[Cite as *In re Estate of Persing*, 2010-Ohio-2687.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ESTATE OF DAVID GEORGE PERSING, DECEASED.	**:**	**O P I N I O N**
	:	**CASE NO. 2009-T-0120**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2008 EST 0399.

Judgment: Reversed and remanded.

David A. Dull, Jr., 808 North Park Avenue, Warren, OH 44483 (For Appellant, Joyce P. Persing).

Mark S. Finamore, 258 Seneca Avenue, N.E., P.O. Box 1109, Warren, OH 44481 (Appellee, Successor Administrator WWA of the Estate of David George Persing, Deceased).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Joyce P. Persing, appeals the judgment entered by the Probate Division of the Trumbull County Court of Common Pleas. The probate court denied appellant's exceptions to the inventory filed in the estate of her late husband, David George Persing.

{¶2} Appellant and David Persing were married. Appellant filed for legal separation in the Domestic Relations Division of the Trumbull County Court of Common Pleas. While that action was pending, appellant withdrew $62,374.37 from a joint account she shared with David Persing. An informal hearing was held before the

domestic relations court magistrate regarding this withdrawal. A hand-written magistrate's order was issued after this hearing.[1] This order provides, in part:

{¶3} "Restraining order will be placed on funds withdrawn by wife from Farmers Natl. Bank. Counsel will do an agreed entry for payment from this account for medical charges put on wife's credit card."

{¶4} Later that same day, another document was issued in the domestic relations action. This document was captioned as a "judgment entry." However, the judge's name was interlined, and the document was signed by the domestic relations magistrate. This document indicates that appellant is restrained from spending any of the $62,374.37 she withdrew from the parties' joint account. In addition, it provides that she is ordered to pay David Persing $31,205.38.

{¶5} Fourteen days after the document was filed, appellant filed a "motion to strike judgment entry as unresponsive," wherein she sought to strike the "judgment entry." A hearing was scheduled on appellant's motion. However, prior to the hearing, David Persing died. Upon learning of David Persing's death, the domestic relations court dismissed the entire domestic relations case, including the motion to strike.

{¶6} The instant matter was filed in the Trumbull County Probate Court regarding David Persing's estate. Appellant is not listed as a beneficiary in David Persing's will. Accordingly, she filed a notice that she was exercising her right, as a surviving spouse, to take against the will.

1. The copy of this order that was introduced as an exhibit during the probate court hearing on appellant's exceptions to the inventory does not contain a time-stamp indicating it was filed in the domestic relations court.

{¶7} The administrator of the estate filed an inventory for the probate court's approval. Included in the inventory as an asset was the $31,205.38 representing the purported judgment from the domestic relations action that directed appellant to pay this amount to David Persing. Appellant filed exceptions to the inventory. The probate court held a hearing on appellant's exceptions to the inventory. At the hearing, Magistrate Deborah Marik testified. She testified that she remembered the hearing in the domestic relations matter. It was her belief that the order she issued was only a restraining order. She did not remember the language ordering appellant to pay David Persing the $31,205.38.

{¶8} The probate court denied appellant's exceptions to the inventory. Subsequently, in a separate judgment entry, the probate court approved the inventory. Appellant has timely appealed the probate court's judgment entry denying her exceptions to the inventory to this court.

{¶9} We note that after this appeal was filed, an additional inventory and appraisal was filed for the probate court's consideration. It appears that the probate court has refrained from ruling on this additional proposed inventory since any determination would be inconsistent with this court's jurisdiction to decide this appeal. However, upon remand, the probate court shall consider this and any additional proposed inventories in light of this decision.

{¶10} Prior to addressing the merits of appellant's assignments of error, we first address whether the trial court's judgment entry is a final, appealable order.

{¶11} In *Sheets v. Antes* (1984), 14 Ohio App.3d 278, the Tenth Appellate District held that an order denying exceptions to an inventory and approving the

inventory is a final, appealable order. Several cases have summarily cited *Sheets* for the proposition that the denial of exceptions to an inventory is a final, appealable order. See *In re Sacco*, 7th Dist. No. 03 CO 39, 2004-Ohio-3196, at ¶15; *In re Workman*, 4th Dist. No. 07CA39, 2008-Ohio-3351, at ¶13; and *In re Poling*, 4th Dist. No. 04CA18, 2005-Ohio-5147. However, pursuant to *Sheets*, an order denying exceptions to an inventory is only a final, appealable order if it also approves the inventory. *Sheets v. Antes*, 14 Ohio App.3d at 278. In *Sheets*, the Tenth District noted:

{¶12} "In an entry dated October 30, 1980, the probate court *** overruled appellant's exceptions to the inventory. Appellant appealed this 'judgment entry' to this court and we dismissed the appeal on January 13, 1981, since the trial court had clearly not entered a final judgment concerning the inventory.

{¶13} "On September 29, 1983, *** the probate court issued another entry overruling appellant's exceptions to the inventory. This entry, unlike the October 30 order, expressly approves the inventory, enters a final judgment, and states that there is no just reason for delay in hearing the appeal upon 'this separate issue.'" Id.

{¶14} This court has previously addressed this issue. In *In re Estate of Allen* (June 8, 1988), 11th Dist. No. 3890, 1988 Ohio App. LEXIS 2293, this court dismissed an appeal after concluding there was not a final, appealable order. In *Allen*, there was a denial of exceptions to the inventory, but the trial court had not approved the inventory. Id. at *6. After conducting an analysis of *Sheets v. Antes*, supra, this court held, "[t]he denial of exceptions to the inventory of the estate of a decedent therefore, does not *ipso facto* make that denial a final appealable order. There must also be, according to

Sheets, an express approval of the inventory." *In re Estate of Allen*, 1988 Ohio App. LEXIS 2293, at *5.

{¶15} We note the Twelfth Appellate District has followed this court's holding in *Allen*, as that court explained in its analysis of this issue:

{¶16} "Ohio courts have repeatedly held that entries overruling exceptions to the inventory of an estate are final and appealable. *Sheets v. Antes* (1984), 14 Ohio App.3d 278, ***. In fact, the *Sheets* court observed, 'furthermore, several Ohio courts, including the Ohio Supreme Court, have heard appeals from orders sustaining or overruling exceptions to the inventory of an estate without considering, in their opinions, whether the orders were final and appealable.' (Citations omitted.) 14 Ohio App.3d at 280. ***

{¶17} "The inquiry on this issue does not stop here. *** [T]he probate court entries appealed from must also actually approve or settle the inventory or account ruled upon. Rulings on exceptions alone do not affect 'substantial rights' as defined in R.C. 2505.02(A)(1). Future relief is not foreclosed because the exceptions can be reviewed when the probate court actually conducts the statutorily required hearing to settle the inventory or account. ***." *In re Estate of Lilley* (Dec. 20, 1999), 12th Dist. Nos. CA99-07-083, CA99-07-084, CA99-08-087, & CA99-08-088, 1999 Ohio App. LEXIS 6094, at *5-7, following *In re Estate of Allen*, supra. (Internal citations omitted.)

{¶18} The Twelfth District recently revisited this issue and followed its previous decision in *In re Estate of Lilley*, again holding that a ruling on exceptions to an inventory, standing alone, does not constitute a final, appealable order. *In re Estate of Perry*, 12th Dist. No. CA2007-03-061, 2008-Ohio-351, at ¶47. Instead, the probate

court must actually approve the inventory itself. Id. Moreover, the Third Appellate District has also adopted this rule, holding, "[w]hile an entry denying exceptions [to an inventory] does not affect the substantial rights of a party, an order approving an inventory is a final appealable order." *In re Estate of Messenger*, 3d Dist. No 5-08-07, 2008-Ohio-5193, at ¶6, citing *In re Estate of Perry*, 2008-Ohio-351, at ¶47. (Secondary citations omitted.)

{¶19} In this matter, the probate court issued an order denying appellant's exceptions to the inventory. Thereafter, the probate court issued a separate judgment entry approving the inventory. Accordingly, there is a final, appealable order in this matter.

{¶20} A review of the record reveals that a "notice of hearing on inventory" was filed on December 22, 2009, indicating that a hearing was scheduled for December 30, 2009. The docket does not contain any additional entries indicating the probate court has approved this inventory.

{¶21} Appellant raises the following assignments of error:

{¶22} "[1.] The trial court erred, as a matter of law, when it ruled that a document issued out of compliance with Ohio Rule of Civil Procedure 53 was nevertheless a Magistrate's Order.

{¶23} "[2.] The trial court erred in finding that a Magistrate's Order may be used to dispose of a claim or defense of a party."

{¶24} Due to the similar nature of appellant's assigned errors, we will address them in a consolidated fashion.

{¶25} Generally, this court reviews a trial court's decision on exceptions to an inventory to determine if the trial court abused its discretion. *In re Estate of Scott*, 164 Ohio App.3d 464, 2005-Ohio-5917, at ¶2, citing *In re Platt*, 148 Ohio App.3d 132, 2002-Ohio-3382, at ¶13. However, if the issue for our review "clearly presents a question of law *** we review the probate court's decision de novo." *In re Estate of Shelton*, 154 Ohio App.3d 188, 2003-Ohio-4593, at ¶8. (Citation omitted.) See, also, *In re Tracey*, 11th Dist. No. 2006-T-0108, 2007-Ohio-2310, at ¶15. In this case, the central issue is the legal effect and impact of the dismissal of the legal separation proceeding by the domestic relations court.

{¶26} Appellant argues the probate court erred in classifying the document signed by the magistrate as a "magistrate's order." "A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys." Civ.R. 53(D)(2)(a)(ii). See, also, *Crawford v. Hayes*, 2d Dist. No. 23209, 2010-Ohio-952, at ¶25.

{¶27} In this matter, the only requirements that are disputed are whether the document was identified as a magistrate's order and whether it was served on the parties.

{¶28} Appellant argues the document was not served by the clerk. During her testimony, Magistrate Marik stated that she personally provided a copy of the hand-written magistrate's order to the respective attorneys that morning. However, she did not state that copies of the second document, captioned "judgment entry," were similarly

provided to the attorneys. There was no other evidence presented that this document was properly served on the parties.

{¶29} The next inquiry is whether the magistrate's order was identified as a magistrate's order in the caption. In this matter, the document in question was clearly labeled as a "judgment entry."

{¶30} In light of the procedural deficiencies contained in this document, the trial court erred by classifying it as a magistrate's order. However, for the following reasons, this error is not determinative of this action, since the domestic relations matter was abated in its entirety by the domestic relations court.

{¶31} The probate court found that appellant failed to timely file a motion to set aside the "magistrate's order" within ten days pursuant to Civ.R. 53(D)(2)(b). In this matter, there was a legitimate issue of whether the document in question was a magistrate's order. The probate court found that "Attorney Dull treated the order as a Magistrate's Order." However, Attorney Dull filed a motion to strike the "judgment entry." This was a proper vehicle to challenge the procedural deficiencies in the document.

{¶32} Moreover, had the domestic relations court reached the merits of appellant's motion to strike, that court could have construed the document as a magistrate's decision instead of a magistrate's order. See, e.g., *Acclaim Sys., Inc. v. Lohutko*, 2d Dist. No. 22569, 2009-Ohio-1405, at ¶5. In this scenario, appellant would have had 14 days to object to the document instead of ten, and the objections would have been timely filed. See Civ.R. 53(D)(3)(b)(i). Accordingly, for this reason, as well

as the reasons set forth below, the timeliness of the motion to strike is not determinative of this matter.

{¶33} The probate court permitted the document signed by the domestic relations magistrate to stand independently, without any approval of the domestic relations court. Civ.R. 53(D)(2)(a)(i) provides:

{¶34} "Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and *if not dispositive of a claim or defense of a party*." (Emphasis added.)

{¶35} If the probate court's decision is permitted to stand, it would permit the "magistrate's order" to terminate the claims of appellant. Specifically, appellant claimed that the money in question, or at least a portion of it, was separate property. Appellant objected to the magistrate's finding by challenging the "judgment entry" by means of a motion to strike the document. However, the domestic relations court did not rule on the motion. In addition, we note the domestic relations court never approved the magistrate's order. In its brief, appellee asserts that the domestic relations magistrate testified that magistrate's orders "do not need to be approved by the judge." However, pursuant to Civ.R. 53(D)(2)(a)(i), such orders do require trial court approval if they dispose of a party's claims. See, also, *Crane v. Teague*, 2d Dist. No. 20684, 2005-Ohio-5782, at ¶32 & 39.

{¶36} Again, the specific classification of the document in question is not determinative of this appeal, since, upon the death of David Persing, the domestic relations court dismissed the action, thus voiding the document signed by the magistrate.

{¶37} Ohio's abatement statute, R.C. 2311.21, provides:

{¶38} "Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party."

{¶39} Even though domestic relations actions are not mentioned by the abatement statute, the Supreme Court of Ohio has held that "'it stands to reason that where one or both parties to a divorce action die before a final decree of divorce the action abates and there can be no revival (because) circumstances have accomplished the primary objective sought.'" *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 99, quoting *Porter v. Lerch* (1934), 129 Ohio St. 47, 56. However, if one of the parties dies subsequent to a decree concerning property rights, but before the decree is actually journalized, the action does not necessarily abate. Id.

{¶40} In *Miller v. Trapp* (1984), 20 Ohio App.3d 191, 192, the Second Appellate District interpreted the *Porter* decision and held that in divorce actions that also concern the division of property, a party's death does not mandate that the matter is abated; instead, in those circumstances, the domestic relations court is vested with the discretion to either dismiss the action or enter a nunc pro tunc judgment entry regarding the division of property. In *Miller*, all of the facts were adjudicated prior to the death of the wife. Id. at 193. Despite this fact, the Second District held that the trial court did not abuse its discretion in dismissing the action in its entirety. Id.

{¶41} This court has adopted the Second District's holding in *Miller v. Trapp*. See *Driggers v. Driggers* (1996), 115 Ohio App.3d 229, 232. In *Driggers*, this court

held, “no evidence was heard and no facts were adjudicated prior to Alisa’s death. As a result, the trial court did not abuse its discretion in dismissing the action.” Id. at 233. (Citation omitted.)

{¶42} The Sixth Appellate District has also followed *Miller v. Trapp* and held that the trial court did not abuse its discretion in dismissing an action where a “settlement agreement had been approved by the court, but not yet reduced to a judgment entry.” *Brooks v. Brooks*, 6th Dist. No. L-02-1286, 2003-Ohio-5177, at ¶12 & 15.

{¶43} We note the Twelfth Appellate District has conducted a comprehensive analysis of this issue. *Gregg v. Gregg* (2001), 145 Ohio App.3d 218. In *Gregg v. Gregg*, the court held: “if a party to a divorce dies before trial begins and the court has not decided any of the issues, the court lacks jurisdiction to proceed in the underlying divorce action. [*State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d at 99]. Under those circumstances, abatement is required by law. [*Miller v. Trapp*, 20 Ohio App.3d at 193.]” Id. at 221. However, the *Gregg* Court recognized that when a trial court has already adjudicated the facts concerning a division of property prior to the party’s death, the court has the discretion to either dismiss the action or put on a nunc pro tunc entry. Id.

{¶44} In addition, the Twelfth District held:

{¶45} “The only adjudication that had occurred consisted of the trial court’s interim award of spousal support to Catherine. That order was not a final property division but was *pendent lite*, and the court reserved jurisdiction to reclassify the payments in order to achieve an equitable result in the final property division.” Id. at 222.

{¶46} In this case, it is an issue whether the order concerning the transfer of the $31,205.38 in question was intended as a final division of property in the domestic relations action or if it was an interlocutory order "pendent lite" addressing possession of the funds while the proceeding was pending.

{¶47} Magistrate Marik described the document as a "Magistrate's Order that was a result of the temporary hearing from that filing." She went on to describe the procedure for issuing a magistrate's order as follows: "[a magistrate's order is] an order pendente lite which is reviewed at the next pretrial and carried through until the divorce is granted, so anything prior to the granting of a divorce, legal separation or dissolution can be an order pendente lite." Thus, it appears the order was temporary in nature and was issued to maintain the status quo until the issue of property division came for review in the domestic relations matter. Since the order was "pendent lite," the domestic relations court was required to dismiss the action.

{¶48} Alternatively, even if it could be argued that the magistrate's order was somehow a final determination with regard to the funds in the joint account, the domestic relations court would have had the discretion, pursuant to *Miller v. Trapp*, to either abate the action or enter a nunc pro tunc entry. The domestic relations court dismissed the action. That decision was not appealed to determine whether that court abused its discretion in dismissing the action. Accordingly, as far as the probate court (and this court) is concerned, the domestic relations action is dismissed.

{¶49} We recognize that there is a potential for appellant to benefit from her actions in unilaterally removing the funds from the joint account. However, this factor

cannot be considered in an analysis of whether the domestic relations action was abated. As stated by the Twelfth District:

{¶50} "We understand that application of this rule renders a harsh result in this case because Catherine, who allegedly attempted to murder John, may now inherit property as his wife. But the law is clear: abatement of the action for divorce and property division was required as a matter of law because no adjudication had taken place." *Gregg v. Gregg*, 145 Ohio App.3d at 222.

{¶51} In the case sub judice, the entire domestic relations action, including the temporary order entered by the magistrate, was dismissed by the domestic relations court. Thus, the probate court erred by overruling appellant's exceptions to the inventory and approving the inventory with the inclusion of the $31,205.38 award from the domestic relations court magistrate.

{¶52} Appellants' assignments of error have merit to the extent indicated.

{¶53} The judgment of the Probate Division of the Trumbull County Court of Common Pleas is reversed. This matter is remanded to the probate court for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.