IN THE COURT OF APPEALS OF TENNESSEE,
AT NASHVILLE

FILED
October 30, 1998
Cecil W. Crowson
Appellate Court Clerk

IN RE: ESTATE OF LERA D. BARNWELL, Deceased,	)	Davidson County Probate Court
	)	No. 95P570
PATRICIA SARGENT,	)	
Plaintiff/Appellant.	)	
VS.	)	C.A. No. 01A01-9711-PB-00656
RICHARD BARNWELL, Executor, Estate of Lera D. Barnwell, and RUBY D. MASHBURN,	)	
Defendants/Appellees.	)	

From the Probate Court of Davidson County at Nashville.
Honorable Frank G. Clement, Jr., Probate Judge

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OPINION FILED:

AFFIRMED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S.: (Concurs)
HIGHERS, J.: (Concurs)

Patricia Sargent appeals the trial court's order which dismissed her second complaint contesting the Last Will and Testament of her mother, Lera D. Barnwell (Decedent). We affirm the trial court's order based on our conclusion that, having voluntarily dismissed an earlier complaint in which she contested the Decedent's will, Sargent is now barred from refiling this action to contest the Decedent's will.

After Lera D. Barnwell died in March 1995, her nephew, Richard J. Barnwell, filed a petition to probate the Decedent's Last Will and Testament, which named Barnwell as its executor.[1] The Clerk of the Probate Court of Davidson County issued Letters Testamentary to Barnwell to serve as the executor of the Decedent's will without bond. The Letters Testamentary empowered the Executor

> to enter upon the execution of said will, and take into [his] possession all of the property, and to make, within sixty days . . . , a perfect inventory thereof, and make due collection for all debts, and after paying all the just demands against the Testator, and settling up the business according to law, [to] pay over and deliver the property and effects that may remain in [his] hands, and do all other things that may be required, according to the provisions of the said will and the laws of the land.

In January 1996, Patricia Sargent filed a complaint in which she contested the Decedent's will on various grounds, including "several irregularities" which allegedly appeared in the will and in the petition to probate the will. The complaint also alleged that the Decedent executed the will as the result of undue influence when she was "not of sound mind."

After one continuance, which was requested by Sargent, the trial was scheduled to begin on July 22, 1997. On the morning of trial, however, Sargent's counsel announced in open court that Sargent was voluntarily dismissing her complaint. Despite the trial court's warning that "there may . . . be an issue of whether a petition to contest a will can be non-suited and then recommenced," Sargent's counsel indicated that Sargent was taking a nonsuit but that she intended to refile the action at a later date. The trial court subsequently entered an order indicating that

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[1]The Decedent's Last Will and Testament actually named two co-executors, including Barnwell, but the other co-executor declined to serve, leaving Barnwell as the sole executor.

Sargent had taken a voluntary nonsuit, but the court did not indicate whether the dismissal was with or without prejudice.

In September 1997, Sargent filed a second complaint contesting the will of the Decedent. The Executor previously had filed a motion seeking to bar Sargent from refiling her complaint. The trial court apparently treated the Executor's motion as a motion to dismiss and, after conducting a hearing, entered an order dismissing Sargent's second complaint with prejudice. This appeal followed.

Prior to our supreme court's adoption of the Tennessee Rules of Civil Procedure, the courts of this state prohibited litigants from refiling a will contest after earlier taking a nonsuit in a contest of the same will. In ***Arnold v. Marcom***, 352 S.W.2d 936 (Tenn. App. 1961), Lela Mae Marcom filed a petition to contest the will of Eula Mae Arnold. During the first will contest proceeding, Marcom moved the court to be permitted to take a voluntary nonsuit without prejudice. In an order entered in July 1959, the trial court granted Marcom's motion, thereby dismissing the action. Marcom then filed a second petition to contest the will, which was heard in November 1960. At the hearing on the second petition, the executor of Arnold's will moved to dismiss Marcom's petition, arguing that the matter already had been adjudicated and that the law did not permit a contestant to take a nonsuit in an action contesting a will and then to file a petition contesting the same will. ***Arnold v. Marcom***, 352 S.W.2d at 937.

The trial court agreed with the executor's argument and granted his motion to dismiss. On appeal, this court affirmed. Citing a previous decision of the supreme court, the court explained:

> In ***Larus v. Bank***, 149 Tenn. 126, 147-148, 257 S.W. 94, the Court discussed the case of ***A.G. Jones, b/n/f, etc. vs. Chambers, Executor***, decided by the Court of Civil Appeals in November 1919, wherein it was held that after a will had been certified to the Circuit Court for contest, and the issues made up, the contestant could not dismiss the suit or withdraw from the case over the objection of the proponent and thereby prevent a determination of the issues.
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> In the same case (***Larus v. Bank***) the Court quoted from a North Carolina case, ***Collins v. Collins***, 125 N.C. 98, 34 S.E. 195, holding that such proceedings are ***in rem*** and that there are no parties

who can withdraw or take a non-suit, and thus put the matter where it was at the start, as in actions between individuals. It is said that such cases involve creditors, legatees and distributees and that public policy and statutes require that this preliminary question be determined as soon as practicable regardless of objecting persons. The opinion concludes as follows;

> "It is well settled in this state that in all cases of contested wills the circuit court is the court of probate, and in forming an issue on the validity of the will all persons interested either for or against it have the right to be made parties, the proceeding being ***in rem***, and the judgment is binding on all persons, whether parties to the record or not. ***Patton v. Allison***, 7 Humph. 320; ***Hodges v. Bauchman***, 8 Yerg. 186; ***Fry v. Taylor***, 1 Head, 594; ***Martin v. Stovall***, 103 Tenn. 1, 52 S.W. 296, 48 L.R.A. 130."
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> In ***Jones v. Witherspoon***, [182 Tenn. 498, 187 S.W.2d 788 (1945)], it is said that the principle underlying these cases is to be determined in such proceeding, not only as to who is entitled to inherit the property but also to hasten the administration of the estate and the payment of debts, and that public policy demands that the courts should shorten as far as possible the litigation lest the estate be absorbed in Court costs and expenses. The Court then says;
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> > "We are of opinion that both by reason and authority, when there is a contest of a will offered for probate, and the circuit court takes jurisdiction, it takes jurisdiction for the purpose of once for all determining as to whom the testator's estate shall go. The proceeding is a proceeding ***in rem***, involving the distribution of the ***res***, the estate."

Arnold v. Marcom, 352 S.W.2d at 938-39.

Since the supreme court's adoption of the Tennessee Rules of Civil Procedure, the courts of this state apparently have not decided the issue of whether or not a litigant may refile a petition to contest a will after previously taking a voluntary nonsuit in a contest of the same will. Rule 41 of the Tennessee Rules of Civil Procedure sets forth a litigant's right to take a voluntary nonsuit in a civil action. As pertinent, rule 41 provides that:

> Subject to the provisions of Rule 23.05 or Rule 66 or of any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall

> also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict.

T.R.C.P. 41.01(1).

Although the courts of this state apparently have not decided the issue, the Supreme Court of Arkansas has held that its version of rule 41 does not permit a litigant to take a voluntary nonsuit in an action to contest a will. ***Screeton v. Crumpler***, 617 S.W.2d 847 (Ark. 1981). As pertinent, rule 41 of the Arkansas Rules of Civil Procedure provides that:

> Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court, provided, however, that such dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

A.R.C.P. 41(a). In rejecting the appellant's argument that the trial court's dismissal of her initial will contest should have been without prejudice, the court explained:

> [W]e do not think that procedure . . . was available. A proceeding to probate a will is a special proceeding, not an "action" as that term is ordinarily used. ***Lanning v. Gay***, 70 Kan. 353, 78 P. 810 (1904); ***State ex rel. Coulter v. McFarland***, 166 Neb. 242, 88 N.W.2d 892 (1958); ***Case v. Case***, 124 N.E.2d 856 (Ohio Prob., 1955); ***Lillard v. Tolliver***, 154 Tenn. 304, 285 S.W. 576 (1926). It does not constitute a civil action within ARCP, Rules 2[2] and 3.[3] A will contestant cannot

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[2]Rule 2 of the Arkansas Rules of Civil Procedure provides that

> There shall be one form of action to be known as "civil action." Actions in equity shall be brought in the Chancery Court and actions at law shall be brought in the Circuit Court.

A.R.C.P. 2. The comparable Tennessee rule provides that "[a]ll actions in law or equity shall be known as 'civil actions.' " T.R.C.P. 2.

[3]Rule 3 of the Arkansas Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the clerk of the proper court who shall note thereon the date and precise time of filing." A.R.C.P. 3. The comparable Tennessee rule provides that "[a]ll

> take a nonsuit under Rule 41, because such a contest is not an independent proceeding in itself. It would seriously disrupt the administration and distribution of estates if a will contest could be dismissed, voluntarily or without prejudice, and refiled at some indefinite later date. Hence the dismissal in the probate court was necessarily with prejudice.

Screeton v. Crumpler, 617 S.W.2d at 849 (footnotes added).

Citing ***Bailey v. Parkridge Hospital, Inc.***, No. 03A01-9303-CV-00135, 1993 WL 310359, at *1 (Tenn. App. Aug. 16, 1993), the will contestant in the present case, Sargent, contends that she had an absolute right to take a nonsuit under rule 41, subject only to certain exceptions set forth in the rule which she contends were not applicable here. In ***Bailey v. Parkridge Hospital***, this court stated that

> Rule 41.01(1), TRCP, provides for the free and unrestricted right of the plaintiff (at various stages of the proceedings) to take a voluntary nonsuit or to dismiss his action without prejudice except: (a) in class actions, (b) in cases where receivers have been appointed, (c) where precluded by a specific statute, or (d) in cases where a motion for summary judgment is pending.

Bailey v. Parkridge Hosp., 1993 WL 310359, at *1. This statement merely reiterates the language of the rule itself, which provides that the right to take a voluntary nonsuit to dismiss an action without prejudice is "[s]ubject to the provisions of Rule 23.05 or Rule 66 or any statute" and, further, that such right is not available "when a motion for summary judgment made by an adverse party is pending." T.R.C.P. 41.01(1).

Contrary to Sargent's contention, we conclude that one of the foregoing exceptions, specifically rule 66 dealing with receivers, applied in the present case and precluded Sargent from taking a voluntary nonsuit to dismiss her first will contest without prejudice. Rule 66 provides that, with two exceptions, the Tennessee Rules of Civil Procedure shall apply to actions which are "brought by or against a receiver" or to actions "in which the appointment of a receiver is sought." T.R.C.P. 66. The first exception to this rule is that "[a]n action wherein a receiver has been

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civil actions are commenced by filing a complaint with the clerk of the court. . . ." T.R.C.P. 3.

appointed shall not be dismissed except by order of the court." ***Id***. The second exception is that "[t]he practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the statutes of this state and with the practice heretofore followed in the courts of this state." ***Id***.[4]

On appeal, Sargent insists that this case does not involve the administration of an estate by a receiver or other similar officer appointed by the court. We disagree. The fifth edition of ***Black's Law Dictionary*** provides the following definition for "receiver":

> An indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, issues, and profits, and apply or dispose of them at the direction of the court when it does not seem reasonable that either party should hold them. A fiduciary of the court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. He is a trustee or ministerial officer representing the court, and all parties in interest in litigation, and property or fund intrusted to him.
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> A custodian of assets involved in litigation and title to assets remain in owner or owners who are parties in proceedings which lead to appointment of receiver who is managing agent of property for benefit of parties.

Black's Law Dictionary 1140-41 (5th ed. 1979); ***see also*** T.C.A. § 29-1-103 (1980) (authorizing courts "to appoint receivers for the safekeeping, collection, management, and disposition of property in litigation in such court"); T.C.A. § 30-3-104 (1984) (authorizing courts to appoint receivers to administer the estates of absentees).

In the context of the administration of estates, receivers, administrators, and executors have very similar roles. The administrator of an estate is "[a] person appointed by the court to administer (***i.e.***, manage or take charge of) the assets and liabilities of a decedent (***i.e.***, the deceased)." ***Black's Law Dictionary*** 43 (5th ed. 1979). By statute, the administrator of an estate in Tennessee has "the same responsibilities as a receiver in chancery." T.C.A. § 30-1-310 (1984).

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[4] ***Cf***. A.R.C.P. 66 (which provides that "[n]o action wherein a receiver has been appointed shall be dismissed except by order of the court," but which fails to contain the second exception relative to the administration of estates by receivers or other similar officers).

If the person performing the services of an administrator "is named by the decedent's will, he is designated as the executor, . . . of the estate." ***Black's Law Dictionary*** 43 (5th ed. 1979); ***see also*** T.C.A. § 1-3-105(7) (1994) (providing that, as used in the Code, the term "executor" includes "an administrator, where the subject matter applies to an administrator"). No person may administer the estate of a decedent, whether as administrator or executor, "until he has obtained letters of administration or letters testamentary" from the court. T.C.A. § 30-1-101 (1984).

We further note that, as in actions involving receivers, actions involving the administration of estates by administrators or executors may involve the rights of persons who are not parties to the action. As the authors of one treatise have observed, in actions in which a receiver has been appointed, rule 66 does "not allow the parties alone to take action affecting [the] rights" of "persons who are not formally parties." 4 Nancy Fraas MacLean & Bradley Alan MacLean, ***Tennessee Practice*** § 66.4 (2d ed. 1989). In our view, this principle applies equally as well to cases in which the court has appointed an administrator or executor to administer the estate of a decedent.

In light of the similarity of their roles in the administration of estates, we conclude that administrators and executors qualify as "other similar officers appointed by the court" so as to make rule 66 applicable to the present proceeding. As previously indicated, rule 66 provides that "[t]he practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the statutes of this state ***and with the practice heretofore followed in the courts of this state.***" T.R.C.P. 66 (emphasis added). Moreover, as previously discussed, the practice followed in the courts of this state prior to the adoption of the Tennessee Rules of Civil Procedure prohibited the contestant of a will from refiling his petition after having dismissed an earlier petition by taking a voluntary nonsuit. ***See Arnold v. Marcom***, 352 S.W.2d 936, 938-39 (Tenn. App. 1961). Accordingly, we hold that these authorities prevented Sargent from refiling her complaint to contest the Decedent's will after Sargent dismissed an earlier complaint to contest the will by taking a voluntary nonsuit.

The trial court's order dismissing Sargent's second complaint is affirmed. Costs of this appeal are taxed to Sargent, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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HIGHERS, J. (Concurs)