

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000352-MR

WILLARD D. GROSS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 91-CI-00158

EUGENE GROSS, AS EXECUTOR  
OF THE ESTATE OF C. P. GROSS

APPELLEE

OPINION AND ORDER DISMISSING APPEAL

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BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Willard Gross (hereinafter "Willard"), proceeding pro se, has appealed from the Fayette Circuit Court's September 20, 2001, order and from the January 16, 2002, order, which made the previous order final and appealable. The only appellee named was Eugene Gross (hereinafter "Eugene"), as the Executor of the Estate of Caleb P. Gross. Having determined that Willard failed to name an indispensable party, we must dismiss the appeal.

This matter involving the Estate of Caleb P. Gross has had a long history in both the district and circuit courts of Fayette County as well as in the appellate courts. A previous three-judge panel of this Court affirmed the circuit court's order regarding five contested \$100,000 certificates of deposit.<sup>1</sup> The subject matter of present appeal began with the filing of a motion for declaration of rights by Fred Irtz (hereinafter "Irtz"), the current administrator of the Estate of Caleb P. Gross<sup>2</sup>, seeking guidance and direction as to three \$10,000 certificates of deposit turned over to him by the master commissioner. On June 25, 2001, the circuit court ordered the administrator to pay \$13,977.28 to each of Caleb's three children, equaling the original \$10,000 value of each certificate of deposit and the accrued interest. The circuit court made the order final and appealable, and no appeal was taken from the order. On July 23, 2001, the Estate moved the circuit court to amend and correct its June 25, 2001, order to allow for an offset of the money due and payable to Willard by the Estate against the judgment he owed to the Estate. On September 20, 2001, the circuit court entered an order ruling on

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<sup>1</sup> In Gross v. Gross, appeal No. 1997-CA-002037-MR and cross-appeal No. 1997-CA-002132-MR, this Court affirmed the circuit court's July 14, 1997, order allowing the Estate to recover \$100,000 and interest from Willard.

<sup>2</sup> Eugene, Caleb's son and Willard's brother, was the original administrator of the Estate until he resigned on February 14, 1997. On May 2, 1997, the probate division of Fayette District Court appointed Irtz as Successor Administrator With Will Attached. Attorney Robert Monk has represented Irtz throughout the proceedings.

several motions, in particular granting the estate's motion to amend. In doing so, the circuit court allowed the \$10,000 and interest awarded to Willard to offset and reduce the Estate's judgment against him. At a September 28, 2001, motion hour hearing, the circuit court denied Willard's motion to void a portion of its September 20, 2001, order, reasoning that the Estate's motion to amend was in the form of a CR 60.02 motion to correct the judgment, which the Estate had one year to file. On January 16, 2002, the circuit court amended the September 20, 2001, order to make it final and appealable. This appeal followed.

On appeal, Willard argues that the circuit court lost jurisdiction to amend its June 25, 2001, order because the Estate did not file its motion within ten days, that the circuit erred in holding that Irtz's withholding of the money was merely inadvertent, and that the circuit court could not take jurisdiction of the case because Eugene Gross was still the executor of the Estate. Eugene, also proceeding without counsel, filed a pro se brief accepting Willard's recitation of the facts and joining in his brief.

Upon the filing of the notice of appeal, the Clerk of this Court requested clarification from Willard regarding representation of the parties listed in the notice of appeal. On February 19, 2002, Willard filed his response, indicating

that he was the appellant and that Eugene Gross, as the appointed Executor of the Estate of Caleb P. Gross, was the appellee. Willard indicated that Eugene's last known attorney of record was Jerry Wright. Our review of the certified record indicates that Eugene resigned as executor of his father's estate in 1997 and that Jerry Wright moved, and was permitted by the circuit court, to withdraw from his representation of Eugene the same year. Furthermore, the probate court appointed Irtz as the successor administrator of the estate on May 2, 1997. From that point, the circuit court served Irtz, through his counsel, with court documents. Moreover, in his first appeal to the Court of Appeals, Willard, then represented by counsel, named the Estate of Caleb P. Gross as an appellee, and served Irtz as administrator for the Estate. However, Irtz was not named as a party in the present appeal. Rather, Willard identified Eugene, as the executor of the Estate, as the sole appellee.

Pursuant to CR 73.03(1), "[t]he notice of appeal shall specify by name all appellants and all appellees . . . ." Furthermore, "[f]ailure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal." Braden v. Republic-Vanguard Life Ins. Co., Ky., 657 S.W.2d 241, 243 (1983). See also Commonwealth, Dep't of Fin., Div. of Printing v. Drury, Ky., 846 S.W.2d 702 (1992). Here, the Estate, through

Irtz, participated fully before the circuit court. However, Irtz was not named as an appellee in the present notice of appeal, his attorney was merely sent a courtesy copy of the clarification response, and did not file a brief or otherwise participate in the appellate process. Eugene obviously sided with Willard, going so far as to join in his brief and his arguments. This is the opposite stance from that taken by the Estate before the circuit court. Therefore, the Estate was not afforded the opportunity to defend the appeal. Because the subject matter of this appeal deals with an issue raised by the Estate below, the present administrator of the Estate is a necessary party to the appeal so that the Estate's interest may be adequately protected. Irtz, as the current administrator of the Estate, is a necessary party to the appeal, and Willard's failure to name him is fatal.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED.

ALL CONCUR.

ENTERED: February 28, 2003

/s/ Daniel T. Guidugli  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT, PRO SE:

BRIEF FOR APPELLEE, PRO SE:

Willard D. Gross  
Lexington, KY

Eugene Gross  
Harlan, KY

