IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Estate of Irene T. Tillimon

Court of Appeals No. L-08-1353

Trial Court No. 2005 EST 243

DECISION AND JUDGMENT

Decided: March 13, 2015

* * * * *

Kevin R. Eff, for appellant.

Douglas A. Taylor, for appellee.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Probate Division. The court adopted a magistrate's decision to deny two motions filed by appellant, Duane J. Tillimon. Appellant's motions sought to be appointed special administrator of the estate of Irene T. Tillimon and to deny payment of fees and commissions to the guardian, the guardian's attorney, and the administrator of the estate.

{¶ 2} For the reasons that follow, we affirm the decision of the probate court.

Statement of Facts and Procedural History

{¶ 3} This case concerns the estate of Irene T. Tillimon who died testate on January 20, 2005. Appellant is Ms. Tillimon's son. Prior to her death, Ms. Tillimon had been deemed incompetent and made a ward of the Lucas County Probate Court. Attorney Edward Fischer was named Tillimon's guardian in 2004.

{¶ 4} The estate of Irene T. Tillimon was opened by "application for authority to administer estate" by Fischer on February 2, 2005. Appellant objected to the appointment of Fischer as administrator and filed his own application to administer the estate on February 24, 2005. Fischer and appellant then agreed on the appointment of an independent fiduciary. On October 14, 2005, after the initial administrator resigned, the probate court appointed Douglas A. Taylor

{¶ 5} On August 7, 2007, appellant moved the court to appoint him as the executor or "special administrator" of the estate. A magistrate recommended that appellant's motion be denied, and appellant objected. On October 1, 2007, the probate court adopted the magistrate's decision and denied appellant's motion to be appointed executor.

{¶ 6} On December 11, 2007, Douglas Taylor filed an application for payment of fees incurred by him as the administrator of the estate. The probate court approved and ordered the payment of fees and commissions on December 12, 2007.

{¶ 7} At this time, a collateral matter was pending before the probate court regarding appellant's objection to the fiduciary's final account. Hearings were held

before a magistrate on December 4, 2007, and again on June 2, 2008, on that issue. The final accounting of the estate is not at issue herein, but at the conclusion of the hearings, on June 10, 2008, the appellant filed two motions that are the subject of the instant appeal. In the first, appellant again requested that he be appointed special administrator for the estate. In the second, appellant objected to the payment of any "commissions or attorney fees" to Edward Fischer, Fischer's attorney, John Wanick, or Douglas Taylor.

{¶ 8} On July 14, 2008, the magistrate released a decision as to (1) appellant's objection to the fiduciary's final account and (2) appellant's June 10, 2008 motions. As for the latter, the magistrate found,

> The Motion to * * * deny fees already granted by Judge Puffenberger should be DENIED in full. The principle of *res judicata* clearly is applicable in this case.
>
> As to the post-hearing Motion to be appointed "special administrator", [appellant's council] filed a similar motion on August 7, 2007, which was denied by the Magistrate in his decision on September 6, 2007, and made the order of the Court by Judge Puffenberger's Entry of October 1, 2007. Furthermore, R.C. 2113.15 permits the appointing of a special administrator "when there is a delay granting letters testamentary or of administration."
>
> Here there is no delay of any kind: there is a lawful Administrator appointed by the Court, a similar motion was denied by Court Entry on

10/1/07 and the principle of *res judicata* applies, and said administrator is waiting for the approval of the final estate account.

{¶ 9} Appellant did not object to the magistrate's decision. Nineteen days later, on July 29, 2008, the trial court adopted the decision and specifically denied appellant's June 10, 2008 motions.

{¶ 10} On September 2, 2008, the trial court issued an "Entry Approving and Settling Account" indicating that the estate had been fully and lawfully administered and closing the case.

{¶ 11} Appellant filed a notice of appeal on September 30, 2008. Appellant raises two assignments of error for our review:

I. THE PROBATE COURT ERRED AND ABUSED ITS' [SIC] DISCRETION WHEN IT DENIED THE MOTION OF SOLE HEAR [SIC] DUANE J. TILLIMON TO BE APPOINTED SPECIAL ADMINISTRATOR FOR THE PURPOSE OF BRINGING A WRONGFUL DEATH LAWSUIT IN THE NAME OF ADMINISTRATOR DOUGLAS A. TAYLOR.

II. THE PROBATE COURT ERRED AND ABUSED ITS' [SIC] DISCRETION WHEN IT DENIED THE MOTION OF DUANE J. TILLIMON TO DENY PAYMENT OF FEES AND COMMISSIONS TO GUARDIAN ATTORNEY EDWARD J. FISCHER, GUARDIAN ATTORNEY EDWARD J. FISCHER'S PERSONAL ATTORNEY JOHN

R. WANICK, AND ADMINISTRATOR ATTORNEY DOUGLAS A. TAYLOR BECAUSE THEY ALL FAILED IN THEIR LEGAL OBLIGATIONS AND DUTIES TO DECEASED WARD IRENE T. TILLIMON.

{¶ 12} The matter was fully briefed in early 2009. On June 23, 2009, this court ordered the appeal stayed based upon appellant's filing for bankruptcy protection in the United States Bankruptcy Court, Northern District of Ohio.

{¶ 13} This court lifted the stay on July 28, 2014, and reinstated the case to the active docket, when it came to our attention that appellant's bankruptcy case was closed.

{¶ 14} Appellant has retained new appellate counsel, his former attorney having died during the pendency of the stay.

Law and Analysis

{¶ 15} Civ.R. 53 governs the procedures to be followed when a court of record refers a case to a magistrate. Civ.R. 53(D)(3)(b)(iv) remains unchanged since 2008 when this matter was before the probate court. Then, as now, the rule provides,

> Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶ 16} In his decision, the magistrate specifically advised the parties of their appellate rights and obligations and cited Civ.R. 53(D)(3)(a)(iii) in full. The magistrate also advised the parties that the deadline to file written objections was "within fourteen (14) days of the filing the decision." Civ.R. 53(D)(3)(b)(i).

{¶ 17} In its judgment entry adopting the magistrate's decision, the probate court noted that no objections to the magistrate's decision were filed.

{¶ 18} By rule, appellant's failure to object to the magistrate's decision operates as "a waiver of claimed error by the trial court in adopting [the] magistrate's findings of fact or conclusions of law." *Foos v. Foos,* 6th Dist. Wood No. WD-08-049, 2009-Ohio-3398, ¶ 16. Accordingly, appellant's claims in this appeal are deemed waived, absent a showing of plain error. *Id.*

{¶ 19} "[I]in rare cases, Ohio courts recognize that a party's failure to object pursuant to Civ.R. 53(D) does not bar review for plain error." *Id.* at ¶ 18 citing *Seaburn v. Seaburn,* 5th Dist. Stark No. 2004CA00343, 2005-Ohio-4722, ¶ 46. (Other citations omitted.) However, those cases are limited to situations in which the error '"rises to the level of challenging the legitimacy of the underlying judicial process itself.'" *Seaburn,* at ¶ 46, quoting *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). An appellant bears the burden of demonstrating the existence of plain error by reference to matters in the record. *Foos* at ¶ 21.

{¶ 20} In this case, appellant has not argued plain error. We have reviewed the record, and find no manifest injustice in the proceedings before the probate court that would constitute plain error. Appellant's first and second assignments of error are not well-taken.

{¶ 21} We affirm the judgment of the Lucas County Court of Common Pleas, Probate Division. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.