[Cite as *Estate of L.P.B. v. S.B.*, 2011-Ohio-4656.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Estate of:	:	Nos. 11AP-81 (Prob. No. 520494)
L. P. B.,	:	11AP-83 (Prob. No. 520494-A)
(S. B.,	:	11AP-84 (Prob. No. 520494-B)
Appellant).	:	11AP-85 (Prob. No. 520494-C)
	:	(REGULAR CALENDAR)
	:	
In the Estate of:	:	Nos. 11AP-82 (Prob. No. 520494)
L. P. B.,	:	11AP-86 (Prob. No. 520494-A)
(P. B. & E. B.,	:	11AP-87 (Prob. No. 520494-B)
Appellants).	:	11AP-88 (Prob. No. 520494-C)
	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on September 15, 2011

Bonnie D. Michael, and *John Jones*, for the Estate of L.P.B.

Gallagher Sharp, *Robert H. Eddy*, and *Colleen A. Mountcastle*, for the Estate of L.P.B. and Bonnie D. Michael.

Michael O'Reilly for appellant S.B.; *Susan Wasserman*, for appellants E.B. and P.B.

APPEALS from the Franklin County Court of Common Pleas, Probate Division.

BROWN, J.

{¶1} S.B., P.B., and E.B., appellants, appeal from a judgment of the Franklin County Court of Common Pleas, Probate Division, in which the court struck portions of S.B.'s objections to the magistrate's decision, overruled S.B.'s objections to the magistrate's decision, and overruled P.B. and E.B.'s objections to the magistrate's decision, or, in the alternative, granted the motion to dismiss objections filed by the estate of L.P.B. ("estate"), appellee; denied the motion for nunc pro tunc order filed by P.B. and E.B.; denied the motion to disqualify counsel filed by P.B. and E.B.; denied the motion for hearing filed by appellants; and approved and adopted the magistrate's decisions issued June 7, 29, and 30, 2010. The estate has filed a motion to dismiss appellants' appeals for lack of a final appealable order.

{¶2} Because we grant the estate's motion to dismiss, we will attempt to recite only an abbreviated summary of the labyrinthine factual history of this contentious case. L.P.B. died in December 2006. At the time of his death he was married to his third wife, S.B., and they had two minor children, E.B. and P.B. L.P.B. was also survived by three adult children from his first marriage. S.B., believing L.P.B. died intestate, applied to be administrator of L.P.B.'s estate on January 24, 2007. On May 25, 2007, B.B., decedent's brother, filed an application to probate the lost will of L.P.B. On July 11, 2007, the court admitted the lost will to probate and appointed B.B. as administrator. Bonnie Michael is the attorney for the administrator of the estate. S.B. subsequently filed an election to take against the will. Many motions filed by the parties followed, including several applications for attorney fees filed by Michael.

{¶3} On June 7, 29, and 30, 2010, the magistrate issued decisions on various motions. As pertinent to this appeal, the magistrate granted Michael attorney fees in the amount of $34,242.47, which were to be paid from the estate's assets. S.B., as well as P.B. and E.B., filed objections to the magistrate's decisions.

{¶4} On November 2, 2010, P.B. and E.B. filed a motion for nunc pro tunc order requesting that the objections to an earlier May 21, 2008 magistrate's decision be set aside because the objections were filed untimely. On November 2, 2010, P.B. and E.B. filed a motion to disqualify Michael as counsel on the basis that Michael was party to the action because she could become a witness with regard to her fees, as well as the untimely filed objections to the May 21, 2008 magistrate's decision. On November 19, 2010, P.B. and E.B. filed a motion seeking a declaration under Civ.R. 44(B) that certain pleadings relating to the extension of time to file the objections to the May 21, 2008 magistrate's decision were never filed with the court. These motions all related to objections filed by B.B. to the magistrate's May 21, 2008 decision, in which the magistrate recommended that B.B. be removed as administrator. The trial court granted B.B. an extension to file objections to the magistrate's May 21, 2008 decision, and then later found, after a hearing on the objections, that B.B. should remain as administrator of the estate.

{¶5} On December 30, 2010, the trial court issued a decision striking portions of S.B.'s objections, overruling S.B.'s objections, and overruling P.B. and E.B.'s objections, or, in the alternative, granting the motion to dismiss objections filed by the estate; denying the motion for nunc pro tunc order filed by P.B. and E.B.; denying the motion to disqualify counsel filed by P.B. and E.B.; denying the motion for hearing filed by appellants; and

approving and adopting the magistrate's decisions issued June 7, 29, and 30, 2010. Appellants appeal the judgment of the trial court, asserting the following assignments of error:

> [I.] The Probate Court erred in denying the Objections to the Magistrate's Decision on the basis that the surviving spouse and minor children did not file a "complete" transcript.
>
> [II.] The Probate Court had a duty to issue an Entry for Lack of Record when counsel could not produce proper[l]y filed documents to support her claim of excusable neglect. The missing documents will be relevant in other non probate remedies to the minor children and the court as superior guardian and clerk of the probate court must maintain an authentic docket.
>
> [III.] The Probate Court erred in denying the Appellants' November 2, 2010 Motion to Disqualify Attorney Bonnie Michael as Counsel for Successor AWWA[.]
>
> [IV.] The Probate Court erred in declining to grant a Nunc Pro Tunc Order to correct its June 5, 2008 Entry Extending Time to Object to the Magistrate's Decision of May 21, 2008 Removing [B.B.] as Administrator. Especially where the entry is issued ex parte upon a missing Motion and proof of excusable neglect or good cause and constituted denial of the substantial right of due process of the minor pretermitted heirs.
>
> [V.] The Probate Court Erred In Ratifying The Magistrate's Decision Of June 30, 2010 Approving Premature Legal Fees Of The Fiduciary's Counsel Where Fiduciary Had Refused To File Final Account Until Her Fees Were Approved And It Erred in Approving Fees That Were Excessive On Their Face.

{¶6} We first address the estate's motion to dismiss the appeals for lack of a final appealable order. Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of final orders of lower courts. "A final order * * * is one disposing of the whole case or some separate and distinct branch

thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. A trial court's order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶7} R.C. 2505.02 defines a final order and provides, in pertinent part:

> (A) As used in this section:
>
> (1) "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.
>
> (2) "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.
>
> (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.
>
> (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:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial;

> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (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.

{¶8} Civ.R. 54(B) provides as follows:

> 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.

{¶9} Thus, in multiple-claim or multiple-party actions, if the court enters judgment as to some, but not all, of the claims and/or parties, the judgment is a final appealable order only upon the express determination that there is no just reason for delay. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 22; Civ.R. 54(B).

{¶10} When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, we must determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies R.C. 2505.02, we must determine whether Civ.R. 54(B) applies and, if so, whether the order contains a

certification that there is no just reason for delay. Id. at 21. Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable. Id., citing *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254, 255. Therefore, the presence of a Civ.R. 54(B) certification is relevant only if the trial court's order first qualifies as a final order under R.C. 2505.02.

{¶11} In the present case, as to R.C. 2505.02, the parties agree that R.C. 2505.02(B)(4) applies, in that the trial court's decision was a "provisional remedy" under R.C. 2505.02(B)(3), because the trial court's decision concerned issues ancillary to the action, and there were further proceedings below that have yet to occur to complete the probating of the estate. Specifically, it is undisputed that a final account has not been approved and settled. Therefore, to be a final appealable order, pursuant to R.C. 2505.02(B)(4), the following must apply: (a) the order must, in effect, determine the action with respect to the provisional remedy and prevent a judgment in the action in favor of the appealing party with respect to the provisional remedy; and (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.

{¶12} Appellants contest four aspects of the trial court's judgment: (1) the court's denial of their motion for nunc pro tunc order; (2) the court's denial of their motion to disqualify attorney Michael; (3) the trial court's awarding of attorney fees to attorney Michael; and (4) the trial court's denial of their request for an entry for lack of record relating to several pleadings missing from the record. Even assuming that the trial court's decision determined the action with respect to these issues and prevented a judgment in favor of appellants with respect to these issues, we conclude that appellants would be

afforded a meaningful and effective remedy by way of an appeal following the trial court's issuance of a final judgment. Appellants do not argue that they would be prejudiced by a later appeal of these issues, and we see no prejudice. Attorney Michael's attorney fees are to be paid by the estate, and there is no threat to the administration of the estate by delaying an appeal of the attorney fees until a final judgment is issued. Furthermore, appellants admit that their motivation for filing the request for an entry for lack of record was to correct the record in case the minor children wished to pursue a legal action after reaching the age of majority; thus, delaying an appeal of this issue clearly would not negatively impact P.B. and E.B.'s ability to pursue a later action. The motion for nunc pro tunc order is effectively reviewable after final judgment, as well. In addition, an order denying a motion to disqualify counsel is not a final appealable order because its effect is not permanent, in that the order may be revisited, and the party seeking disqualification may pursue other avenues, such as disciplinary proceedings, to address any improprieties that occur. See, e.g., *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, ¶8-10 (in the context of a divorce proceeding, the denial of a motion to disqualify counsel is not a final appealable order); *In re Estate of Cullen* (1997), 118 Ohio App.3d 256, 261 (a motion to disqualify counsel in a civil proceeding has been characterized as a request for ancillary relief, the denial of which is not a final appealable order); *Bouzaher v. Wahba*, 6th Dist. No. E-09-034, 2010-Ohio-1593 (in the context of a civil case, the denial of a motion to disqualify counsel is not a final appealable order). Therefore, appellants would be afforded a meaningful and effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Accordingly, we find the trial court's judgment failed to meet the requirements of a final order that is immediately appealable pursuant to R.C. 2505.02(B)(4).

{¶13} Given the failure to satisfy the requirements of R.C. 2505.02, whether the trial court made a finding under Civ.R. 54(B) that "there is no just reason for delay" is irrelevant. For these reasons, we find the trial court's December 30, 2010 decision did not constitute a final appealable order, and we lack jurisdiction to consider appellants' appeals from that decision. The estate's motion to dismiss the appeal is granted.

{¶14} Accordingly, the estate's motion to dismiss the appeal is granted, and we dismiss appellants' appeals due to the lack of a final appealable order.

Appeals dismissed.

SADLER and CONNOR, JJ., concur.

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