[Cite as *Colburn v. Cooper*, 2018-Ohio-5190.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CHERYL COLBURN, et al.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2018-L-008**
- vs -	:	
MICHAEL COOPER, et al.,	:	
Defendants-Appellees.	:	

Appeal from the Lake County Court of Common Pleas, Probate Division, Case No. 2017 CV 001066.

Judgment: Affirmed in part, reversed in part, and remanded.

John S. Salem, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #22, Mentor, OH 44060. (For Plaintiff-Appellant).

Russell J. Meraglio and *Timothy James Gallagher,* Reminger Co., LPA, 101 West Prospect Avenue, Suite 1400, Cleveland, OH 44115 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Cheryl Colburn ("Cheryl"), appeals from the judgment of the Lake County Court of Common Pleas, Probate Division, dismissing her complaint which, inter alia, demanded an accounting from her brother, appellee-Michael Cooper ("Michael"), in his capacity as economic power of attorney for their mother, Theresa Roberts. We affirm in part, reverse in part, and remand.

{¶2} In January 2017, Cheryl filed a complaint against Michael and his wife, Sharon Cooper ("Sharon"), pertaining to the alleged misuse and mismanagement of assets belonging to Theresa. Factually, Cheryl alleged Theresa sold certain business interests, in 2002 and 2005, respectively. And, on January 8, 2008, Theresa appointed Michael as her financial power of attorney. In March 2016, Theresa was placed under guardianship and Attorney Shannon Ciancola was appointed Theresa's guardian at that time. Based upon his status as financial power of attorney between 2008 and 2016, Cheryl pleaded seven causes of action: (1) a demand for an accounting during Michael's time as Theresa's power of attorney; (2) breach of fiduciary duties pertaining to Michael's role as Theresa's power of attorney; (3) breach of "common law duties" similar to the breach of fiduciary claim; (4) conversion; (5) civil damages relating to criminal felony theft, pursuant to R.C. 2307.60 and R.C. 2307.61; (6) an injunction to restrain the Coopers from spending Theresa's assets; and (7) intentional interference with expectation of inheritance.

{¶3} The Coopers moved to dismiss the complaint, pursuant to Civ.R. 12(B)(6). They argued Cheryl lacked standing for her first six causes of action as they could only be properly asserted by Theresa, by way of her guardian. The Coopers further asserted the cause of action for intentional interference with expectation of inheritance was unripe. Cheryl opposed the motion, claiming she had standing to demand an accounting of Michael in her capacity as a presumptive heir and a named beneficiary under Theresa's will. The probate court entered judgment in the Coopers' favor, dismissing the complaint without explanation.

{¶4} Cheryl now appeals assigning the following as error:

{¶5} "It was error for the trial court to dismiss Plaintiff's complaint."

{¶6} Although Cheryl asserted multiple causes of action, all of which were dismissed pursuant to Michael's Civ.R. 12(B)(6) motion, she limits her argument on appeal to the issue of standing. She further limits her appellate argument to whether she has standing to demand an accounting of Michael's actions as power of attorney for Theresa. We shall therefore limit our analysis to this issue.

{¶7} A court of appeals reviews a trial court's judgment dismissing a complaint pursuant to Civ.R. 12(B)(6) de novo. *Goss v. Kmart Corp.,*11th Dist. Trumbull No. 2006-T-0117, 2007-Ohio-3200, ¶17. In general, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In considering the propriety of the dismissal, "we accept all factual allegations in the complaint as true and draw all reasonable inferences in the non-moving party's favor." *Transky v. Ohio Civil Rights Comm.,* 193 Ohio App.3d 354, 2011-Ohio-1865, ¶11 (11th Dist.) "Lack of standing is properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *United States Bank Nat'l Ass'n v. Duvall,*, 8th Dist. Cuyahoga No. 94714, 2010-Ohio-6478, ¶10.

{¶8} "Standing to sue is part of the common sense understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102 (1998). Generally, standing involves a determination of whether a party has alleged a personal stake in the outcome of the controversy to ensure the dispute will be presented in an adversarial context. *Mortgage Elec. Registration Sys. v.*

Petry, 11th Dist. No.2008-P-0016, 2008-Ohio-5323, ¶18. In this case, a party's standing to seek an accounting is defined by statute. To wit, Cheryl asserts she has standing to request an accounting pursuant to R.C. 1337.36, which governs who may seek a court order to review an agent's conduct. It provides, in relevant part:

{¶9} (A) Any of the following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

{¶10} * * *

{¶11} (5) An individual who would qualify as a presumptive heir of the principal;

{¶12} (6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate.

{¶13} Cheryl claims she has standing to proceed with a demand for an account by operation of either of the foregoing provisions. Michael maintains she does not have standing because, in his view, the right of a presumptive heir or beneficiary to seek review of an agent's conduct under these sections vests only upon the death of the principal.

{¶14} With respect to subsection (5), a "presumptive heir" is "one who would be the heir if the ancestor should die, but whose right to an inheritance may be defeated by the birth of a nearer relative." 1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. Sec. 15:5 (2017 update). Further, the status of a child is that of either an heir apparent or presumptive heir. 31 Ohio Jur.3d, Decedents' Estates, Sec. 7 (2018 update). Either way, however, a living person has no heirs, only prospective or potential heirs. By implication, a presumptive heir has no vested rights in the ancestor's property.

Ostrander v. Preece, 129 Ohio St. 625, 632 (1935); *Casey v. Gallagher*, 11 Ohio St.2d 42 (1967). Hence, the term "presumptive heir" only has meaning if the ancestor is living. If the ancestor has died and the previously designated presumptive heir has not been superseded by another, such an heir becomes an "actual heir." 1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. Sec. 15:5, citing 4 Bowe-Parker, Page on Wills 34.6 (1961).

{¶15} Moreover, with respect to subsection (6), Cheryl attached a copy of Theresa's will to her memorandum in opposition, which specifically demonstrates she is a designated heir. Michael did not contend that the attachment was inaccurate. As such, Cheryl is "[a] person named as a beneficiary to receive any property * * * *on* the principal's death." *Id.* (Emphasis added.) The preposition "on" suggests the principal's death is not sine qua non to trigger the right to demand review of an agent's conduct. Rather, it implies that the movant-beneficiary possess such a right by virtue of an extant will.

{¶16} Given these points, we disagree with Michael's construction. There is nothing to support his position that a principal must be deceased before a presumptive heir or a designated beneficiary has the right to seek review of Michael's conduct as Theresa's power of attorney. This is particularly true of subsection (5) as, once the principal passes away, the status of "presumptive heir" ceases to exist and, to the extent that party inherits, he or she becomes an actual heir. We therefore conclude Cheryl's status as either a presumptive heir or designated beneficiary under Theresa's will provides her with statutory standing to move the court for an accounting.

{¶17} In further support of his position that Cheryl lacks standing, however, Michael cites R.C. 1337.34(H). R.C. 1337.34 governs an "agent's duties," and subsection (H) provides:

> **{¶18}** (H) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

{¶19} Michael asserts that, "conspicuously absent" from the listed individuals who may demand an accounting from an agent is a presumptive heir or potential beneficiary of the principal's estate. We do not agree with Michael's interpretation of subsection (H).

{¶20} Even though presumptive heirs and beneficiaries are not specifically included, the statute states that an agent would be required to provide an accounting if "ordered by a court." To the extent that Cheryl has standing to pursue an accounting via R.C. 1337.36(A)(5) or (6), the court must consider, within its discretion, whether she is entitled to the same. *See e.g. Fetters v. Duff*, 3d Dist. Mercer No. 10-17-14, 2018-Ohio-542, ¶11 (the decision to grant or deny a request for an accounting under R.C. 1337.36 is within the trial court's sound discretion). If the court finds merit in Cheryl's request, it will issue an order and, pursuant to R.C. 1337.34(H), Michael would be required to submit an accounting.

{¶21} A final point requires attention. At oral argument, the court was given notice of Theresa's passing. And, on July 27, 2018, Michael moved the court to dismiss the underlying action as moot. He claims R.C. 1337.34(H) provides a means for a "successor in interest" to the estate of a principal to move for an accounting. Because we do not see this provision as exclusive, we decline to dismiss the matter.

{¶22} Even though Cheryl is no longer a presumptive heir, she is still a beneficiary. We recognize that R.C. 1337.34(H) permits a "successor in interest" to a principal's estate to seek an accounting once a principal dies; it is unclear, however, why this provision would render Cheryl's appeal moot. Given their language, there is nothing preventing R.C. 1337.36(A)(6) and R.C. 1337.34(H) from operating as two viable, alternate means of seeking an accounting. And, because dismissing the instant matter would likely have preclusive effect on Cheryl's initial complaint for an accounting, which she had standing to request, we conclude judicial prudence and economy favors ruling on the merits of this case. Michael's motion to dismiss as moot is without merit.

{¶23} We therefore conclude that Cheryl has standing to seek an accounting of Michael's actions as financial power of attorney, during Theresa's life, via R.C. 1337.36(A)(5) and/or (6), or after her passing, via R.C. 1337.36(A)(6) or R.C. 1337.34(H). Because, however, she does not contest the dismissal order on any of the remaining six causes of action set forth in her complaint, that order remains effective for counts two through seven. That aspect of the judgment is accordingly affirmed. The matter is reversed and remanded, however, for the court to specifically consider her cause of action for an accounting.

{¶24} Cheryl's assignment of error has merit.

{¶25} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas, Probate Division, is affirmed in part, reversed in part, and remanded.

THOMAS R. WRIGHT, P.J.,

DIANE V. GRENDELL, J.,

concur.