[Cite as *Guardianship & Protective Servs., Inc. v. Setinsek*, 2011-Ohio-6515.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

GUARDIANSHIP AND PROTECTIVE SERVICES, INC., GUARDIAN OF THE ESTATES OF RUDOLPH J. SETINSEK AND MARY T. SETINSEK, INCOMPETENT INDIVIDUALS,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0099**
- vs -	:	
RUDOLPH JOSEPH SETINSEK,	:	
Defendant-Appellant,	:	
(JEFFREY S. HOVANIC, SUCCESSOR TRUSTEE,	:	
Appellee).	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2010 CVA 0005.

Judgment: Appeal dismissed.

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William M. Flevares and *Stephen A. Turner*, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481 (For Appellant-Rudolph Joseph Setinsek).

Mark S. Finamore, 258 Seneca Avenue, N.E., P.O. Box 1109, Warren, OH 44481 (For Appellee-Jeffrey S. Hovanic).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Rudolph Joseph Setinsek, appeals the July 27, 2010 Judgment Entry of the Trumbull County Court of Common Pleas, Probate Division, removing him as Successor Trustee of the Rudolph J. Setinsek and Mary T. Setinsek Trust ("The Setinsek Family Trust"), on the grounds that he has committed serious breaches of the trust and of the duty of loyalty. For the following reasons, we dismiss the appeal for lack of a final order.

{¶2} On February 1, 2010, plaintiff-appellee, Guardianship and Protective Services, Inc. filed a Complaint (Declaratory Judgment), pursuant to R.C. 5810.01, against Setinsek.

{¶3} The Complaint alleged the creation of a revocable living trust, known as the Setinsek Family Trust, by Rudolph J. Setinsek and Mary T. Setinsek, the parents of the appellant herein. In December 2008, the Setinseks were declared incompetent by the Trumbull County Probate Court, Case Nos. 2008-GDP-0168 and 2008-GDP-0169. Upon the declaration of his parents' incompetency, Setinsek became the Successor Trustee for The Setinsek Family Trust. As of December 2009, Guardianship and Protective Services has served as the Successor Guardian to the Estates of Rudolph J. and Mary T. Setinsek.

{¶4} The Complaint further alleged that Setinsek committed a breach of trust by violating the duties he owed to the Trust beneficiaries as Successor Trustee. The Complaint sought, inter alia, his removal as Successor Trustee, an order that he render an accounting of activities as Trustee, and damages.

{¶5} On February 10, 2010, the probate court issued a Judgment Entry appointing Robert G. Kroner, Jr., "special court investigator and special commissioner

*** to investigate the circumstances of the wards," and thereafter file a report with the court.

{¶6} On June 14, 2010, a hearing was held on the Complaint.

{¶7} On July 27, 2010, the probate court issued a Judgment Entry, ordering "that *** Setinsek be *** removed as Successor Trustee for serious breaches of trust," and the appointment of another Successor Trustee. The Entry ordered "that this cause is *** continued to allow additional time for the Special Court Investigator and Special Commissioner to further investigate the trust and for the [newly appointed] Successor Trustee to review the trust assets and make a recommendation to the Court as to whether or not any transactions under the former trustee [Setinsek] should be voided." The Entry further ordered that the fees and expenses of the Special Investigator for services rendered, as well as any additional fees and expenses hereafter approved by the court, shall be paid by the Trust and surcharged against Setinsek's share of the trust estate. Finally, the court ruled: "All pending further order of the Court."

{¶8} On August 18, 2010, Setinsek filed his Notice of Appeal.

{¶9} Guardianship and Protective Services raises the preliminary argument that the probate court's July 27, 2010 Judgment Entry does not constitute a final order. We agree.

{¶10} "Courts of appeals *** 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 ***." Section 3(B)(2), Article IV, Ohio Constitution; *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20 ("[i]f an order is not final, then an appellate court has no jurisdiction").

{¶11} "When more than one claim for relief is presented in an action ***, the court may enter final judgment as to one or more but fewer than all of the claims *** only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order *** which adjudicates fewer than all the claims *** shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Civ.R. 54(B).

{¶12} In the present case, the probate court's July 27, 2010 Judgment Entry expressly stated that the cause would continue until the Trust assets could be reviewed and a determination made whether any of Setinsek's transactions should be voided. Cf. R.C. 5810.01(B)(9) ("[t]o remedy a breach of trust that has occurred ***, the court may *** void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds"). Rather than finding "no just reason for delay," the court stated "[a]ll pending further order of the Court."

{¶13} In response, Setinsek asserts that "the effect of the probate court's order removing him as successor trustee effectively end[s] his involvement in the pending action," and "foreclosures the possibility of further damages against Appellant." Contrary to this position, the court's order leaves open the possibility of the recovery of Trust assets for the benefit of Guardianship and Protective Services, as guardian of the Estates of Rudolph J. and Mary T. Setinsek (the primary beneficiaries of The Setinsek Family Trust). Setinsek's position is also contrary to the provision of Civil Rule 54(B),

that an "order *** which adjudicates fewer than all the claims *** shall not terminate the action as to any of the claims or parties."

{¶14} For the foregoing reasons, the present appeal is dismissed for lack of a final order.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion,

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

{¶15} Although I agree with the outcome and basic analysis of the lead opinion, I write separately because certain issues concerning the finality of the appealed judgment warrant additional discussion.

{¶16} First, it is important to emphasize that the request to remove appellant as the successor trustee was not made in the context of a motion filed in a pending estate proceeding before the probate court. Instead, the request was set forth as part of the prayer for relief in a complaint which appellee filed at the outset of the underlying action. Accordingly, the removal of the trustee in this particular matter cannot be considered a "provisional remedy" under R.C. 2505.02(A)(3). In turn, this means that the "provisional remedy" category for finality under R.C. 2505.02(B)(4) has no application to the facts of this appeal. Cf., *In re Estate of Meloni*, 11th Dist. No. 2003-T-0096, 2004-Ohio-7224.

{¶17} Second, as was obliquely referenced in the lead opinion, the complaint in question was brought pursuant to R.C. Chapter 5801 et seq. As a general proposition,

R.C. 5801.02 provides that R.C. Chapters 5801 through 5811 govern the use of express inter vivos trusts in the state of Ohio. In regard to the legal enforcement of such a trust, R.C. 5802.01(A) indicates that an Ohio court has the basic authority to intervene in the administration of the trust when its jurisdiction has been properly invoked. Furthermore, section (C) of the latter provision specifically states that the group of permissible judicial proceedings pertaining to express trusts includes an action for the declaration of rights under the controlling document.

{¶18} Under its first claim in the instant complaint, appellee sought a declaratory judgment as to whether appellant had breached his duties as the successor trustee. In addition, the caption of appellee's complaint indicated that the action had been brought as a proceeding in declaratory judgment. Thus, as such a legal proceeding, the basic procedure of the case was governed by the provisions of R.C. Chapter 2721.

{¶19} Third, besides the declaration of rights under the trust, appellee sought the removal of appellant as trustee, the appointment of a new trustee, the submission of a final accounting by appellant, and a determination of monetary damages resulting from appellant's breach. Despite that fact that appellee's request for the additional remedies was delineated under two claims distinct from the "declaratory judgment" claim, it was evident from the nature of the allegations in the complaint that the trial court's ruling on the additional remedies was contingent upon its resolution of the declaratory judgment claim; i.e., appellee would not be entitled to any additional relief if it was found that no breach of trust had taken place.

{¶20} However, in relation to the granting of further relief based upon the decree in a declaratory judgment action, R.C. 2721.09 provides that the request for such relief must be made by separate application contained in a complaint. In light of this express

statutory requirement, I conclude that a declaration of the parties' right is the sole relief that usually can be granted under a declaratory judgment claim. Thus, notwithstanding the contingent nature of the additional relief sought in the instant complaint, appellee used the proper procedure in stating his request for further relief under the two separate claims.

{¶21} Fourth, I would note that, pursuant to well-settled Ohio law, a declaratory judgment action constitutes a special proceeding for purposes of R.C. 2505.02(B)(2); as a result, an order rendered in such an action is considered final when it affects a party's substantial right. See, e.g., *State ex rel. New Concept Housing, Inc. v. Metz*, 123 Ohio St.3d 457, 2009-Ohio-5862. In applying R.C. 2505.02(B)(2), the appellate courts of this state have held that a declaratory judgment decree satisfies the requirements for finality if it delineates the rights of all parties to the case. See, e.g., *Niehaus v. The Columbus Maennerchor*, 10th Dist. No. 07AP-1024, 2008-Ohio-4067, at ¶20. In the instant matter, since the trial court disposed of all issues raised in the declaratory judgment claim in the appealed judgment, that aspect of the entry was final under R.C. 2505.02(B)(2).

{¶22} Nevertheless, it is equally well-settled under Ohio law that Civ.R. 54(B) is applicable to judgments in declaratory judgment actions. *Allstate Ins. Co. v. Soto* (Nov. 30, 2000), 8th Dist. Nos. 78114 & 78115, 2000 Ohio App. LEXIS 5607, at *7-9, quoting *Gen. Acc. Ins. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. As noted by the lead opinion, the trial court in the present case did not make a final determination as to the amount of damages sought by appellee under its third claim. Therefore, since the appealed judgment also did not contain a finding of "no just reason for delay" under Civ.R. 54(B), none of the trial court's various rulings are immediately appealable.

{¶23} As a final point, I would indicate that, in many respects, it seems illogical

to apply Civ.R. 54(B) to judgments which are otherwise final because they affect a substantial right in a special proceeding. Pursuant to R.C. 2505.02(B)(2), the only requirement for finality in regard to a "special proceeding" judgment is that it must affect a substantial right of a party to the action. Given the lack of any reference to "determining" the case, as is required under R.C. 2505.02(B)(1), it is evident that R.C. 2505.02(B)(2) was intended to permit appeals from partial judgments which would only be considered interlocutory orders in "non-special" civil actions. By adding the requirement that Civ.R. 54(B) must also be satisfied in regard to judgments affecting a substantial right in a special proceeding, we have essentially eliminated the distinction between the two types of final orders under R.C. 2505.02(B)(1) and (B)(2).

{¶24} Stated otherwise, there is no logical reason to determine whether an order qualifies as one that affects a substantial right in a special proceeding if, in the end, it is going to be treated as any other claim in the absence of Civ.R. 54(B) "no just cause for delay" language. The legislature could not have intended for such orders to be anything other than immediately appealable, even absent "no just cause for delay" language.

{¶25} However, under the precedent originally stated by the Supreme Court of Ohio in the *General Accident* opinion, Civ.R. 54(B) must be followed in multiple-claim cases in which the declaratory judgment claim has already been fully decided. Thus, I concur in the dismissal of this appeal.

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

{¶26} At first blush, and upon a simple Civ.R. 54(B) analysis, one may conclude that the appealed order is not a final, appealable order. Consideration of Civ. R. 54(B)

alone, however, is insufficient. A full R.C. 2505.02 analysis must be undertaken before consideration of the civil rule, inasmuch as the Ohio Constitution confers appellate jurisdiction over "judgments or final orders *** as may be provided by law." Section 3(B)(2), Article IV, Ohio Constitution. Further, Civ.R. 54(A) defines a judgment for purposes of the civil rules to include "any order from which an appeal lies, as provided in section 2505.02 of the Revised Code." Civ.R. 54(A). While other code sections may come into play in a final, appealable order analysis, R.C. 2505.02 is the jurisprudential mother lode that must always be considered.

{¶27} Such analysis is especially needed in light of the inharmonious jurisprudence in the area of probate proceedings, special proceedings, and provisional remedies.

{¶28} R.C. 2505.02(B) delineates nine types of orders that are "final orders": 1) "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment;" 2) an order that affects a substantial right made in a special proceeding; 3) an order made upon a summary application in an action after judgment that affects a substantial right; 4) an order that vacates or sets aside a judgment; 5) an order granting a new trial; 6) an order that grants or denies a provisional remedy, and to which both of the following apply, "(a) [t]he 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," and (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;" 7) "[a]n order that determines that an action may or may not be maintained as a class action;" 8) an order determining the constitutionality of any changes to the Revised Code made by

certain tort reform legislation; and 9) "[a]n order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code." R.C. 2505.02(B)(1)-(6).

{¶29} "'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). "'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, [or] suppression of evidence ***." R.C. 2505.02(A)(3).

{¶30} I note, at the outset, that the question of finality was not raised by motion, but asserted in appellee's brief as an "additional issue for review." In his reply brief, the appellant, Mr. Setinsek, argues that his removal as fiduciary, in and of itself, renders the order final and appealable, citing a Seventh District decision. Indeed our court has held that an order denying a party's request to remove an executor is a final, appealable order under R.C. 2505.02(B)(4), in that the order is determinative of the action with respect to a "provisional remedy." It prevents a judgment in the action in favor of the appealing party as to that remedy, and the removed fiduciary would have no meaningful remedy upon appeal following final resolution of the estate, since there would no longer be an opportunity for the fiduciary to perform his or her duties. See *In re Estate of Meloni*, 11th Dist. No. 2003-T-0096, 2004-Ohio-7224. As Judge Christley noted in *Meloni*, even where "this issue was not raised by the parties, an appellate court has the duty to *sua sponte* raise the issue of jurisdiction," regardless of the vehicle for presenting the question. Id. at ¶14, citing *Davison v. Rini* (1996), 115 Ohio App.3d 688, 692.

{¶31} The special proceedings/provisional remedies conundrum in the probate arena was recently and succinctly addressed by the Sixth District's opinion in *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006-Ohio-1868. Following the reasoning of our court in *Meloni*, the Sixth District was persuaded to reverse its field and find that a judgment to remove a fiduciary is a final, appealable order.

{¶32} Their analysis is enlightening, beginning first with the special proceeding question: "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, where 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, 739 N.E.2d 813, 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)." Id. at ¶11.

{¶33} But that declaration did not resolve the question, and the Sixth District went on to analyze the provisional remedy portion of the statute, R.C. 2505.02(B)(4). The Sixth District first considered its earlier decision in *In re Estate of Packo* (Feb. 15, 2000), 6th Dist. No. L-99-1350, 2000 Ohio App. LEXIS 544, where it 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." *Sneed* at ¶12.

{¶34} After reviewing the conflicts among the various districts, the Sixth District examined and accepted the *Meloni* determination that the denial of a motion to remove a fiduciary was 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." *Sneed* at ¶16, quoting, *Meloni* at ¶29.

{¶35} In noting the conflict between the various districts is really about "what will be lost if a party who wishes to be the executor of an estate is not allowed to serve in that capacity," the Sixth District observed that its earlier decisions "focused on whether any mistakes or mishandling of estate assets could be remedied by an appeal after the estate is closed." Id at ¶17. Other districts, such as ours, have "focused on whether a person's missed opportunity to administer the estate himself could be remedied by an appeal after the estate is closed." Id. The Sixth District then concluded that the loss of a person's opportunity to be the executor of an estate is "a loss [that] cannot be remedied." Id. at ¶18.

{¶36} That court acknowledged "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, recovering those assets may be even more futile." Id.

These considerations are equally true in the case before us today. The fact that the instant case relates to the administration of a trust, rather than a decedent's estate, is a distinction without a difference.

{¶37} Unfortunately, the Supreme Court of Ohio has chosen not to weigh in on a certified conflict as to whether probate estate proceedings (which most certainly could include trust proceedings before the probate court) were known at common law and are, therefore, special proceedings under R.C. Section 2505.02. Without guidance from the high court, and with the growing precedent from this court and others regarding final, appealable orders and the provisional remedy prong of R.C. 2505.02, I must respectfully dissent.