

[Cite as *In re Hess*, 2009-Ohio-7010.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF THE )  
GUARDIANSHIP OF DAVID W. HESS, )  
GEORGE W. HESS, JR., et al. )

APPELLANT )

VS. )

DAVID W. HESS, et al. )  
IN THE MATTER OF THE ESTATE OF )  
SUSAN ANN HESS, et al. )

APPELLEE )

CASE NO. 09 BE 8

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Probate Court of  
Belmont County, Ohio  
Case No. 02 CV 599

JUDGMENT:

Affirmed.

APPEARANCES:

For Appellant:

Atty. Lindsey M. Tomlan  
Tomlan Law Offices  
108 East Main Street  
St. Clairsville, Ohio 43950

For Appellee:

Atty. Tracey Lancione Lloyd  
Lancione & Lloyd Law Office Co., LPA  
3800 Jefferson Street  
P.O. Box 560  
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JUDGES:

Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: December 22, 2009

[Cite as *In re Hess*, 2009-Ohio-7010.]  
WAITE, J.

{¶1} Appellant George W. Hess, Jr. appeals the judgment of the Probate Court of Belmont County, Ohio rescinding a previous order transferring real estate from the estate of Susan Ann Hess to the David W. Hess Supplemental Service Trust (David Hess Trust). Appellant is both the guardian of David W. Hess and the commissioner of the estate of Susan Ann Hess, deceased. The problem in this case stems from the fact that the probate court mistakenly approved a certificate of transfer of real estate in Susan Hess' estate to the David Hess Trust rather than to the beneficiary directly (pursuant to the laws of intestacy), following the faulty instructions and filings provided by Appellant. Appellant, acting as the guardian of David Hess, then tried to sell the real estate, but in the answer to the complaint the defendants pointed out that David Hess did not own the real estate because it was wrongly placed in a trust rather than awarded to David personally. The court was further enlightened as to the problem when two creditors of the estate of Susan Hess (the Appellees in this appeal) filed a motion to authorize payment of funeral expenses that had never been submitted for payment by Appellant, and in their motion they explained the circumstances of the erroneous certificate of transfer. In an effort to clear up the entire matter, the probate court found that the original property transfer was in error and transfer should have been made to David Hess, personally. The court rescinded the certificate of transfer, the effect of which was that the real estate was returned to the estate of Susan Hess. The court also denied Appellant's complaint to sell real estate since there was never any real estate legally in David Hess' guardianship estate.

{¶12} Appellant claims on appeal that the proceeding before the probate court was a reopening of the estate, and that the court had no jurisdiction or discretion to reopen Susan's estate. Appellant argues that the decision of the probate court constituted more than a clerical nunc pro tunc entry. In Appellant's view, not only was the proper procedure to reopen an estate not followed, but he claims the better procedure was for Appellees Mary E. DeFelice and Charles M. Goodman, Jr. to have filed a direct appeal, a motion for new trial, or a Civ.R. 60(B) motion for relief from judgment. For all these reasons, Appellant concludes that the judgment should be reversed. Appellant's arguments are not well-taken. Appellees did file a motion to reopen the estate of Susan Hess, and such motions are reviewed only for abuse of discretion. Further, Appellant invited any procedural error that may have arisen by requesting the court to sell real estate that was not properly in the David Hess guardianship estate, filing the incorrect certificate of transfer, filing the incorrect application for relief from administration, and failing to file the bills for funeral expenses that had been in Appellant's possession for seven years. The language of Appellees' motion for reimbursement of funeral expenses may be construed as a motion to reopen or a Civ.R. 60(B) motion, and the probate court acted within its discretion to reopen the estate and rescind the certificate of transfer. The judgment of the probate court is affirmed.

#### Background

{¶13} Susan Ann Hess died intestate on July 21, 2000. Appellant George W. Hess is the former husband of the decedent. Appellees Charles Goodman and Mary DeFelice, Susan's brother and sister, paid her funeral bills. Appellees sent multiple

requests for reimbursement of funeral expenses to Appellant's counsel at the Tomlan Law Offices soon after the funeral, but they received no response. No action was taken to open the decedent's probate estate for seven years.

{¶14} In 2002, Appellant became the guardian of his 18-year old incompetent son, David W. Hess. Seven years after Susan's death, on August 9, 2007, Appellant filed an application to relieve her estate from administration. No liabilities or creditors were listed on the application, and the application stated that all debts had been paid. David W. Hess was listed as the only next of kin. Appellant included a certificate of transfer of real estate with the application. The application described Susan's interest in four parcels of property in Belmont County. Susan was a one-third owner of three of the parcels, and full owner of the fourth. Appellant listed the transferee as the David Hess Trust rather than David Hess personally. Appellant was also listed as the grantor and trustee of the trust. It should be noted that John R. Tomlan of the Tomlan Law Offices signed as Appellant's attorney on the application to relieve the estate from administration. This is the same law firm that Appellees sent their reimbursement requests to seven years earlier.

{¶15} On August 9, 2007, the probate court signed and filed the judgment entry relieving the estate from administration and approving the certificate of transfer.

{¶16} On September 22, 2008, Appellees filed a motion for authorization to pay expenses in the estate of Susan Hess. They asked the estate to pay the funeral expenses, to pay for the grave opening, and to pay for the cost of the gravestone. Attached to the motion were copies of the letters that Appellees had sent to the Tomlan Law Offices in 2000, along with copies of bills and receipts. In the motion

they explained that their bills were not included as part of the estate and that the only asset in the estate was improperly transferred to the David Hess Trust instead of to the heir directly. They noted that a quiet title action had been filed by the David Hess Trust to force a sale of the real estate, but that the property could not be sold because of a title defect caused by the erroneous certificate of transfer. It was described in the motion that mediation had occurred and the parties had agreed to reopen Susan Hess' probate estate, correct the title defect, and submit the funeral bills to the court to determine if they could be paid. The motion specifically stated that, "[t]he estate must be re-opened in order to accomplish this."

{¶7} On November 3, 2008, Appellant, in his capacity as guardian of David Hess, filed a complaint to sell real estate. The real estate that was the subject of the complaint was the same real estate that had been in Susan's estate and was transferred to the David Hess Trust. The other fractional owners of the property were listed as defendants in the suit. In their answer to the complaint, these defendants denied that David had any personal interest in the property because the property was titled in the name of the David Hess Trust.

{¶8} A pretrial hearing was held on January 30, 2009, to review the complaint to sell real estate.

{¶9} On February 3, 2009, the court issued a joint judgment entry in the estate of Susan Hess, the guardianship of David Hess, and in the civil action filed by Appellant to sell the real estate. The court found that the certificate of transfer to the David Hess Trust was in error and transfer should have been made to David Hess, personally. The court found that the guardianship of David Hess had no real estate

asset to sell and that the complaint was null and void. The court rescinded the certificate of transfer and explained that the effect of the rescission was that the real estate remained an asset of the estate of Susan Hess.

{¶10} This appeal was filed on March 5, 2009.

ASSIGNMENT OF ERROR

{¶11} “The Probate Court of Belmont County, Ohio erred in issuing the Judgment Entry filed on February 3, 2009.

{¶12} Appellant argues that the probate court had no authority to reopen the estate of Susan Hess and no authority to rescind the certificate of transfer of real estate from the estate of Susan Hess to the David Hess Trust. Appellant argues that the only means for either reopening the estate or changing the certificate of transfer order were through a direct appeal, a nunc pro tunc entry, a motion for new trial, or a motion for relief from judgment.

{¶13} It is obvious that Appellees could not file a direct appeal of the order relieving the estate of Susan Hess from administration because they were not parties to the action. Appellant is therefore incorrect that Appellees waived any error by not filing a direct appeal.

{¶14} As for Appellant’s remaining argument, there are three main reasons why it too, must fail. First, R.C. 2109.35 provides a variety of means for vacating a fiduciary’s account, including the account in a decedent’s estate, that fall outside of the options listed by Appellant. R.C. 2109.35(B) states: “The order may be vacated for good cause shown, other than fraud, upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who

had no knowledge of the proceeding in time to appear in it.” Appellees qualify as proper parties to file a motion to reopen the estate of Susan Hess pursuant to R.C. 2109.35(B), since they were not parties to the administration proceedings, had no knowledge of the proceedings, and because they filed a motion to reopen the estate. The decision whether to grant a motion to reopen an estate is within the discretion of a probate court. *In re Estate of Smith*, 3d Dist. No. 13-02-37, 2003-Ohio-1910, ¶11; *Wanamaker v. Davis*, 2d Dist. No. 2005-CA-151, 2007-Ohio-4340, ¶34.

{¶15} Second, the court could have construed Appellees’ motion to reopen as a Civ.R. 60(B) motion for relief from judgment even though it was not specifically labeled as a Civ.R. 60(B) motion. Although a court is not required to construe an improperly labeled motion as a Civ.R. 60(B) motion, it has the discretion to do so. As such, a motion may be so construed for the first time at the trial level or on appeal. *In re Adoption of A.W.*, 9th Dist. Nos. 08CA0040-M, 08CA0051-M, 2009-Ohio-1492, ¶11; *Burgess v. Safe Auto*, 2d Dist. No. 20941, 2005-Ohio-6829, ¶11. *Fredebaugh. Well Drilling, Inc. v. Brower Contracting*, 11th Dist. No. 2004-A-0061, 2005-Ohio-6084, ¶14; *Ray v. Dickinson*, 7th Dist. No. 03-BE-29, 2004-Ohio-3632, ¶23.

{¶16} Third, it was Appellant, himself, who brought the issue to the attention of the court by filing a quiet title action and a guardian’s complaint to sell real estate. Both actions notified the court that there was a title defect in the property, that it had been improperly transferred to the David Hess Trust, and asked the court to take action based on the title defect. Appellees’ motion to reopen the estate of Susan Hess actually explained the problem to the court and provided a solution, whereas all of Appellant’s filings actually appear to compound the original errors with additional

errors. Of course, it was Appellant who caused the initial error by providing improper and erroneous information to the court in Susan's estate, by failing to submit Appellees' bills in the estate, and by attempting to sell property that was not properly transferred to the guardianship of David Hess. Under the invited error doctrine, a party may not take advantage of an error that he or she invited or induced the trial court to make. *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus. Thus, any error which may allegedly exist in the method by which Appellees raised the title defect and the estate debts to the court's attention must be considered as error invited by Appellant, himself.

{¶17} Appellant's assignment of error has no merit and is overruled. The judgment of the Belmont County Probate Court is affirmed in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.