

IN THE SUPREME COURT OF OHIO

IN RE ESTATE OF VLADA SOFIJA STANCIKAITE ABRAITIS, DECEASED	:	Case No. 2021-0713
	:	
	:	
[Adam Fried, Successor Fiduciary of the Estate of Vlada Sofija Stancikaite Abraitis, Deceased,	:	On Appeal from Cuyahoga
	:	County Court of Appeals,
Appellee,	:	Eighth Appellate District
	:	
v.	:	
	:	
Catherine Brady,	:	Court of Appeals
	:	
Appellant.	:	Case No. 109810

NOTICE OF PENDING MOTION TO CERTIFY A CONFLICT

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Notice of Pending Motion to Certify a Conflict

Appellant Catherine Brady hereby gives notice to the Supreme Court of Ohio of a pending Motion to Certify a Conflict pending before the Eighth District Court of Appeals in Case No. CA -20- 109810 pursuant to S.Ct.Prac.R. 7.07(A)(1). S.Ct.Prac.R. 7.07(A)-Effect of Pending Motion to Certify a Conflict upon a Jurisdictional Appeal.

At the end of briefing by the parties, the Eighth District Court of Appeals ordered the parties to address “special proceedings” in relation to two cases, to wit, *In re Estate of Smith*, 4th Dist. No. 06CA2915, 2007-Ohio-3030 and *In re Estate of Allen*, 11th Dist. Trumbull No. 3890, 1988 Ohio App. LEXIS 2293, 1988 WL 64759 (June 17, 1988). [Eighth District Court of Appeals docket entry dated Feb. 8, 2021, Motion No. 544054]. The issue was whether the sua sponte dismissal of Exceptions to a final and distributive account in the administration of an estate was a final and appealable order under R.C. 5205.02.

Appellant Brady filed a Motion to Certify a Conflict on May 2, 2021. On May 13, 2021, Appellee Fried filed a Brief in Opposition to Motion to Certify a Conflict. On May 19, 2021, Appellant Brady filed her Reply to Brief in Opposition to Motion to Certify a Conflict.

The following questions were raised for certification of a conflict:

- Whether probate proceedings are “special proceedings” as that term is used in R.C. 2505.02; and
- Whether a probate court order is final and appealable as a “provisional remedy” as that term is used in R.C. 2505.02.

A true and correct copy of the Motion to Certify a Conflict and the Reply to Brief in Opposition to the Motion to Certify a Conflict, filed in the appellate court, are attached hereto as Exhibit A and Exhibit B and adopted herein by reference.

Respectfully submitted,

/s/ Catherine M. Brady

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Pending Motion to Certify a Conflict was electronically filed and served on June 7, 2021 through this Court's electronic filing system.

The undersigned further certifies that the Notice of Pending Motion to Certify a Conflict was sent via electronic mail on June 7, 2021 to the following counsel of record:

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**IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO**

IN RE ESTATE OF VLADA SOFIJA
STANCIKAITE ABRAITIS,
DECEASED

Case No. CA 20 109810

[Adam Fried, Successor Fiduciary of
the Estate of Vlada Sofija Stancikaite
Abraitis, Deceased,

On Appeal from Cuyahoga County
Court of Common Pleas, Probate Division
Order of Denial and Dismissal of Exceptions
to Fiduciary's Final & Distributive Account

Appellee,

v.

Catherine Brady,

Case No. 2011 EST 172533

Appellant.

MOTION TO CERTIFY A CONFLICT

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MOTION TO CERTIFY A CONFLICT

Appellant Catherine Brady moves this Honorable Court for an order certifying the record in this case to the Supreme Court of Ohio for review and final determination pursuant to App.R. 15 – Motions and App.R. 25 – Motion to certify a conflict.

The grounds for certification of a conflict are that the Opinion of this court dismissing for lack of a final and appealable order/jurisdiction, entered in this case on April 22, 2021, is in conflict with the judgment pronounced on the same question by the Court of Appeals for the Sixth District sitting in Lucas County, in the case of *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006-Ohio-1868 (6th Dist. Lucas). See Opinion released April 22, 2021. See attached Opinion of *In re Estate of Sneed*, attached hereto and adopted herein by reference.

Contradicting the Eighth District, the Court of Appeals for the Sixth District held that probate court proceedings are not special proceedings under R.C. 2505.02(B)(2). *Id.* at ¶ 11.

The holding in *Sneed* relied on cases from the 7th, 10th, and 11th Appellate Districts and acknowledged that a conflict exists on whether or not probate proceedings are “special proceedings.” The court in *Sneed* focused its analysis on whether the probate court order was final and appealable as a provisional remedy under R.C. 2505.02(B)(4). *Id.* at ¶ 11, ¶18.

The holding in *Sneed* is consistent with the 1998 amendment by the Ohio General Assembly to R.C. 2505.02 that revised subsection 2505.02(A)(2) and included the addition of subsections 2505.02(A)(3) and (B)(4), which incorporated language

regarding “provisional remedies.”

This appeal involves the probate court's sua sponte dismissal and denial of Exceptions to a Final and Distributive Account. (R. 300; R. 313, R. 316). Therefore, the appellate court analysis must be under R.C. 2505.02(A)(3) and (B)(4) based on the foregoing precedent, not R.C. 2505.02(A)(2) and (B)(2). The applicability of the statute subsection of R.C. 2505.02 is based on the underlying action not the nature of the order being appealed. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121, 122, 676 N.E.2d 890, 893 (1997) citing *Polikoff v. Adams*, 67 Ohio St. 3d 100, 616 N.E.2d 213, Syllabus (1993).

This motion is not interposed for the purpose of delay or any other improper purpose, but in the interest of justice.

The grounds for this motion are more fully stated in the memorandum in support which is attached hereto and adopted herein by reference.

Respectfully submitted,

/s/ Catherine M. Brady

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MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY A CONFLICT

The Eighth District Court of Appeals is asked to certify the following questions:

- Whether probate proceedings are “special proceedings” as that term is used in R.C. 2505.02; and
- Whether a probate court order is final and appealable as a “provisional remedy” as that term is used in R.C. 2505.02.

I. Procedural History

The notice of appeal of the sua sponte order denying Exceptions was filed July 7, 2020, which was fifteen days after a pro forma hearing on the Final Account. (R. 299, Accounts hearing set for June 22, 2010; R. 316, JE sua sponte dismissal of Exceptions to Final Account; R. 322, Notice of Appeal). On July 16, 2020 and September 23, 2020, Appellee Fried filed motions to dismiss based on lack of standing. Appellant Brady opposed the motions to dismiss. On December 18, 2020, briefing was completed.

On February 8, 2021, the appellate court ordered supplemental briefing by the parties on the issue of final and appealable order relating to the sua sponte order of the probate court denying and dismissing the Exceptions. (R. 316). The briefing on the issue of final and appealable order was completed on April 24, 2021. Docket.

The appellate court scheduled oral argument for April 21, 2021. On April 14, 2021, the appellate court gave telephonic notice that the oral argument had been canceled. On April 18, 2021, Appellant Brady motioned the court to journalize its verbal notice canceling oral argument. On April 19, 2021, the appellate court granted the motion to journalize its order but did not make an entry on the docket as requested in the motion to journalize the notice of cancellation. Docket.

The appellate court issued its opinion on April 22, 2021 holding that the sua sponte judgment entry denying and dismissing the Exceptions to the Final and Distributive Account of Appellee Fried was not a final order under R.C. 2505.02(B)(2) based upon the cases cited by the Court in the Opinion ¶ 13.

II. The Court of Appeals should order Certification of a Conflict

The court of appeals should order certification because the point of conflict, the application of R.C. 2505.02(A)(2) had an “arguable effect on the judgment of the certifying court” as the application of R.C. 2505.02(A)(2) resulted in dismissal of the appeal for lack of jurisdiction. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004 Ohio 1497, 805 N.E.2d 1116, ¶ 19 (2004). [“A conflict does not exist when “the point upon which the conflict exists had no arguable effect on the judgment of the certifying court.” *citing Pincelli v. Ohio Bridge Corp.*, 5 Ohio St.2d 41, 44, 213 N.E.2d 356 (1966)].

The Ohio Supreme Court in *Pincelli* held:

There is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals, where, as here, the point upon which conflict exists had no arguable effect upon the judgment of the certifying court.

Dismissal for lack of jurisdiction under R.C. 2505.02(A)(2) is in conflict with the holdings of other appellate districts. Specifically, the Court of Appeals for the Sixth District held that probate court proceedings are not special proceedings under R.C. 2505.02(B)(2). *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006 -Ohio-1868, ¶ 11 (6th Dist. Lucas). The *Sneed* court noted the conflict among the appellate districts regarding “special proceedings” was raised but not ruled on by the Ohio Supreme Court. *Id.*

Three cases relied on by this Court involved the inclusive clause of R.C. 2505.02(B)(2) that states, in part: “An order that affects a substantial right made in a special proceeding .” R.C. 2505.02(B)(2); Opinion dated April 21, 2021, ¶ 13 citing *In re Estate of Sickmiller*, 3d Dist. Paulding No. 11-13-01, 2013-Ohio-3788, *In re Estate of Smith*, 4th Dist. Ross No. 06CA2915, 2007-Ohio-3030, ¶ 8; and *In re Estate of Perry*, 12th Dist. Butler No. CA2007-03-061, 2008-Ohio-351, ¶ 45. *Smith* and *Perry* rely on case support issued prior to the 1998 revision to R.C. 2505.02, while the *Sickmiller* court relies on *Perry. Sickmiller* at ¶ 6-7.

The last case relied on in the Opinion dated April 22, 2021, *In re Estate of Allen*, was issued by the 11th District prior to the Ohio General Assembly’s 1998 amendment of R.C. 2505.02. Opinion ¶ 13; *In re Estate of Allen*, 11th Dist. Trumbull No. 3890, 1988 Ohio App. LEXIS 2293 (June 17, 1988). The 11th District has since reversed its position and has determined that probate court proceedings are not “special proceedings” because “the administration of decedents’ estates was recognized at common law and in equity.” *Pulford v. Adams* 122 Ohio App.3d 88, 91, 701 N.E.2d 58 (11th Dist. Trumbull 1997).

Since an actual hearing on an account only occurs when exceptions are filed, the supplementary hearing is necessarily an ancillary proceeding indicating a “provisional remedy.” R.C. 2505.02(A)(3). Other examples of ancillary proceedings involving exceptions are found in the following Revised Code Sections:

- R.C. 2109.33 – Service of additional notice – exceptions to account [relating to Final Accounts]
- R.C. 2115.16 – Hearing on inventory

- R.C. 5731.30 – Filing exceptions to tax commissioner's final determination of taxes with probate court [The probate court failed to have Appellee Fried file an amended Ohio Estate Tax Return following the concealment of assets case, 2015ADV203909, that resulted in the Estate Vlada Sofija Stancikaite Abraitis, who died on December 16, 2008, going from no net assets (R.97, JE dtd July 18, 2014, ODT dismissing Exceptions with prejudice to Ohio Estate Tax Return) to a final account with taxable estate assets transferred from the Estate of Sarunas V. Abraitis, Case No. 2017 EST 222341 (R. 300, Final and Distributive Account)]

An order that grants or denies the provisional remedy, the exceptions, in effect, determines the action with respect to the provisional remedy and prevents a judgment in favor of the appealing party with respect to the provisional remedy. R.C. 2505.02(B)(4)(a).

Under the facts in this case, the peremptory denial of the exceptions, sua sponte, by the probate court occurred before the June 22, 2021 hearing on the final account; an ancillary proceeding that only occurs if exceptions are filed. In other words, the probate court denied the appellant of her constitutional right to due process, which is a substantial right. The peremptory denial of the appealing party's provisional remedy was clearly done to deny the appellant a meaningful or effective remedy by appeal following final judgment as to all proceedings, issues, claims, and parties in the action because the appellant's motion for attorney fees that had not been ruled upon by the probate court would be extinguished by issuance of the final order. R.C. 2505.02(B)(4)(b). Further, in this case, the appealing party would not be afforded a meaningful remedy by filing a subsequent action following final judgment as a result of res judicata.

Since “special proceedings” and “provisional remedies” were fully briefed before this Court, they are not rendered immaterial by the dictum relating to standing set forth in the Opinion. The decision to dismiss for lack of jurisdiction is “the point upon which

conflict exists” which had an “arguable effect” upon the judgment of the certifying court because it dismissed the appeal for lack of jurisdiction based on the absence of a final order.

III. The Opinion addressing standing constitutes mere dictum and does not impact the certification process.

In dictum, the appellate court Opinion discussed that even if the probate court order was final and appealable, Appellant Brady could not prevail as she lacked standing as a creditor owed attorney fees to file the Exceptions to the Final and Distributive Account.

An appellate court does not have jurisdiction over an order that is not final. Judge Mark P. Painter and Douglas R. Dennis, *Ohio Appellate Practice*, Section 2:1, Appealable orders -Introduction, p. 30 (2006 Ed.) fn 1 citing *General Acc. Ins. Co. v. Insurance Co. of North America*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989) [As a general matter, an appellate court has no jurisdiction over an order that is not final.]. *See also In the Matter of the Estate of Geanangel, Dec'd*, 147 Ohio App.3d 131, 134, 2002-Ohio-850, 768 N.E.2d 1235, 1237 (7th Dist. Harrison)[“If an order is not a final appealable order, then *an appellate court has no jurisdiction to review the matter* and the appeal must be dismissed.”(Emphasis added) citing *Davison v. Rini*, 115 Ohio App.3d 688, 692, 686 N.E.2d 278; citing Ohio Constitution, Article IV, Section 3(B)(2) [“Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final order of the courts of record inferior to the court of appeals with the district...”].

Where the jurisdictional issue is not raised by the parties on appeal, the court of

appeals has a duty to raise the issue on its own motion. *In the Matter of Geanangel* at 134 citing *Davison* at 692. *Heinz v. Riffle*, 2003 -Ohio -6358 (2003). Jurisdiction cannot be made to exist by agreement of counsel where a final order does not exist in fact and law. *Lima v. Elliot*, 6 Ohio App.2d 243, 217 N.E.2d 878 (1964).

Here, after briefing was completed and the court of appeals repeatedly asserted that the appeal was ready for the scheduling of the oral argument. The court of appeals ordered the parties involved in the appeal to brief the issue of final and appealable order and then canceled the scheduled oral argument without making an entry on the docket as required by the Ohio Rules of Superintendence. Sup.R. 26.02(C), Courts of appeals – Contents of docket.

Ultimately, the court of appeals held that the sua sponte probate court Judgment denying and dismissing the Exceptions to the Final and Distributive Account of Appellee Fried was not a final and appealable order. Opinion released April 22, 2021. However, the appellate court did not have jurisdiction to review the case and reach any determination on whether Appellant Brady had standing as a creditor of the Estate to take Exceptions to the Final and Distributive Account. *Geanangel* at 134.

Without jurisdiction to review the case, the appellate court was without jurisdiction to address whether Appellant Brady had standing as a creditor who was owed attorney fees by the Estate of Vlada Sofija Stancikaite Abraitis where her professional services benefited the Estate. *Id.*

CONCLUSION

For good cause shown, the Motion to Certify a Conflict should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion to Certify a Conflict was electronically filed and served on May 2, 2021 through this Court's electronic filing system.

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

In re Estate of Sneed,

Court of Appeals No. L-06-1054

Trial Court No. ES96-2586

DECISION AND JUDGMENT ENTRY

Decided: April 12, 2006

* * * * *

James L. Major, for appellant.

Sarah A. McHugh, for appellee.

* * * * *

Per Curiam.

{¶ 1} Appellee, attorney Sarah McHugh, administrator of the estate of Andre Sneed, has filed a motion to dismiss the appeal filed by Jessie J. Fitzgerald Jr., the former administrator of the estate. The order from which Fitzgerald is appealing removed him as administrator and appointed McHugh as the new administrator. In the motion to dismiss, McHugh states that the order removing Fitzgerald as administrator is not appealable until the estate is closed. Fitzgerald has not filed a response to the motion.

{¶ 2} The issue of whether a ruling on a motion to remove a party as the administrator of an estate is final and appealable at the time it is entered has a long and

tortured history in Ohio. See *In re Estate of Gannett* (Nov. 27, 2001), 6th Dist. No. H-01-047.

{¶ 3} All final-appealable-order issues begin with an analysis of R.C. 2505.02, which governs final and appealable orders in Ohio. There are only two categories of orders listed in that statute that could have any applicability to the grant or denial of a motion to remove an executor of an estate: R.C. 2505.02(B)(2) and (4). R.C. 2505.02 states as follows:

{¶ 4} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶ 5} "* * *

{¶ 6} "(2) An order that affects a substantial right made in a special proceeding¹ or upon a summary application in an action after judgment;

{¶ 7} "* * *

{¶ 8} "(4) An order that grants or denies a provisional remedy² and to which both of the following apply:

¹"Special proceeding' means 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).

²"Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [and] suppression of evidence * * * ." R.C. 2505.02(A)(3).

{¶ 9} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶ 10} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶ 11} We will first address the special-proceeding category, R.C. 2505.02(B)(2). There is a split of opinion in Ohio on whether probate proceedings are "special proceedings" as that term is used in R.C. 2505.02. See *In re Estate of Bloom* (June 21, 2000), 6th Dist. No. H-00-020, in which we held that probate proceedings are not special proceedings, recognized a conflict on that issue, and certified the conflict to the Supreme Court of Ohio. The appeal to that court on the certified question was dismissed, *In re Estate of Bloom* (2000), 90 Ohio St.3d 1487, and the state's high court has not addressed the issue. We 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).

{¶ 12} We next address the "provisional remedy" portion of the statute, R.C. 2505.02(B)(4). In *In re Estate of Packo* (Feb. 15, 2000), 6th Dist. No. L-99-1350, we held that an order granting or denying a motion to remove an executor is not appealable under R.C. 2505.02(B)(4), because even if the order is a provisional remedy, any financial harm done by the administrator of an estate can be addressed on appeal at the

conclusion of the entire estate proceedings and, therefore, R.C. 2505.02(B)(4)(b) is not met.

{¶ 13} We addressed this issue again in *In re Estate of Gannett* (Nov. 27, 2001), 6th Dist. No. H-01-047, in which we reaffirmed our decision in *Packo* and noted that our decision is in conflict with the Tenth District Court of Appeals in *In re Estate of Nardiello* (Oct. 30, 2001), 10th Dist. No. 01AP-281. The Tenth District held that "the removal of appellant as executor * * * constitutes a final appealable order from which appellant may [immediately] appeal" pursuant to R.C. 2505.02(B)(4) because "[t]he removal of an executor * * * falls within this category of provisional remedies for which no meaningful or effective remedy could be granted upon an appeal by an executor following final resolution of the estate, since there would no longer be any opportunity for the executor to undertake his duties and functions as executor." See R.C. 2505.02(B)(4)(b).

{¶ 14} Finding that a conflict existed between our holding in *Gannett* and the holding in *Nardiello*, we certified a conflict to the Supreme Court of Ohio on the following question: Is an executor of a probate estate denied a meaningful or effective remedy if he must wait until the entire probate proceedings are concluded to appeal an order granting a motion to remove him as executor of the estate? No appeal was taken to the Ohio Supreme Court in *Gannett*, and the issue has not been addressed by that court.

{¶ 15} Since our 2001 decision in *Gannett*, two additional appellate districts have addressed this issue of whether an appeal can be taken from an order granting or denying

a motion to remove a probate estate's executor; *In re Estate of Geanangel* (2002), 147 Ohio App.3d 131, and *In re Estate of Meloni* (Dec. 30, 2004), 11th Dist. No. 2003-T-0096, 2004-Ohio-7224, appeal not accepted for review, 105 Ohio St.3d 1546, 2005-Ohio-2188. In *Geanangel*, the trial court granted a motion to remove an executor and the executor appealed. The Seventh District held that the order is final and appealable as a provisional remedy because if the aggrieved party must wait for an appeal following final resolution of the estate, his opportunity to undertake his duties and functions as executor of the estate are forever lost.

{¶ 16} In *Meloni*, the trial court denied a motion to remove the co-executors of an estate. On appeal, the Eleventh District found the denial to be a final, appealable order as a provisional remedy because "appellant would have no effective or meaningful remedy following the final resolution of the estate because appellees' duties, as co-executors, would terminate."

{¶ 17} The difference in our holding in *Gannett* and *Packo* and the holdings of the Seventh, Tenth, and Eleventh Districts in *Geanangel*, *Nardiello*, and *Meloni* is the focus on what will be lost if a party who wishes to be the executor of an estate is not allowed to serve in that capacity. Our decisions focused on whether any mistakes or mishandling of estate assets could be remedied by an appeal after the estate is closed; the other districts focused on whether a person's missed opportunity to administer the estate himself could be remedied by an appeal after the estate is closed.

{¶ 18} In considering all of the above, we are persuaded that the approach taken by the Seventh, Tenth, and Eleventh Districts is sound and more realistic than our previous holding. By focusing on the loss of a person's opportunity to be the executor of an estate, the courts in *Geanangel*, *Nardiello*, and *Meloni* acknowledge that such a loss cannot be remedied. Our focus in *Gannett* and *Packo* on the economic impact of a decision as to who will administer an estate, and the conclusion that any mistakes or mishandling of estate assets could be remedied after the estate closed, is theoretically true, but in practice not realistic. Once an estate has been administered, all of the decisions about how to value, invest, dispose of, and distribute the assets of the estate will have been made. Second guessing those decisions after the fact is generally futile, and even if mishandling can be proven, trying to recover the assets may be even more futile. Thus, we overrule our prior determination that an order ruling on a motion to remove an executor from a probate estate is not final and appealable and now hold that pursuant to R.C. 2505.02(B)(4), such an order is final and appealable.

{¶ 19} Accordingly, the motion to dismiss this appeal is denied. Appellant shall file his assignments of error and brief within 20 days of the date of this decision and judgment entry. It is so ordered.

Motion denied.

SINGER, P.J., SKOW and PARISH, JJ., concur.

**THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO**

IN RE ESTATE OF VLADA SOFIJA
STANCIKAITE ABRAITIS,
DECEASED

Case No. CA 20 109810

[Adam Fried, Successor Fiduciary of
the Estate of Vlada Sofija Stancikaite
Abraitis, Deceased,

On Appeal from Cuyahoga County
Court of Common Pleas, Probate Division
Order of Denial and Dismissal of Exceptions
to Fiduciary's Final & Distributive Account

Appellee,

v.

Catherine Brady,

Case No. 2011 EST 172533

Appellant.

**REPLY TO BRIEF IN OPPOSITION TO
MOTION TO CERTIFY A CONFLICT**

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REPLY TO BRIEF IN OPPOSITION TO MOTION TO CERTIFY A CONFLICT

The following questions were raised for certification of a conflict:

- Whether probate proceedings are “special proceedings” as that term is used in R.C. 2505.02; and
- Whether a probate court order is final and appealable as a “provisional remedy” as that term is used in R.C. 2505.02.

I. Summary of Argument of Appellee

Appellee Fried failed to raise the inconsistent position of this Court when it took jurisdiction in the appeal titled *In re Estate of Sarunas Vincas Abraitis, Dec'd*, Eighth Dist. Cuyahoga No. CA-19-109299, 2020-Ohio-4222; an appeal that also involved the filing of exceptions to a final account by Appellant Brady. Appellee Fried also falsely asserted the current appeal is identical to the foregoing when it clearly was not..

Appellee Fried opposes the Motion to Certify a Conflict by arguing that the appeal of probate court orders granting or denying the removal of a fiduciary as a provisional remedy are factually distinguishable from the instant appeal of a probate court order denying Exceptions to a Final and Distributive Account where the appellate court held that the order was not final and appealable as not involving a substantial right in a special proceeding.

Appellee Fried concludes that the asserted conflict is nonexistent because the probate court orders arose out of different facts and therefore fails the “upon the same question” prong while failing to address the issue of whether probate court proceedings are “special proceedings.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1034 (1993). Brief in Opposition to Certify a Conflict, pp. 3-7.

II. Appellant's Response

Appellee Fried cleverly misinterprets *Whitelock* and misleads this Court by deliberately confusing the conflict in the appellate court holding/decision with the probate court orders *then* misrepresenting “upon the same question [of law]” prong by focusing on irrelevant “facts.” This the type of blatant misrepresentation of the law is frequently employed by Appellee Fried to mislead the courts. Judge Mark J. Painter and Douglas R. Dennis, *Ohio Appellate Practice*, Section 7:35, Certification to Supreme Court in cases of conflict, pp. 146-147 [Under the Ohio Constitution, a court of appeals is required to certify the record of a case to the Supreme Court if it finds that its decision is in conflict with the judgment of another court of appeals on the same question. fn 1 citing Ohio Constitution, Article IV, Section 3(B)(4)].

The questions of law before this court are restated because, clearly, Appellee Fried has misrepresented the record and the nature of the conflict. After two motions to dismiss and the briefing was completed, this Court ordered the parties to address “special proceedings” in relation to two cases, to wit, *In re Estate of Smith*, 4th Dist. No. 06CA2915, 2007-Ohio-3030 and *In re Estate of Allen*, 11th Dist. Trumbull No. 3890, 1988 Ohio App. LEXIS 2293, 1988 WL 64759 (June 17, 1988)¹. [Eighth District Court of Appeals docket entry dated Feb. 8, 2021, Motion No. 544054].

The prior briefing by Appellant included the following: Brief in Opposition to Motion to Dismiss filed Aug. 17, 2020; Brief of Appellant filed Aug. 31, 2020; Brief in Opposition to Renewed Motion to Dismiss filed Oct. 18, 2020; Reply Brief of Appellant filed December 18, 2020].

¹ It is important to note that the Eleventh District has since changed its position regarding “special proceedings.”

Appellant Brady addressed that R.C. 2505.02 was revised in 1998, and that the interpretation of this revision is at the heart of the conflict between the appellate districts. R.C. 2505.02-Final orders; Responsive Brief of Appellant to Final Appealable Issue, p. 8, filed Feb. 18, 2021.

The Ohio Supreme Court held that: “orders that are entered in actions that are recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02.” *Polikoff v. Adams*, 67 Ohio St.3d 100, 616 N.E.2d 213, Syllabus (1993). This would be the basis for the 1998 revision to the Revised Code where this language was added to R.C. 2505.02(A)(2).

The applicability of the statute subsection of R.C. 2505.02 for a special proceeding is based on whether the underlying action was recognized at common law or equity and not the nature of the order being appealed. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121, 122, 676 N.E.2d 890, 893, 1997-Ohio-232 citing *Polikoff v. Adams*, Syllabus.

The underlying action controls whether an action is a “special proceeding” or “provisional remedy” under R.C. 2505.02. *Id.* The underlying action from which this appeal arose is the administration of decedents' estates. Therefore, the motion to certify the conflict involves whether probate court orders relating to the administration of decedent's estates are appealable under R.C. 2505.02 as special proceedings or as provisional remedies. The interpretation of R.C. 2505.02 by the appellate districts focus on upon the same question of law. *Whitelock* at 596.

The Responsive Brief of Appellant to Final Appealable Order Issue and the Motion to Certify a Conflict cite *Walters* which held that the applicability of the statute

subsection of R.C. 2505.02 is based on the underlying action not the nature of the order being appealed. Responsive Brief of Appellant to Final Appealable Order Issue, p. 8; filed Feb. 18, 2021; Motion to Certify a Conflict, p. 4, filed May 2, 2021.

The conflict before this Court is ripe for determination given that the Eleventh Appellate District held that the administration of estates was recognized at common law and therefore are not special proceedings under R.C. 2505.02. *In re Estate of Pulford, Dec'd.*, 122 Ohio App.3d 92, 701 N.E.2d 58 (11th Dist. Geauga, 1997) and *In re Estate of Meloni, Dec'd.*, 11th Dist. Trumbull No. 2003 T 0096, 2004-Ohio-7224].

The appellate courts in the Sixth, Seventh, and Tenth Appellate Districts have also found that the administration of estates are not special proceedings. *In re Estate of Sneed, Dec'd.*, 166 OhioApp.3d 595, 2006-Ohio-1868, ¶ 11(6th Dist. Lucas); *In re Estate of Geanangel, Dec'd.*, 147 Ohio App.3d 131, 135-136, 2002- Ohio-850, 768 N.E.2d 1235, 1238, (7th Dist. Harrison); and *In re Estate of Nardiello, Dec'd.*, 10th Dist. Franklin No. 01-AP-281, 2001-Ohio-4080. *Sneed* cites the *Geanangel*, *Nardiello*, and *Meloni*. *Sneed* at ¶16

Having rejected the applicability of “special proceedings” to the administration of decedent's estates, the foregoing appellate courts focused their analysis on provisional remedies in cases where an order, in effect, (1) determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, and (2) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. R.C. 2505.02(B)(4)-Final orders.

CONCLUSION

The Journal Entry and Opinion of this Court, released on April 22, 2021, dismissing the appeal for lack of a final appealable order/jurisdiction is in conflict with the judgment pronounced on the same question by the court of appeals for the Sixth Appellate District sitting in Lucas County in the case of *In re Estate of Sneed, Dec'd.*, 166 Ohio App.3d 595, 2006-Ohio-1868 (6th Dist. Lucas), and the appellate decisions it relies on for case authority.

Therefore, the conflict between the decisions in the Eight appellate district and the Sixth appellate district, in the interpretation of R.C. 2505.02 relating to the administration of decedent's estates, should be certified as conflicting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply to Brief in Opposition to Motion to Certify a Conflict was electronically filed and served on May 19, 2021 through this Court's electronic filing system.

The undersigned further certifies that the Reply to Brief in Opposition to Motion to Certify a Conflict was sent via electronic mail on May 19, 2021 to the following counsel of record:

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