

[Cite as *In re Estate of Durkin*, 2021-Ohio-1076.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: ESTATE OF VIRGINIA DURKIN

C.A. No.       29532

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     2015-ES-2539

DECISION AND JOURNAL ENTRY

Dated: March 31, 2021

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TEODOSIO, Judge.

{¶1} John Durkin appeals the judgment of the Summit County Court of Common Pleas, Probate Division. We dismiss the attempted appeal for lack of a final appealable order.

I.

{¶2} This Court has previously set forth facts of this matter as follows:

In September 2015, an application to probate the will of Virginia Durkin was filed in the Probate Court of Summit County, Ohio. John Durkin, the son of Virginia Durkin, was the executor of the estate. Daniel O'Halloran, the grandson of Virginia Durkin, was a beneficiary of the estate, along with his two sisters. Mr. O'Halloran's mother (the daughter of Virginia Durkin), Patricia O'Halloran, had predeceased Virginia Durkin. Ms. Durkin's will divided her estate one-half to Mr. Durkin and one-half to Ms. O'Halloran's three children.

During the course of the matter, Mr. O'Halloran filed various motions, including a motion to remove John Durkin as the fiduciary for the estate, a motion to remove Gregory Plesich as attorney for the estate, and a motion to compel. Attorney Plesich filed a motion to require Mr. O'Halloran to produce copies of documents received in response to subpoenas issued to various banks and two motions for contempt. In February 2017, a magistrate's decision denied Mr. O'Halloran's motions, granted \$500.00 for contempt against Mr. O'Halloran, and addressed exceptions to the

inventory of the estate. Mr. O'Halloran filed objections to the magistrate's decision, which were overruled by the trial court's judgment entry of May 8, 2018.

*In re Estate of Durkin*, 9th Dist. Summit No. 28661, 2018-Ohio-2283, ¶ 2-3.

{¶3} Mr. O'Halloran subsequently appealed to this Court raising eight assignments of error. We overruled all but the seventh assignment of error, which we sustained on the grounds that the trial court had abused its discretion in holding Mr. O'Halloran in contempt without a hearing as required under R.C. 2705.03. We therefore affirmed in part and reversed in part, remanding the case to the Probate Court of Summit County, Ohio, for further proceedings consistent with our decision.

{¶4} Upon remand the trial court dismissed the motion for contempt and ordered the filing of an amended inventory. In March 2019, the trial court judge recused herself and Judge Steven O. Williams was appointed by the Supreme Court of Ohio to preside over the case. On August 20, 2019, the trial court entered an order stating that it shared the concerns of Patricia O'Halloran's children relating to the actions of Mr. Durkin, as the holder of power of attorney, prior to Virginia Durkin's death and their impact upon the assets of the estate. The order did not remove Mr. Durkin as executor, but rather appointed Attorney Jay E. Michael as a master commissioner pursuant to R.C. 2101.06 to investigate whether any additional assets should be included in the estate after examining Mr. Durkin's actions with the power of attorney. Mr. Durkin now appeals from that order, raising one assignment of error.

## II.

### ASSIGNMENT OF ERROR

THE LOWER COURT ON REMAND ABUSED ITS DISCRETION WHEN IT DISREGARDED THIS APPELLATE COURT'S RULINGS AND SUA SPONTE RECONSIDERED ISSUES SETTLED IN THIS CASE IN DEROGATION OF THE LAW-OF-THE-CASE DOCTRINE.

{¶5} Before this Court can reach the merits of an appeal, we must consider whether the orders appealed from are final, appealable orders as “[t]his Court has jurisdiction to hear appeals only from final judgments.” *Peppard v. Summit Cty.*, 9th Dist. Summit No. 25057, 2010-Ohio-2862, ¶ 9, citing Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2501.02. “In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction.” *Id.*

{¶6} R.C. 2505.02(B)(2) provides, in pertinent part: “An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is \* \* \* [a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment \* \* \*.” “‘Substantial right’ means 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). “‘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). “[A]n order affects a substantial right for purposes of R.C. 2505.02(B)(2) only if ‘in the absence of immediate review of the order [the appellant] will be denied effective relief in the future.’” *Thomasson v. Thomasson*, 153 Ohio St.3d 398, 2018-Ohio-2417, ¶ 10, quoting *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993). Thus, in order to demonstrate that the trial court’s order was a final, appealable order, Mr. Durkin must show: (1) that the order was made in a special proceeding, (2) that the order affects a substantial right, and (3) that he would not be able to effectively protect his substantial right without immediate review. *See Thomasson* at ¶ 11. This Court has previously recognized that probate cases involving the administration of estates constitute special proceedings. *In re Estate of Chonko*, 9th Dist. Lorain No. 14CA010691, 2016-Ohio-980, ¶ 10.

{¶7} “[A]n order granting or denying a motion to remove an executor would affect a substantial right created by statute \* \* \*.” *In re Estate of Griffa*, 9th Dist. Summit No. 25987, 2012-Ohio-904, ¶ 10. Mr. Durkin argues that the probate court’s order assigning a master commissioner indirectly removes the executor, and therefore affects a substantial right and is a final appealable order.

{¶8} R.C. 2101.06 provides:

The probate judge, upon the motion of a party or the judge’s own motion, may appoint a special master commissioner in any matter pending before the judge. The commissioner shall be an attorney at law and shall be sworn faithfully to discharge the commissioner’s duties. When requested by the probate judge, the commissioner shall execute a bond to the state in the sum that the court directs, with surety approved by the court, and conditioned that the commissioner shall faithfully discharge the commissioner’s duties and pay over all money received by the commissioner in that capacity. The bond shall be for the benefit of anyone aggrieved and shall be filed in the probate court.

The commissioner shall take the testimony and report the testimony to the court with the commissioner’s conclusions on the law and the facts involved. The report may be excepted to by the parties and confirmed, modified, or set aside by the court.

{¶9} In appointing a master commissioner, the probate court stated the purpose was “to investigate and make a report to the Court as to whether any additional assets should be included in the Estate of Virginia Durkin after examining the actions of John Durkin acting with the Power of Attorney from Virginia Durkin.” Under the circumstances of this case, we cannot conclude that the appointment of a master commissioner, in and of itself, effectively revokes Mr. Durkin’s status as executor. We cannot, therefore, agree that the appointment of the master commissioner affected a substantial right.

{¶10} Mr. Durkin also argues that a substantial right was affected because the appointment of a master commissioner violates this Court’s mandate from the previous appeal directing the trial court to carry its judgment into execution in accordance with App.R. 27. We

find nothing, however, in the mandate of the prior order of this Court that would conflict with the appointment of a master commissioner by the trial court. Likewise, we cannot conclude that the order appointing a master commissioner implicates the Ohio Rules of Civil Procedure governing discovery, as suggested by Mr. Durkin.

{¶11} Although it is possible that the master commissioner's actions may result in further appeal to this Court, such arguments are premature upon the mere appointment of the commissioner. Because the order of the trial court appointing a master commissioner did not constitute a final appealable order, we conclude this attempted appeal must be dismissed.

### III.

{¶12} Mr. Durkin's attempted appeal is dismissed for lack of a final appealable order.

Appeal dismissed.

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Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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THOMAS A. TEODOSIO  
FOR THE COURT

CALLAHAN, P. J.  
CONCURS.

CARR, J.  
DISSENTING.

{¶13} I respectfully dissent as I would conclude that the order here is final and appealable under the unique circumstances of this case. The trial court specifically indicated that it would like to remove Mr. Durkin as executor before appointing a master commissioner. The trial court also appears to view this Court’s prior decision as merely procedural and not binding. Accordingly, I would hold that the trial court’s ruling has affected a substantial right in a special proceeding.

{¶14} If Mr. Durkin has not appealed from a final, appealable order in this matter, what would be an appropriate remedy? Perhaps an appropriate remedy under these circumstances would be for Mr. Durkin to file an action requesting an extraordinary writ, given that he contends that the visiting judge disregarded this Court’s prior decision. The Supreme Court of Ohio has long held that “the Ohio Constitution ‘does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.’” *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶ 32, quoting *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32 (1979). “Therefore, ‘a writ of prohibition is an appropriate remedy to prevent a lower court from proceedings contrary to the mandate of a superior court.’” *Marshall* at ¶ 32, quoting *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 182 (1995), *see also State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97-98 (1978).

{¶15} As I believe that Mr. Durkin has in fact appealed from a final, appealable order, however, I respectfully dissent.

APPEARANCES:

MICHELE MORRIS, Attorney at Law, for Appellant.

RONALD MARTIN, Attorney at Law, for Appellant.

DANIEL O'HALLORAN, pro se, Appellee.

KELLY O'HALLORAN, pro se, Appellee.

KATHY WILLIAMS, pro se, Appellee.