ORIGINAL

IN THE SUPREME COURT OF OHIO 13-1352

In the Matter of the Estate of Gilberto Garza, Jr.

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals
Case No. 12 AP 1000

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, CO-EXECUTORS OF THE ESTATE OF GILBERTO GARZA, JR.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Standing is a fundamental question and a "threshold requirement that must be met before a court may consider the merits of a legal claim." *Beaver Excavating Co. v. Testa,* 134 Ohio St.3d 565, 2012-Ohio-5776, ¶8. The law regarding standing of Executors of an Estate to appeal a decision of the Probate Court is unclear, and can lead to arbitrary application and results.

The law regarding the standing of Executors or Administrators of Decedents' Estates to appeal decisions of the Probate Court in their fiduciary capacities provides little guidance in cases with analogous facts to the case at bar. Specifically, as a result of the Appellate Court's decision, where beneficiaries of a Will have not been ascertained by the lower court by looking to the intent of the testator, which is the "pole star" of will construction, Executors do not have standing to protect those unknown beneficiaries' interests and ensure that the Court consider the testator's intent. Further, according to the court of appeal's decision, where Executors attempt to protect the Estate from arbitrary divestment of estate funds by the Probate magistrate, Executors do not have standing to protect the assets of the Estate.

In the case at bar, the precedent set by the court of appeals would leave Administrators or Executors in circumstances similar to this without recourse to appeal a decision of the lower court that is not based on the evidence before it. Had the Appellants in this case appealed the Probate Court's decision in their individual capacities, the appeal would have been, and *should have been*, dismissed for ripeness because the beneficiaries had not yet been identified. The law, as applied by the appellate court, leaves Executors in this case without recourse to protect the assets of the estate and the rights of the beneficiaries whose identities have not yet been

properly ascertained. This result, and the underlying case law which led the court to its decision, merits review.

Often, wills are prepared by the testators themselves, especially by under-educated or indigent people who cannot afford the advice of an attorney. A self-made will, in which a lay person attempts to express his wishes but leaves some unintentional ambiguity, may, under the precedent set by the court of appeals, be effectively discarded without the Probate Court's review of the testator's intent, while the appointed Executor of the will would be left without recourse to ascertain the testator's intent through a will construction action. This is certainly a case of great public interest, as testators are, by definition, unavailable to express their wishes after their wills have been admitted to Probate.

In this case, the Appellate Court found that Executors did not have standing to appeal the decision of the Probate Court in their fiduciary capacities based on case law stating that fiduciaries only have the standing to maintain an appeal when they have been aggrieved in their representative capacity. However, given the legal authority on when standing exists and the fiduciary duties of an executor or administrator, the finding in this case is contrary to settled law on those points. It is the duty of the fiduciary to protect assets of the estate. When those assets have been wrongfully divested of the Probate estate, it follows that it is the duty of the fiduciary to prevent such harm to the estate. In this case, the fiduciaries were left without recourse to appeal the decision of the lower court, either in their fiduciary *or* individual capacities, and that conclusion is contrary to notions of justice.

This case is of great public interest and importance because justice requires a more definitive and clear determination as to the standing of a fiduciary in an estate to file an appeal to protect the assets of the estate to prevent injustice and confusion. Only the fiduciary has the

authority and duty to protect the assets of the estate, and, in this case, the Co-Executors were denied the ability to fulfill that duty.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

The Estate of Gilberto Garza, Jr. ("Garza, Jr." or "Decedent") was opened for the purpose of pursuing a wrongful death and survivorship action due to his death at his workplace. His Will was admitted on November 14, 2007. Demencia Vargas-Ortega ("Demi") and Joshua Mark Vargas ("Joshua") were appointed Co-Executors pursuant to the Will.

Once a settlement was reached with Decedent's employer, the Co-Executors filed an Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims. A hearing was held on April 22, 2011 to consider the allocation of the proceeds of this settlement only. The intent of the testator was not at issue before the Court and no evidence of such intention was solicited or submitted to the Court. On December 13, 2011, Franklin County Probate Court Magistrate Benjamin F. Suffron, III issued a decision apportioning 80% of the settlement to the wrongful death action and 20% of the settlement to the survivorship action, among other findings.

The Co-Executor's filed Objections to the Magistrate's Decision on March 16, 2012. On October 30, 2012, Franklin County Probate Court Judge Robert G. Montgomery issued a decision adopting the Magistrate's decision of December 13, 2011.

On November 29, 2012, the Co-Executors gave notice that they were appealing the Magistrate's decision to the Tenth District Court of Appeals. On January 22, 2013, Co-Executors, filing a brief with the court of appeals, cited the following assignments of error:

> I. The finding that there was a mutual loving relationship between Decedent and his father and brother was against the manifest weight of the evidence before the Court.
>
> II. The finding that the decedent survived "seconds" in an industrial compactor prior to his death was against the manifest weight of the uncontested and un-refuted evidence before the Court.

III. The Magistrate erred when he found that, because the Will contained no residuary clause, the proceeds of the survival claim should pass to Decedent's heirs under Ohio Revised Code Section 2105.06.

IV. The apportionment of the settlement to the survival claim and the wrongful death claim was not supported by evidence.

On February 8, 2013, Appellees filed their brief. On February 18, 2013, Appellants filed a reply brief. On June 13, 2013, the Tenth District Court of Appeals requested that both parties file briefs regarding the issue of Appellants' standing to maintain the appeal, as Executors of the Estate. Both parties thereafter filed briefs on the subject. On June 27, 2013, the Tenth District Court of Appeals issued a decision finding that Appellants lacked standing, and filed a Judgment Entry on July 8, 2013 dismissing the appeal.

Statement of Facts

On August 14, 2007, Garza, Jr. was trapped in an industrial trash compactor at his job. Garza, Jr. survived 20-30 seconds in the trash compactor before finally succumbing to his injuries.

The Last Will and Testament of Gilberto Garza, Jr. named "my aunt, DEMENCIA VARGAS, and my [cousin] with whom I was raised as a brother, JOSHUA MARK VARGAS" as Executors. Demi and Joshua, through counsel, pursued a personal injury suit against Gilberto, Jr.'s employer and received a net settlement of five hundred thousand dollars ($500,000.00).

Gilberto, Jr.'s Will left "[a]ll of the interest [he] may own" in certain real property in Texas to Demi and Joshua and made no other explicit devises or bequests. Gilberto, Jr. was survived by his father, Gilberto Garza, Sr. ("Gilberto, Sr."), brothers, Roberto and Henry, and his sister Jennifer, as well as his aunt Demi and cousin, Joshua. Aside from another aunt,

Faustina, who was named alternate Executor, the Will made no mention of any other family member.

There is considerable evidence in the record and supported by Gilberto, Jr.'s choice of language in his Will, that Gilberto, Jr.'s *de facto* family unit consisted of Demi and Joshua, and not his father, brothers, and sister.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The fiduciary of an estate has the authority to file wrongful death and survival claims in the Court of Common Pleas.

Civ. R. 17(A) states, in part, that "[a]n executor, administrator… may sue in his name as such representative without joining with him the party for whose benefit the action is brought." On this point of law and pursuant to Civ. R. 17(A), Courts have found that Executors have standing to engage in civil litigation on behalf of the decedent. *See e.g.Beery v. Turner*, Fourth Dist. Highland No. 09CA5, 2009-Ohio-6832.

This point of law was not at issue in the case before the Appellate Court and a fiduciary's duty to maintain and prosecute a wrongful death action in the name of the decedent was not contested. However, it is important to note that the law intends to give fiduciaries this authority and it is on this basis that Appellants appealed. While it is undisputed that Appellants, as Co-Executors, had the authority to prosecute the wrongful death action in the name of the decedent and as the decedent's personal representatives, the holding in the court of appeals would immediately divest the fiduciaries of this duty upon approval of the settlement in Probate Court. When, as in this case, the fiduciaries appeal a decision of the Probate Court in an attempt to preserve the assets obtained through settlement, which they rightfully prosecuted in their representative capacities, they are suddenly and inexplicably without standing to do so. This holding is not in accordance with the well-settled duties and responsibilities of fiduciaries.

Proposition of Law No. II: A fiduciary of an estate has the authority to file and prosecute wrongful death and survival claims in Probate Court.

Pursuant to R.C. 2125.02(A)(1), a fiduciary has the responsibility of prosecuting a wrongful death action for the benefit of the decedent's next of kin. Further, in Ohio, "when an

individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death." (Emphasis sic.) *Peters v. Columbus Steel Castings Co.,* 115 Ohio St.3d 134, 2007-Ohio-4787, ¶11. While the proceeds of a wrongful death action pass to the next of kin of the decedent for damages, such as loss of consortium and loss of financial support, the proceeds from a survival action pass through the decedent's *estate* to his beneficiaries. R.C. 2125.02; *Columbus Steel Castings Co.* at ¶10-11 (emphasis added).

Here, the Co-Executors obtained a global settlement for their wrongful death and survival claims in the Franklin County Court of Common Pleas. The Probate Court held a hearing to allocate these proceeds among the survival action, which would be collected by Co-Executors as an asset of the estate to be passed to the beneficiaries of decedent's Will, and the wrongful death action, which would pass directly to decedent's next of kin to compensate them for their damages due to decedent's demise. Because the Appellees presented *no* evidence contrary to the Appellants' evidence, the Probate Court wrongfully allocated these proceeds, giving the larger amount to the wrongful death claim. Given the lack of evidence before the Probate Court, the Co-Executors, in an attempt to protect the assets of the estate from this wrongful allocation, appealed. The Appellate Court held that the Co-Executors did not have standing to maintain the appeal because they did not have a pecuniary interest in the estate. However, given the case law above, and the duties and responsibilities of the fiduciaries, the Co-Executors had standing to maintain the appeal in their representative capacity to protect the assets of the estate.

Proposition of Law No. III: A fiduciary of an estate has the authority to file a will construction action in Probate Court.

R.C. §2107.46 provides that "a fiduciary may file an action in the probate court … and ask the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and *the rights of the parties in interest*." (Emphasis added.) This statute encompasses the filing of a will construction action. It is well-settled that, in the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator. *Carr v. Stradley*, 52 Ohio St. 2d 220, 224, 371 N.E.2d 540 (1977).

Here, no such action has been filed. Because the will only bequeathed a piece of real property, there is an ambiguity as to decedent's intent, as expressed in this document. The identities of the beneficiaries are not clear and must be ascertained by looking to the intent of the testator. The Probate Court prematurely determined the identities of the beneficiaries of the will and the court of appeals accepted this determination in finding that Co-Executors did not have standing. This is in error because it is the duty of the fiduciary to protect the rights of the beneficiaries. Since the beneficiaries had not yet been identified, it was the duty of the fiduciaries to protect the assets of the estate and ask the Court to determine the identities of the beneficiaries through a will construction action, which they had statutory authority to file.

Proposition of Law No. IV: A fiduciary has standing to bring an appeal when he has been aggrieved in his capacity as representative of the estate.

The duty of the fiduciary is to serve as representative of the *entire* estate. (Emphasis added.) *Elam v. Hyatt Legal Services*, 44 Ohio St. 3d 175, 176, 541 N.E.2d 616 (1989) He owes a duty to the beneficiaries to act in a manner which protects those beneficiaries' interests. *Id.* In order to establish a right to an appeal from an order of the Probate Court, a fiduciary,

such as an executor, must demonstrate that he is aggrieved by the judgment in his *fiduciary capacity*. (Emphasis added.) *In re Estate of Wirebaugh*, 84 Ohio App.3d 1, 3, 616 N.E.2d 245 (6th Dist. 1992). In the context of a trustee/fiduciary, the Ohio Supreme Court has held that

> [w]here the order or judgment affects or threatens the very existence, validity, or continuance of the trust, or prevents the trustee from discharging his duties under the trust, or threatens to defeat the purpose of the trust, or depletes the trust fund by allowance of unreasonable or unfounded claims against it, the trustee, though having no personal interest in the litigation, is not a disinterested party. In such case, he, *in his fiduciary or representative capacity*, is aggrieved by the judgment or order, and may appeal therefrom, whether the litigation is between the beneficiaries themselves or between the trust and third parties. (Emphasis added.)*Toledo Trust Co. v. Farmer*, 165 Ohio St. 378, 385, 135 N.E.2d 356 (1956).

The very basis of this language and the purpose of this rule is to cement the fiduciary's role as protector of the estate with which he is entrusted.

In this case, given that the law gives fiduciaries certain rights and responsibilities, it should only logically follow that a fiduciary has standing to maintain an appeal where (1) the beneficiaries have not been identified by ascertaining the intent of the testator; and (2) the estate has been wrongfully divested of funds, which were allocated to the wrongful death action rather than the survivorship action, and that divestment was not based on the evidence before the court.

Here, (1) the fact that the Court did not hear evidence as to the testator's intent before ruling on the identity of the beneficiaries defeated the purpose of the will; and (2) the wrongful and unfounded divestment of survivorship funds depleted the estate corpus. Who, if not a fiduciary, may protect an estate from such injustice?

Further, because Co-Executors, in their personal capacities, were never adjudged to be or not to be beneficiaries of the estate through a will construction action, they would not have standing in their individual capacities to appeal the order of the Probate Court.

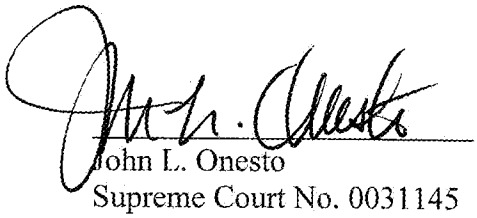
Indeed, in this case, if the Co-Executors, in their representative capacities, do not have standing to maintain this appeal to protect the beneficiaries and the corpus of the estate, no person does. That result is untenable, illogical, and unjust.

CONCLUSION

A review of the cases and law cited herein demonstrates that there is no dispositive and clear cut law regarding which party or entity, in the circumstances of this case, has the authority to appeal the decision of the Probate Court. For this reason, this case is of great public interest.

For the foregoing reasons, Appellants respectfully request this Court to favorably consider their request for review of the important issues presented herein.

Respectfully Submitted,



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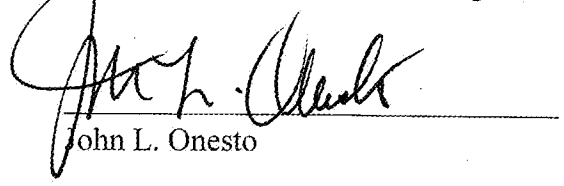
CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for Appellees, Louis M. Borowicz, Esq., Baxter & Borowicz, Co. LPA, 150 E. Wilson Bridge Road, Suite 230, Worthington, Ohio 43085 on 22nd day of August, 2013.



John L. Onesto

COUNSEL FOR APPELLANTS, CO-EXECUTORS OF THE ESTATE OF GILBERTO GARZA, JR.

APPENDIX

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
Estate of Gilberto Garza, Jr.,	:	No. 12AP-1000 (Prob. No. 525604)
(Demencia Vargas-Ortega et al.,	:	(REGULAR CALENDAR)
Appellants).	:	

D E C I S I O N

Rendered on June 27, 2013

John L. Onesto, for appellants.

Baxter & Borowicz Co., L.P.A., and *Louis M. Borowicz*, for appellees.

APPEAL from the Franklin County Court of Common Pleas, Probate Division.

SADLER, J.

{¶ 1} Appellants, Demencia Vargas-Ortega ("Demencia") and Joshua Mark Vargas ("Joshua"), co-executors of the estate of Gilberto Garza, Jr., appeal from a judgment of the Franklin County Court of Common Pleas, Probate Division. For the reasons that follow, we dismiss this appeal for lack of standing.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 14, 2007, while at work for his employer, Sears Logistics Services, Inc., Gilberto Garza, Jr. ("the decedent"), became trapped in an industrial trash compactor and died at the scene from injuries sustained when he fell inside and the trash compactor was activated. The decedent had a will devising real property located in Hildalgo County, Texas, to his aunt, Demencia, and his nephew, Joshua. However, the

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June 19, 2002 will made no provisions for any other property nor did it contain a residuary clause.

{¶ 3} Upon request of appellants, the will was admitted to probate, and appellants were appointed to serve as co-executors of the estate. Appellees, consisting of the decedent's father, Gilberto Garza, Sr. ("Gilberto, Sr."), and the decedent's three siblings, Jennifer Garza, Henry Garza, and Robert Garza, moved to have appellants removed as co-executors. Said motion was denied by the trial court.

{¶ 4} The purpose of opening the estate was to assert wrongful death and survival claims against decedent's employer. A settlement in that action was reached and appellants filed an application to approve settlement and allocation of the net settlement proceeds, consisting of $257,210.23. Specifically, appellants asserted that 100 percent of the net settlement proceeds should be allocated to Demencia and Joshua as beneficiaries of the survival claim and none of the settlement proceeds should be allocated to the wrongful death action. Appellees challenged the application and argued 100 percent of the settlement proceeds should be allocated as a wrongful death settlement available only to the decedent's next of kin, specifically appellees. Additionally, appellees argued that even if allocated as 100 percent to the survival claims, because the will did not contain a residuary clause, the funds would not pass to Demencia and Joshua, but, rather, would pass intestate to decedent's father.

{¶ 5} The matter proceeded to a hearing before a magistrate. After consideration of the evidence presented at the hearing, including the testimony of six witnesses and admission of depositions and exhibits, the magistrate rendered a decision including findings of fact and conclusions of law. The magistrate found there was a close, personal, mutual, loving relationship between decedent and Demencia, decedent and Joshua, and decedent and Gilberto, Sr. The magistrate also found there was a mutual, loving relationship between decedent and Robert. With respect to the accident, the magistrate found decedent survived "seconds" in the trash compactor prior to his death.

{¶ 6} In the conclusions of law, the magistrate concluded wrongful death actions and survival actions are distinct legal remedies. A wrongful death action is brought by a fiduciary of the estate for the exclusive benefit of the beneficiaries defined by R.C. 2125.02 to cover pecuniary and emotional loss suffered as a result of the premature death of the

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decedent. In contrast, the magistrate concluded a survival action is brought by the decedent's fiduciary for the benefit of the decedent's estate for injuries suffered while the decedent was still alive.

{¶ 7} Because the will present in this case did not contain a residuary clause, decedent's heirs, defined by R.C. 2105.06, were entitled to any proceeds from the settlement allocated to the survival claim. In this case, the magistrate determined, because decedent had neither a surviving spouse nor surviving children at the time of his death, decedent's only heir is Gilberto, Sr. With respect to the wrongful death beneficiaries, the magistrate concluded those consisted of appellees Gilberto, Sr., Robert, Henry, and Jennifer.

{¶ 8} The magistrate also concluded that Demencia and Joshua were not entitled to any amounts from the net settlement proceeds, and that 80 percent of the proceeds be allocated to the wrongful death claims and 20 percent be allocated to the survival claims. Accordingly, the magistrate allocated $207,983.29 to the wrongful death claims and further allocated 79 percent of that amount to Gilberto, Sr., and 7 percent to each sibling. Therefore, $51,995.82 was allocated to the survival claims to be delivered to the co-fiduciaries of the estate for administration.

{¶ 9} Appellants filed objections to the magistrate's decision challenging both the magistrate's factual findings and conclusions of law. Specifically, appellants challenged the magistrate's factual determinations regarding the relationships between decedent and his family, as well as the amount of time decedent survived in the trash compactor before his death. Appellants also challenged the magistrate's conclusions that (1) R.C. 2105.06 heirs are entitled to the proceeds of the survival claim, (2) the damages include loss of consortium, and (3) the wrongful death proceeds should be greater than the survival proceeds. Appellees filed a memorandum contra and appellants replied. After review, the trial court overruled appellants' objections and adopted the decision of the magistrate.

II. ASSIGNMENTS OF ERROR

{¶ 10} This appeal followed, and appellants bring the following four assignments of error for our review:

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I. The finding that there was a mutual loving relationship between Decedent and his father and brother was against the manifest weight of the evidence before the Court.

II. The finding that the decedent survived "seconds" in an industrial compactor prior to his death was against the manifest weight of the uncontested and un-refuted evidence before the Court.

III. The Magistrate erred when he found that, because the Will contained no residuary clause, the proceeds of the survival claim should pass to Decedent's heirs under Ohio Revised Code Section 2105.06.

IV. The apportionment of the settlement to the survival claim and the wrongful death claim was not supported by evidence.

III. DISCUSSION

A. Standing

{¶ 11} After oral arguments, this court requested briefing on the issue of whether appellants, as co-executors of the estate, have standing to appeal the trial court's judgment in this case. In accordance with this court's request, the parties submitted supplemental briefs.

{¶ 12} " 'It is the duty of a fiduciary of an estate to serve as representative of the entire estate.' " *Wanamaker v. Davis*, 2d Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶ 20, quoting *Elam v. Hyatt Legal Servs.*, 44 Ohio St.3d 175, 176 (1989). Such fiduciary, in the administration of an estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. *Id.*

{¶ 13} In order to establish a right to an appeal from an order of the probate court, a fiduciary, such as an executor, must demonstrate that he is aggrieved by the judgment in his fiduciary capacity or that he is personally affected and appeals in his individual capacity. *In re Estate of Wirebaugh*, 84 Ohio App.3d 1, 3 (6th Dist.1992), citing *Fineman v. Cent. Natl. Bank of Cleveland*, 87 Ohio Law Abs. 236, 241 (8th Dist.1961); *Skelly v. Graybill*, 109 Ohio App. 277, 283-86 (5th Dist.1959); *Doty v. Peters*, 106 Ohio App. 435, 439 (12th Dist.1958); *In re Estate of Hoffman*, 68 Ohio App. 47 (1st Dist.1941); *First Natl. Bank of Cincinnati v. Rawson*, 54 Ohio App. 285 (1st Dist.1936). Ordinarily, an executor

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is not an aggrieved party in a proceeding which affects only the rights of the beneficiaries. *Id.*, citing *Fineman*; *In re Estate of Byerly*, 74 Ohio Law Abs. 586, 587 (2d Dist.1956). In such a proceeding, the executor/beneficiary must appeal in his individual capacity or he is presumed to be satisfied with the judgment of the lower court. *Id.*, citing *Fineman; Rawson.* Indeed, where the executor does not represent all of the beneficiaries and/or those beneficiaries appear to resist the executor's contentions that the estate has been prejudiced by a probate court's order, courts have determined that the executor cannot appeal that order. *Id.*, citing *Cent. Bank Co. v. McCarthy*, 73 Ohio App. 431, 433 (1st Dist.1943).

{¶ 14} The beneficiaries in this case, Gilberto, Sr., Robert, Henry, and Jennifer, have not appealed from the trial court's judgment. Nonetheless, appellants contend that, as co-executors of the estate, they have standing to appeal the trial court's judgment because (1) the trial court failed to properly identify the estate's beneficiaries, and (2) the 80/20 allocation of the net settlement proceeds damaged the estate. According to appellants, through this appeal, they are "attempting to rectify prejudice to the Estate and maximize the beneficial interests to the eventual beneficiaries of the Estate once those beneficiaries are properly determined." (Supp. Brief, 2.)

{¶ 15} In this case, it is without question that the will admitted to probate bequeathed no property other than real property in Hildalgo County, Texas, nor did it contain a residuary clause. Thus, any settlement proceeds allocated to the survival claim would pass in accordance with R.C. 2105.06 to Gilberto, Sr., because decedent did not have a surviving spouse, surviving children or surviving mother.

{¶ 16} To the extent appellants assert that, in their fiduciary capacity, they are appealing to protect the assets of the estate for the "proper beneficiaries," they are in essence contesting the will as admitted to probate. However, it is well-settled that, pursuant to R.C. 2741.01, a will contest action may be brought only by one who has a direct pecuniary interest in the estate of the putative testator that would be defeated or impaired if the will admitted to probate is a valid will. *Moore v. Dague*, 46 Ohio App.2d 75, 85-86 (10th Dist.1975), citing *Steinberg v. Cent. Trust Co.*, 18 Ohio St.2d 33 (1969) (decided under former analogous section R.C. 2741.01). Moreover, an executor has no ground to appeal when the issue involves the interpretation of the will. *Fried v. Fried*, 65

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Ohio App.3d 61, 63 (8th Dist.1989), citing *Boulger v. Evans*, 54 Ohio St.2d 371, 375 (1978). Thus, as co-executors of the estate, appellants have no pecuniary interest in the estate, and to the extent they are attempting to challenge the trial court's determination that they are not beneficiaries under the will, such an action could be sustained only if brought in their individual capacities. *In re Estate of Hoffman* at 50 (an administrator of an estate cannot use an appeal to advance his personal interests to the disadvantage of other parties).

{¶ 17} Additionally, as previously stated, where the executor does not represent all of the beneficiaries and/or those beneficiaries appear to resist the executor's contentions that the estate has been prejudiced by a probate court's order, courts have determined that the executor cannot appeal that order. *Wirebaugh*. Here, the settlement amounts apportioned to the survivorship claim would be held as an asset of the estate, but with no residuary clause, such asset would pass, in accordance with R.C. 2105.06, to Gilberto, Sr., who, in this appeal, resists and is actively opposing the co-executors' contention that the estate has been prejudiced by the probate court's order. Accordingly, we conclude appellants, as co-executors of the estate, have not been aggrieved by the probate court's judgment and, therefore, have no standing to appeal the same.

IV. CONCLUSION

{¶ 18} Because, in their capacity as co-executors of the estate of Gilberto Garza, Jr., they have not been aggrieved by the probate's court's judgment, appellants lack standing to appeal the judgment of the probate court and their appeal is hereby dismissed.

Appeal dismissed.

BROWN and CONNOR, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
Estate of Gilberto Garza, Jr.,	:	No. 12AP-1000 (Prob. No. 525604)
(Demencia Vargas-Ortega et al.,	:	(REGULAR CALENDAR)
Appellants).	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 27, 2013, appellants lack standing to appeal the judgment of the Franklin County Court of Common Pleas, Probate Division, and it is the judgment and order of this court that this appeal is dismissed. Costs shall be assessed against appellant.

SADLER, BROWN, and CONNOR, JJ.

/S/ JUDGE

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Tenth District Court of Appeals

Date: 07-08-2013

Case Title: IN THE MATTER OF RZA THE ESTATE OF GILBERTA GA JR

Case Number: 12AP001000

Type: JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Lisa L. Sadler