

[Cite as *In re Estate of Strauss* , 2010-Ohio-811.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

THE ESTATE OF

LAVONE U. STRAUSS

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 08-COA-19

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of
Common Pleas, Probate Division, Case No.
200221300

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 4, 2010

APPEARANCES:

For Appellant

For Appellee

ROBERT S. NAYLOR
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Hoffman, J.

{¶1} Appellant Bonnie J. Markel appeals the June 17, 2008 Judgment Entry of the Ashland County Court of Common Pleas, Probate Division removing her as executrix of the Estate of Lavone Strauss. Appellee is Flat Rock Homes.

STATEMENT OF THE FACTS AND CASE

{¶2} In 2003, LaVone U. Strauss, the decedent herein, died testate at the age of 92 with no children and preceded in death by her husband. Strauss' Last Will and Testament (hereinafter "Will") appointed Appellant Bonnie J. Markel as Executrix of the estate. Item XXVIII of the Will set forth the residuary clause, which provided the rest, remainder and residue of decedent's estate would be divided equally between the following:

- {¶3} (I) The Christian Children's Fund, Inc.;
- {¶4} (J) St. Labre Mission, Ashland, Montana;
- {¶5} (K) The Flat Rock Children's Home, Bellevue, Ohio;
- {¶6} (L) Boy's Village, Smithville, Ohio;
- {¶7} (M) Cross Road Fort Wayne Children's Home (formerly known as Indiana Church Home, Fort Wayne, Indiana);
- {¶8} (N) The Red Bird Mission, Frakes, Kentucky;
- {¶9} (O) The Salvation Army, Ashland Ohio Chapter; and
- {¶10} (P) Seeing Eye Foundation, Morristown, New Jersey.

{¶11} An Inventory and Appraisal filed in the probate of the estate listed total probate assets of \$277,962.58 consisting of tangible personal property of \$55,480.00, intangible personal property of \$74,982.58 and real property appraised at \$147,500.00.

{¶12} During the administration of the estate, it came to the attention of the trial court the decedent had substantial non-probate assets with a total value of over \$1,000,000. The information indicated a substantial portion of the non-probate assets may have been transferred to Appellant, the fiduciary in the estate proceedings, and/or members of her family. As a result, the trial court appointed Attorney Josiah L. Mason to conduct an investigation of the matter, including the financial affairs of the decedent prior to her death.

{¶13} On October 18, 2004, Appellee moved the probate court to remove Appellant as Executrix pursuant to R.C. 2109.24. The court conducted a hearing on the issue on June 14, 2005. In addition to other witnesses, Attorney Mason testified at the hearing.

{¶14} The trial court did not decide the motion until June 17, 2008, a little more than three years after the hearing on the issue.

{¶15} Following the June 17, 2008 Judgment Entry, Appellant filed a notice of appeal with this Court. Upon Appellant's filing of a notice of appeal, the trial court indicated the audio tapes of the June 14, 2005 hearing had been lost or misplaced; therefore, no transcript of the hearing was available. On December 23, 2008, Appellant filed an Appellate Rule 9(C) statement of the evidence or proceedings with this Court.

{¶16} On January 29, 2009, Appellant filed a letter with the probate court seeking approval of the 9(C) statement and settlement. This Court ordered the settlement and approval of the 9(C) statement to occur on or before February 6, 2009.

{¶17} On February 4, 2009, Appellee Flat Rock Homes filed separately an objection to the approval of Appellant's 9(C) statement and a motion for extension of time to provide input as to the 9(C) statement.

{¶18} Via Judgment Entry, this Court granted Appellee Flat Rock Home's motion, in part, ordering any objections or proposed amendments to the 9(C) statements be made on or before February 23, 2009. This Court further ordered the trial court shall settle and approve the statement of the evidence on or before March 9, 2009.

{¶19} Flat Rock filed its 9(C) statement on or about March 5, 2009, and the trial court filed a settlement and approval of the statement of the evidence on March 26, 2009.

{¶20} Appellant now appeals, assigning as error:

{¶21} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONSIDERING FACTS OUTSIDE OF THE RECORD.

{¶22} "II. THE DECISION OF THE TRIAL COURT TO REMOVE BONNIE J. MARKEL AS FIDUCIARY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶23} In the first assignment of error, Appellant maintains the trial court erred in considering matters outside the record in deciding the motion at hand.

{¶24} Specifically, Appellant argues the trial court improperly considered the court investigator's report and a transcript of a July 27, 2004 hearing.

{¶25} Consideration of evidence outside the record is inappropriate and can constitute reversible error. *Boling v. Valecko*, 9th Dist. No. 20464, 2002-Ohio-449. However, where there is ample evidence within the record to uphold the determination by the trial court, the consideration of evidence outside the record is not necessarily prejudicial. *In re Estate of Visnich* L 3000427, 2006-Ohio-5499; *Keith v. Keith*, 11th Dist. No. 1844, 1988 Ohio App. LEXIS 2308, 3, 1988 WL 64758.

{¶26} In the instant case, the trial court's June 17, 2008 Judgment Entry sets forth the findings of the court. The court specifically found decedent's May 2000 will prepared by her long-time attorney left a substantial portion of her estate to various charities, as had a prior will. Within approximately a month of the date she executed the will, she executed a second will prepared by Attorney Eric Miller of Mansfield, Ohio, who had never performed legal services for decedent previously. Attorney Miller was known to Appellant, and Appellant took decedent to Mr. Miller's office. The will prepared by Attorney Miller also left a substantial portion of decedent's assets to various charities. Thereafter, the nature of decedent's assets began to change, resulting in a substantial portion of the assets becoming non-probate assets by virtue of being changed to payable on death accounts, transfer on death accounts, and/or joint and survivorship accounts. The value of assets transferred to these types of accounts totaled \$1,064,409.08. Out of those assets, approximately \$937,342.19 was placed in a form making those assets not only non-probate assets, but directly benefiting Appellant, members of her family and her church. During the time period the assets were changed, Appellant held a power of attorney for decedent. The trial court found

Appellant was generally present with decedent at the time the assets were changed. In fact, Appellant had daily contact with decedent.

{¶27} As a result, the trial court concluded,

{¶28} “The action before this Court is not a claim for breach of fiduciary duty regarding the transfer of assets for the benefit of Mrs. Markel and her family prior to the death of Mrs. Strauss. The facts as discussed above can validly be considered by a trier of fact to determine if Mrs. Strauss knowingly, and without undue influence, created the accounts to benefit Mrs. Markel and her family. It is clear, however, that Mrs. Markel would not be in a position to pursue such an action as she would have a conflict of interest in doing so. In addition, she would be a party to such a proceeding.”

{¶29} Upon review of the 9(C) statement approved by the court, we conclude there was ample evidence in the record sufficient to support the decision of the probate court. Therefore, assuming the probate court erred in considering evidence outside the record, the error was not prejudicial.

{¶30} Appellant’s first assignment of error is overruled.

II.

{¶31} In the second assignment of error, Appellant maintains the trial court abused its discretion in removing her as executrix of the estate.

{¶32} The decision as to whether to revoke an executor rests within the sound discretion of the trial court and a reviewing court will not reverse the decision absent a clear showing of abuse of discretion. *Pio v. Ramsier* (1993), 88 Ohio App.3d 133, citing *In re Estate of Jarvis* (1980), 67 Ohio App. 2d 94. An abuse of discretion involves more than an error of judgment; it implies the trial court’s attitude was unreasonable, arbitrary

or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. The executor's actions need not amount to violations of law or even cause injury to the estate to warrant a finding the best interest of the estate would be served by his removal. *In re Estate of Bost* (1983), 10 Ohio App.3d 147.

{¶33} Ohio Revised Code Section 2109.24 provides:

{¶34} "The probate court at any time may accept the resignation of any fiduciary upon the fiduciary's proper accounting, if the fiduciary was appointed by, is under the control of, or is accountable to the court.

{¶35} ****

{¶36} "*The court may remove any fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the property, testamentary trust, or estate that the fiduciary is responsible for administering demands it, or for any other cause authorized by law.*

{¶37} "The court may remove a testamentary trustee upon the written application of more than one-half of the persons having an interest in the estate controlled by the testamentary trustee, but the testamentary trustee is not to be considered as a person having an interest in the estate under the proceedings; except that no testamentary trustee appointed under a will shall be removed upon such written application unless for a good cause." (Emphasis added)

{¶38} Upon review of the trial court's judgment entry and the 9(C) statement, and in light of the fact unsettled claims may exist which could be the subject of controversy or litigation between Appellant and the estate, we find the trial court did not

abuse its discretion in removing Appellant as the executrix in the estate proceeding. See *In re Estate of Julius J. Wahl* (July 15, 1992), Licking App. No. 92-CA-1.

{¶39} The June 17, 2008 Judgment Entry of the Ashland County Court of Common Pleas, Probate Division, is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

