

[Cite as *In re Estate of Scanlon*, 2011-Ohio-1097.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95264

IN RE: ESTATE OF GERTRUDE I. SCANLON

[APPEAL BY PATRICK DANIEL SCANLON]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Probate Court Division
Cuyahoga County Common Pleas Court
Case No. 07 EST 0131115

BEFORE: Blackmon, J., Kilbane, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 10, 2011
APPELLANT

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ATTORNEYS FOR APPELLEES

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Patrick Daniel Scanlon (“Patrick”) appeals pro se the probate court’s granting judgment in favor of appellees Patti C. Scanlon (“Patti”), Brian T. Scanlon (“Brian”), and Hugh A. Carlin.¹ He assigns eight errors for our review.²

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court’s decision. The apposite facts follow.

Facts

¹Because several of the parties have the last name Scanlon, we will refer to those parties by their first names to prevent confusion.

²See appendix.

{¶ 3} The decedent, Gertrude Scanlon (“Gertrude”), was the surviving spouse of Thomas Scanlon (“Thomas”), who died on February 19, 2005.³ Gertrude and Thomas were married for over 56 years and had no children. Patrick is Thomas’s nephew (son of Michael T. Scanlon who died Sept. 2, 2003). Following Thomas’s death, Gertrude was the sole trustee and beneficiary of a family trust created by Thomas, The Thomas P. Family Trust (“trust”). Upon her death, the remainder of the trust was to revert to the remainder beneficiaries listed in the trust document, with Cecile O’Donnell as the trustee.

{¶ 4} After Gertrude passed away on September 25, 2007, Cecile, as the successor trustee, discovered that Gertrude had depleted the assets from the trust. Gertrude’s will was admitted to probate court on November 14, 2007. Pursuant to her will, Gertrude’s entire estate was given to Patti C. and Brian Scanlon.

{¶ 5} On May 15, 2008, Cecile O’Donnell and her brother John J. Scanlon, the surviving brother and sister of Thomas, filed suit against Patti C. Scanlon in her position as executrix of Gertrude’s estate and the contingent remainder beneficiaries of the trust, including Patrick. Cecile and John alleged that Gertrude had breached her fiduciary duties as trustee by depleting the funds. They demanded an accounting of all trust income, expenses, distributions, and other transactions during the time Gertrude was trustee and that damages be paid from Gertrude’s estate.

³Gertrude did have a son from a prior marriage, Richard Sydbalski.

{¶ 6} On January 23, 2009, Patrick⁴ filed a cross-claim against Patti in her capacity as executrix of Gertrude's estate, alleging the same claims brought by his uncle and aunt, that is that Gertrude breached her fiduciary duty as trustee. He requested his share of the trust fund from Gertrude's estate (20% of his deceased father's share, plus 1% he would receive per stirpes).

{¶ 7} Patrick proceeded to file, pro se, a multitude of motions in the general division of the court of common pleas, including a complaint for concealment of assets under R.C. 2109.50. Pursuant to this complaint he alleged that Patti, Brian Scanlon and the estate's attorney, Hugh Carlin, engaged in concealing and embezzling the trust funds. He requested that Patti, Brian, and attorney Carlin be compelled to produce records of all Gertrude's bank accounts, written records of the trust, power of attorney for Gertrude, and a full accounting regarding Patti's sale of Gertrude's condominium. On February 8, 2010, the trial court, pursuant to Patti and John's motion to strike, struck Patrick's motions and pleadings filed beyond the court's set deadline without leave of court. At the time of this appeal, his cross-claim is still active in the court of common pleas.

{¶ 8} On April 5, 2010, Patrick filed the same pleadings and motions in the probate court as he had done in the general division, common pleas court, along with a motion contesting Gertrude's will. On May 3 and 4, 2010, Patti and John filed motions to dismiss Patrick's motions and complaint. On May 12, 2010, the probate court

⁴Patrick's brother, Michael, also joined in the cross-claim; however, he is not appealing the judgment of the probate court.

concluded that Patrick lacked standing to contest Gertrude's will because he was not a necessary party pursuant to R.C. 2107.72. He was not a blood relative, thus, he would not inherit anything from Gertrude by intestate succession. The court also found that pursuant to R.C. 2107.76, Patrick's action contesting the validity of the will, filed two years after Gertrude's will was admitted to probate, was filed too late.

{¶ 9} As for Patrick's other claims regarding the concealing of assets of the trust, the probate court concluded that Patrick commenced a civil action in the general division, court of common pleas on identical issues; thus, the probate court lacked jurisdiction to consider the same issues.

{¶ 10} We initially note that although Patrick assigns eight errors, he fails to argue them in an intelligible manner and fails to number his arguments to correspond with the relevant assigned error. Thus, we will combine the assigned errors when appropriate.

Standing

{¶ 11} In his first and second assigned errors, Patrick contends the trial court erred by concluding he did not have standing to contest Gertrude's will.

{¶ 12} Lack of standing challenges the legal capacity of a party to bring an action or to continue to prosecute an action. *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178, 298 N.E.2d 515. In an action contesting the validity of a will, R.C. 2107.71 requires that the party challenging the will be "a person interested" in the will. An interested party has been defined as: "any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution

of the testator's estate as would be impaired or defeated by the probate of the will, or be benefitted by setting aside the will * * *.” *York v. Nunley* (1992), 80 Ohio App.3d 697, 610 N.E.2d 576, quoting *Bloor v. Platt* (1908), 78 Ohio St. 46, 49-50, 84 N.E. 604. See, also, *Mayfield v. Herderick* (1986), 33 Ohio App.3d 44, 46, 514 N.E.2d 441.

{¶ 13} Here, it is undisputed that Patrick is a nephew of Gertrude's by marriage and not by blood; therefore, he would not be entitled to inherit by intestate succession if the will is found to be invalid. Although he contends the trust funds in which he has an interest were wrongly taken by Gertrude and ultimately included as part of her estate, this remains to be proven. Thus, Patrick does not have an “immediate” interest in Gertrude's will and, therefore, lacks standing. Moreover, if Patrick is successful in the general division, court of common pleas, the damages would be paid from the estate.

{¶ 14} R.C. 2107.76 requires a contest to a will be filed within three months of the will being admitted to probate. Patrick filed his contest to the will over three years after the will was admitted to probate. While Patrick argues he failed to receive notice that Gertrude's will was being admitted to probate, it is undisputed that he knew about the will when his uncle and aunt filed the complaint on May 15, 2008. Yet, Patrick still waited almost two years to file a contest to the will on April 20, 2010. See *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, 174, 512 N.E.2d 971 (court held that although plaintiff was not afforded actual notice of the will being admitted to probate, his attempts to contest the will were still made more than three months after he knew about the decedent's death.) Accordingly, Patrick's first and second assigned errors are overruled.

Probate Court's Jurisdiction

{¶ 15} In his third, fourth, and fifth assigned errors, Patrick argues the probate court erred by concluding it did not have jurisdiction over his complaint brought pursuant to R.C. 2109.50.

{¶ 16} R.C. 2109.50, states in relevant part:

{¶ 17} “Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of 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, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. * * *.”

{¶ 18} The purpose of R.C. 2109.50 is not to furnish a substitute for a civil action to recover judgment for money owing to an administrator or executor, but to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for the purpose of administration. *Goodrich v. Anderson* (1940), 136 Ohio St. 509, 26 N.E.2d 1016; *In re Black* (1945), 145 Ohio St. 405, 62 N.E.2d 90.

{¶ 19} R.C. 2109.50 does not apply to this case because the trust was not part of Gertrude's estate. It was an inter vivos trust. An inter vivos trust is defined as a "trust created during the lifetime of settlor and to become effective in his lifetime as contrasted with a testamentary trust, which takes effect at the death of settlor or testator." Black's Law Dictionary, (6 Ed.1990) 568-69. The Thomas P. Scanlon Trust was created and used during Thomas's lifetime and subsequently available for Gertrude to use during her lifetime after Thomas's death. As the court in *Burns v. Daily* (1996), 114 Ohio App.3d 693, 700-701, 683 N.E.2d 1164, explained:

{¶ 20} **"In order for an asset to belong to a probate estate, title to the asset must rest in the decedent upon her death. See, e.g., *Black*, supra; *Leiby*, supra. If title to personal property resides in the decedent upon her death, title to that property passes over to the executor or administrator of the estate, *Winters Natl. Bank & Trust Co. v. Riffe* (1965), 2 Ohio St.2d 72, 77, 31 O.O.2d 56, 58, 206 N.E.2d 212, 216, and the property can be properly considered 'probate property' subject to a discovery proceeding under R.C. 2109.50. See, e.g., *Fecteau v. Cleveland Trust Co.* (1960), 171 Ohio St. 121, 12 O.O.2d 139, 167 N.E.2d 890; *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 641 N.E.2d 739; *Lauerman v. Destocki* (1993), 87 Ohio App.3d 657, 622 N.E.2d 1122. If, on the other hand, title does not reside in the decedent upon her death, but passed to a third party by inter vivos transaction or gift, then such property may not be included as an estate asset, and may not be retrieved by**

a summary proceeding in the probate court. See, e.g., *In re Estate of Sexton* (1955), 163 Ohio St. 124, 56 O.O. 178, 126 N.E.2d 129; *Goodrich v. Anderson* (1940), 136 Ohio St. 509, 17 O.O. 152, 26 N.E.2d 1016; *McMahan v. Jones* (App.1934), 17 Ohio Law Abs. 488; *Black*, *supra*; *Leiby*, *supra*.”

{¶ 21} Additionally, the general division, common pleas court has concurrent jurisdiction with the probate court to address inter vivos trusts. R.C. 2101.24(B)(1)(b); *In re Guardianship of Lombardo*, 86 Ohio St.3d 600, 604, 1999-Ohio-132, 716 N.E.2d 189; *State ex rel. Sladoje v. Belskis*, 149 Ohio App.3d 190, 2002-Ohio-4505, 776 N.E.2d 557. Thus, because Patrick first raised his claims regarding the trust in the common pleas court the probate court was correct in concluding it did not have jurisdiction. “The jurisdictional priority rule provides that ‘as between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.’” *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 476 N.E.2d 1060, quoting *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, 364 N.E.2d 33, syllabus. The probate court’s resolution of Patrick’s claims would interfere with the resolution of his claims presented in the general division, common pleas court. Accordingly, Thomas’s third, fourth, and fifth assigned errors are overruled.

Motion for Reconsideration

{¶ 22} In his seventh assigned error, Patrick argues the probate court erred by not considering his motion for reconsideration. A motion for reconsideration of a civil final order is a nullity. *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 381, 423 N.E.2d 1105; *In re Estate of Coman*, 7th Dist. No. 07-MA-181, 2008-Ohio-2266. Therefore, the trial court did not err by failing to rule on the motion for reconsideration. Accordingly, Patrick's seventh assigned error is overruled.

Procedures Pursuant to R.C. 2505.02

{¶ 23} In his eighth assigned error, Patrick argues the probate court failed to follow the proper procedure according to R.C. 2505.02. More specifically, he argues, his rights to a jury trial, due process, legal representation, and redress in court were violated.

{¶ 24} Because we have determined that Patrick lacks standing to contest Gertrude's will and that the general division, common pleas court has jurisdiction over his other claims, this assigned error is moot and need not be addressed. App.R. 12(A)(1)(c). Accordingly, Patrick's eighth assigned error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR

APPENDIX

Assignments of Error

“I. Probate Court erred by dismissing one (1) complaint and seven (7) motions filed. Court gave reason, ‘Lacks Standing to Contest Will Pursuant to ROC 2107-71A. [sic]’ The filings cannot all be answered with this one Ohio Revised Code; does not cover all issues.”

“II. Probate Court erred in applying incorrect interpretations of ORC 2107.73, ORC 2107.66, and ORC 2107.19.”

“III. Probate Court erred in finding ‘that Probate Court Lacks Jurisdiction to Deal with Issues’ in ORC 2101.24.”

“IV. Probate Court erred in finding ‘Patrick Daniel Scanlon commenced a civil action in Cuyahoga County Common Pleas Court CV 08 659632.’”

“V. Probate Court erred regarding rights of beneficiaries of Thomas Trust (vested) and Gertrude will of 10-25-90 to file exceptions to 1st partial account secretly held.”

“VI. Probate Court in not granting Patrick Daniel Scanlon’s Motion in Reply to Defendant/Appellees Motion to Dismiss filed in probate 5-3-10 and 5-4-10. Patrick Daniel Scanlon, Plaintiff/Appellant, filed a timely reply on 5-13-10 in Probate Court. Magistrate Homolak in a rush to judgment did not allow time for a reply and did not consider it.”

“VII. Probate Court erred in not hearing and ruling on Patrick Daniel Scanlon’s Motion for Reconsideration of Judgment Entry of 5-12-10, timely filed on 5-26-10 in Probate Court.”

“VIII. Probate Court erred in not following proper procedure in regard to ORC 2505.02 involves substantial rights.”