

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

IN THE ESTATE OF:
CHARLES RAY DEVORE, DECEASED

LORRIE DEVORE, ADMINISTRATRIX,

Plaintiff-Appellee,

v.

SHANNON MALONE, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 HA 0004

Civil Appeal from the
Court of Common Pleas, Probate Division, of Harrison County, Ohio
Case No. 20171058.

BEFORE:

Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Dismissed.

Atty. John O. Tabacchi, 145 South Main Street, Cadiz, Ohio 43907, for Plaintiff-Appellee.

Atty. Travis Collins, 105 Jamison Avenue, Cadiz, Ohio 43907, for Defendants-Appellants.

Dated: June 24, 2019

WAITE, P.J.

{¶1} Appellants Shannon Malone, Travis DeVore and Kyle Devore appeal from the judgment of the Harrison County Court of Common Pleas, Probate Division. The probate court approved Appellee Lorrie DeVore’s appraisal of the marital real estate and inventory of personal property filed as part of the estate of her late husband, Charles Ray DeVore (“the decedent”). After Appellee filed the inventory and appraisal with the probate court, Appellants filed exceptions. Following a hearing on the matter, the probate court adjusted Appellee’s appraisal of the real estate and the valuation of the personal property, both in Appellants’ favor. However, the probate court held a decision as to other claimed assets of the estate in abeyance, including those involving ownership of a pizza business. On appeal, Appellee indicates that at some time after the hearing at issue here was held, she received a notification from the IRS of an outstanding income tax liability belonging to her and the decedent. It is apparent that, based on the outstanding issues regarding ownership of the pizza restaurant and possible income tax liability, an amended inventory must be filed in this case in order to fully address these issues. Therefore, as the probate court did not rule on all of the property issues in the estate in the judgment entry currently on appeal, the judgment is not final and appealable. We are without jurisdiction to review the matter at this time. The appeal is dismissed for lack of jurisdiction.

Factual and Procedural History

{¶2} The decedent passed away on March 2, 2017, intestate. Appellee is the decedent’s surviving spouse and stepparent to Appellants, who are the decedent’s three surviving adult children. On August 7, 2017, Appellant Travis DeVore filed an application

with the Harrison County Probate Court for authority to administer his father's estate. On October 26, 2017, Appellee filed a competing application for authority to administer the estate. By agreement of the parties, Appellee was appointed as the administrator.

{¶3} On January 17, 2018, Appellants filed a motion to be present during the scheduled appraisal of the decedent's house and personal property. The probate court granted the motion on the same day. An appraisal was conducted on February 6, 2018 by Phillip J. Flenniken ("Flenniken"). Present were all three of the Appellants and Appellee, who still lives in the marital residence. According to Appellants, during the appraisal they were permitted access only to the basement, the kitchen, and the outdoor area. Appellee and Flenniken dispute Appellants' contention that they were not permitted to be present in any other part of the house during this appraisal. The record also indicates that, although this was the formal inventory and appraisal, Flenniken had actually visited the property three times while the matter was pending. On the appraisal report the date of inspection is listed as November 20, 2017, the effective date of appraisal is listed as May 2, 2017, and the date of the signature is March 26, 2018.

{¶4} The final appraisal report by Flenniken contained many specifics regarding the property. The real estate was appraised at \$55,000. In making that determination, Flenniken's report contained a provision reading: "The property is being appraised assuming several EXTRAORDINARY ASSUMPTIONS." These assumptions were as follows:

{¶5} 1.) The water supply was inadequate and would not pass county requirements;

{¶16} 2.) The septic system was inadequate and would not pass county requirements;

{¶17} 3.) The tin roof on the house was properly installed;

{¶18} 4.) Despite selling the mineral rights to the property, the DeVores retained the surface rights free, clear, and suitable for mortgage purposes as certified by a real estate title lawyer;

{¶19} 5.) No binding agreements for the burial of Mr. DeVore on the subject property prior to his death and prior to the effective date of the report existed;

{¶110} 6.) The basement of the house was infested with snakes;

{¶111} 7.) A home inspection made by a qualified professional inspector would agree to the list of repairs needed. (5/18/18 Appraisal.)

{¶112} Flenniken's appraisal also listed the repairs needed, again with the caveat that the suggested repairs should be confirmed by a home inspector:

{¶113} 1.) The barn needed to be torn down.

{¶114} 2.) A new approved water well and septic system needed to be installed.

{¶115} 3) A new forced air furnace, duct work, and registers needed to be installed.

{¶116} 4.) The bathroom and kitchen needed a complete remodel and new floor coverings needed to be installed. The interior walls and ceiling needed patched and painted throughout.

{¶117} 5.) Trim work needed installed throughout the house.

{¶118} 6.) Windows needed to be framed and cased.

{¶119} 7.) The snakes had to be removed and the house was to be sealed in manner to prevent snakes and rodents from entering.

{¶20} 8.) The basement floor needed concrete installed and an appropriate basement or garage door needed to be installed. The foundation wall needed sealed against leaks and the basement stairs were to be replaced.

{¶21} 9.) Plumbing was to be repaired or replaced, both as to supply and drain lines.

{¶22} 10.) Electrical wiring throughout the house needed replacement.

{¶23} 11.) The flashing around chimney needed secured; the eaves needed to be boxed in and soffit, fascia, gutters, and down spouts were to be installed. (5/18/18 Appraisal.)

{¶24} The final page of Flenniken's report is entitled, "PERSONAL PROPERTY SUMMARY." Several items of the decedent's personal property are listed, including items grouped together for appraisal purposes such as kitchen appliances; back porch contents; front porch contents; and a bottle/glass collection. Several items are listed individually, such as a mounted deer head; inoperable motor vehicles; and an old bus used for storage. The total appraised value of the decedent's personal property was \$12,425, minus an auction cost of approximately \$3,500 to \$4,000. (5/18/18 Appraisal.)

{¶25} Flenniken's report also contains several photographs of the interior and exterior of the property as well as numerous photographs of personal property found inside the home. Photographs of the basement show several boxes and other items stacked on top of each other. Photographs of the front and back porches reveal several piles covered by tarps. Also included is a hand-written list captioned "Notes provided by Lorrie Devore [Appellee]:"

No well. Springwater to the house

No up to code wiring in house or barn or fuse box

No approved septic tank system

No down spouts or outside drains

No basement floor – no concrete

No concrete sidewalks - or basement drains

No thermo pane insulated windows

No insulation on outside wall of home

No gas furnace – coal and wood only source of heat!

No sealed basement entries

One bathroom only needs updated

Need kitchen cabinets replaced

Lighting fixtures need replaced also [sic]

Stairs to basement need replaced! or repaired

(5/18/18 Appraisal.)

{¶26} On May 18, 2018, Appellee filed her inventory and appraisal, and a schedule of assets. Appellee's inventory and appraisal listed the value of the tangible personal property as \$12,425 and the real estate as \$25,000, for a total estate value of

\$37,425. On June 4, 2018, Appellants filed exceptions, raising objections to both the appraisal of the real estate and the valuation of the personal property. Regarding the real estate, Appellants contended that, while there were defects to the buildings, there were no defects in the 14.048 acres of land. Appellants contended that Appellee's proposed \$25,000 valuation equated to only \$1,780 per acre and was too low, considering that Flenniken's appraisal valued the real estate at \$55,000. Appellants requested in their objections that the real estate be valued at \$55,000.

{¶27} Regarding the personal property, Appellants contended in their objections that the house contained valuable antiques and glassware. Appellants also noted that the valuation of the personal property by Flenniken listed a Kubota tractor on the property at \$9,000, leaving the balance of all of the decedent's other personal property at only \$3,425, which was under value.

{¶28} The objections filed by Appellants also raised the issue that the decedent owned a pizza restaurant in Bowerston. Appellants attached a copy of the corporate registration filed with the Ohio Secretary of State for the restaurant, Pro Pizza Plus. Appellants contend Appellee is not an owner or shareholder in the pizza restaurant business.

{¶29} Appellants also objected to the failure to appraise any of the decedent's firearms. Appellants did not identify any specific firearm that was missing from the valuation nor did they produce any other evidence related to these firearms in their objections.

{¶30} Appellants raised concerns that photos included in the appraisal were dated November 28, 2017. Appellants had attended the appraisal scheduled on February 6, 2018 and had never been notified that any prior appraisal had been undertaken.

{¶31} A hearing on Appellants' exceptions was held on June 28, 2018. There was testimony provided by two witnesses. Flenniken testified on behalf of Appellee that he had been doing real estate appraisals since 1971. (6/28/18 Tr., p. 10.) He testified that he had been to the property three times. The first time, he briefly visited in order to determine if he would be able to do the appraisal. He testified that the second visit was "more the formal inspection," while the third visit was to more thoroughly examine the spring and water supply going to the property. (6/28/18 Tr., p. 12.)

{¶32} When asked what the positive aspects of the property were, Flenniken stated that the street view was appealing and it appeared to have a newer tin roof. When asked to describe the characteristics of the property that would negatively affect its value, Flenniken testified as to several defects. Beginning with the exterior of the house, he testified that on further inspection the tin roof was installed on top of an existing shingled roof and the soffit and fascia had been left off, leaving the wood exposed and rotting. He also testified that the windows did not fit properly and the trim was missing. He called the wiring in the home "scary," with wires hanging exposed in the basement and having existing fixtures spliced into the wiring. (6/28/18 Tr., p. 13.) He testified that the plumbing was "almost as bad" and showed leakage in the bathroom and kitchen. (6/28/18 Tr., p. 13.) The kitchen cabinets needed replaced, the bathroom needed to be updated and the basement had a dirt floor. Part of the basement was intended to serve as a garage, but

a garage door had never been installed. Instead, it was propped up and nailed in place and covered with a tarp. (6/28/18 Tr., p. 14.)

{¶33} Flenniken testified that the existing fuse box in the basement was newer, but that there was damage on the walls and joists from where the prior fuse box had caught on fire. He also testified that the heating system was a coal and wood furnace. There appeared to be no coal on the premises, but large piles of wood were on the basement floor. The furnace door did not close.

{¶34} Regarding water and sewer service to the house, Flenniken stated he could not locate the septic system for the property and that it would most likely need a new one before the property could be sold. The house was serviced by a spring as a water source. The spring was located approximately one quarter mile from the home. The wires that connected the spring system were hanging overhead outside, four to six feet off the ground, and had no insulation. The bare wire could be touched by a person or animal and would cause the water supply to be knocked out. (6/28/18 Tr., p. 16.) He testified that the county had not tested the water but that an oil and gas company had tested it several years ago and declared it safe. Flenniken testified that Appellee had run out of water several times and had to wait for the spring “to make enough additional water.” (6/28/18 Tr., p. 17.)

{¶35} Flenniken also testified regarding the mineral rights and surface rights of the property, stating that when he appraised the home he was told that the decedent had retained the surface rights when selling the mineral rights to the property. At the hearing, counsel for Appellee presented Flenniken with Plaintiff’s Exhibit A, a deed dated January 8, 2016, granting the mineral rights and surface rights of the property from the decedent

and Appellee to Okey Energy, LLC. Flenniken read the deed into the record at the hearing. He testified that had he been aware that the surface rights had not been retained, he would have appraised the real estate substantially lower, as the conveyance of the surface rights had a “big impact” on the value of the property. (6/28/18 Tr., p. 21.) Flenniken stated the value of the property would drop by approximately fifty percent. (6/28/18 Tr., p. 21.)

{¶36} Flenniken testified regarding the inventory and valuation of the decedent’s personal property. He stated that Appellee and all three Appellants were present at the house during his appraisal. Appellee and Appellants each pointed to specific personal items for him to consider. Flenniken said there was disagreement between Appellee and Appellants as to what property should be included. He stated that each room of the house and the basement were full of personal items. There were several items of personal property outdoors as well, including on the front and back porch, which were full of piles of objects covered with tarps. He stated an abandoned bus was being used for storage on the property, and there were items sitting directly outside and in portions of the barn. (6/28/18 Tr., pp. 23-24.)

{¶37} In regard to his inspection of items in the basement, he said:

Well, it was on a dirt floor so that’s not a good way or good area to store anything for that matter. It didn’t look like anything had been handled for several years which was an indication that there was nothing [sic] real value. In fact the one son said, you know, something to the effect this is the same way as it was sixteen years ago. So that was an indication to me that no one has touched anything or used anything or considered anything of any

value at that point. There was snake skin laying there and Mrs. Devore [Appellee] said that she had had snakes down there on different occasions. And it was cluttered down there too. Things were piled on top of one another and so forth.

(6/28/18 Tr., p. 25.)

{¶38} Regarding the valuation of items on the first floor, Flenniken testified that he did not see anything of significant value. He took several pictures in every room and showed these photos to an antiques expert who did not see anything of value. He then testified that he typically groups similar items together and sorts through them carefully before an auction.

{¶39} Appellants submitted a notebook which included various photographs of items that Appellants contended were in the house and were not appraised. When shown these photos, Flenniken testified that either the items were not pointed out to him or that he did not see them if they were piled under other items.

{¶40} Appellant Shannon Malone testified on behalf of all of the Appellants. She testified that she and her brothers were present at the appraisal but were only permitted to be in the kitchen, the basement and outside in the yard. They were not permitted to take photographs of any property. Appellants submitted various family photographs depicting personal property of the decedent that was not included in the appraisal. Malone admitted that some of the items may have been under tarps on the front or back porch during the appraisal. Several of the items were related to the decedent's pizza business, including large electric ovens. Malone testified that she was not sure where those items were located on the property. She also testified regarding various

photographs Appellants submitted into evidence which were from eBay and other online stores. These depicted items allegedly similar to those owned by the decedent. Appellee's counsel objected on authentication grounds, arguing the photographs from the internet could not be utilized to establish the actual value of alleged items that were never seen on the property. After a bench conference, the probate court admitted the photographs under Evid.R. 105, deciding that they had only a limited value to the court since the photos did not represent the decedent's actual item, its condition or its value. (6/28/18 Tr., pp. 63-66.)

{¶41} Malone testified that she lived across the street from her father on a six and one-half acre lot. She testified that her home had been appraised at \$134,000 less than a year earlier. (6/28/18 Tr., p. 68.) On cross-examination Malone testified that she had remodeled her home, so that it was newer and in better condition than her father's. (6/28/18 Tr., p. 70.)

{¶42} At the end of the hearing, Appellee's counsel raised the issue that the ownership of the pizza business was still in dispute. There also remained a question as to whether there were any outstanding tax debts for the business. The probate court noted:

Then what I will be ruling on is solely the specific valuation of the real estate and valuation on the miscellaneous. I am holding off on any valuation or inclusive or not inclusive of the pizza shop until [counsel for all parties] have discussed that. After I rule on that that gives you each the opportunity to file additional motions or see where this resolves itself.

(6/28/18 Tr., p. 74.)

{¶43} In a judgment entry dated July 3, 2018, the probate court held the following: (1) the value of the real estate was \$55,000, based on the evidence presented and the testimony of Flenniken with no expert testimony to dispute this valuation; (2) the personal property was valued at \$17,425 because the appraiser admitted to missing items and the state of the property made an efficient appraisal difficult; and (3) the valuation of the pizza business was held in abeyance, as the parties continued to discuss issues relating to ownership. (7/3/18 J.E.)

{¶44} Thus, the probate court's order failed to enter judgment on the value of the pizza business, as its ownership had yet to be resolved. This matter remains pending in the trial court. Appellee additionally states on appeal that an IRS notice of income tax liability for decedent and Appellee was received post hearing. Hence, this issue was not before the trial court at the time the July 3, 2018, judgment entry was issued.

{¶45} Appellants filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT IMPROPERLY APPROVED APPELLEE'S APPRAISAL OF DECEDENT'S REAL ESTATE WHERE THE APPRAISER MADE SEVERAL ASSUMPTIONS REGARDING THE CONDITION OF THE PREMISES WITHOUT ANY EVIDENCE TO SUPPORT THOSE ASSUMPTIONS.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT IMPROPERLY APPROVED APPELLEE'S INVENTORY AND APPRAISEMENT OF DECEDENT'S PERSONAL PROPERTY WHERE THE ITEMS OF PERSONAL PROPERTY WERE NOT INDIVIDUALLY INVENTORIED AND THE APPRAISER ADMITTED HE DID NOT VIEW CERTAIN ITEMS BECAUSE THEY WERE HIDDEN FROM HIS VIEW DUE TO THE CONDITION OF THE PREMISES.

{¶46} Before addressing the merits of Appellants' assignments of error, we must first address whether the probate court judgment entry identified in the notice of appeal is a final appealable order. Article IV, Section 3(B)(2) of the Ohio Constitution establishes that courts of appeal "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 within the district."

{¶47} To be final and appealable, an order must satisfy the requirements set forth in R.C. 2505.02. *IBEW, Local Union No. 8 v. Vaughn Indus., L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, ¶ 7. Pursuant to R.C. 2505.02(B)(1) and (2), an order is final and appealable if it "affects a substantial right in an action that in effect determines the action and prevents a judgment" or if it "affects a substantial right made in a special proceeding or upon a summary application in an action after judgment." If the judgment appealed is not a final appealable order, an appellate court lacks jurisdiction to review it. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, ¶ 14. Thus, in the absence of a final appealable order, an appellate court must dismiss the appeal. Under R.C. 2505.02(A)(1), 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.” An order affects a substantial right when that order is “perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993).

{¶48} In *Sheets v. Antes*, 14 Ohio App.3d 278, 470 N.E.2d 931 (10th Dist.1984), the Tenth District held that an order denying the exceptions to an inventory and approving the inventory is final and appealable. We have cited *Sheets* for the proposition that the denial of exceptions to an inventory and appraisal is a final appealable order. *In re Sacco*, 7th Dist. Columbiana No. 03 CO 39, 2004-Ohio-3196, at ¶ 15. However, the probate court’s judgment entry must not only deny the exceptions to the inventory, but must also approve the final estate inventory for that judgment to be a final and appealable. *Sheets*, at 278.

{¶49} In the instant matter, Appellee argues the July 3, 2018 judgment entry is not a final appealable order for two reasons: (1) the issue regarding ownership of the pizza restaurant was explicitly held in abeyance by the trial court awaiting further discussions by the parties; and (2) an IRS claim of income tax liability against the decedent was received after the hearing and was not before the trial court when the instant judgment entry was issued. Appellee contends she will “file an amended inventory consistent with the Courts’ rulings and will also file a schedule of debts to show the existence of a newly discovered claim by the IRS against the decedent and Appellee in the amount of \$10,681.48 as of July 16, 2018.” (Appellee’s Brf., p. 1.)

{¶50} The Tenth District has held that the judgment is not a final appealable order when it, “clearly contemplates further action in the probate court before approval or settlement of the final account” or when “future filing of an amended inventory is clearly

contemplated.” *In re Estate of Robison*, 10th Dist. No. 17AP-232, 2017-Ohio-8980, ¶ 26. In *Robison*, the judgment entry appealed noted that several motor vehicles needed to be added to the inventory, the whereabouts of which were unknown at the time of the hearing on the exceptions. It also noted that the judgment entry did not approve or settle an account, hence the filing of an amended inventory was contemplated. *Id.*

{¶51} Applying this rule to the instant case, at the hearing the probate court noted the ownership of the pizza restaurant remained unresolved and the issue was purposely held in abeyance:

Then what I will be ruling on is solely the specific valuation of the real estate and valuation on the miscellaneous. I am holding off on any valuation or inclusive or not inclusive of the pizza shop until [counsel for all parties] have discussed that. After I rule on that that gives you each the opportunity to file additional motions or see where this resolves itself.

(6/28/18 Tr., p. 74.)

{¶52} The July 3, 2018 judgment entry concluded, “the real estate valuation is set at \$55,000.00” and “the Court will Order the value of the Tangible Personal Property to be \$17,425.00.” (7/3/18 J.E., pp. 1-2.) However, the judgment entry also states, “[t]he parties agreed to review the ownership of the pizza shop privately and would not present any evidence regarding that issue today.” (7/3/18 J.E., p. 1.) According to Appellee’s brief, an issue concerning an IRS claim for income tax liability also arose after the hearing and needs to be addressed by the probate court. (Appellee’s Brf., p. 1.)

{¶53} The probate court clearly did not settle all potential assets relative to the decedent's estate. Appellants acknowledge that some of the personal property at the home should include alleged assets owned by the pizza restaurant. A certificate naming the pizza restaurant, Pizza Pro Plus, as an Ohio corporation and listing only the decedent as having an interest was made part of the record. The probate court noted at the hearing that this issue was to be resolved at a later date. The record also includes a list of other tangible assets allegedly held by the pizza shop which were not included in the instant inventory and appraisal. As noted, there may also be an IRS tax liability claim that was not before the probate court at the time the court entered its partial judgment. It is clear in any event that a future amended inventory was anticipated to include outstanding items relative to the pizza business and that the court and the parties anticipated further action was necessary in this matter before final disposition could issue.

{¶54} Although the real estate appraisal and the inventory of the personal property contents therein appear to be resolved by the probate court, it is clear that a full and final accounting or settlement of the assets of the estate is still to be forthcoming. Appellants may have objections to the amended inventory and would not be foreclosed from appealing the ruling on their objections to this preliminary accounting at that time. Thus, future relief on Appellants' objections would not be foreclosed to them after a filing of the amended inventory. *Robison*, at ¶ 26. Appellants could certainly file objections challenging the validity of the amended inventory and appraisal and appeal from any adverse decision to that objection.

{¶55} We conclude that while the July 3, 2018 judgment entry addressed the objections to the inventory raised by Appellants, it did not include a final inventory of all

assets relative to the decedent's estate. Therefore, the July 3, 2018 judgment entry is not a final appealable order. The instant appeal is hereby dismissed for lack of jurisdiction.

Conclusion

{¶56} Based on the foregoing, the appealed judgment entry contemplates further action by the probate court and it is clear an amended inventory is contemplated. Therefore, the judgment entry of the probate court that is the subject of this appeal is not a final appealable order and we are without jurisdiction to review the order at this time. The appeal is dismissed for lack of a final appealable order.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the judgment entry of the Court of Common Pleas, Probate Division, of Harrison County, Ohio is not a final appealable order and we are without jurisdiction to review the matter at this time. This appeal is hereby dismissed for lack of jurisdiction. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.