[Cite as *In re Estate of Dotson*, 2002-Ohio-6889.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN RE:	)	
	)	CASE NO. 01-CA-97
ESTATE OF RAYFORD DOTSON.	)	
	)	OPINION
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Probate Division, Case No. 1995ES00695
JUDGMENT:	Affirmed
APPEARANCES:	
For Appellant:	Attorney Gary S. Singletary 840 Leader Building 526 Superior Avenue Cleveland, Ohio 44114
For Appellee:	(no brief filed)

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 11, 2002

DONOFRIO, J.

{¶1} Appellant, Yvonne Franklin, appeals a decision of the Mahoning County Common Pleas Court, Probate Division, denying her relief from judgment.

{¶2} On October 19, 1995, Richard LaBooth filed an application for authority to administer the estate of Rayford Dotson, who died intestate on October 21, 1994.[1] The Probate Court appointed LaBooth as administrator of the estate in November of that year. The estate included an unliquidated wrongful death claim for an asbestos related injury. On January 9, 1998, LaBooth filed an application to approve a wrongful death settlement. A notice was sent to Denise Carver, the decedent's daughter and next of kin, for a hearing set for February 19, 1998. At that hearing, Carver indicated the possible existence of another daughter of the decedent and supplied appellant's name to the court. Counsel for the estate was ordered to investigate the matter and to serve appropriate notice. On February 27, 1998, LaBooth, through counsel, filed a motion captioned, "Motion to reset hearing on wrongful death application; notice of hearing; service" wherein LaBooth requested a hearing on the application to approve the wrongful death settlement. On March 2, 1998, the probate court notified LaBooth, Carver and appellant by certified mail of a hearing scheduled for March 19, 1998. That notice stated: "Please take notice that on Thursday, the 19th day of March, 1998 at 11:00 o'clock A.M. a hearing will be held in this court concerning MOTION TO RESET HEARING ON WRONGFUL DEATH APPLICATION. This shall be your only notice in this cause."

{¶3} On March 19, 1998, the court approved the wrongful death settlement of $15,100.87. Distribution of the wrongful death proceeds except for attorney fees and reimbursement of funeral expenses was taken under advisement. There was service

[1] The first portion of the facts and procedural history recited herein are borrowed verbatim from this court's decision in *In re Estate of Dotson* (Sept. 28, 2000), 7th Dist. No. 99-CA-34.

of this order to counsel for the estate and to Carver. Appellant, who did not appear for the hearing, did not receive notice of this order.

{¶4} By a magistrate's order filed on November 6, 1998, the balance of the wrongful death proceeds were awarded to Carver. A copy of the order was sent to appellant by regular mail on November 13, 1998. On November 16, 1998, the probate court filed a letter received from appellant. The letter was an emotional appeal for a share of the wrongful death settlement based on the fact that the appellant was the abandoned daughter of the decedent. The probate court filed this letter as an objection to the magistrate's decision. On January 8, 1999, the probate court filed a judgment entry adopting the magistrate's decision. The court stated that children of the decedent are rebuttably presumed to have been injured by the decedent's wrongful death but that appellant's "objections" to the magistrate's decision demonstrated that she suffered no injury by virtue of her admission that the decedent was not a part of her life.

{¶5} On February 5, 1999, appellant appealed that decision to this court. Appellant argued that she had not received proper notice of the March 19, 1998 hearing. However, appellant failed to raise this issue in her "objection" to the magistrate's decision. This court concluded that appellant had therefore waived the notice issue absent plain error. Finding no plain error, the court affirmed the probate court on September 28, 2000. See *In re Estate of Dotson* (Sept. 28, 2000), 7th Dist. No. 99-CA-34, discretionary appeal not allowed (2001), 91 Ohio St.3d 1445.

{¶6} On September 19, 2000, LaBooth filed another application to approve a wrongful death settlement. The application referred to the same wrongful death action

that was listed in the January 9, 1998 application. The settlement was the result of an asbestos exposure claim made in the Cuyahoga County Common Pleas Court (Case No. 96-310485). However, this time the application indicated that the settlement amount was $43,250.87. After deducting attorney fees and costs of $15,137.80, the net settlement proceeds came to $27,566.19. The application proposed distributing that in three equal shares of $9,188.73 each to the estate of Nina Patton LaBooth Dotson, Denise Carver, and appellant Yvonne Franklin. The court set a hearing for October 25, 2000 on this new application.

{¶7} On October 25, 2000, the court, on its own motion, continued the matter. The court indicated that there was an issue of whether a further appeal to the Ohio Supreme Court was going to be instituted. According to appellant, that same day an agreement was reached between the parties with respect to the application filed on September 19, 2000. Based on this agreement, appellant filed a motion for relief of the court's January 8, 1999 judgment. The motion was unopposed and on January 29, 2001, a magistrate issued a judgment entry granting the motion. The following day, the magistrate filed another entry stating:

{¶8} "ORDERED that the judgment entered into on January 8, 1999 be and is hereby set aside and vacated and this Court hereby schedules a new hearing for the purpose of determining the distribution of wrongful death proceeds among the beneficiaries under the authority of 2125.03 O.R.C. related to both the Applications filed on January 9, 1998 and on September 19, 2000."

{¶9} On February 9, 2001, the court, on its own motion, vacated and set aside both of the magistrate's orders declaring that he was without jurisdiction to

preside over that type of motion. On February 28, 2001, the court filed another judgment entry which addressed appellant's motion on the merits and overruled it. This appeal followed.

{¶10} Appellant's sole assignment of error states:

{¶11} "UNDER THE AUTHORITY OF SECTION 2125.03 O.R.C. APPELLANT AS A BENEFICIARY OF DECEDENT HAD THE RIGHT TO ENTER AN AGREEMENT TO ADJUST THE SHARES OF THE WRONGFUL DEATH DISTRIBUTION AND THE PROBATE COURT'S JUDGMENT ENTRY AND ORDERS OVERRULING APPELLANT'S MOTION FOR RELIEF FROM THE JANUARY 8, 1999 JUDGMENT IS AN ABUSE OF DISCRETION"

{¶12} After the court's January 8, 1999 order denying her a portion of the settlement proceeds, appellant argues that the parties entered into an agreement whereby she would receive an equal share. Appellant argues that R.C. 2125.03(A)(1) allows for such an arrangement, and that the court erred by not granting her relief from the January 8, 1999 judgment and giving effect to the agreement.

{¶13} Appellant has already appealed the probate court's January 8, 1999 decision excluding her as a beneficiary of the wrongful death settlement proceeds. See *In re Estate of Dotson* (Sept. 28, 2000), 7th Dist. No. 99-CA-34. Therefore, any issues regarding the probate's court's decision in that regard are barred by the doctrine of res judicata. See *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, *State v. Perry* (1967), 10 Ohio St.2d 175. Additionally, "[i]t is highly questionable that Civ.R. 60(B) can be used to obtain relief from a judgment based upon a settlement agreement entered into by the parties to the action." (Internal quotation marks and

citation omitted.) *Boster v. C & M Serv., Inc.* (1994), 93 Ohio App.3d 523, 525. If an agreement is extrajudicial, as in this case, then the agreement can be enforced if the parties are found to have entered into a binding contract. See *Bolen v. Young* (1982), 8 Ohio App.3d 36, 38. Relief may be sought through the filing of an independent action seeking enforcement of that contract. See id.

{¶14} Accordingly, appellant's sole assignment of error is without merit.

{¶15} The judgment of the trial court is hereby affirmed.

Judgment affirmed.

Waite, J., concurs.

DeGenaro, J., concurs in judgment only; see concurring in judgment only opinion.

DeGenaro, J., concurring in judgment only.

{¶16} I agree with majority's judgment affirming the probate court's decision denying appellant's Civ.R. 60(B) motion for relief from judgment. However, I must write separately as I disagree with its reasoning. Appellant is asking for Civ.R. 60(B) relief from judgment because she and the other beneficiaries have agreed to a distribution of the wrongful death settlement after the court had already entered judgment distributing that settlement. Pursuant to R.C. 2125.03(A), the only time beneficiaries may adjust their shares in an estate among themselves is when the beneficiaries are on an equal degree of consanguinity with the decedent. In this case, the beneficiaries are not on an equal degree of consanguinity. Therefore, they may not adjust their benefits among themselves. Accordingly, appellant has not presented a meritorious defense and is not entitled to Civ.R. 60(B) relief.

{¶17} The standard of review applied to a trial court's decision on a Civ.R. 60(B) motion is abuse of discretion. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914. An abuse of discretion connotes more than an error of law or judgment; rather, it implies the court has acted either unreasonably, unconscionably, or arbitrarily. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶18} A trial court may only grant relief from judgment in the manner provided by Civ.R. 60. Because the rule is remedial, it should be liberally construed so the ends of justice may be served. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102. Nonetheless, to prevail on his motion under Civ.R. 60(B), the

movant must demonstrate: (1) the movant has a meriorious defense or claim to present if relief is granted; (2) the movant is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151, 1 O.O.3d 86, 351 N.E.2d 113. "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack* at 174.

{¶19} As a general rule, a trial court bears the responsibility of adjusting each beneficiary's share of a wrongful death settlement in a manner that is equitable. R.C. 2125.03(A). However, when the beneficiaries are on an equal degree of consanguinity, they may adjust their share among themselves. Id. "If the beneficiaries do not adjust their shares among themselves, the court shall adjust the share of each beneficiary in the same manner as the court adjust the shares of beneficiaries who are not on an equal degree of consanguinity to the deceased person." Id. The plain language of the statute provides the only time beneficiaries may reach such an agreement among themselves is when those beneficiaries are on an equal degree of consanguinity.

{¶20} Appellant's Civ.R. 60(B) motion for relief from judgment must fail because the beneficiaries which she argues have agreed to adjust the shares of the distribution are not on an equal degree of consanguinity. Appellant and Denise Carver are both daughters of the deceased person and, therefore, are on an equal degree of

consanguinity. However, the third beneficiary, the estate of Nina Patton LaBooth Dotson, is not. It is the estate of the deceased spouse of the decedent and, as such, is not consanguineous with the other two beneficiaries. Accordingly, these three beneficiaries are not allowed to adjust their shares of the distribution among themselves. For this reason, appellant has failed to demonstrate a meritorious defense to the judgment and her assignment of error is meritless and the trial court's judgment must be affirmed.'

{¶21} Although I agree with the majority's judgment, I respectfully disagree with much of its rationale. First, the majority notes appellant's previous appeal of the January 8, 1999 judgment and states that any issues regarding that decision are barred by the doctrine of res judicata. See ¶13. However, appellant's arguments in this appeal are wholly unrelated to her arguments in her previous appeal. In her previous appeal she argued the trial court's distribution of the wrongful death settlement was error because she did not receive adequate notification of the action. In this case, she argues the trial court's denial of her Civ.R. 60(B) motion to vacate that judgment was error because R.C. 2125.03(A) allows the beneficiaries to adjust the distribution and they did. Furthermore, it would have been impossible for appellant to raise her current argument at an earlier point in this case as the beneficiaries had not entered into an agreement regarding the distribution of the wrongful death settlement. Accordingly, the doctrine of res judiciata cannot be applied to this case.

{¶22} The majority next notes it is highly questionable that Civ.R. 60(B) can be used to vacate a judgment based upon a settlement agreement entered into by the parties to the action. I agree with that general proposition. However, that general

proposition is inapplicable to this case. The judgment appellant is seeking to have vacated was not based on a settlement agreement entered into by the parties to this probate action. There are only two agreements in this case: the wrongful death settlement and the agreement between the heirs serving as the basis for Appellant's Civ.R. 60(B) motion. The wrongful death settlement was between the parties to that action; it was not entered into by the beneficiaries in this probate action. The heirs' agreement was entered into after the probate court's judgment entry. Thus, it could not have formed the basis of that judgment entry.

{¶23} Finally, the majority appears to be saying that where, as here, a trial court renders a judgment on the merits, and the parties then reach a settlement agreement, that post-judgment agreement can never be the basis for vacating a judgment pursuant to Civ.R. 60(B). The majority rests this proposition upon case law wherein the parties reached an agreement before the trial court entered judgment. I am uncomfortable reaching that general conclusion. A specific example arguing against such a broad rule immediately comes to mind. Had the parties actually been on an equal degree of consanguinity, they would be allowed to settle by the statute, which may be a sufficient basis to vacate the probate court's judgment.

{¶24} For the foregoing reasons, I concur in the majority's judgment only.