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IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0370
DA 18-0607

IN RE THE ESTATE OF EDWARD M. BOLAND,

Deceased,

PAUL BOLAND and MARY GETTEL, Co-Personal
Representatives of the Estate of Dixie L. Boland,

Petitioners and Appellants,

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND
CONSTRUCTION, INC., and NORTH PARK
INVESTMENTS, LLC,

Respondents and Appellees,

BRIEF IN SUPPORT OF MOTION

I.

Procedural and Factual Background.

The appeal in DA 18-0370 is an appeal from the lower court's denial of a Petition filed by Paul Boland and Mary Gettel as Co-Personal Representatives of the Estate of Dixie L. Boland. The Petition was filed in the case of *The Estate of Edward M. Boland*, Cause No. ADP 15-125 (Cascade County), the Estate of Dixie's husband and father of Paul and Mary; this is the case from which this appeal is taken. However, an Order dated November 26, 2018, was entered in the case of *The Estate of Dixie L. Boland*, Thirteenth Judicial District Court, Yellowstone County, Montana, Cause No. DP 16-0017, granting motions to terminate the appointment of both Co-Personal Representatives, Paul Boland and Mary Gettel.

The issues raised in the appeal of this current case, however, have not been resolved. In the same Order, Kevin Gillen, a neutral third party, was appointed as Personal Representative. Paul Boland and Mary Gettel filed a motion for relief from said Order pursuant to Rule 60(b) along with a motion to suspend operation of the Order until the Rule 60(b) motion could be resolved. In the meantime, briefs are due and this case may not proceed in an orderly fashion if it is necessary to await an opportunity for the new personal representative to decide whether to continue the appeal in his own name, hire the same attorney or a different attorney, or take some other course of action.

Paul Boland and Mary Gettel are children of Dixie L. Boland and therefore are heirs and devisees of the Estate of Dixie L. Boland and stand to benefit as beneficiaries of that estate. While their brothers, Christopher Boland and Barry Boland are challenging the Last Will and Testament of Dixie Boland, whoever is successful in that lawsuit will not affect the entitlement of Paul Boland and Mary Gettel as heirs of their mother, Dixie Boland, because they are named as residual beneficiaries in both Wills advanced for approval in that lawsuit. As persons with a “interested person” as defined by the Uniform Probate Code (§72-1-103(25), M.C.A.) in the outcome of the current appeal (DA 18-0370) they wish to be added as Petitioners and Appellants in this Supreme Court appeal.

On December 3, 2018, the Respondents and Appellees of the instant case filed a “Notice to Court and Request to Dismiss or in the Alternative Stay Proceedings.” Appellants filed a brief in opposition to that pleading suggesting that the request to dismiss is inappropriate because the issues are far from resolved and other parties would be substantially affected by the Court’s decision in this case. Appellants indicated that Paul Boland, Mary Gettel, and perhaps Jacqueline Boland plan to move for permission to be added as Petitioners and Appellants thus joining the case in their individual capacities as devisees of their mother’s Will. This is that Motion.

II. Argument.

Paul Boland and Mary Gettel have Standing and are Proper Parties. This Action is Specifically Authorized Under Rule 25(2) of the Montana Rules Of Appellate Procedure.

(a) This Motion is Authorized Under Rule 25(2).

Rule 25(2) of the Montana Rules of Appellate Procedure specifically authorizes substitution of a party in the Supreme Court if it is necessary for any reason other than a death. Death of a party is handled in Rule 25(1); it specifically provides what happens when a party dies after the notice of appeal has been filed or while proceeding is otherwise pending in this Court in a civil case. It provides for the substitution of the personal representative upon motion filed by any party with the Clerk of the Supreme Court.

See also Rule 25(3) which outlines the procedure in the event that a “public officer” dies or is separated from office when that public officer is a party to an appeal or other proceeding in the Supreme Court in his or her official capacity. In that case, the successor is automatically substituted as a party. While the personal representatives may not be within the definition of public officers in Rule 25(3), their position is very similar and it makes sense that a similar remedy should apply.

However, Rule 25(2) specifically addresses the instant case. It reads:

If substitution of a party in the supreme court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in section (1).

It is respectfully submitted that the instant case is exactly that; a substitution of someone is necessary for this case to proceed. The issues raised have not yet been resolved. Paul Boland and Mary Gettel both have standing and therefore are appropriate for persons to be substituted as Petitioners and Appellants to this lawsuit. This will allow the case to proceed with the least amount of delay or difficulty and this Court is authorized to grant this motion by the specific language contained in Rule 25(2) of the Montana Rules of Appellate Procedure.

(b) Paul and Mary have Standing.

As heirs and beneficiaries of their mother's estate, the *Estate of Dixie L. Boland*, Paul Boland and Mary Gettel both have standing and are proper persons to be substituted or added as parties to this lawsuit. Clearly they have a stake in this case. They are devisees. They stand to gain or to lose depending on the outcome and the decision of this Court in this case. See *In re Estate of Lawlor*, 2015 MT 54, ¶¶16-33, 378 Mont. 281, 285-89, 343 P.3d 577, 579-582 (A distant relative has standing to challenge a will but not to bring a petition to remove the personal representative which, in that case, was conditional on winning the will contest, (¶¶ 27-30)). In the instant case, the interest of Paul and Mary is not conditional. They have an interest in the estate whether or not their brothers are successful in the will contest because Paul and Mary are residuary beneficiaries in both wills (See Dixie's Last Will and Testament dated October 16, 2015, at 3 (Item No. 12) and

Dixie's Will dated July 11, 2013 proposed by Chris and Barry at 3, Eighth paragraph attached hereto.)

This conclusion is adopted and supported in the more recent case of *Estate of Engellant v. Engellant*, 2017 MT 100, ¶¶10-14. In that case, petitioners Daren and Kevin Engellant sought to intervene in a conservatorship. The protected party had executed 2 wills and Daren and Kevin were devisees under both wills. This Court held that Kevin and Daren were interested persons under the definition in the Uniform Probate Code, namely, §72-1-103(25) MCA. 2017 MT at ¶12, 387 Mont. at 316, 400 P.3d at 220. This is exactly the case that is before the Court at the present time.

Therefore, Paul and Mary have standing and under the appellate rules they may be added as parties when necessary for the orderly proceeding of this case

Dated this 2nd day of January, 2019.

TOWE, BALL, MACKEY, SOMMERFELD
& TURNER, P.L.L.P.
Attorney for Petitioners/Appellants

By 
THOMAS E. TOWE

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman typeface of 14 point; is double spaced except for quoted and indented material; and the word count does not exceed 1,250 words, i.e., is 1147 words, excluding the caption, Certificate of Compliance and Certificate of Service.

Dated this 2nd day of January, 2019.

TOWE, BALL, MACKEY, SOMMERFELD
& TURNER, P.L.L.P.

Attorney for Petitioners/Appellants

By



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to the following counsel of record, served by e-service and/or U.S. mail, postage-prepaid, upon:

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Dated this 2nd day of January, 2019.

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By

