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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000225-MR

CINDY MIFFLIN, AS
EXECUTRIX OF THE ESTATE
OF CHARLES R. MIFFLIN;
CINDY MIFFLIN, INDIVIDUALLY;
AND DEBBIE ANN MIFFLIN — APPELLANTS

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2003-SC-000857-DG

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00127

LAURA MIFFLIN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

GUIDUGLI, JUDGE: This matter is again before this Court based upon an opinion rendered by the Supreme Court of Kentucky reversing and remanding on August 25, 2005.[1] Our Supreme Court reversed the previous opinion rendered by this Court on August 1, 2003, and remanded for the purpose of addressing the issues

[1] Mifflin, et al. v. Mifflin, 2003-SC-00857-DG, not to be published.

raised on appeal by appellants. This Court had affirmed the Livingston Circuit Court's final order and judgment on a probate contest because appellants had designated only twenty-eight seconds of the videotaped trial and three pages of deposition, which we believed was insufficient to provide meaningful review of the issues presented. However, our Supreme Court overruled Colonial Life and Accident Insurance Co. v. Weartz,[2] and stated that "[w]hen an appellant has designated part of the record for appeal that is sufficient to support a conclusion of error by the trial court, the appellee must also designate portions of the record in support of her position."[3] Upon remand we have reviewed the record before this Court and believing errors have been made in the distribution of estate proceeds, we reverse and remand.

We adopt the following portion of the Supreme Court of Kentucky opinion regarding the factual basis of the appeal.

> This dispute involves the estate of Charles R. Mifflin, who died testate in June 1998. The residuary beneficiaries of Mr. Mifflin's will were his widow, Appellee (Laura Mifflin), and his two daughters, Appellants (Cindy and Debbie Mifflin). Appellee was to receive the income from the estate assets. Cindy Mifflin was designated as the executrix.
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> The estate was probated in the Livingston District Court. Appellee filed

[2] 636 S.W.2d 891 (Ky.App. 1982).

[3] Mifflin, et al. v. Mifflin, 2003-SC-000857-DG, slip opinion at p. 4.

an action in Livingston Circuit Court challenging the probate proceeding and the distribution of assets. The trial court referred the matter to a Special Commissioner. After conducting hearings and taking evidence, the Special Commissioner rendered his Report and Recommendations. The trial court accepted most of the Special Commissioner's recommendations and issued a Final Order and Judgment.

Appellants filed a Motion to Correct Final Order and Judgment pursuant to CR 60.02. One of the errors that Appellants alleged in the Motion was that the calculations involving a bank account, referred to as the Mifflin and Associates bank account (hereinafter "M&A"), were incorrect. This bank account was owned by Mr. Mifflin and was not mentioned in the will. Appellee had access to this account, and continued to use it after Mr. Mifflin's death by depositing her personal funds into the account and writing checks on the account for both personal and estate purposes. In the Motion, Appellants alleged that, in their calculations, the commissioner and trial judge improperly treated the M&A account as a joint account owned by Appellee. The trial judge denied the Appellants' motion on this issue.

Appellants raised the issue regarding the M&A account calculations to the Court of Appeals. Appellants argued that the residuary estate owned the M&A account, but the trial court based its monetary calculations on the mistaken assumption that Appellee owned the account. In doing so, Appellants claimed that the estate was erroneously charged with money spent for the benefit of the M&A account. Appellee argued that Appellants, who designated only twenty-eight seconds of videotaped trial record on appeal, had not designated enough of the record to resolve the issue. Appellee did not designate any portion of the record on

> appeal, and argued that, as a rule of law, the Court of Appeals should assume that any undesignated portions of the record supported the judgment of the trial court. The Court of Appeals affirmed the judgment of the trial court, stating that, without the benefit of the trial record and only twenty-eight seconds of videotaped record, it did not have a basis to conclude that the trial court had erred. We granted review.
>
> Appellant claims that no specific findings were made at trial regarding ownership of the M&A account because ownership was never a contested issue before the trial court. Appellant argues that Appellee admitted that the estate owned the M&A account in an affidavit, and Appellee's attorney took this position both in writing and orally at trial. The twenty-eight seconds of record that Appellants designated on appeal was a statement from Appellee's attorney before the Special Commissioner. Appellee's attorney stated that the M&A bank account belonged one-third to Laura Mifflin, one-third to Cindy Mifflin, and one-third to Debbie Mifflin.[4]

Appellants' brief basically argues that the court erred in its calculations of money expended by appellee and expenses paid by appellee for the benefit of the estate from the co-mingled M&A account. While we do not agree with appellants' calculations that conclude appellee owes the estate $10,803.23, we do believe the court's calculations are in error in ordering the estate to pay appellee the sum of $174,313.24.[5]

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[4] Id., slip opinion at p. 1-3.

[5] This amount is taken from the order granting in part motion to correct and amending final order and judgment entered June 18, 2002.

As noted in our previous opinion, the trial court in its June 18, 2002, order stated the difficulty it faced in deciding this case as follows:

> Back at the end of January, 2002, the Respondents filed a motion to correct Final Order and Judgment -- basically a motion to alter, amend or vacate. The Petitioner has had an opportunity to respond, and both sides have argued their cases. The Court has expended a considerable amount of time going back over all of the documentation and reviewed the evidence including watching substantial portions of the video taped hearing before the Special Commissioner. The Court has examined the documentation and computed the figures submitted by both sides trying to intelligently rule on the motion to correct. Any reviewer of the evidence in this case would find -- as do the attorneys, Special Commissioner and this Court -- that this litigation is embroiled in a quagmire of almost indecipherable property issues, accounting problems and conflicting figures impossible to reconcile. In reviewing the documentation as well as viewing portions of the video taped hearing before the Special Commissioner, the Court is of the opinion that the Special Commissioner did as well as anyone could do in resolving the disputes. While the Special Commissioner's job may have been made easier, the record is made less concrete by the fact that much of the hearings on the issues involved in this case consist primarily of arguments of counsel rather than hard and direct testimony.

While we agree with the trial court's characterization that "this litigation is embroiled in a quagmire of almost indecipherable property issues, accounting problems and conflicting figures impossible to reconcile" we believe the main

source of the problem is the co-mingling of the estate expenses with the personal funds of Laura in the M&A account. While Laura has conceded throughout the litigation that the M&A account is an estate asset, she had used the account as her own personal checking account. To further complicate the matter, the executrix, Cindy, not only permitted this to occur but requested Laura to expend her own personal funds on estate expenses such as taxes and farm expenses. Because of these events and the complicated day to day expenditures in maintaining an ongoing farm operation, both the Special Commissioner and the trial judge expended a tremendous effort in trying to resolve the problems that resulted in the co-mingling of these personal funds and estate expenses.

Despite the trial court's best efforts, we believe error occurred. Therefore, the court's calculations as set forth in its final order must be reversed and remanded for additional proceedings. Upon further review, we believe the trial court should consider the effect of its partial summary judgment entered by the court on December 18, 2000. In that order, the court granted partial summary judgment in favor of Laura and awarded her $70,000.00 to be paid from the estate. As to the accounting problems raised by the co-mingling of Laura's funds and the estate expenses, we believe the court would be best served if it specifically isolated the M&A account at the

time of Charles R. Mifflin's death and determined that the account was an asset of the estate to be divided equally among Laura, Cindy and Debbie Ann Mifflin. We believe the court should then determine the expenses incurred by the estate including farm expenses, taxes, executrix and attorney fees, funeral expenses, etc. In this manner the court can determine if the estate had assets (including the M&A account) sufficient to pay the legitimate expenses incurred by the estate. Next, we believe the court needs to determine what estate expenses Laura paid with her own money and that needs to be ordered reimbursed to Laura from the estate. Finally, we believe the court needs to determine what estate expenses Laura paid from the M&A account and if there were sufficient other estate assets to pay those expenses and if there was sufficient funds remaining in the M&A account to be divided among Laura, Cindy and Debbie Ann.

We sympathize with the trial court in that the parties did not adequately present a clear picture of the estate's assets and liabilities. To further complicate the problem, it appears the parties were acting in agreement on continuing the farm operation for a significant period of time and co-mingling funds, and only after much time passed and substantial funds had been co-mingled did the parties then disagree. As often happens in situations such as this, the parties subsequently had a disagreement over the manner in which the estate was to be

settled and only after the damage had been done, was the court brought in to resolve the dispute.

However, despite its best efforts, we believe the trial court erred in its determination ordering the estate to pay to Laura the sum of $174,313.24. Therefore, the orders of the Livingston Circuit Court finding that Laura is entitled to judgment from the estate in the sum of $174,313.24 are reversed and the matter is remanded for further proceedings.

TACKETT, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN RESULT: I concur with the result reached in the majority opinion. The trial court erroneously failed to include the M & A account as an estate asset, and the case should be remanded to correct the error. However, I would not give the trial court specific directions to follow on remand. I believe the trial court is in the best position to consider all facts and evidence as it makes its calculations.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Richard C. Roberts Paducah, Kentucky	Willard B. Paxton Princeton, Kentucky