the time of his death. The policy named his mother as beneficiary, but she had died before the decedent died accidentally on September 14, 1984. On November 2, 1984, appellant, Juno A. Harris, as Byard's sister, filed a petition for administration, alleging that she was guarantor of decedent's funeral expenses. She was appointed personal representative of the estate and letters of administration were issued.

Walter Byard and appellee, Gloria J. Byard, were once legally married, and Belden Byard (age 16) and Benita Byard (age 14) were the only children born of their

marriage. Walter Byard fathered and was paying child support to five other minor children who were heirs of his estate at his death.

Gloria Byard, as natural guardian of Belden Byard and Benita Byard, filed her petition to determine Belden and Benita the sole beneficiaries of the insurance policy and served copies on the attorney for the personal representative and on each of the other children as heirs of the decedent. The petition alleged that Belden and Benita Byard were the only legitimate heirs of the decedent born as issue of his marriage to her, and that the marriage was dissolved by an order entered August 30, 1976, by the circuit court of Duval County, which stated, "The Husband shall maintain a major medical and life insurance policy covering the minor children as beneficiaries." Based on this provision, appellee contended ***732** that Belden and Benita Byard were the only lawful heirs of decedent entitled to the benefits of the life insurance policy.

Appellant filed a response alleging that Walter Byard had been determined to be the natural father of minor heirs Sandralyn Brown, Gerry Brown, Walter C. McRae, Kevin McRae, and Walter J. Byard in final judgments of paternity entered by the Duval County circuit court and required to pay child support for their benefit, which he was doing at the time of his death. The response further alleged that pursuant to section 732.108(2), Florida Statutes (1985), all the minor heirs were lineal descendants of Walter Byard and entitled to share equally in the assets of the estate available for distribution after payment of claims to creditors and costs of administration.

The minor heirs did not file a response to the petition; however, they appeared at the hearing through their natural mothers. Accordingly, the court had jurisdiction over them pursuant to section 731.301, Florida Statutes (1985).

After the parties presented evidence and argument on the issues at a hearing, the trial court, reasoning that the named beneficiary had "predeceased Walter Byard so in effect there is no beneficiary named in that policy" and that "the issues in this case appear to be controlled by the law as set forth in the case of *Dixon v. Dixon* [184 So.2d 478 (Fla. 2d DCA 1966), *cert. discharged,* 194 So.2d 897 (Fla.1967)] and *Roxy v. Roxy* [454 So.2d 84 (Fla. 2d DCA 1984)]," entered final judgment determining Belden Byard and Benita Byard to be the sole beneficiaries of the life insurance policy and entitled to receive all benefits of that policy. Appellant's motion for rehearing was denied and this appeal followed.

We note that the record before the trial court failed to identify any particular insurance policy in effect at the time of the judgment of dissolution. There was no basis, therefore, for the court to determine what insurance policy or amount of insurance was contemplated by the provision in that judgment. Moreover, that judgment does not require that compliance with this provision be accomplished by obtaining a particular policy naming only the two children as beneficiaries. That including the two named children as beneficiaries in a single policy with other beneficiaries would comply with the provision is strongly indicated by the reference to life insurance and medical insurance in the same sentence, for medical insurance is characteristically obtained by a single policy or certificate covering the insured and his dependents. We are unwilling, therefore, to construe the provision as requiring Byard to thereafter make the two children of that marriage the sole beneficiaries of any and all after-acquired life insurance, regardless of amount, to the complete exclusion of his other children, or other family members, as this would amount to ruling that the judgment of dissolution effectively circumscribed his future right to obtain life insurance for any other beneficiary. Finally, there is no evidence or indication that the group life insurance coverage in dispute was acquired by Byard to comply with the terms of the order or that his other children could not be named as beneficiaries and still comply with the provision in the judgment.

Were this a contract action to enforce Byard's agreement to provide life insurance for the two children pursuant to a writing containing the language of the judgment, we would be hard pressed to effectuate such an agreement because the essential terms of the contract would obviously be too vague. *See, e.g., Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc.,* 125 So.2d 903 (Fla. 3d DCA 1961), *cert. discharged,* 137 So.2d 568 (Fla.1962). This argument, however, has not been presented to us.

The decisions relied on by the trial court as controlling, *Dixon v. Dixon,* 184 So.2d 478, and *Roxy v. Roxy,* 454 So.2d 84, and other decisions following *Dixon* cited to us, *Holmes v. Holmes,* 463 So.2d 578 (Fla. 1st DCA 1985); *Vath v. Vath,* 432 So.2d 806 (Fla. 1st DCA 1983);

Pensyl v. Moore, 415 So.2d 771 (Fla. 3d DCA), *pet. for rev. denied,* 424 So.2d 762 (Fla.1982), are distinguishable ***733** from this case for the reason that in each case the record established that the particular insurance policies contemplated by the parties' stipulation or settlement agreement incorporated in the dissolution judgment was in existence at the time of the judgement and identified in the record.

For example, in *Dixon* the husband was covered at the time of the divorce by his employer's group policy with Metropolitan Life. Thereafter, a group policy with Provident Life, covering the husband for $8,000, was substituted for the Metropolitan coverage. The court held that the substituted policy was just as subject as the original policy to that provision of the divorce decree stipulating that the husband would " 'maintain and keep current with his employment any and all policies on his life, which such policies shall be made payable to the minor child herein.' " 184 So.2d at 479. It construed this provision as amounting to "a surrender of the essential incidents of ownership" of the policy such that "the present action, brought in chancery, is an altogether appropriate vehicle for the appellant to assert equitable title to the proceeds." 184 So.2d at 481.

Similarly, in *Roxy* the settlement agreement read in part that the husband "acknowledges ownership or [sic] a policy of life insurance through his employer ... and agrees to maintain this policy with the minor child above mentioned as beneficiary thereof so long as the wife shall have custody of such minor child." 454 So.2d at 84. The court specifically noted that the existing policy insured the husband for $10,000. Relying on *Dixon,* it found insignificant the employer's subsequent change of insurers and substitution for the Travelers policy of a policy with Aetna providing $20,000 coverage. Specifically noting that "no consideration has been given to whether a payment of $10,000 from the Aetna policy ... would satisfy paragraph 5 of the settlement agreement because this argument was not made either here or in the trial court," 454 So.2d at 85, n. 1, the court held that the child became equitably entitled to the proceeds of the Aetna policy. As we read this case and *Dixon,* a property interest in a particular existing policy was created at the time of the divorce, and the substituted policy was subject to perfection of the minor children's equitable interest thereafter enforced by the court.

In *Holmes* the parties' stipulation incorporated in the judgment of dissolution required that "the husband shall maintain life insurance on himself and shall designate the minor child of the parties irrevocable beneficiary thereof." 463 So.2d at 579. Although the provision did not identify the policy referred to, the evidence established without apparent contradiction that the agreement was made in contemplation of a $25,000 policy already in existence and that this was the policy covered by the judgment. Contrary to his stipulation, however, the husband named his sister as beneficiary, and the policy proceeds were paid to her upon his death. This court held that in view of the stipulation the proceeds of that policy were subject to a constructive trust in favor of the minor child. As in the two preceding cases, there was an identified policy in existence at the time of dissolution upon which the court could impose the equitable interest.

Pensyl v. Moore, 415 So.2d 771, involved certain specific life insurance policies shown to be in effect at the time of the dissolution judgment which named the wife as primary beneficiary and the children as secondary or contingent beneficiaries. The judgment incorporated the settlement agreement, which provided that "the husband shall maintain and remain the owner of all life insurance policies on his life with the minor children herein as the direct or indirect beneficiaries thereof." 415 So.2d at 772. Thereafter, the husband purported to change the named beneficiaries to his girlfriend and left the children as secondary beneficiaries. The court, relying on *Dixon* as controlling, affirmed a judgment establishing the children as beneficial owners of the existing policies.

In *Vath* the judgment of dissolution included the provision that " 'the husband ***734** shall maintain the existing life insurance policies on his life and shall change the beneficiaries to be the minor children of the parties.' " 432 So.2d at 807. Despite this provision, the husband changed the named beneficiary from his mother to his new wife just before he died. The court distinguished *Cadore v. Cadore,* 67 So.2d 635 (Fla.1953), and held, in reliance on *Dixon,* that the judgment gave the children an equitable interest in the *existing life insurance policy* which should be enforced under the maxim "that equity regards as done that which ought to be done." 432 So.2d at 809.

Cadore v. Cadore, 67 So.2d 635 likewise involved an insurance policy existing at the time of the divorce decree which required the husband to change the named

beneficiary from the wife to the children of the parties. The husband complied with the judgment but thereafter changed the beneficiary to his second wife, who paid the premiums on the policy for a number of years. All of the children had reached majority at the time of their father's death. Unlike the above cited cases, the supreme court held that the subsequent wife, rather than the children, was the proper owner of the policy and entitled to the proceeds thereof, pointing out that the policy reserved in the husband the right to revoke the designation of beneficiaries and to assign ownership to another, and that these rights were not circumscribed by the divorce decree.

We conclude that the cited decisions are not controlling in this case because there was no proof that a particular insurance policy was in existence at the time of the divorce to provide the necessary specificity and meaning to the otherwise ambiguous and indefinite provisions of the dissolution judgment. In each of the cited cases holding the children entitled to the policy proceeds there existed an identifiable policy at the time of divorce to which the equitable principles could be applied to perfect an equitable property interest in the designated minor children. In this case, however, no such policy or identifiable property interest has been established. The husband could have satisfied the terms of the judgment by naming the two children, Belden and Benita, as joint beneficiaries with the other children in a life insurance policy of any amount. Unlike the other cases cited, the lack of an existing policy at the time of dissolution deprives this case of any specific property interest in which the court could create an equitable interest or constructive trust. *Cf. Cadore v. Cadore*, 67 So.2d 635. If we were to affirm the trial court's enforcement of the dissolution provision, as provided in the appealed order, it would mean that the provision had the legal effect of requiring any and all life insurance acquired by the father after dissolution to be for the sole benefit of the two children, to the complete exclusion of the father's remaining children. We know of no legal or equitable principle requiring this result.

Since appellee has not shown that the subject policy was obtained to comply with the judgment for dissolution, or that it was in existence or obtained in substitution of a policy in existence when the dissolution was decreed, we hold that the trial court erred in declaring Belden and Benita Byard beneficially entitled to all proceeds of the insurance policy. Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than decedent's estate for administration and distribution. The judgment below is therefore reversed and the action remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

JOANOS, J., and MINER, CHARLES E., Jr., Associate Judge, concur.

All Citations

501 So.2d 730, 12 Fla. L. Weekly 429

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