

[Cite as *In re Guardianship of Brady*, 2004-Ohio-5972.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83881

IN RE: GUARDIANSHIP OF : JOURNAL ENTRY
NORA T. BRADY :
: AND

[Catherine M. Brady, :
Appellant] : OPINION
:

DATE OF ANNOUNCEMENT
OF DECISION: November 10, 2004

CHARACTER OF PROCEEDING: Civil Appeal from
Common Pleas Court, Probate Division,
Case No. 2003 ADV 82174.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

For Appellant: CATHERINE M. BRADY, pro se
3699 Rocky River Drive
Cleveland, OH 44111

Appellee: WILLIAM BENZING, pro se
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5638 Denfield Place
Adamstown, MD 21710

For Appellee: CHASE MANHATTAN BANK
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Hicksville, New York 11801

Appellee:	CITIBANK SOUTH DAKOTA, N.A. c/o Legal Department 701 East 60 th Street, North P.O. Box 6034 Sioux Falls, SD 57117
Appellee: [FDIC]	STEPHEN J. PRUSS, ESQ. 1910 Pacific Avenue, Suite 300 Dallas, TX 75201
Appellee:	HOMEcomings FINANCIAL NETWORK, INC. c/o Legal Department 2711 North Haskell Drive, Suite 1000 Dallas, TX 75204
Appellee:	HOMEcomings FINANCIAL NETWORK, INC. c/o Legal Department P.O. Box 890040 Dallas, TX 75389
Appellee:	PROVIDIAN FINANCIAL CORP. Attn: Resolution Service Department P.O. Box 9016 Pleasanton, CA 94566-9016
Appellee:	PROVIDIAN NATIONAL BANK c/o Legal Department 295 Main Street Tilton, NH 03276
Appellee:	USAA FEDERAL SAVINGS BANK c/o Legal Department 10750 McDermott Freeway San Antonio, TX 78288-0544
Appellee:	USE CREDIT UNION c/o Legal Department, Carl Sessions 7051 Alvarado Rd., Suite 200 La Mesa, CA 91941

SEAN C. GALLAGHER, J.:

{¶ 1} Catherine M. Brady (“Catherine”), the daughter of Nora T. Brady and appellant herein, appeals the judgment of the Cuyahoga County Court of Common Pleas, Probate Division, that dismissed her complaint for concealed or embezzled assets under R.C. 2109.50. For the reasons that follow, we affirm.

{¶ 2} In October 2003, Catherine instituted the within action against her sister and brother-in-law, Roseann Brady Benzing and William Benzing, seeking to recover assets in excess of \$100,000 that Catherine alleges are in their possession or that they “conveyed away.” Catherine also named as defendants several creditors of the Benzings as “holders in possession” of most of these funds.

{¶ 3} In November 2003, the probate court sua sponte dismissed Catherine’s complaint, concluding it had no jurisdiction to issue any citation under R.C. 2109.50. It further found that Catherine “is not an interested party with legal standing to bring this action” because the probate court appointed attorney John F. McCaffrey as guardian of Nora’s estate in January 2002 and that McCaffrey is pursuing an action in the common pleas court for the recovery of these funds.¹

¹ Catherine previously acted as attorney-in-fact for her mother under a durable power of attorney executed by Nora. In that capacity, she filed a complaint in the common pleas court for conversion against these same defendants, captioned *Brady v. Benzing* and assigned case number CV-462917. McCaffrey revoked the power of attorney and was substituted for Catherine as a party. McCaffrey had been appointed guardian of the estate after the probate court declared Nora incompetent. See *Brady v. Benzing*, Cuyahoga App. No. 81894, 2203-Ohio-3354; see, also, *Brady v. Hickman & Lowder, Co., LPA*, Cuyahoga App. No. 82461, 2003-Ohio-5649.

{¶ 4} Catherine has appealed the trial court’s decision, raising three assignments of error, all of which challenge the trial court’s dismissal of her complaint. As an initial matter, we shall review the trial court’s determination that Catherine is not an “interested party” under R.C. 2109.50 and is without legal standing to bring this action.

{¶ 5} R.C. 2109.50 provides in relevant part:

{¶ 6} “Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate * * *, by a person interested in such trust estate * * * against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation * * * compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint.”

{¶ 7} A proceeding that is instituted under R.C. 2109.50 is a special statutory proceeding for the discovery of concealed or embezzled assets of an estate. *Rinehart v. Bank One, Columbus, NA* (1998), 125 Ohio App.3d 719, 732. The proceeding is of a summary and inquisitorial character that is quasi-criminal in nature. *Id.* The purpose of the proceeding is “to facilitate the administration of estates by providing an expeditious means for bringing into such estates those assets that rightfully belong to the estate.” *Id.* at 732. Moreover, the purpose of the statute is “not to furnish a substitute for a civil action to recover a judgment for money owing to an administrator, but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for purposes of administration.” *Id.* citing *Goodrich v. Anderson* (1940), 136 Ohio St. 509 (construing predecessor statute). Furthermore, despite the quasi-criminal nature of the proceedings, the Ohio Rules of Civil Procedure are applicable to proceedings under R.C. 2109.50. *Id.*

{¶ 8} In this action, Catherine filed the complaint with regard to the guardianship of Nora T. Brady “by and through Catherine M. Brady, interested person in the guardianship.” However, Catherine does not raise any real interest in the subject matter of the action. The complaint alleges that the Benzings stole \$100,000 from the guardianship of Nora T. Brady and that the various creditors are “holders in possession” of the stolen money. Since Catherine is not the legal guardian for Nora and has no direct interest in the money, she has no legal right to maintain this action. See *In re Estate of Wilson* (Jan. 12, 1995), Cuyahoga App. No. 67566.

{¶ 9} Further, an application of the Civil Rules to this special statutory proceeding requires a finding that Catherine has no standing to maintain this action. Civ.R.17 specifically deals with representation of incompetent persons and provides:

{¶ 10} “Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.”

{¶ 11} Under this rule, Nora’s guardian is the legal representative who may bring an action on behalf of Nora’s interest. In the case of *In re Estate of Wilson*, supra, we addressed a similar issue with respect to a claim brought under R.C. 2109.50 by a grandmother on behalf of her minor granddaughter. In that case we held as follows:

{¶ 12} “Here, a review of appellant’s complaint for concealment of assets as well as her motion for accounting and restitution of social security death benefit[s] demonstrates that appellant was attempting to bring an action on behalf of her granddaughter, Charlotte Wilson. It is undisputed that a legal guardian has the right

to initiate a complaint on behalf of a minor pursuant to R.C. 2109.50 respecting the concealment of assets of the estate for which the minor has a legal right. *Kelly v. Smith* (1964), 7 Ohio App.2d 142, 219 N.E.2d 231. However, appellant is not and has never been Charlotte Wilson’s legal guardian. In fact, the probate court, when faced with appellant’s application to become guardian of Charlotte Wilson, instead chose Nora O’Banner as the guardian of Charlotte Wilson.”

{¶ 13} Id.

{¶ 14} Although this case involves an incompetent person instead of a minor, the same principles apply. It is the legal guardian who has the right to initiate a complaint under R.C. 2109.50 on behalf of an incompetent person or their estate, in order to recover assets belonging to the estate. As a result, Catherine does not have standing to maintain this action. Her assigned errors are moot. App.R. 12(A)(1)(c).

{¶ 15} We note that in her brief and at oral argument, Catherine challenged the appointment of Edward Brady as guardian of the person of Nora Brady. Specifically, Catherine claims the Standard Probate Form 15.1, waiver of notice and consent, obtained for the appointment did not comport with the requirements of Civ.R. 73(H), Sup.R. 51, and Sup.R. 52.² Catherine also states that she had no notice of the guardianship proceeding. We are without jurisdiction to review these

² Civ.R. 73(H) provides in part: “Forms used in proceedings in the probate division of the courts of common pleas shall be those prescribed in the rule applicable to standard probate forms in the Rules of Superintendence. Forms not prescribed in such rule may be used as permitted in that rule.”

Sup.R. 51 prescribes the format, content and use of standard probate forms, including forms 15.1, waiver of notice and consent, and 17.1, statement of expert evaluation.

Sup.R. 52 provides specifications for printing probate forms.

issues, since they arise from a separate and distinct action. Moreover, our review is limited to a review of the judgment designated in the notice of appeal. *Brady v. Benzing*, Cuyahoga App. No. 81894, 2003-Ohio-3354. This matter relates to the dismissal of Catherine’s complaint for concealed or embezzled assets under R.C. 2109.50, and our review is limited thereto. For the same reasons, we will not consider Catherine’s challenge to the purported settlement reached in CV-462917.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court, Probate Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., AND

DIANE KARPINSKI, J., CONCUR.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court’s decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court’s decision. The time

period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).