

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

Robert C. Egger, Guardian of the  
Estate of Edward I. Soltesz

Appellee

Court of Appeals No. E-11-047

Trial Court Nos. 07-2-028  
07-2-028 A

v.

Edward I. Soltesz, et al.

Defendants

**DECISION AND JUDGMENT**

[E. Dean Soltesz—Appellant]

Decided: July 13, 2012

\* \* \* \* \*

John F. Kirwan, for appellee.

E. Dean Soltesz, pro se.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from an April 21, 2011 judgment of the Erie County Court of Common Pleas, Probate Division, which denied appellant's untimely jury demand. For the reasons set forth below this court affirms the judgment of the probate court.

{¶ 2} Appellant sets forth the following assignments of error:

1. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND MY DAD, AND ABUSED ITS DISCRETION BY OVERIDING APPELLANT’S JURY DEMAND UNDER THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION AS WELL AS OHIO CONSTITUTION, ARTICLE 1, SECTION 1.05, TO DECIDE THE ISSUE OF WHETHER THE LAND SALE CASE, ROBERT C. EGGER, GUARDIAN OF THE ESTATE OF EDWARD SOLTESZ V. EDWARD I. SOLTESZ, ET AL., MAY BE *MAINTAINED* AGAINST MY DAD, WHO IS ALSO THE WARD IN THAT CASE, AFTER THIS COURT HAS *DENIED* THE APPOINTMENT OF A GUARDIAN *AD LITEM* TO REPRESENT MY DAD IN THAT PARTICULAR CASE IN AN ESTATE VALUED AT OVER EIGHTY-THOUSAND DOLLARS.

2. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND MY DAD, AND ABUSED ITS DISCRETION BY EITHER:

A) FAILING TO KEEP AND MAINTAIN THE RECORD OF A HEARING HELD IN THE GUARDIANSHIP CASE, WHERE APPELLANT AS AN “INTERESTED PARTY” REQUESTED SUCH RECORD TO BE MADE BY THE PROBATE COURT IN

ACCORDANCE WITH R.C. 2111.02(C)(4) PURSUANT TO HIS FILED  
MOTION

OR

B) FAILING TO “KEEP AND MAINTAIN” THE RECORD OF  
SUCH HEARING IN ACCORDANCE WITH R.C. 2101.121, AND  
MAKE SUCH RECORD “READILY AVAILABLE TO THE PUBLIC,”  
“NECESSARY FOR AN EXAMINATION OF THE RECORD.”

WHEN SUCH RECORD WOULD BENEFIT A REVIEWING  
COURT ON DISPOSING THE CASES BELOW WITHOUT ANY  
UNNECESSARY PREJUDICE TO ANY PARTIES INVOLVED.

{¶ 3} On February 20, 2008, appellee was appointed as guardian of the estate of Edward I. Soltesz (“Soltesz”), an incompetent person. On May 12, 2009, appellee filed a complaint for a land sale of property on behalf of the ward of the estate, pursuant to R.C. 2127.13. The complaint named all interested parties required by statute, including Soltesz. The basis for the complaint was that Soltesz had become a resident of the Ohio Veteran’s Home and was no longer living at his former residence. The cost associated with maintenance of Soltesz’s former residence would have been a financial drain on his monthly income.

{¶ 4} Appellant, E. Dean Soltesz, son of Soltesz, filed an answer to appellee’s complaint and admitted paragraphs 20-25 of the complaint. No jury demand was made in the answer. No Civ.R. 38 jury demand was made by appellant at any time prior to trial.

Notably, no parties to this case, either appellant or appellee, ever made a written demand for a jury trial prior to trial as required by Civ.R. 38. In addition, appellant never requested leave of court, at any time, to submit an untimely demand for a trial by jury.

{¶ 5} On April 21, 2011, the date of trial, appellant made an oral demand for a jury trial. This was the first time appellant notified the court of his desire for a jury trial. Subsequently, appellant filed an improper, untimely written demand for a trial by jury on August 16, 2011. This post hoc written request was several months after the actual trial had taken place.

{¶ 6} The clerk of Erie County Probate Court was unable to provide an audio recording of a hearing that was held on January 28, 2008, in the guardianship case. Significantly, this hearing was conducted before appellee was appointed the guardian of Soltesz and over a year before the complaint was filed for the sale of his residence. On October 29, 2009, during a hearing on this case Erie County Probate Court, Judge McGookey acknowledged on the record that Soltesz had previously stated to the judge on the record at the January 28, 2008 hearing that he did not want to become a financial burden on any of his children.

{¶ 7} Appellant also claims that the probate court erred to his prejudice and abused its discretion by failing to maintain a recording of the hearing of January 28, 2008. However, this assignment of error has already been submitted. It is pending as an assignment of error in appeals case Nos. E-11-003 and E-11-015. This is the state of the record upon which appellant brings his most recent appeal.

{¶ 8} With respect to the first assignment of error, upon examining the record, we find the probate court did not abuse its discretion by denying appellant's demand for jury trial. Ohio Civ.R. 38(B) provides that:

Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party.

{¶ 9} Ohio Civ.R. 38(D) further states:

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

{¶ 10} At no time after the filing of this matter and prior to the trial did appellant file a written demand for a trial by jury. Thus, we find that appellant waived his right to a jury trial pursuant to Civ.R. 38. We find appellant's first assignment of error not well-taken.

{¶ 11} As stated above, appellant's second assignment of error has already been presented to this court in a previously filed case. It is pending before this court in the separate filing. *See* case Nos. E-11-003 and E-11-015. Thus, appellant's second assignment of error is not properly before this court in the instant case as the same legal

contention and assignment of error is already pending. As such, it will not be addressed in this matter.

{¶ 12} Although we have elected to address this matter on the merits, we would further note that a suggestion of death was filed in this matter during its pendency, on December 23, 2011. Civ.R. 25(A)(1) establishes that under circumstances where a party dies and a claim is not extinguished, such as this case, appellant should have moved the court within 90 days of the filing in order to substitute the proper parties based upon the death of Soltesz terminating the underlying guardianship. Appellant failed to do so, which could have subjected this matter to dismissal on grounds other than on the merits. *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 556 N.E.2d 484 (1990). Regardless, assuming arguendo that this procedural basis of dismissal was not present, we nevertheless are not persuaded by this case on its merits.

{¶ 13} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Probate Division, is hereby affirmed. 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, 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:  
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