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The blood kit box had no effect on the test performed on the blood or the results of the test. And while the box itself contains information regarding the chain of custody, much of this information is documented in other places, including on the blood vials. The State established an ample chain of custody for the blood drawn from Hashman through the testimony of Galyen, Grumbles, Busch, and Mraz. Hashman's attorney cross-examined each of these witnesses thoroughly regarding the collection, transport, and storage of Hashman's blood. Hashman has not shown a reasonable probability that, had the destruction of the blood kit box been disclosed to the defense prior to trial, the result of the proceeding would have been different. Nor has he shown that the State acted in bad faith in destroying the blood kit. The kits are stored separately from the blood vials, and the kits are routinely destroyed after a 2-year period. We conclude that there was no *Brady* violation. The district court did not err in finding that Hashman's due process rights were not violated. Hashman's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in denying Hashman's request for a discovery violation or in denying his *Brady* challenge.

AFFIRMED.

IN RE ESTATE OF SHIRLEY A. WEBB, DECEASED. ROGER WEBB AND MARK WEBB, APPELLEES, V. DANNY L. WEBB, PERSONAL REPRESENTATIVE OF THE ESTATE OF SHIRLEY A. WEBB, APPELLANT.

817 N.W.2d 304

Filed July 17, 2012. No. A-11-721.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law,

is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Decedents' Estates.** A person interested in the estate may petition for removal of a personal representative for cause at any time.
5. ____. Cause for removal of a personal representative exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.
6. ____. That the named personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent.
7. **Decedents' Estates: Courts.** If the individual interest of the personal representative comes into irreconcilable conflict with the interests of the estate, then the county court has the authority to act to protect the interests of all by restraining or removing the personal representative, or supervising the personal representative's administration of the estate.
8. **Decedents' Estates.** A personal representative is under a duty to settle and distribute the estate of the decedent as expeditiously and efficiently as is consistent with the best interests of the estate.
9. **Decedents' Estates: Time.** Within 3 months after appointment, a personal representative is required to prepare and file an inventory of property owned by the decedent at the time of death. The inventory is to list the decedent's property with reasonable detail and include a fair market value. The personal representative is required to send a copy of the inventory to interested persons who request it.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Affirmed.

Maurice A. Green, of Green Law Offices, P.C., for appellant.

Stanley C. Goodwin, of Goodwin Law Offices, for appellees.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Danny L. Webb appeals from an order of the Red Willow County Court removing him as personal representative of the

estate of Shirley A. Webb and appointing a successor personal representative. We find that the county court's determination that it is in the best interests of the estate to remove Danny as personal representative is supported by competent evidence and is not clearly erroneous. We affirm.

BACKGROUND

Roger Webb, Mark Webb, and Danny are the surviving children of Shirley A. Webb, who died September 22, 2010. The decedent's will, executed June 30, 2009, directed all assets of her business, Webb's Water Truck Service, LLC, to Danny, including but not limited to "all tangible assets of the business, including furniture, fixtures, inventories, tools, machinery, equipment, motor vehicles and other property connected thereto and utilized by and associated with this proprietorship." The will recognized that Danny "continued to work for and directly assisted in the equity and value" of the business. The residuary estate was directed to be split between Roger, Mark, and Danny. Danny was nominated in the will to serve as personal representative. The validity of the will is not at issue on appeal.

On September 29, 2010, Danny filed a petition for informal probate of will and informal appointment of personal representative. On that date, Danny was informally appointed as personal representative of the estate and letters of appointment were filed. No objections to Danny's appointment were filed.

On June 8, 2011, Roger and Mark filed an application for removal of the personal representative and requested appointment of a successor personal representative. They alleged that (1) no inventory had been filed; (2) Danny informed them that he removed items from the decedent's home and claimed ownership of said items which Roger and Mark felt were part of the residual estate; (3) Danny intended to sell the decedent's home, which is part of the residual estate, to his son for the assessed valuation of the property which is substantially below market value; (4) Danny had or may have represented that certain items of personal property were gifts made to him by the decedent prior to her death, which items Roger and Mark

believe should be part of the residual estate; and (5) Danny had in other ways and instances mismanaged the estate to their detriment.

On July 26, 2011, a hearing was held on the removal application. On the same day, Danny filed an inventory of the estate. No other filings were made by Danny in the estate proceeding prior to this date. Danny acknowledged that he was late in filing the inventory due to difficulties coordinating with his attorney and Ron Smith, the accountant for the decedent and the business. Smith testified about his delay in providing Danny with a valuation of the business. Despite previous requests from Danny's attorney, Smith did not produce the valuation until June 1 due to the need to first complete the income tax returns and the financial statements.

Roger and Mark made efforts to obtain information from Danny about the status of the estate, which efforts were not successful. Roger testified that he contacted Danny "[a] couple of times" by telephone to inquire about the status of the estate between September 2010 and January 2011. Roger and Mark sent a letter to Danny's attorney requesting an inventory and accounting of the estate, a copy of the will, and a copy of the Nebraska statutes for dispersal of the estate. Roger testified that he did not receive a response, but that his own lawyer obtained a copy of the will. Roger did not attempt to contact Danny further after sending the letter. Mark testified that after sending the letter, he spoke with Danny again and told him that they needed to know exactly what was in the estate. Danny acknowledged that Roger and Mark had made some inquiries about the status of the estate proceeding prior to filing their application.

The inventory reveals that the largest asset owned by the decedent is the business, which Smith valued at $501,605. In addition, the inventory includes real estate valued at $65,884; "Stocks and Bonds" valued at $45,655; "Mortgages, Notes and Cash" valued at $51,488; and "Miscellaneous personal property, furniture, etc[.]" valued at $4,250. The record shows that the stocks have been evenly distributed between the brothers and that life insurance proceeds have also apparently been divided between the brothers.

To value the family home for the inventory, Danny used the assessed tax value of $65,884. Danny testified that he had discussed selling the house to his son for a purchase price of $66,000, but no transaction had been completed. Both Roger and Mark recommended to Danny that he get the house appraised, but Danny declined. According to Roger and Mark, Danny's response was to tell them that they could get an appraisal done themselves. Roger obtained an appraisal valuing the home at $88,000. Danny was aware that an appraisal had been done but did not ask for a copy of the report. Danny testified that he did not agree with the appraised value of the house and continued to believe that the assessed value was correct.

The evidence concerning the bank accounts listed under "Mortgages, Notes and Cash" on the inventory was less than clear. The list shows two checking accounts, three money market accounts, a "Christmas Club" account, and an IRA variable account. Apparently, there are personal accounts and business accounts, but there was no evidence to identify the different accounts listed on the inventory. The evidence suggests that the business was a limited liability company owned by the decedent and her husband and that during their lifetime, they used the business account to make some personal expenditures and used their personal accounts to make some business expenditures. After the decedent's husband died, she added Danny as a joint holder on her bank accounts. However, there was no evidence adduced to specify the form in which the accounts were held, i.e., whether there was a right of survivorship, a "pay on death" designation, or an agency designation. Danny testified that he was informed that he could use the accounts as he needed to in order to pay for business expenses, the decedent's utilities, and her funeral. Danny stated that the banks told him that the accounts belonged to him. At some point, Danny transferred the money that was in the decedent's accounts to an account in his name only. Danny also indicated that he had a power of attorney to make bank transfers from the decedent's accounts; however, he was unsure exactly how the bank transactions occurred. Danny claims that the money in the accounts at the time of the decedent's death belongs to him. Danny

acknowledged that he did not contribute his own money to the accounts, with the possible exception of the business account due to his work for the business. Danny also agreed that the accounts would more properly have been classified under the jointly owned property category on the inventory.

Evidence was adduced concerning miscellaneous personal property that has been removed from the decedent's house. Danny identified several items that were paid for by the business which he claims he now owns by virtue of the devise of the business to him. These items include a corner hutch which Danny gave to his son, together with a bed and a television which remain in the house. Receipts were received in evidence indicating the purchaser of these items was Webb's Water Truck Service.

Danny testified that he had authorized other family members to remove property, but as far as he was aware, nothing was taken that would affect the bottom line on the inventory. The brothers had an apparent agreement that each could remove items that he had given to their parents as gifts. Roger removed a grandfather clock, an antique churn, a quilt, a recipe box, and other personal items that he had given his parents. Mark removed three small ivory walrus carvings that he had given the decedent as a gift.

The decedent owned jewelry which was not separately listed on the inventory. Danny was not sure whether the value of the jewelry had been included in the personal property portion of the inventory. According to Mark, the decedent had received several "expensive" items of jewelry as gifts from their father, including earrings purchased shortly before he died in 2009. Mark testified that he saw the receipt for these earrings which indicated a price of approximately $4,000. Danny testified that he had not had the jewelry appraised; however, Mark testified that the decedent's jeweler told him that an inventory had been prepared and given to Danny. Danny testified that Roger and Mark had not asked him about the jewelry; however, Mark testified he asked Danny about the jewelry, to which Danny responded that the decedent had been hiding it and that he did not know the location. At the hearing, Danny testified that some of the jewelry was in his possession

and some was at the decedent's house. Danny testified that he intended to divide the jewelry equally "[w]henever things here get settled."

At the end of the presentation of evidence, the court made comments on the record. The court noted that the evidence and testimony explained the reason for the delay in filing the inventory and noted that inventories can be amended. The court found it concerning that inquiries were made by Roger and Mark to Danny as personal representative with regard to the status of the estate, the inventory, and the value of the house. The court found that the value of the real estate listed in the inventory was substantially less than that of the appraisal procured by Roger and Mark. Although Danny did not have a copy of the appraisal at the time he was preparing the inventory, he had been requested to get an appraisal and declined to do so. The court expressed concern regarding Danny's refusal to get an appraisal and telling Roger and Mark to do it themselves. The court also noted that Danny "testified both ways" in that he used his power of attorney to transfer assets to joint accounts and then later testified that he did not do that. The court noted the evidence that money in the decedent's accounts was used by Danny to pay bills for a business that he was going to inherit. The court was concerned that there had been commingling of assets between the decedent's personal and business accounts. It also noted that the decedent's jewelry was not listed on the inventory and that no valuation had been provided to Roger and Mark, even though there was testimony that Danny had obtained the information from the jeweler.

The court concluded that Danny should be removed as personal representative. Specifically, the court stated that the "conflict of interest by [Danny] is not necessarily dispositive of his ability to serve," but found it was in the best interests of the estate to remove him and appoint a successor.

On July 28, 2011, the court entered an order finding that the application for removal should be sustained and that there should be an appointment of a successor personal representative. The court did not make any additional findings of fact in its written order.

ASSIGNMENT OF ERROR

Danny assigns that the county court erred in finding that he should be removed as personal representative of the estate, because there was no wrongdoing or cause pursuant to Neb. Rev. Stat. § 30-2454(b) (Reissue 2008) and because the court made no such requisite findings in its order.

STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court. *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id*.

ANALYSIS

[4,5] A person interested in the estate may petition for removal of a personal representative for cause at any time. § 30-2454(a). Section 30-2454(b) provides:

> Cause for removal [of a personal representative] exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

We first address Danny's argument that the court did not make the requisite findings to support removal in its order entered on July 28, 2011. The written order generally found that the application for removal of Danny as personal representative should be sustained and that there should be an appointment of a successor personal representative. We understand Danny's argument to be that it was necessary to make findings in the order consistent with § 30-2454(b); namely,

that it was in the best interests of the estate or that one or more of the enumerated causes listed therein existed. However, nothing in the statute requires that such findings be included in the order. We further note that Danny did not specifically request such findings. See Neb. Rev. Stat. § 25-1127 (Reissue 2008) (upon trial of questions of fact by court, it shall not be necessary for court to state its findings, except, generally, for plaintiff or defendant, unless either party requests it). Finally, the trial judge did in fact make oral findings at the close of evidence, culminating in the conclusion that it was in the best interests of the estate to remove the personal representative and appoint a successor. This argument is without merit.

We next address whether there was cause to remove Danny as personal representative. Roger and Mark alleged that (1) no inventory had been filed in the matter, (2) Danny removed items from the decedent's home and claimed ownership of items which Roger and Mark believed were part of the residual estate, (3) Danny intended to sell the decedent's home for the assessed value of the property which is less than market value, (4) Danny represented that certain items of value were gifts made to him by the decedent which Roger and Mark believed should be part of the residual estate, and (5) Danny had in other ways and instances mismanaged the estate to Roger and Mark's detriment. We note that nothing in the application for removal could be construed to allege that Danny disregarded an order of the court or that he had become incapable of discharging the duties of a personal representative, nor was evidence adduced to support such findings.

[6,7] Prior to a discussion of the evidence as it relates to the allegations in the application to remove Danny as personal representative, we note the county court's reference to the possible "conflict of interest" between Danny and the heirs of the estate, which conflict the county court found is "not necessarily dispositive of his ability to serve." It is common practice for a will to nominate a personal representative who is close to, or related to, the testator, and it is thus not uncommon for the nominated personal representative to have an interest in the estate, or in other property of the decedent. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). That the named

personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent. *Id*. If the individual interest of the personal representative comes into irreconcilable conflict with the interests of the estate, then the county court has the authority to act to protect the interests of all by restraining or removing the personal representative, or supervising the personal representative's administration of the estate. *Id*. See Neb. Rev. Stat. §§ 30-2440 through 30-2443 and § 30-2450 (Reissue 2008).

In this case, we agree that the potential conflict of interest between the personal representative and the other interested beneficiaries is in itself insufficient to warrant removal. However, as we discuss below, the conflict of interest, when considered with the other evidence, supports the county court's decision to remove Danny as personal representative.

[8,9] Neb. Rev. Stat. § 30-2464(a) (Reissue 2008) provides in part that a personal representative is under a duty to settle and distribute the estate of the decedent as expeditiously and efficiently as is consistent with the best interests of the estate. Neb. Rev. Stat. § 30-2467 (Reissue 2008) also requires a personal representative, within 3 months after appointment, to prepare and file an inventory of property owned by the decedent at the time of death. The inventory is to list the decedent's property with reasonable detail and include a fair market value. See *id*. The personal representative is required to send a copy of the inventory to interested persons who request it. See *id*.

In *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989), the Nebraska Supreme Court determined that a personal representative's inactivity was not in the best interests of the estate and provided cause for removal. In *In re Estate of Snover*, the interested parties filed a motion for accounting after which the court ordered the personal representative to comply with a specified time schedule or notify the court of any necessary adjustment in the schedule in a timely fashion. When the personal representative failed to comply with the progression order and failed to timely file the federal estate

tax return, the parties filed a motion to remove the personal representative. The county court overruled the motion, but the district court reversed, and remanded with directions to remove the personal representative. The Supreme Court affirmed the district court's decision, finding that where the county court had ordered a certain progression, such unexplained inactivity by the personal representative constituted grounds for removal. *Id*. Conversely, in *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992), the Nebraska Supreme Court affirmed the lower court's denial of the party's motion to remove the personal representative where there was no violation of any court order or evidence of neglect.

In this case, Danny did not file an inventory until approximately 10 months after his appointment and not until the day of the hearing on the application to remove him as personal representative. Clearly, Danny did not comply with the statutory requirements for filing the inventory, although he did not violate any court order. However, there was evidence presented as to the reason for the delay, at least with respect to valuation of the major asset of the estate. Nevertheless, Danny failed to keep the remaining heirs apprised of the status of the inventory and the estate proceedings, despite several requests for information.

In addition to failing to keep Roger and Mark informed, Danny also failed to obtain an appraisal of the house, despite requests from Roger and Mark to do so. Rather, Danny initially intended to sell the decedent's home to his son for the assessed valuation of the property. And Danny continues to maintain that the house should be valued at the assessed value as opposed to the appraised value, which is more than $20,000 higher than the assessed value. Danny has also failed to provide Roger and Mark with an inventory or valuation of the decedent's jewelry, which jewelry is not separately listed on the inventory.

The activity surrounding the decedent's bank accounts also creates concern in this case. Danny testified that the myriad accounts owned by the decedent at her death were held jointly with him, but they were not listed as jointly owned property on the inventory. Danny has treated the accounts as his own since

the decedent's death, transferring them into an account in his name only. We do not know from this record the specific manner in which the accounts were created or held. Neb. Rev. Stat. § 30-2719 (Reissue 2008) sets forth the various ways in which multiple-party accounts can be created, such as with a right of survivorship, a "pay on death" designation, or an agency designation. The statute further specifies the ownership rights upon the death of a party to the various types of accounts. Although Danny testified that he was told by the banks that the accounts belonged to him, such ownership has not been verified based on the record before us, especially since we do not know which accounts are personal and which are business. The court was concerned about the possible commingling of the personal and business accounts, which appears to be a legitimate concern, at least at this juncture.

Although of limited significance, Danny's position that the items of household furniture purchased by the business were his by virtue of his inheritance of the business appears misguided and contrary to the best interests of the estate. It seems clear that these items—the hutch, bed, and television—are not business assets but were simply purchased using a business account, which was not an unusual practice for the decedent and her husband.

Considering the totality of the circumstances in this case and recognizing our deferential standard of review, we conclude that the county court did not err in finding that it was in the best interests of the estate to remove Danny as personal representative and appoint a successor.

CONCLUSION

We conclude that the district court's decision to remove Danny as personal representative of the estate and appoint a successor was not clearly erroneous.

AFFIRMED.