

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

IN RE: : **OPINION**
THE GUARDIANSHIP OF :
BERTINA HARDS. : **CASE NO. 2010-L-088**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 20 GU 0467.

Judgment: Affirmed.

Jacqueline Adams, pro se, 9441 Pekin Road, P.O. Box 234, Novelty, OH 44072 (Appellant).

Franklin C. Malemud, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Appellee Russell J. Meraglio, Jr.).

Lee M. Brewer, Alber Crafton, P.S.C., 501 West Schrock Road, Suite 104, Westerville, OH 43081 (For Appellee State Automobile Company).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal arises from the judgment entered by the Lake County Court of Common Pleas, Probate Division, approving a final accounting of the Guardianship of Bertina Hards and entering a surcharge against appellant, Jacqueline Adams, on the underlying guardianship. We affirm the trial court's judgment.

{¶2} Appellant was appointed guardian of the person and the estate of her mother, Bertina Hards, in April 1995. After the appointment, appellee, State Automobile

Company (“State Auto”), issued a guardian’s bond of which appellant was the principal. Appellant served as guardian from April 10, 1995, until February 4, 2002, when the probate court removed her and directed appellant to turn over all estate assets and documents to the successor guardian, Appellee Russell J. Meraglio, Jr. (“successor guardian”), and file a final accounting. The ward died February 24, 2002.

{¶3} From the date of her removal through June 2007, the probate court had formally ordered appellant to file a final distributive accounting relating to the guardianship and turn over all estate documentation to the successor guardian on at least *seven* separate occasions. At no point did appellant comply with the court’s order. She was later held in indirect criminal contempt as well as indirect civil contempt. Both contempt orders were later affirmed by this court. See *In re Guardianship of Hards*, 175 Ohio App.3d 168, 2008-Ohio-630 (affirming the probate court’s determination that appellant was guilty of indirect criminal contempt) and *In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002 (affirming the court’s judgment holding appellant in indirect civil contempt).

{¶4} On February 29, 2008, after the issuance of this court’s opinion affirming the trial court’s judgment holding appellant in indirect criminal contempt, the successor guardian filed a motion for surcharge order seeking an amount “in excess of \$100,000.00” against appellant and State Auto, as surety of appellant. State Auto later served the successor guardian with a memorandum in opposition to the motion. State Auto then undertook an investigation of the case to determine its potential obligations as a result of appellant’s management of the guardianship.

{¶5} Pursuant to its investigation, State Auto met with the successor guardian and attempted to secure relevant estate documents. The successor guardian, however, advised he was not in possession of any such estate assets or documents due to appellant's failure to comply with the trial court's multiple orders. The record indicates that State Auto subsequently attempted to obtain the estate documentation from appellant, but was unsuccessful. State Auto also served subpoenas on the financial institutions, brokerages, and investment entities listed in the partial accountings filed by appellant prior to her removal; it deposed appellant, her husband, and her daughter; it reviewed all filings, pleadings, and decisions concerning the guardianship estate; and it reviewed all documentation filed under case number 02PE00094 in the Geauga County Probate Court, captioned *In re Bertina Hards* (the decedent's probate estate). After completing its investigation, however, State Auto determined the documentation necessary to provide a full and accurate accounting of the guardianship was either impracticable to obtain or impossible to locate.

{¶6} The court held a status conference on April 29, 2010. Although notice was served on appellant, she failed to appear. On May 27, 2010, after convening with the court, the successor guardian and State Auto submitted a "Joint Motion to Approve Final Account and Entry of Surcharge Against Jacqueline Adams and State Automobile Mutual Insurance Company." The joint motion provided:

{¶7} "Successor Guardian and State Auto agree that Successor Guardian is entitled to recover legal and guardian fees totaling Forty Two Thousand Five Hundred Dollars and no/100 (\$42,500.00), which is a compromise on the actual attorney fees he incurred since this Court's entry dated August 13, 2007 approving fees, and hereby ask

that this court enter a surcharge against Adams and State Auto for the sum of Forty Two Thousand Five Hundred Dollars and no/100 (\$42,500.00), which amount shall be paid to Successor Guardian.”

{¶8} On June 8, 2010, appellant filed a motion for leave to file a response to the May 27th joint motion. Several days later, the successor guardian filed a brief in opposition. Although the brief was served on appellant, she neither responded to the brief in opposition nor filed a response to the joint motion.

{¶9} On June 21, 2010, the probate court issued its judgment granting the successor guardian and State Auto’s joint motion and denying appellant’s motion for leave to file a response to the joint motion. In its entry, the court found:

{¶10} “[Appellant], during her tenure as guardian, filed six partial accounts with the Court, which the Court approved. [Appellant] submitted numerous final accounts, which the Court did not approve because of inaccuracies, mathematical errors, and unauthorized expenditures and transfers. Furthermore, [appellant] did not remit all guardianship assets and documents to [the successor guardian]. [Appellant] further disputed [the successor guardian’s] authority *** and the court’s jurisdiction over several years and appeals, despite continued rulings by this Court, the Court of Appeals, and the Ohio Supreme Court that the Probate Court has jurisdiction.

{¶11} “[Appellant] has, with the assistance of attorney Flaherty and, later, Mary Papcke, Esq., who also served as her attorney, delayed the closing of the guardianship for years. [Appellant] has filed nonsensical motions and ‘notifications.’ Most of her filings have been meritless, redundant, and ruled on in the past, not only by the Probate Court, but also the Eleventh District Court of Appeals and the Ohio Supreme Court.

[Appellant] filed numerous appeals and, when the appellate courts upheld this Court's orders, continued to disobey said orders. She has filed numerous continuance[s] and extension requests."

{¶12} The court further found appellant did little to assist State Auto in its investigation relating to her actions as guardian of the estate. And, based upon evidence attached to State Auto and the successor guardian's joint motion, the court found appellant made unauthorized distributions, failed to cooperate with the successor guardian and the surety, and "caused a great deal of extraordinary effort by the [successor] guardian and State Auto that could have been avoided if she had been responsive to the Court's orders and [the successor] guardian and State Auto's numerous requests." The court found appellant had been properly served with all motions and hearing notices and, as a result, had an opportunity to be heard at all phases of the proceedings.

{¶13} In light of these findings, the court concluded "**** that the Joint Motion to Approve Final Account and Entry of Surcharge Against Jacqueline Adams and State Automobile Company filed by the Successor Guardian is granted." As such, the trial court ordered that State Auto and appellant be surcharged \$42,500 to the successor guardian.

{¶14} From this order, appellant filed her notice of appeal. Appellant's four assignments of error are styled accordingly:

{¶15} "[1.] Limited jurisdiction

{¶16} "[2.] Jurisdiction after death of ward

{¶17} "[3.] Guardian appointments

{¶18} “[4.] Standing”

{¶19} We first point out that, although appellant sought leave of the court to file a memorandum in opposition to the joint motion, she did not accompany the request with an actual motion. Appellant, therefore, did not specifically oppose the successor guardian and State Auto’s joint motion. By failing to appear at the status conference or file substantive objections, appellant waived all but plain error on appeal.

{¶20} That said, we shall consider appellant’s first and second assignments of error together as they pertain to the probate court’s jurisdiction. Appellant specifically argues that the probate court lacks subject matter jurisdiction over the case because the death of the ward terminated the guardianship as a matter of law. This court and the Supreme Court of Ohio have repeatedly rejected appellant’s position. It is the law of the case as well as a well-settled principle controlling the law of guardianship that the probate court possesses jurisdiction to proceed with winding up a guardianship estate even where, as here, the ward has passed. See *State ex rel. Estate of Hards v. Klammer*, 11th Dist. No. 2004-L-189, 2005-Ohio-2655 at ¶20; *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 106, 2006-Ohio-3670; *In re Guardianship of Hards*, 175 Ohio App.3d 168 , 2008-Ohio-630, at ¶49; *In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002, at ¶35. Because appellant has consistently refused to file a final accounting, the successor guardian was unable to proceed with finalizing and settling the guardianship estate. The probate court therefore possessed jurisdiction to proceed with winding up the estate and, as a result, appellant’s jurisdictional argument has no merit.

{¶21} Appellant’s first and second assignments of error are overruled.

{¶22} Under her third assignment of error, appellant asserts the successor guardian's appointment was invalid. Again, this court has ruled on this argument. In relation to this issue, this court, in its most recent, 2009 opinion in this chain of cases, determined:

{¶23} “[The successor guardian] testified he has been the guardian since the 2002 appointment and would remain so until he completed his duties ‘winding up’ the guardianship estate. Even if there were a technical problem relating to [his] appointment, appellants did not file a direct appeal of the February 4, 2002 judgment entry appointing [the] successor guardian. Hence, any argument relating to the sufficiency of the appointment process is barred by the doctrine of res judicata.” *Id.* at ¶34.

{¶24} Appellant's position is controlled by the law of the case and therefore her third assignment of error is overruled.

{¶25} Appellant's final assignment of error takes issue with the ability of the successor guardian and surety to move the court for the relief they sought. Appellant argues that neither appellee is a “real party of interest.” Appellant is incorrect.

{¶26} In *Hards*, *supra*, at 106, the Supreme Court of Ohio, in affirming this court's jurisdictional determination, held “a guardian has the power after the ward's death to make a proper accounting and settlement of any acts taken in regard to the ward's assets.” Accordingly, the successor guardian had standing to take all reasonable actions to assure the guardianship was settled.

{¶27} Since his appointment, the record indicates the successor guardian has used various means to compel appellant's cooperation in settling the guardianship. As

a result of the successor guardian's efforts, appellant has been repeatedly ordered by the probate court to account for missing funds and documentation. She has also been held in criminal and civil contempt for defying these orders. And, as of the date of the underlying judgment entry, nothing indicates appellant has made an effort or intends to make an effort to account for or produce the missing assets that are the subject of the orders.

{¶28} "If a fiduciary fails or refuses to file an account, it is the obligation of a successor fiduciary appointed by the court to file an account for the former fiduciary. Once the liability of the former fiduciary has been determined by the probate court, it is appropriate to commence a surcharge action against the surety on the former fiduciary's bond." *Schraff v. Harrison* (1998), 94 Ohio Misc.2d 104, 108, affirmed by this court in *Schraff v. Harrison* (Nov. 11, 2000), 11th Dist. No. 99-G-2233, 2000 Ohio App. LEXIS 5358.

{¶29} The successor guardian moved for a surcharge against both appellant and the surety. Once the motion was filed, State Auto, as the surety, became an interested party with a personal stake in the outcome of the proceedings and, as such, had standing to respond to the motion and protect its rights. To this end, State Auto conducted a thorough investigation to determine its ultimate liability on the guardian's bond for which it was surety. Although many estate assets could not be located, the successor guardian and State Auto reached an agreement regarding the surcharge amount to which the surety would be obligated. We discern nothing peculiar or problematic in the manner in which either the successor guardian or State Auto

proceeded in resolving the issues which have heretofore prevented the settlement of the underlying guardianship estate.

{¶30} Appellant's final assignment of error is therefore overruled.

{¶31} For the reasons discussed in this opinion, appellant's four assigned errors are overruled and the judgment of the Lake County Court of Common Pleas is therefore affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.