[Cite as *In re Estate of Brown*, 2021-Ohio-655.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	:	**MEMORANDUM OPINION**
THE ESTATE OF DONALD C. BROWN, DECEASED	:	**CASE NO. 2020-T-0049**
	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2019 EST 0994.

Judgment: Appeal dismissed.

Thomas E. Schubert, 138 East Market Street, Warren, Ohio 44481 (For Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, Ohio 44240 (For Appellants).

THOMAS R. WRIGHT, J.

{¶1} Appellants, Stacy and Scott Brown, appeal from the judgment of the trial court that admitted a will filed by Michael Brown to probate.

{¶2} Donald Brown died on November 18, 2019, survived by his three children: Stacy, Michael, and Scott Brown. On December 19, 2019, Stacy applied to have Donald's will from 2003, which appointed her as executor, admitted to probate. On the same date, Michael applied to have Donald's will from 2019, which appointed him as executor, admitted to probate. On the 2019 will, the signatures of the two witnesses are handwritten in print instead of cursive. The trial court issued an interlocutory order denying admission of the 2019 will and setting the matter for hearing.

{¶3} A transcript of the hearing has not been filed. However, the affidavits of the witnesses to the 2019 will were filed in the trial court. Their affidavits indicate that the witnesses work in a Bureau of Motor Vehicles office. The witnesses averred that Donald came to the BMV to have his will witnessed on September 18, 2019. The witnesses stated that they subscribed their names to the will attesting to the fact that they witnessed the signing of the will.

{¶4} After hearing, Stacy and Scott submitted a joint post-hearing brief that challenged the will submitted by Michael. They maintained that because the witnesses printed their names, they did not sign the will. Michael responded that R.C. 2107.03 does not require the subscription of an attesting witness be written in cursive.

{¶5} Thereafter, the magistrate entered a report and decision recommending the court admit the 2019 will to probate, and the court adopted the magistrate's decision.

{¶6} Stacy and Scott appealed, and we ordered the parties to show cause as to why the appeal should not be dismissed for lack of a final appealable order. Stacy and Scott responded.

{¶7} Article IV, Section 3(B)(2) of the Ohio Constitution limits this court's jurisdiction to the review of judgments or final orders. "'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.'" *In re Estate of Meloni*, 11th Dist. Trumbull No. 2003-T-0096, 2004-Ohio-7224, ¶ 15, quoting *In re Estate of Geanangel*, 147 Ohio App.3d 131, 134, 768 N.E.2d 1235, 2002-Ohio-850. An order may be final if a statutory provision specifically so provides or pursuant to R.C. 2505.02, which provides in relevant part:

> (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:

* * *

> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
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> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
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> (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.
>
> (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.
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> * * *

{¶8} 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). "'An order which *affects* a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.'" (Emphasis sic.) (Citations omitted.) *Estate of Haueter*, 11th Dist. Geauga No. 2016-G-0071, 2016-Ohio-7164, ¶ 22, quoting *Bell v. Mount Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993).

{¶9} Generally, "[a]n order of the Probate Court admitting an instrument to probate as a last will is not reviewable on appeal." *In re Frey's Estate*, 139 Ohio St. 354, 40 N.E.2d 145, 146 (1942), paragraph one of the syllabus; *see* R.C. 2107.181 ("A final order refusing to probate the instrument may be reviewed on appeal."); *see also In re Estate of Horowitz*, 11th Dist. Trumbull No. 92-T-4710, 1993 WL 150487, *3 (Mar. 26, 1993) ("An order admitting a will to probate does not constitute a final judgment.").

{¶10} However, as we recognized in our show cause order, the Ninth District held in *In re L.M.W.*, 9th Dist. Summit No. 29111, 2019-Ohio-3873, that an order admitting a will to probate was final pursuant to R.C. 2505.02(B)(2) under the facts of that case. There, the decedent's daughter applied to have a 1991 will admitted to probate. *Id.* at ¶ 3. The trial court admitted the will and appointed her as executor. *Id.* Thereafter, the decedent's granddaughter applied to have a 2002 will, which named her as executor and contained a no-contest clause, admitted to probate. *Id.* at ¶ 4. The daughter argued that the 2002 will was not properly executed. *Id.* at ¶ 7. After a hearing regarding the execution of the 2002 will, the trial court admitted the 2002 will to probate, revoking the order admitting the 1991 will by operation of law. *Id.* at ¶ 7, 9; R.C. 2107.22(A)(3). On appeal, the Ninth District reasoned that admission of the 2002 will also effectively removed daughter as executor, and its case law holds that an order removing an executor is a final appealable order under R.C. 2505.02(B)(2). *Id.* at ¶ 8, citing *In re Estate of Griffa*, 9th Dist. Summit No. 25987, 2012-Ohio-904. In addition, the Ninth District concluded that daughter could not challenge the 2002 will through a will contest due to the no-contest clause. *Id.* at ¶ 9.

{¶11} In their response to our show cause order, Stacy and Scott quote extensively from *In re L.M.W.* and argue that their case is similar because Stacy was denied her status as executor due to the later filed will. They also argue that the concept that they could have challenged the order admitting the will through a will contest proceeding is "disingenuous" because the issue before the court would have been identical to the issue they already presented prior to admission of the 2019 will.

{¶12} This court has held that an order removing an executor of an estate is a final order as a provisional remedy pursuant to R.C. 2505.02(B)(4). *In re Estate of Meloni*, 11th Dist. Trumbull No. 2003-T-0096, 2004-Ohio-7224, ¶ 29; *see also In re Estate of Pulford*, 122 Ohio App.3d 88, 701 N.E.2d 55 (11th Dist.1997) (order ruling on application for authority to administer decedent's estate is not made in "a special proceeding"). Here, unlike *In re L.M.W.*, the trial court did not appoint Stacy as executor of the estate prior to admitting the later will to probate. *See In re L.M.W.* at ¶ 3. Therefore, Stacy was not "removed" from her position as executor, although she was effectively prevented from obtaining appointment due to Michael's appointment under the 2019 will.

{¶13} Regardless, unlike *In re L.M.W.*, Donald's 2019 will did not contain a no-contest clause that would affect Scott's and Stacy's challenge of the will through a will contest. We are cognizant that such an action would involve the same matters already before the court when admitting the 2019 will to probate. However, because the validity of the 2019 will itself is in dispute, a will contest to invalidate the will provides an effective, meaningful remedy. *See* R.C. 2107.71 et seq. Accordingly, the order here does not affect a substantial right because immediate appeal is not necessary to obtain appropriate relief. *See Estate of Haueter*, 2016-Ohio-7164, at ¶ 22. Therefore, the order does not satisfy the finality requirements of R.C. 2505.02(B)(2). Similarly, the order did not prevent Stacy and Scott from a judgment in their favor as to the administration of the estate, and therefore it cannot satisfy the finality requirements of R.C. 2505.02(B)(4).

{¶14} Accordingly, the order appealed is not a final appealable order, and we lack

jurisdiction to consider the merits of the appeal. The appeal is dismissed.

CYNTHIA WESTCOTT RICE, J.,

MATT LYNCH, J.,

concur.