STATE OF VERMONT
CALEDONIA COUNTY, SS

IN RE ESTATE OF MERLYN WALTER BANDY, Late of Kirby, Vermont, SOPHIE BEER and LYNETTE SHUFELT, individually, and as co-administrators of the ESTATE OF MERLYN WALTER BANDY, Appellants	)	CALEDONIA SUPERIOR COURT DOCKET NO. 171-8-97 Cacv

On appeal from State of Vermont Probate Court District of Caledonia # CP-94-2082

DECISION AND ORDER

This case is before the Court on Appellants' Appeal to the Caledonia Superior Court of the August 12, 1997 Ruling Denying Appellants' Motion for Relief Under V.R.P.P. 60(b), through which Appellants seek to remedy the Special Administrators' power of appointment.

FACTS

On September 22, 1994, Merlyn Walter Bandy, a resident of Lyndon died. His estate was subsequently opened, administered and closed in the Caledonia District Probate Court, and the Administrator, Cynthia M. Fox, discharged on June 20, 1995.

On September 6, 1996, Appellants Lynette M. Shufelt and Sophie V. Beer, through their attorney, Debroha T. Bucknam, Esq., filed a Petition to Reopen an Intestate Estate and to Reappoint Interim Administrators. Appellants justified the reopening on the existence of a claim under 14 V.S.A. § 1492 against Earl Donovan Stetson, the party allegedly responsible for the decedent's death. The decedent's heirs consented to the petition for the sole purpose of suing Earl Donovan Stetson.

As the result of the petition, the Probate Court appointed Appellants Shufelt and Beer as Special Co-Administrators, granting them the requested authority to institute a lawsuit against Earl Donovan Stetson. Subsequently, the Appellants filed an action in Caledonia Superior Court against Earl Stetson and the Vermont Agency of Transportation entitled Beer et al. v. Stetson and the Vermont Agency of Transportation, Docket No. 217-9-96 Cacv.

In May, the State of Vermont filed a Motion to Dismiss in the Superior Court action pursuant to V.R.C.P. 12(b)(1), on the grounds that Appellants lacked the authority to sue the State due to their failure to request it in their September 6, 1996 petition.

As a result, on May 22, 1997, the Coadministrators filed, in the probate case below, a Motion to Amend the Appointment of Special Administrators, nunc pro tunc to September 13, 1996, so as to give them authority to sue the State and add the State as a defendant in the wrongful death action. Then on June 12, 1997, the Coadministrators, through their attorney, filed a Motion for Relief pursuant to V.R.P.P. 60(b) in the probate action below stating that when the attorney's office staff prepared the various documents, they inadvertently failed to recite the names of both proposed defendants in the Superior Court case.

On August 12, 1997, the Probate Court denied both of the Coadministrators' Motions. The Probate Court based its decision on several findings of fact:

1. several months had elapsed between the appointment of the Special Co-Administrators and the discovery by Attorney Bucknam that the Appellants possessed the authority to sue only Earl Stetson, and not the State of Vermont;

2. the State of Vermont was not listed as a defendant in any documents filed in the Probate Court;

3. the attorneys, the heirs and other office personnel reviewed the paperwork several times during the preparation of the petition and consent forms, signing of the Probate Bond, and the subsequent appointment of Special Co-Administrators in September of 1996, yet no one discovered the omission until the State of Vermont filed its Motion to Dismiss in the Superior Court case;

4. the carelessness of the Special Co-Administrators, heirs and their attorneys is not excusable under Rule 60(b)(1).

On August 18, 1997, Appellants filed a Notice of Appeal and on September 3, 1997, Appellants filed Appellants' Statement of Question on Appeal with this Court.

DISCUSSION

Appellants appeal from the Probate Court's denial of the Administrators' Motion for Relief under V.R.P.P. 60(b). Generally, the Superior Court sits as a "higher court of probate" with powers to try identical matters involved in the subject of an appeal. 12 V.S.A. § 2553; In re Estate of Collette, 122 Vt. 231, 234 (1960). Here, the decision of the Probate Court, denying the relief sought by the petition was a final disposition of the matter before the court, and in that respect, a judgment from which an appeal to this Court may be taken. See Haskins v. Haskins Estate, 113 Vt. 466, 468 (1944); Adams v. Adams, 21 Vt. 162, 167 (1849).

V.R.P.P. 60(b) was promulgated in an effort to replace all independent modes of obtaining relief from judgment on the grounds of mistake, fraud or newly discovered evidence with two alternative procedures: (1) a motion under V.R.P.P. 60(b); or (2) an independent action for relief in superior court. See V.R.P.P. 60(b) reporter's notes. In Haskins v. Haskins Estate, 113 Vt. 466,

the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ....

Here, Earl Donovan Stetson was an employee of the State of Vermont at the time of the accident, and that fact was apparent to Appellants at the time the Petitions to Reopen and Appoint Co-Administrators were filed. Therefore, there is no basis for a claim that Plaintiff was unaware of the State as a potential defendant. The Superior Court case was filed in September of 1996, at the same time the Petitions to Reopen were filed. The State was not listed as a defendant in any documents filed in the Probate Court. Several interested persons, including the attorneys, the heirs and other office personnel reviewed the paperwork at several stages of preparation, but failed to discover the omission until the State's Motion to Dismiss was filed. Appellants' failure to include such an obvious party as the State resulted in the burden being shifted such that the State was forced to file a Motion to Dismiss, and considerable effort has been expended by the parties to both cases on this issue, resulting in a delay in the case being heard on its merits, and therefore, prejudice to the other parties. Thus, in this case, inattention does not qualify as "excusable neglect."

Appellants argue that the failure to include the State of Vermont was the result of an error by Attorney Bucknam's office staff. Appellants' failure to seek authority to sue the State of Vermont cannot be excused on the grounds that the office staff did not prepare the petition properly. The content of pleadings is ultimately the responsibility of the attorney, and not the office personnel.

Neglect on the part of a plaintiff's attorney is "excusable" if it does not prejudice or mislead other parties. In this case, the error was misleading to both Earl Stetson and the State of Vermont about who was being sued, and imposed not only unnecessary costs on Defendants, but delays in the Superior Court action. It was preventable by the attorney. Under these circumstances, the Probate Court did not abuse its discretion in denying the motion. The Probate Court did not do so arbitrarily, but articulated a rational basis for its decision. This Court finds no error in the Probate Court's exercise of discretion. Sitting as a "higher court of probate," this Court also reaches the same result independently for the reasons stated herein.

Accordingly, the Probate Court's decision is AFFIRMED.

Dated at St. Johnsbury, Vermont, this 13th day of February, 1998.

CALEDONIA SUPERIOR COURT

Mary Miles Teachout

Mary Miles Teachout
Presiding Judge