

[Cite as *Neumeyer v. Estate of Penick*, 2008-Ohio-6894.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SUZANNE RAE NEUMEYER, ET AL.

Plaintiffs-Appellants

-vs-

ESTATE OF RAYMOND H. PENICK,
DECEASED, PARK NATIONAL BANK,
EXECUTOR, ET AL.

Defendants-Appellees

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 07-CA-146

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Probate Division, Case No.
2006-0679-A

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

December 23, 2008

APPEARANCES:

For Plaintiffs-Appellants

For Defendants-Appellees

DAN L. CVETANOVICH

W. EVAN PRICE II

ROBERT R. DUNN

TIFFANY C. MILLER

BAILEY CAVALIERI LLC

One Columbus

10 West Broad Street, 21st Floor

Columbus, Ohio 43215-3422

ROBERT M. KINCAID, JR.

JESSIE MORGAN GABRIEL

BAKER & HOSTETLER LLP

65 East State Street, Suite 2100

Columbus, Ohio 43215-4260

Hoffman, P.J.

{¶1} Plaintiffs-appellants Suzanne Rae Neumeyer, James Karl Neumeyer, Mark William Neumeyer and Karen Rae Hammond appeal the October 26, 2007 Judgment Entry of the Licking County Court of Common Pleas in favor of Defendants-appellees Park National Bank, Executor of the Estate of Raymond H. Penick, deceased, and Trustee of the Raymond H. Penick Revocable Trust and the Licking County Foundation.

STATEMENT OF THE FACTS AND CASE

{¶2} Raymond H. Penick died on August 30, 2006. Appellant Suzanne Rae Neumeyer is Penick's niece and only surviving relative. Although some of Penick's prior estate plans left the majority of his estate to Neumeyer and her children, on November 12, 2004, Penick executed an Amended and Restated Trust Agreement for the Raymond H. Penick Revocable Trust, Park National Bank, Trustee (the "2004 Trust"). John S. Gard signed the 2004 Trust on behalf of Park National Bank. The 2004 Trust included an \$8 million bequest to the Licking County Foundation.

{¶3} Penick was 96 years old at the time he executed the 2004 Trust. Appellants cite Penick's inappropriate behavior symptomatic of his inability to appreciate the nature of his relationship with his family, and his growing increasingly bitter and angry disposition. Appellants argue Penick's cancelling insurance on all the properties he owned evidences his irrational behavior. In rebuttal, Appellees assert the 2004 Trust stemmed from an argument between Appellants and Penick, and the changes made to the estate plan revolved around Penick's estate tax concerns.

{¶4} In 2005, Penick gifted his oil and gas business and certain real property to Appellant Suzanne Neumeyer. On February 2, 2006, Penick modified his estate plan to reflect the same (the “2006 Trust”).

{¶5} On September 11, 2006, Penick’s Last Will and Testament was admitted to probate, and on December 8, 2006, Appellants filed the within action in the Licking County Probate Court challenging the validity of the 2004 Trust and 2006 Trust. Appellants maintain Penick lacked testamentary capacity when he executed the 2004 and 2006 documents modifying the distribution of his estate. In the alternative, appellants assert Penick was subjected to the undue influence of Park National Bank through John Gard, Penick’s trust advisor and a vice president of Park at the time Penick executed the instruments.

{¶6} On September 6, 2007, Park National Bank moved for partial summary judgment on Appellants’ claims Penick was subjected to undue influence. The Licking County Foundation later joined the motion. On October 9, 2007, the Licking County Foundation moved for partial summary judgment on Appellants’ claim Penick was incompetent when he executed his 2004 Trust, and Park National Bank later joined in that motion.

{¶7} On October 26, 2007, the trial court granted both motions for partial summary judgment. Via Judgment Entry of November 13, 2007, the trial court stayed appellants’ lack of testamentary capacity claim related to the February 2, 2006 Will and Trust pending the appeal in this matter. On December 10, 2007, Appellants filed the within appeal, assigning as error:

{¶8} “I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS’ UNDUE INFLUENCE CLAIMS BY WEIGHING THE EVIDENCE AND DECIDING GENUINE AND DISPUTED ISSUES OF MATERIAL FACT.

{¶9} “II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS’ LACK OF TESTAMENTARY CAPACITY CLAIMS BY WEIGHING THE EVIDENCE AND DECIDING GENUINE AND DISPUTED ISSUES OF MATERIAL FACT.

{¶10} “III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS’ LACK OF TESTAMENTARY CAPACITY CLAIMS BY IGNORING GENUINE AND DISPUTED ISSUES OF MATERIAL FACT REGARDING DECEDENT’S DELUSIONS CONCERNING HIS RELATIONSHIP WITH APPELLANTS.”

{¶11} Before addressing the merits of appellants' arguments, we note when jurisdiction appears unclear, a court of appeals should raise the issue sua sponte. *In re Estate of Geanangel*, 147 Ohio App.3d 131, 2002-Ohio-850. Thus, we shall first consider whether this court has jurisdiction over this appeal.

{¶12} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505 .02. If an order is not final and appealable, an appellate court has no jurisdiction to review the matter and it must be dismissed.

{¶13} To be final and appealable, an order must comply with R.C. 2505.02 and Civ.R. 54(B), if applicable. R.C. 2505.02(B) provides the following in pertinent part:

{¶14} “(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:

{¶15} “(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶16} “(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.”

{¶17} Civ.R. 54(B) provides:

{¶18} “When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties 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 or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, 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.”

{¶19} As noted in the statement of the facts and case, supra, via Judgment Entry of November 13, 2007, the trial court stayed Appellant’s lack of testamentary capacity claim related to the February 2, 2006 Will and Trust pending this appeal of the trial court’s summary judgment rulings. The November 13, 2007 Judgment Entry did not include Civ.R. 54(B) language. As such, there is no final appealable. Because

there is no final appealable order, this court does not have jurisdiction to entertain Appellants' appeal.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
 FIFTH APPELLATE DISTRICT

SUZANNE RAE NEUMEYER, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ESTATE OF RAYMOND H. PENICK, DECEASED, PARK NATIONAL BANK, EXECUTOR, ET AL.	:	
	:	
Defendants-Appellees	:	Case No. 07-CA-146

For the reason stated in our accompanying Memorandum-Opinion, this appeal is dismissed. Costs assessed to Appellants.

s/ William B. Hoffman
 HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
 HON. SHEILA G. FARMER

s/ Patricia A. Delaney
 HON. PATRICIA A. DELANEY