

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE GUARDIANSHIP OF BOLOG

: JUDGES:
:
: Hon. William B. Hoffman, P.J.
: Hon. Patricia A. Delaney, J.
: Hon. Craig R. Baldwin, J.
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: Case No. 2015CA00016
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: OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Probate Division, Case
No. 219089

JUDGMENT: DISMISSED

DATE OF JUDGMENT ENTRY: September 14, 2015

APPEARANCES:

For Plaintiff-Appellant:

JEFFREY R. JAKMIDES
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For Defendant-Appellee:

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Delaney, J.

{¶1} Appellant Frank K. Bolog appeals the February 4, 2014 judgment entry of the Stark County Court of Common Pleas, Probate Division.

FACTS AND PROCEDURAL HISTORY

{¶2} On October 11, 2013, Patricia A. Schaefer filed an application to be appointed as guardian of her father, Frank Karl Bolog. On October 18, 2013, Frank A. Bolog, younger brother of Patricia A. Schaefer, filed an application to be appointed as guardian of his father. The Stark County Court of Common Pleas, Probate Division, served Frank A. Bolog with two forms of notice of the guardianship proceedings.

{¶3} In a separate probate case, Patricia A. Schaefer and Frank A. Bolog filed applications to be appointed as guardian for their mother, Elizabeth A. Bolog.

{¶4} The probate court held an initial hearing on the two applications for appointment as guardian for Frank K. and Elizabeth A. Bolog on November 26, 2013. The trial court did not appoint Patricia A. Schaefer or Frank A. Bolog as guardian. On November 27, 2013, the probate court appointed Attorney John R. Frank to serve as the interim guardian of the person and estate of Elizabeth A. Bolog through January 31, 2014. The probate court scheduled a subsequent hearing for the guardianships of Frank K. and Elizabeth A. Bolog for December 19, 2013.

{¶5} The parties filed a joint motion to continue the December 19, 2013 hearing. The hearing was rescheduled for February 4, 2014.

{¶6} The hearing went forward before the probate court on February 4, 2014. All parties were present and represented by counsel. The probate court issued its judgment entry on February 4, 2014. Pursuant to R.C. 2111.02, the probate court found

Frank K. Bolog to be incompetent and appointed Attorney John R. Frank as the guardian of the estate. There is no dispute the judgment entry was a final appealable order. There is no record in the docket that the Clerk of Courts served notice of the February 4, 2014 judgment entry on the parties pursuant to Civ.R. 58(B).

{¶7} On August 28, 2014, Frank A. Bolog filed a motion to vacate the February 4, 2014 judgment entry. Frank K. Bolog filed a motion to vacate the February 4, 2014 judgment entry on September 11, 2014.

{¶8} On October 15, 2014, Frank A. Bolog and Frank K. Bolog filed motions to terminate the guardianship.

{¶9} On January 30, 2015, Frank K. Bolog filed a notice of appeal of the February 4, 2014 judgment entry of the probate court.

{¶10} Frank K. Bolog passed away on May 29, 2015. The estate is now subject to a will contest in the Mahoning County Probate Court.

ASSIGNMENTS OF ERROR

{¶11} Frank K. Bolog raises three Assignments of Error:

{¶12} "I. THE TRIAL COURT ERRED IN FINDING, VIA THE JUDGMENT ENTRY NOW ON APPEAL, THE OSTENSIBLE WARD/INSTANT APPELLANT 'INCAPABLE OF TAKING PROPER CARE OF HIS PROPERTY' WITHOUT FIRST HAVING FOUND HIM TO BE 'MENTALLY IMPAIRED' UNDER O.R.C. 2111.01(D).

{¶13} "II. THE TRIAL COURT ERRED IN APPOINTING, VIA THE JUDGMENT ENTRY NOW ON APPEAL, A GUARDIAN OF THE OSTENSIBLE WARD'S/INSTANT APPELLANT'S ESTATE WITHOUT SAID OSTENSIBLE GUARDIAN HAVING EVER

FILED A PROBATE FORM 17.0 APPLICATION FOR APPOINTMENT OF GUARDIAN OF ALLEGED INCOMPETENT AS REQUIRED UNDER O.R.C. 2111.03.

{¶14} "III. THE TRIAL COURT ERRED BY DENYING THE OSTENSIBLE WARD'S/INSTANT APPELLANT'S CONSTITUTIONAL DUE PROCESS RIGHTS."

ANALYSIS

{¶15} Before we reach the merits of the appeal, we must first determine whether we have jurisdiction to consider the appeal. The judgment entry being appealed was filed on February 4, 2014. Frank K. Bolog filed his notice of appeal of that judgment entry on January 30, 2015. The notice of appeal was filed 360 days after the judgment entry.

{¶16} Pursuant to App.R. 4(A)(1), "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry."

{¶17} Frank K. Bolog argues his appeal was timely filed based on the Ohio Supreme Court's holding in *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806. On January 29, 2015, the Court held, "[t]he 30-day time period to file a notice of appeal begins upon service of notice of the judgment and notation of service on the docket by the clerk of courts regardless of actual knowledge of the judgment by the parties." In this case, the trial court did not instruct the Clerk of Courts to serve notice of the February 4, 2014 judgment or make notation of service on the docket pursuant to Civ.R. 58(B).

{¶18} The Court's decision overruled *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 619 N.E.2d 412 (1993). In *Celeste*, the Court held the Governor failed to file a timely appeal of a writ of mandamus because:

The record in this case shows that the court's issuance of the peremptory writ of mandamus was journalized on January 10, 1991. The docket lacks an entry indicating that the court clerk served notice on the parties, nor does the record reveal any evidence of service. Such an apparent defect does not toll the running of the time for appeal, however, unless no service is effected within three days. App.R. 4(A); Civ.R. 58(B). This is not the case here. Civ.R. 5(B) provides that service may be made “by delivering a copy to the person to be served * * *.” Appellant's attorney served the Governor's attorney, Assistant Attorney General Patrick A. Devine, with a copy of the peremptory writ on the day it was issued. Service was thus perfected in a manner consistent with Civ.R. 5(B).

We conclude that: (1) the first peremptory writ was issued and journalized on January 10, 1991; (2) the Governor was served with the writ on the same day; (3) the writ was a final appealable order; (4) the time for appeal was never tolled; and (5) the Governor failed to appeal the writ within thirty days of its entry upon the court's journal. The Governor is thus bound by the writ.

{¶19} Attorney Frank states that prior to the Ohio Supreme Court's decision in *Gator Milford*, Frank K. Bolog should have filed his appeal of the judgment entry by March 6, 2014. Because Frank K. Bolog did not appeal the probate court's decision to

appoint him as guardian of the estate, Attorney Frank conducted his duties as guardian for almost a year before the appeal was filed. In the alternative, Attorney Frank contends this Court should not retrospectively apply *Gator Milford* to the present case. In support of his argument, he refers this Court to *DiCenzo v. A–Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132. The *DiCenzo* court held at paragraph two of the syllabus:

An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result. (*Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, adopted and applied.)

{¶20} Under the procedural history of the present case, we find the appeal of the February 4, 2014 judgment entry to be untimely filed. We find the delay in filing the appeal is akin to invited error. Under the invited error doctrine, a party is not entitled to take advantage of an error that he himself invited. See *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002–Ohio–4849, 775 N.E.2d 517, ¶ 27. There is no dispute that Frank K. Bolog was in receipt of the judgment entry and the judgment entry was a final appealable order. Frank A. Bolog and Frank K. Bolog filed motions to vacate the appointment of the guardian on August 28, 2014 and September 11, 2014, respectively. Frank A. Bolog and Frank K. Bolog filed motions to terminate the guardianship on

October 15, 2014. It is well-settled that a motion to vacate cannot be used as a substitute for a timely appeal.

{¶21} This decision does not create an exception to the requirements of Civ.R. 58(B) or to the holding in *Gator Milford*. Our decision has limited application to the facts and procedural history of this case, which necessitates the determination that the appeal was untimely filed.

CONCLUSION

{¶22} The appeal of the February 4, 2014 judgment entry issued by the Stark County Court of Common Pleas, Probate Division is dismissed.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.