

[Cite as *Garden v. Langermeier*, 2017-Ohio-972.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104674

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**ALAN GARDEN, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**GEORGE LANGERMEIER**

DEFENDANT-APPELLEE

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**JUDGMENT:  
DISMISSED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Probate Division  
Case No. 2015 ADV 207367

**BEFORE:** Stewart, J., E.A. Gallagher, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** March 9, 2017

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MELODY J. STEWART, J.:

{¶1} During her lifetime, decedent Betty Garden placed her assets into a revocable trust and named her long-time companion, defendant-appellee George Langermeier to succeed her as trustee upon her death. Two beneficiaries of the trust, plaintiffs-appellants Alan and William Garden (Betty’s sons), demanded an accounting of all trust assets, liabilities, receipts, and disbursements, but Langermeier did not respond to them. The Gardens brought this action alleging that Langermeier breached his fiduciary duties, converted trust assets for his personal use, and intentionally interfered with their expectation of inheritance under the trust.

{¶2} While the complaint was pending, Langermeier filed an application for an order of distribution of the trust assets. The Gardens objected to the application on grounds that Langermeier had breached his statutory and fiduciary duties with respect to the trust. They asked the court to allow the matter to go to trial on their complaint.

{¶3} The court scheduled a trial on the complaint but, on the day of trial, the parties instead agreed to proceed solely on the merits of Langermeier’s application for an order of distribution. After conducting an evidentiary hearing, the court overruled the objections with respect to Langermeier’s conduct in administering the trust. The court ordered that Langermeier be paid a trustee fee, ordered that both parties’ attorney fees be paid from the trust estate, and that Langermeier retain \$10,000 from the trust for completion of all tax returns and payment of taxes. Finally, the court ordered that “after

payment of the above expenses, and upon determination of actual final values of Trust assets, distribution be made to the beneficiaries according to the terms of the Trust and that the successor Trustee file with the Court a final account.” The Gardens appeal.

{¶4} After the parties filed their merit briefs, we ordered them to “to brief the issue of whether the granting of the application to distribute is a final, appealable order, especially in light of the trial court not explicitly resolving the complaint for breach of fiduciary duties and the expectation of filing the final accounting.” The parties complied with that order. After consideration of the respective arguments made by the parties, we believe under the circumstances of this case that the order of distribution is not a final order.

{¶5} The jurisdiction of a court of appeals is constitutionally limited to the review of “final” orders. *See* Section 3(B)(2), Article IV, Ohio Constitution (“Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district \* \* \*.”).

{¶6} R.C. 2505.02(B) defines the types of orders that can be “final.” The order being appealed is one entered by the probate court relating to estate administration. Among those types of final orders are orders that affect a substantial right made in a special proceeding or upon a summary application in an action after judgment. *See* R.C. 2505.02(B)(2). A “special proceeding” is defined as “an action or proceeding that is

specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2).

{¶7} We have characterized probate court matters as “special proceedings” coming under the purview of R.C. 2505.02(B)(2). *Schwartz v. Tedrick*, 2016-Ohio-1218, 61 N.E.3d 797, ¶ 11 (8th Dist.) (removal of trustee); *In re Estate of Janet N. Price*, 8th Dist. Cuyahoga No. 68628, 1995 Ohio App. LEXIS 4727 (Oct. 26, 1995); *In re Putka*, 8th Dist. Cuyahoga No. 77986, 2001 Ohio App. LEXIS 763 (Mar. 1, 2001).

{¶8} We acknowledge a difference of opinion exists among the appellate districts on this point. Most appellate districts take the same position as this court and consider probate court judgments to have derived from special proceedings for purposes of R.C. 2505.02(B)(2). *See, e.g., In re Myers*, 107 Ohio App.3d 489, 669 N.E.2d 53 (1st Dist.1995); *In re Estate of Depugh*, 2d Dist. Miami No. 94 CA 43, 1995 Ohio App. LEXIS 1232 (Mar. 31, 1995); *Palmer v. Wheeler*, 2d Dist. Greene No. 94-CA-18, 1995 Ohio App. LEXIS 1219 (Mar. 31, 1995); *In re Estate of Knauff*, 4th Dist. Adams No. 96CA623, 1997 Ohio App. LEXIS 2467 (May 27, 1997); *In re Estate of Thomas*, 9th Dist. Summit No. 27177, 2014-Ohio-3484, ¶ 6; *In re Estate of Lilley*, 12th Dist. Warren No. CA99-07-083, 1999 Ohio App. LEXIS 6094 (Dec. 20, 1999).

{¶9} The Sixth Appellate District holds to the contrary. In *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006-Ohio-1868, 852 N.E.2d 234, ¶ 11 (6th Dist.), it stated that “[w]e remain of the opinion that probate proceedings are not special proceedings and that

an order ruling on a motion to remove an executor in a probate estate is not a final appealable order pursuant to R.C. 2505.02(B)(2).”

{¶10} The Tenth Appellate District, noting that “no conclusive or binding precedent can be found for either side of the question,” has found that some probate matters are not special proceedings under R.C. 2505.02(B)(2), but that an order removing the executor of an estate is a provisional remedy under R.C. 2505.02(B)(4). *In re Estate of Nardiello*, 10th Dist. Franklin No. 01AP-281, 2001-Ohio-4080.

{¶11} The Ohio Supreme Court has yet to decide this issue, so we adhere to precedent from this appellate district and conclude that an appeal from an order of distribution is issued in a special proceeding.

{¶12} In addition to being issued in a special proceeding, an order falling with R.C. 2505.02(B)(2) must also affect a “substantial right.” A “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect,” R.C. 2505.02(A)(1) — because “an immediate appeal is necessary to protect the right effectively.” *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 7, citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993).

{¶13} The order of distribution does not affect a substantial right in this case because an immediate appeal from the order of distribution does not foreclose the Gardens from seeking appropriate relief on their complaint. In supplemental briefing, both the Gardens and Langermeier acknowledge that the Gardens’ causes of action

against Langermeier remain pending. *See* Jurisdictional Brief of appellant at 6; Appellee’s Supplemental Brief at 4. That fact alone is enough to show that the Gardens can obtain relief without an immediate appeal from the order of distribution.<sup>1</sup>

{¶14} Nevertheless, the Gardens insist that an immediate appeal is necessary because they believe that “[i]n the time between the judgment entry and the filing of the final account all of the assets could be transferred, concealed, or spent by Appellee, which could significantly impair Appellant’s [sic] ability to obtain a remedy for any of [their] claims against Appellee.” Jurisdictional Brief of appellants at 6. Under no scenario

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<sup>1</sup> That the Gardens’ complaint remains pending would ordinarily implicate Civ.R. 54(B), which states that an order is not final unless the court resolves all of the claims as to all of the parties. Civ.R. 54(B) undoubtedly applies to R.C. 2505.02(B)(1) — that section speaks in terms of an order that “affects a substantial right in an action that in effect determines the action and prevents a judgment.” Whether Civ.R. 54(B) applies to R.C. 2505.02(B)(2) is not as clear. In *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989), the Ohio Supreme Court noted compliance with Civ.R. 54(B) in an R.C. 2505.02(B)(2) appeal, without any elaboration as to why the rule would apply. *Gen. Acc. Ins.* has been questioned because R.C. 2505.02(B)(2) does not reference an order that “determines the action.” For this reason, “[w]hen an order affects a substantial right in a special proceeding, it is final under R.C. 2505.02(B)(2) even though that same order would not qualify as a final order under R.C. 2505.02(B)(1).” Painter and Pollis, *Ohio Appellate Practice*, Section 2:13 (2016). *See also Guardianship & Protective Servs. v. Setinsek*, 11th Dist. Trumbull No. 2010-T-0099, 2011-Ohio-6515 (Wright, J., concurring).

We need not decide this question, however. Appellate jurisdiction requires that an order meet both R.C. 2505.02 and Civ.R. 54(B). *Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 21. Our holding that the Gardens have not established that the order granting the motion for distribution affects a substantial right moots a fuller consideration of the issue.

have the Gardens shown that without an immediate appeal they will be foreclosed from additional relief when the court considers the causes of action on the merits.<sup>2</sup>

{¶15} Appeal dismissed.

It is ordered that appellee recover appellants costs herein taxed.

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

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR

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<sup>2</sup> While not dispositive of the finality issue, we note that the Gardens did not ask the court to stay the order of distribution pending appeal.