[Cite as *In re Estate of Atkinson*, 2010-Ohio-4065.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN THE ESTATE OF: JAMES WILLIAM ATKINSON	C. A. No. 09CA0062 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. E-48357-05

DECISION AND JOURNAL ENTRY

Dated: August 30, 2010

CARR, Judge.

{¶1} Appellant, Daniel Atkinson, appeals the judgment of the Wayne County Court of Common Pleas, Probate Division. This Court dismisses the appeal.

I.

{¶2} Daniel Atkinson ("Atkinson") was appointed as the guardian of the person and estate of his brother James W. Atkinson in 1987, due to James' mental and physical disability. James Atkinson (the "decedent") died in 2004. Atkinson filed a final account in the guardianship case, and the decedent's children, who are also appellees in the instant appeal, moved to vacate the final account on December 16, 2005. Atkinson, who was also the executor of the decedent's will, was removed and replaced by James Lanham (the "administrator"), also an appellee in the instant appeal. The administrator also moved to vacate the final account in the guardianship case. The probate court vacated the final account, and Atkinson appealed. This Court affirmed the probate court's vacation of the final account for good cause, specifically for the reason that

Atkinson violated his fiduciary duty in managing the ward's financial accounts. *In the Matter of the Guardianship of Atkinson*, 9th Dist. No. 06CA0041, 2007-Ohio-765. We further concluded that "[t]his concern that [Atkinson] violated his fiduciary duty pursuant to R.C. 2111.14(B) is wholly separate from the alleged fraud perpetuated on the probate court by [Atkinson] and his attorney." Id. at ¶15.

{¶3} In the instant underlying case, Atkinson, as executor of the decedent's will and estate, filed an application to probate the decedent's will. On February 28, 2005, Atkinson filed an inventory and appraisal, listing $244,089.45 in intangible personal property. On March 22, 2005, the probate court allowed and confirmed the inventory and appraisal.

{¶4} On March 31, 2005, Melissa Nicklin, one of the decedent's children, filed a complaint for a will contest, alleging that the decedent lacked testamentary capacity to execute the will which was executed on November 24, 1989. Atkinson filed an answer, denying that the decedent lacked testamentary capacity to execute a will. On September 8, 2005, Ms. Nicklin voluntarily dismissed her complaint pursuant to Civ.R. 41(A).

{¶5} On September 8, 2005, Ms. Nicklin moved for Atkinson's removal as executor due to alleged existing unsettled claims between the executor and the estate for the reason that Atkinson was the owner and beneficiary of two annuities which were rightfully property of the decedent's estate. One annuity included a principal amount of $155,843.00, while the other included a liquidated amount of $52,121.88. Ms. Nicklin requested that she be appointed as the administrator of her father's estate. She filed an application for authority to administer the estate and estimated the value of the estate as $435,000.00. Atkinson filed a memorandum in opposition to the motion for his removal as executor. The probate court heard the matter on December 1, 2005. On January 17, 2006, the probate court issued a judgment, removing

Atkinson as executor of the decedent's estate, removing Atkinson's wife Dolly as the alternate executor, and denying Ms. Nicklin's request to be named the executor. On February 1, 2006, the probate court appointed Attorney James Lanham as administrator de bonis non over the decedent's estate.

{¶6} On June 21, 2006, Atkinson filed a final and distributive account along with a request to be discharged as the fiduciary of the estate. After itemizing receipts and disbursements, Atkinson indicated that a balance of $149,184.31 had been turned over to Mr. Lanham, the administrator of the decedent's estate. On July 31, 2006, the probate court issued an entry approving and settling the June 21, 2006 account.

{¶7} On March 12, 2007, the administrator of the decedent's estate and the decedent's four adult children filed a complaint against Atkinson, his wife Dolly, and their three adult children, alleging the concealment or embezzling of estate assets, pursuant to R.C. 2109.50. The probate court issued citations to each of the defendants as required by statute, requiring them to appear on April 24, 2007, upon the complaint. The defendants filed answers to the complaint on April 10, 2007, and April 16, 2007. Just over a year later, on April 17, 2008, the decedent's children filed a request for the issuance of a citation to the defendants to appear for examination under oath regarding the matters set forth in the complaint. There is nothing in the record to indicate whether or not the defendants had earlier appeared on April 24, 2007, as ordered. In lieu of the requested citations to appear, the probate court issued a judgment entry, scheduling the matter for a pretrial conference on August 12, 2008.

{¶8} The probate court issued a judgment entry on August 12, 2008, after the pretrial. The court noted that counsel for all parties were present, although it does not indicate that the parties themselves appeared. The court then ordered that counsel may file motions for summary

judgment "on the *remaining* issue of interest, penalties, costs and attorney's fee claimed in paragraph 8 of the complaint." (Emphasis added.) There is no transcript of the pretrial in the record.

{¶9} On August 29, 2008, Atkinson and his wife filed a motion for summary judgment. They asserted that the case should be dismissed because (1) the R.C. 2109.50 claims are barred by the doctrine of res judicata; (2) the claims were previously compromised and settled in the prior guardianship case; (3) the complainants did not have a cause of action pursuant to R.C. 2109.52; and (4) a judgment awarding a statutory penalty, attorney fees, and costs, pursuant to R.C. 2109.52 can only be entered upon a finding of guilty and the guardianship proceedings precluded such a finding in this case. Appended to the motion for summary judgment were two judgment entries issued on January 30, 2008, by the probate court in the guardianship case. In one, the probate court approved and accepted the final account, but also ordered Atkinson to facilitate the payment of monies, which had been improperly assigned to him, to the decedent's children and the decedent's estate. In the other, the probate court approved the payment of guardian fees to Atkinson for his work in the guardianship case.

{¶10} On September 23, 2008, the decedent's children filed a response to Atkinson's motion for summary judgment, as well as their own motion for partial summary judgment. On September 30, 2008, the administrator of the decedent's estate filed a motion for summary judgment. The parties filed numerous responses and replies. On November 19, 2008, the administrator moved for a ruling on the pending motions.

{¶11} On November 25, 2008, the probate court issued a judgment entry in which it granted Atkinson's motion for summary judgment in part, as to his wife and children, but denied it as to Atkinson alone. The probate court further granted the administrator's motion for partial

summary judgment. The probate court relied on an admission by Atkinson in the guardianship case that his "naming himself as beneficiary/owner of said annuities was in contravention of the Guardian's fiduciary duty to the Ward and in contravention of the Guardian's duty to avoid self-dealing." The court, however, did not reference any testimony presented in the estate case, the case in which the complaint for concealing assets was actually pending. In other words, the probate court failed to obtain or consider any evidence regarding Atkinson's conduct as the executor of the decedent's estate, conduct relevant to the pending complaint. Moreover, the probate court failed to make a finding that Atkinson was guilty of concealing or embezzling assets from the decedent's estate. The court further failed to order the imposition of the statutory ten percent penalty required upon a finding of guilt pursuant to R.C. 2109.52. Finally, the probate court failed to address the motion for partial summary judgment filed by the decedent's children.

{¶12} On March 3, 2009, the decedent's children and the administrator of the estate filed a joint motion for a hearing on attorney fees. Counsel for the children requested fees in the amount of $31,248.50. The administrator requested fees in the amount of $5,796.50, which included $5,705.03 for legal fees provided by two attorneys and one secretary, as well as expenses. On September 11, 2009, the probate court issued a judgment entry in which it concluded that attorney fees constitute a portion of the "costs" associated with an R.C. 2109.50 action, and awarded attorney fees in the amounts of $31,248.50 to the attorney for the decedent's children and $5,705.03 to the law firm which represented the administrator. Atkinson filed a timely appeal, raising three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING ATTORNEY FEES TO ADMINISTRATOR AND DECEDENT'S CHILDREN BECAUSE THERE IS NO CAUSE OF ACTION OR CLAIM FOR CONCEALMENT OF PROBATE ASSETS UNDER R.C. 2109.50 WHEN THE DECEDENT WAS UNDER GUARDIANSHIP AND THE GUARDIAN HAD TO ACCOUNT IN THE PROBATE COURT FOR THE ASSETS HELD BY HIM AS GUARDIAN."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY HOLDING THAT THE CLAIMS OF THE ADMINSTRATOR AND THE DECEDENT'S CHILDREN WERE NOT BARRED BY THE DOCTRINE OF RES JUDICATA."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING ATTORNEY FEES TO ADMINISTRATOR AND THE DECEDENT'S CHILDREN WHERE ATKINSON WAS NOT FOUND GUILTY IN THIS CASE FOR CONCEALMENT OF ESTATE ASSETS."

{¶13} As a preliminary matter, this Court is obligated to raise sua sponte questions related to our jurisdiction. *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. This Court has jurisdiction to hear appeals only from final judgments. 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. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.* (Jan. 26, 2000), 9th Dist. No. 2930-M. "An order is a final appealable order if it affects a substantial right and in effect determines the action and prevents a judgment." *Yonkings v. Wilkinson* (1999), 86 Ohio St.3d 225, 229.

{¶14} In *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 215, this Court explained that "the primary function of a final order or judgment is the termination of a case or controversy that the parties have submitted to the trial court for resolution."

{¶15} Civ.R. 54(B) provides:

> "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."

{¶16} In this case, the probate court purported to dispose of all issues arising out of the complaint for concealing of assets pursuant to R.C. 2109.50 by way of summary judgment. This Court declines to address at this time whether the probate court may dispose of a complaint alleging the concealment of trust assets pursuant to R.C. 2109.50 by way of summary judgment given the statutory mandates for the management and disposition of such actions. The fact remains, however, that the probate court purported to dispose of the action by way of summary judgment. There were three motions for summary judgment pending in this case, one by Atkinson, his wife, and children; one by the administrator; and one by the decedent's children. The probate court failed to rule on the decedent's children's motion for summary judgment, thereby failing to resolve the claims of four parties to the action. Moreover, the November 25, 2008 judgment does not contain an express determination pursuant to Civ.R. 54(B) that there is no just reason for delay. Therefore, as the claims of the decedent's children remain undisposed, there is no final, appealable order and this Court lacks the jurisdiction to consider the merits of the appeal.

{¶17} Moreover, "to terminate the matter, the order must contain a statement of the relief that is being afforded the parties." *Hawkins v. Innovative Property Mgt.*, 9th Dist. No.

22802, 2006-Ohio-394, at ¶5, quoting *Harkai*, 136 Ohio App.3d at 215. This Court has further held that "[a]n order is not final until the trial court rules on all of the issues surrounding the award, 'leaving nothing outstanding for future determination.'" *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 9th Dist. No. 24553, 2009-Ohio-4655, at ¶18, quoting *State v. Muncie* (2001), 91 Ohio St.3d 440, 446.

{¶18} After the probate court has complied with the procedural mandates set forth in R.C. 2109.50, it must enter judgment. R.C. 2109.52 mandates that, upon a determination that the accused is guilty of concealing trust assets, the probate court "shall render judgment *** for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of such proceedings or complaint[.]"

{¶19} This Court declines to address at this time the effect of the probate court's failure to enunciate whether or not Atkinson was guilty of concealing assets. We further decline to address at this time whether or not attorney fees constitute a portion of the "costs of such proceedings or complaint" as contemplated by R.C. 2109.52. Moreover, although a vague inference can be drawn from the record that the moneys alleged to have been concealed or embezzled by Atkinson were identified and accounted for within the context of the guardianship case and that those assets were subsequently identified and accounted for as part of the decedent's estate, there is no order regarding those moneys. The probate court further failed to order the imposition of the mandatory statutory ten percent penalty relevant to concealment cases. Accordingly, the judgment fails to "contain a statement of the relief that is being afforded the parties." See *Hawkins* at ¶5. Therefore, there is no final, appealable order and this Court

lacks jurisdiction to address the merits of the appeal.

Appeal dismissed.

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(E). 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

CHARLES A. KENNEDY, Attorney at Law, for Appellant.

JAMES J. LANHAM, and MATTHEW A. LONG, Attorneys at Law, Appellee.

ROBERT W. ECKINGER, Attorneys at Law, for Appellees.