

*****Please see Erratum to Opinion at *In re Estate of Kirk*, 2003-Ohio-472.*****

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

**IN THE MATTER OF THE ESTATE OF
WILLIAM T. KIRK, DECEASED**

CASE NO. 5-02-42

**(CAROLYN S. KIRK AND
NICHOLAS A. KIRK, APPELLANTS)**

OPINION

(FRANCESCA E. KIRK, APPELLANT)

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Probate Division**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: January 24, 2003

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SHAW, P.J.

{¶1} This is an appeal from the judgment of the Probate Division of the Hancock County Court of Common Pleas, which approved the sale of property in the estate of decedent, William Kirk.

{¶2} William Kirk died on February 14, 2001. His last will and testament designated, his brother, Joseph Kirk (executor) as executor of his estate and further provided “My executor shall have full power and authority to retain any investments in my estate in the same form as received by my executor; to sell, transfer, dispose of, assign, lease and convey any property, investments or securities held by my Executor including, by way of example only, real estate, stocks and bonds, without notice, advertisement, appraisalment,

valuation or court order or other legal formality at public or private sale, for such amount and on such terms as my executor deem advisable.”

{¶3} On October 9, 2001, the executor filed an Appraisal and Inventory of the estate. At that time, the primary estate asset, Alvada Construction,¹ was appraised at \$1,400,000.00. On October 12, 2001, three beneficiaries under the will, Carolyn Kirk, Francesca Kirk and Nicholas Kirk (Kirks)², made a motion to extend the time within which to file exceptions to the inventory and appraisal. The motion was granted and on December 7, 2001, the Kirks filed exceptions alleging among other things, that Alvada was not properly valued. Subsequently, the Kirks and the estate filed numerous motions. On January 29, 2002, the trial court issued an agreed judgment entry signed by the executor and representatives of all of the beneficiaries. The entry also stated that the inventory and appraisal were agreed to as representing the market value and that the inventory and appraisal was accepted by the court. The estate also agreed that access to records and Alvada’s physical facility would be available for 45 days to a professional hired by the Kirks for the purpose of inspecting Alvada’s books. The parties refer to this process as performing due diligence. The Kirks agreed in the entry that they would not be

¹ Included in this dispute is the real estate underlying Alvada Construction Inc. and a surrounding parcel of real estate which will collectively be referred to as Alvada.

² There are two other beneficiaries under the will, Amanda Summit and Jason Kirk, however, they are not party to the various disputes between the executor and Kirks.

given access to Alvada individually, unless given permission by the Court. Furthermore, the parties agreed that if there were more than one prospective purchaser, a hearing would be held. Finally, the parties agreed that before any offer was accepted, it would have to be approved by the court.

{¶4} On February 20, 2002, the Kirks filed a motion to extend the 45 day window to perform due diligence and also to allow the Kirks access to Alvada records and physical facilities. The trial court overruled both motions. On April 5, 2002, the executor filed an amended account of the estate assets. The account listed an increase in value of Alvada stock. On April 19, 2002, the Kirks filed exceptions to the amended account.

{¶5} Per the January 29, 2002 entry, on April 23, 2002, the executor filed an application for a hearing to consider offers to purchase Alvada. The executor hired Fenix Team, Inc. to market the sale of Alvada. Fenix reported that they sent a company profile of Alvada to its regular customers, sent 200 emails to others, and sent offering summaries of Alvada to 150 contractors. Despite the agreement, on April 29, 2002 the Kirks filed a memorandum in opposition to the application for a hearing to consider offers to purchase Alvada stating that the Kirks would be disadvantaged by establishing arbitrary cut-off dates for offers to purchase. On May 2, 2002, the Kirks filed a motion to reconsider the court's agreed decision preventing the Kirks from personally

performing due diligence as the Kirks were considering buying Alvada with an associate, John Danis. On May 3, 2002, the trial court filed an entry which provided that the Kirks, while permitted to perform due diligence, were not permitted to have on-site visits to Alvada absent the executors permission based on the animosity between the parties involved and the disruption to business activities.

{¶6} On May 7, 2002, in response to the executor's application, the trial court filed an entry, which reflected a bidding schedule for the sale of Alvada. The court required all due diligence to be completed by June 15, 2002 and all offers to be submitted by June 28, 2002. Bids were to be unsealed on June 28, 2002. Thereafter, all bidders would have until July 16, 2002 to revise their bids. If the executor deemed it necessary, the court would hold a hearing on July 17, 2002 wherein the executor would summarize the bids and set forth a recommendation to accept or reject the bids. Any interested party would then be permitted to express his response to the executor's recommendation. Finally, the entry provided that Danis construction could begin due diligence through a suitable professional designated by Danis as soon as confidentiality agreements were signed.

{¶7} On June 17, 2002, the Kirks filed a motion to extend time to complete due diligence because their associate Danis decided not to pursue the

purchase of Alvada leaving only one prospective purchaser who had completed due diligence. A letter was filed the next day with the court identifying four parties who completed due diligence at Alvada and the possibility of additional parties. The trial court denied the Kirks' motion based on the Kirks' mistaken belief that only one prospective purchaser had completed due diligence. On June 27, 2002 the Kirks appealed this denial, however, this court dismissed the appeal as not taken from a final appealable order.

{¶8} On July 5, 2002, twelve days before the hearing to conclude bidding, the Kirks filed discovery requests. On July 8, 2002, the executor filed a motion to quash the discovery request. On July 10, 2002 the Kirks filed a motion in opposition to the executor's motion to quash the discovery requests. On July 12, 2002, the Kirks filed an emergency motion requesting that the July 17, 2002 hearing be vacated and that an evidentiary hearing should be ordered as to whether Alvada should be sold. The trial court issued an order stating that the July 17, 2002, hearing would proceed as scheduled, that no decision regarding the sale of Alvada would be made at the hearing unless there was unanimous consent, and that all questions regarding discovery and future evidentiary proceedings would be decided at the hearing.

{¶9} At the July 17, 2002 hearing, bids were proposed and the executor and representatives for all of the beneficiaries expressed their opinions

regarding the fate of Alvada. At the hearing, the trial court found that the issue before the court was “an application to approve sale.” The trial court further found, that while the executor had requested the trial court’s approval for the sale of Alvada, the executor had full power of sale in the will, which appeared to negate the need for court approval. Regarding the issue of discovery, the trial court found that while the Ohio Civil Rules are generally applicable to probate cases, there are exceptions to that rule. The trial court noted that full discovery was not necessarily available for issues such as an application to probate a will, an application to appoint an appraiser or an application to sell an automobile as that could “tie an estate in knots.” Consequently, the trial court quashed the motion for discovery by the Kirks.

{¶10} Following the ruling on discovery matters, the trial court heard proffers of bids for the purchase of Alvada. The first offer was presented by Crouse Enterprises and offered \$992,760.00, which did not include any debt assumption or provisions for the purchase of the underlying real estate. ACI Acquisition Co. (ACI) presented the second offer for \$500,000.00 including debt assumption of between 3.5 and 4 million dollars and an offer to purchase the real estate for \$1,940,000. All parties agreed that they did not want to consider Crouse’s offer. Consequently, the issue remaining was whether to sell to ACI, liquidate Alvada, or continue operating the company. Jason Kirk and

Amanda Summitt recommended that the Court accept ACI's offer, however, they requested that instead of selling the real estate to ACI that the real estate be listed separately and ACI lease the land for the cost of maintaining it. The remaining Kirks did not want to sell Alvada to ACI.

{¶11} On August 2, 2002, the trial court issued an entry, which ordered the executor to accept ACI's offer, and also adopted the recommendations of Amanda Summit and Jason Kirk regarding the lease of the real estate. On August 2, 2002, the trial court also filed an entry reiterating its ruling to quash the discovery motions. In response, the Kirks filed this appeal and a request to stay the August 2, 2002, order regarding the sale of Alvada. This court granted a stay preventing the sale of Alvada during the pendency of this appeal. The Kirks assert four assignments of error.

First and Second Assignments of Error

{¶12} “The trial court committed reversible error by precluding appellants from conducting discovery pursuant to the Rules of Civil Procedure in an adversarial proceedings [sic] where the trial court exercised full judicial control and ultimately issued an order of sale on August 2, 2002 regarding the stock and related real estate of Alvada Construction, Inc.”

{¶13} “The trial court committed reversible error by refusing to hold an evidentiary hearing prior to issuing an order of sale on August 2, 2002 in an

adversarial proceedings [sic] where the fundamental dispute was whether or not ACI should be sold or retained as an estate asset, and if sold, to whom and under what conditions, and thereby improperly precluded appellants from calling and examining witnesses under oath, presenting evidence, cross-examining the fiduciary and other persons having information regarding the fundamental issue in dispute.”

{¶14} R.C. 2113.39 provides “If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him. A power to sell authorizes a sale for any purpose deemed by such executor, administrator, or testamentary trustee to be for the best interest of the estate, unless the power is expressly limited by such will.” See also *In re Estate of Honaker* (Sept. 28, 2001) Lucas App. No. L-01-1041. Accordingly, an executor’s only duty is to carry out his duties in good faith and for the best interest of the estate. *In re Green* (Nov. 3, 1998), Logan App. No. 8-98-16.

{¶15} An executor with a power of sale may proceed under the will for the sale of real estate or he may proceed under the statutory guidelines for the sale of lands provided in R.C. 2127.01, which requires the trial court’s authorization to sell, and the consent of a percentage of the beneficiaries. He

may also apply to the court to sell the testator's personal property pursuant to R.C. 2113.40. However, an executor is "is not required to comply with procedural requirements where the will specifically directs the executor to sell property." *Ziechmann v. Adomaitis* (Mar. 13, 1986), Cuyahoga App. No. 50264 at *2.

{¶16} If the executor sells under the power of the will, "R.C. 2113.39 does not by its terms require an executor to notify the beneficiaries prior to exercising the power to sell estate property * * * [as] R.C. 2113.39 does not contain the express requirement of consent by the beneficiaries mandated by R.C. 2127.011." *In re Estate of Hughes* (1994), 94 Ohio App.3d 551, 557; see also *In the Matter of Githens* (Feb. 13, 1984) Warren App. No. CA83-06-039 (finding that an executor who has a power of sale is permitted to sell estate property without the beneficiaries consent). Moreover, a power of sale under R.C. 2113.39 "enables the fiduciary to *avoid* the expense of a litigation-type proceeding." 1 Maag, Troy, & Barlow, Ohio Probate, Practice and Procedure 2002 (2001) 312, Section 19.01(emphasis added).

{¶17} In this case, William Kirk's will gave the executor full power and authority to sell any property including stocks and real estate "without notice, advertisement, appraisal, valuation or court order or other legal formality at public or private sale, for such amount and on such terms as my executor deem

advisable.” The Kirks argue that while the will permits the executor to sell Alvada without court approval under R.C. 2113.39, the executor elected to proceed under R.C. 2127.01 and R.C. 2113.40 when he filed a motion with the court for a hearing to consider offers to purchase Alvada. Moreover, the Kirks argue that the Rules of Civil Procedure apply to the sale of land under R.C. 2127.01 and the sale of property under R.C. 2113.40 enabling them to have full use of discovery tools. See 1970 Staff Note to Civ. R. 73.

{¶18} Upon review of the record, we cannot find that the executor in this case elected to be governed by R.C. 2127.01 and R.C. 2113.40. In this case, the executor in his application to the court did not ask the trial court *if* he could sell Alvada as required by R.C. 2127.01 and 2113.40, rather he asked the Court to determine *to whom* he should sell. Furthermore, the executor stated in his application to the court, that in asking for the court’s assistance, he was seeking, among other things, the “protection from any potential adversarial beneficiaries as to the reasonableness of the offer(s) rejected and the offer accepted.” See also *Milarcik v. Demis* (Nov. 2, 1989), Tuscarawas App. No. 89AP100076 (because of numerous controversies between the executrix and the beneficiaries, executrix with power of sale sought refuge and insulation by invoking the discretionary authority of judge). Moreover, the Kirks have not pointed to nor were we able to locate any authority which states that an

executor's decision to request the assistance of the trial court to make the final decision regarding the sale of estate property means that the executor surrenders his power of sale under the will or that he is obligated by such request to then follow the procedural requirements of R.C. 2127.01 and R.C. 2113.40.

{¶19} Moreover, Civ. R. 73 provides that the Rules of Civil Procedure shall apply to proceedings in probate court “except to the extent that by their nature they would be clearly inapplicable.” The 1970 Staff Note to Civ. R. 73 states, “the Rules of Civil Procedure are clearly inapplicable to many of the ministerial procedures of the probate division such as the preparation of an inventory, a schedule of debts, or a final account. As discussed previously, the action to consider offers to purchase Alvada did not require consultation with or the consent of the Kirks. Consequently, the use of discovery tools by the Kirks would clearly be inapplicable as contemplated by Civ. R. 73.

{¶20} As a potential bidder for Alvada, the Kirks' associate, John Danis, was given the same access to financial materials and physical access to the facility as any other potential bidder. In this case, while the executor and trial court were not required to provide the Kirks with information regarding the sale of Alvada, the executor included the Kirks in the sale process by supplying numerous documents regarding the financial status of Alvada and also including them in meetings to discuss the disposition of Alvada. Furthermore,

the trial court invited all of the beneficiaries to voice their opinions at the bid hearing and there is evidence that the probate court considered these opinions as the probate court adopted Amanda Summit and Jason Kirk's recommendation in its August 2, 2002 order.

{¶21} Under these circumstances, we cannot find that the trial court was required to hold a full evidentiary hearing to consider the bids to sell Alvada. Consequently, we cannot find that the trial court erred in denying the Kirks formal discovery or an evidentiary hearing and the Kirks' first and second assignments of error are overruled.

Third Assignment of Error

{¶22} The Kirks further argue that if this court finds that they are not entitled to discovery and a hearing, that R.C. 2113.39 and Civ. R. 73 are unconstitutional. Failure to raise the issue of the constitutionality of a statute at the trial court level constitutes a waiver of the issue and it need not be heard for the first time on appeal. *Springer v. Koehler Bros.* (1990), 69 Ohio App.3d 592, 597. In this case, while the Kirks asserted at the trial court level that their general constitutional rights had been violated, they did not specifically challenge the constitutionality of R.C. 2113.39 or Civ.R. 73.

{¶23} Furthermore, we note that R.C. 2721.12 requires a party challenging the constitutionality of a statute to serve a copy of the complaint to

the attorney general so as to give her an opportunity to be heard. A court lacks jurisdiction to render declaratory relief if the requirements in R.C. 2721.12 are not met. *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95, 100. “When the Attorney General does not receive notice until after the trial court has rendered judgment or the case has been appealed, the party who is challenging a statute’s constitutionality has failed to meet the mandates of R.C. 2721.12.” *Id.* See also *Harmon v. Adams* (Feb. 16, 2001), Union App. No. 14-2000-33. In this case, the Kirks failed to provide the attorney general with any notice of a constitutional challenge. As the Kirks failed to challenge the constitutionality of R.C. 2113.39 at the trial court level and also failed to comply with R.C. 2721.12, we will not consider the constitutionality of R.C. 2113.39. Consequently, the Kirks’ third assignment of error is overruled.

Fourth Assignment of Error

{¶24} Finally, the Kirks request that this court reassign the present case to another judge on remand if we find in their favor. As we have overruled the Kirks’ first three assignments of error, the fourth assignment of error is also overruled.

{¶25} Based on the foregoing, the judgment of the trial court is affirmed.

Judgment Affirmed.

Case No. 5-02-42

HADLEY and WALTERS, J.J., concur.

/jlr