

THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Milous H. Keith, Jr.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 07AP-666 (C.P.C. No. 07CVH04-4692)
Daniel E. Bringardner et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on March 6, 2008

Gallagher, Gams, Pryor, Tallan & Littrell, LLP, Timothy J. Ryan, and Dennis J. Fennessey, for appellant.

Wiles, Boyle, Burkholder & Bringardner Co., LPA, and Michael L. Close, for appellees Daniel E. Bringardner, James M. Hughes, and Wiles, Boyle, Burkholder & Bringardner Co., LPA.

Jack G. Gibbs, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Plaintiff-appellant, Milous H. Keith, Jr., appeals from a judgment of the Franklin County Court of Common Pleas granting motions to dismiss filed by defendants-appellees, Daniel E. Bringardner, James M. Hughes, Jack G. Gibbs, Jr., and the law firm Wiles, Boyle, Burkholder & Bringardner Co., LPA (collectively referred to as

"appellees"). For the following reasons, we affirm in part and reverse in part that judgment and remand the matter with instructions.

{¶2} On April 4, 2007, appellant filed a complaint against the appellees in the general division of the Franklin County Court of Common Pleas ("trial court"). In the complaint, appellant alleged that Mr. Bringardner filed an emergency guardianship application in the Franklin County Court of Common Pleas, Probate Division ("probate court"). The probate court granted the application and appointed Bringardner as appellant's emergency guardian. Bringardner had appellant removed from his home and placed in an Alzheimer's ward at a local long-term-care facility. This emergency guardianship continued until Mr. Hughes was appointed appellant's guardian on April 8, 2004.¹ Hughes resigned as guardian on November 9, 2005 and was replaced by Mr. Gibbs. The guardianship continued until the probate court ruled that appellant was not incompetent and that the guardianship was not appropriate.

{¶3} Appellant alleged in his complaint that he was not incompetent and that the guardianship and his stay in the Alzheimer's ward were against his wishes. He also alleged that his estate was diminished in value by more than \$550,000 due to actions that appellees took while they were guardians. Appellant specifically alleged that appellees defrauded him and violated their duties to him. Other causes of action in appellant's complaint included: intentional infliction of emotional distress, abuse of process, negligence, conversion, and civil conspiracy. Appellant's complaint sought compensatory damages in excess of \$25,000 as well as punitive damages.

¹ Bringardner was also Hughes' counsel. Both are lawyers employed by Wiles, Boyle, Burkholder & Bringardner Co., LPA.

{¶4} The appellees filed motions to dismiss appellant's complaint. The motions alleged that the trial court lacked subject matter jurisdiction to hear appellant's complaint because the probate court had exclusive jurisdiction over the claims appellant asserted. Appellant filed a memorandum in opposition to appellees' motions, arguing in part that if the trial court lacked subject matter jurisdiction, the trial court should transfer the case to the probate court. The trial court granted appellees' motions and dismissed the complaint based upon its determination that the probate court had exclusive jurisdiction over appellant's claims. The trial court, however, declined to transfer the case to the probate court.

{¶5} Appellant appeals and assigns the following errors:

[1.] The trial court erred when it dismissed the Appellant's complaint on the basis that the jurisdiction to preside over the action rested with the Probate Division of the Common Pleas Court rather than the General Division of the Common Pleas Court.

[2.] The trial court erred when, presuming that it was correct in its decision that jurisdiction to hear the case rested with the Probate Court, it dismissed the Appellant's complaint rather than transferring the case to the Probate Court.

{¶6} By his first assignment of error, appellant contends the trial court erred when it dismissed his complaint for lack of jurisdiction. Essentially, appellant argues that the general division of the court of common pleas, not the probate division of the court of common pleas, has jurisdiction over his claims. We disagree.

{¶7} We review a trial court's decision on a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction under a de novo standard of review. *Brethauer v. Fed. Express Corp.* (2001), 143 Ohio App.3d 411, 413, citing *Crestmont Cleveland*

Partnership v. Ohio Dept. of Health (2000), 139 Ohio App.3d 928, 936. Under Civ.R. 12(B)(1), the question is whether the plaintiff alleges any cause of action the court has authority to decide. *Howard v. Supreme Court of Ohio*, Franklin App. No. 04AP-1093, 2005-Ohio-2130, at ¶7, citing *Troutman v. Ohio Dept. of Rehab. & Corr.*, Franklin App. No. 03AP-1240, 2005-Ohio-334.

{¶8} The probate division of a common pleas court is a court of limited jurisdiction. Its jurisdiction is limited to those matters granted by statute and by the Ohio Constitution. *Gilpin v. Bank One Corp.*, Clermont App. No. CA2003-09-073, 2004-Ohio-3012, at ¶10. Pursuant to R.C. 2101.24(A)(1)(e), a probate court has exclusive jurisdiction to "appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts." Indeed, the probate court's jurisdiction extends to all matters touching the guardianship. *In re Guardianship of Jadwisiak* (1992), 64 Ohio St.3d 176, 180.

{¶9} It is undisputed that appellant's claims arise out of the alleged conduct of his guardians. However, appellant directs our attention to *Schucker v. Metcalf* (1986), 22 Ohio St.3d 33, in which the Supreme Court of Ohio held that "the probate division has no jurisdiction over claims for money damages arising from allegations of fraud." *Id.* at 35. Because he seeks money damages for fraud, appellant contends the trial court erred when it determined that the probate court had jurisdiction over his claims. See, also, *Dumas v. Estate of Dumas* (1994), 68 Ohio St.3d 405, 408 (relying on *Schucker* for proposition that probate court has no jurisdiction over claims for money damages).

{¶10} Since *Schucker*, the Supreme Court of Ohio has embraced a broader view of the probate court's jurisdiction. In *State ex rel. Lewis v. Moser* (1995), 72 Ohio St.3d 25, 28-29, the court adopted the view that: (1) claims for breach of fiduciary duty, which inexorably implicate control over the conduct of fiduciaries, are within the jurisdiction of the probate court by virtue of R.C. 2101.24(A)(1)(c) and (e); and (2) the probate court's plenary jurisdiction at law and in equity under R.C. 2101.24(C) authorizes any relief required to fully adjudicate the subject matter within the probate court's exclusive jurisdiction. In *Lewis*, the court rejected a challenge to the probate court's jurisdiction to decide a claim for breach of fiduciary duties even though the relator sought money damages.

{¶11} Since *Lewis*, other appellate courts have rejected the proposition that probate courts cannot award monetary damages for claims that are within the exclusive jurisdiction of the probate court, such as claims based upon the conduct of a guardian. *Rowan v. McLaughlin*, Cuyahoga App. No. 85665, 2005-Ohio-3473, at ¶9 (affirming common pleas court's dismissal of complaint for lack of jurisdiction because claims for monetary damages pertaining to conduct of guardian were within jurisdiction of probate court); *Ohio Farmers Ins. Co. v. Bank One* (Aug. 21, 1998), Montgomery App. No. 16981 ("[W]e hold that probate courts in some instances may award monetary damages in the exercise of their plenary power to adjudicate fully any matter properly before the court."); *Holik v. Lafferty*, Ashtabula App. No. 2005-A-0005, 2006-Ohio-2652, at ¶18-21 (rejecting claim that probate court lacked jurisdiction over claims because money damages sought).

{¶12} We also hold that probate courts can award monetary damages for claims that are within the court's exclusive jurisdiction. R.C. 2101.24(C) grants the probate court the power at law and in equity to "dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code." This broad statutory grant of authority to fully resolve matters properly before it includes the power to award monetary damages. See *Goff v. Ameritrust Co.* (May 5, 1994), Cuyahoga App. No. 65196 (cited favorably in *Lewis* for holding that R.C. 2101.24(C) authorizes any relief that is required to fully adjudicate a claim within probate court's jurisdiction).

{¶13} All of appellant's claims revolve around appellees' conduct as guardians during his guardianship. Appellant's claims "touch the guardianship" and are within the exclusive jurisdiction of the probate court. R.C. 2101.24(A)(1)(e); see, also, *Jadwisiak*, at 180; *Rowan*, at ¶4 (various civil claims against guardian including negligence and intentional infliction of emotional distress properly before probate court); *Goff* (claims for guardian's breach of fiduciary duty properly before probate court); *Gilpin*, at ¶11 (claims against fiduciary). The fact that the guardianship has terminated does not foreclose the probate court's jurisdiction found in R.C. 2101.24(A)(1)(e). See *Bank One*, supra (complaint within exclusive jurisdiction of probate court that alleged claims concerning acts of former guardian); see, also, *Ohio Farmers Ins. Co. v. Huntington Natl. Bank* (Sept. 28, 2000), Cuyahoga App. No. 76303. The statutory language in R.C. 2101.24(A)(1)(e) that grants the probate court exclusive jurisdiction in this type of case does not distinguish between claims against current guardians and former guardians. Nor does appellant's demand for money

damages divest that court of jurisdiction over the claims. *Rowan*, at ¶11. The trial court properly determined that the probate court had exclusive jurisdiction over these claims, notwithstanding appellant's claim for money damages. Therefore, we overrule appellant's first assignment of error.

{¶14} Appellant contends in his second assignment of error that even if the trial court did not have subject matter jurisdiction over his complaint, it erred by dismissing the complaint instead of transferring the matter to the probate court. We agree.

{¶15} Civ.R. 73, which governs the probate court, provides, in part, that "[p]roceedings which are improperly venued shall be transferred to a proper venue provided by law and this subdivision * * *." Civ.R. 73(B). This court has interpreted that rule to authorize the transfer of a matter from the general division of the common pleas court to the probate division of the common pleas court when the matter was docketed in the wrong division of the common pleas court. *Siebenthal v. Summers* (1978), 56 Ohio App.2d 168, 173-174.

{¶16} In *Siebenthal*, we rejected the argument appellees make here that the use of the term "venue" in the rule refers to the proper county in which an action is filed. Instead, we determined that the word "venue" as used in Civ.R. 73(B) refers to the separate divisions of the common pleas court. *Id.* at 172-174; see, also, *Mid-Ohio Chemical Liquid Fertilizers, Inc. v. Lowe* (Oct. 28, 1981), Fayette App. No. 80-CA-15 (relying on *Siebenthal's* interpretation of venue in Civ.R. 73(B) in ordering the transfer of a matter filed in the wrong division of the common pleas court).

{¶17} Appellant filed his complaint in the general division of the common pleas court. In response to appellee's motion to dismiss, appellant argued that if the trial

court determined that it lacked subject matter jurisdiction over appellant's claims, the trial court should transfer the case to the probate court. Therefore, appellant raised the issue of transfer with the trial court. Because the probate division of the common pleas court has exclusive jurisdiction over appellant's claims, the trial court should have transferred the case to the probate division. *Siebenthal*, at 173-174. Accordingly, we sustain appellant's second assignment of error.

{¶18} In conclusion, we overrule appellant's first assignment of error and sustain his second assignment of error. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and the matter is remanded with instructions for the trial court to transfer the matter to the probate division of the common pleas court.

*Judgment affirmed in part and reversed in part;
and cause remanded with instructions*

PETREE, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶19} In my view, neither the probate court's enumerated powers nor its plenary power bestow upon it jurisdiction over this case. For this reason, I respectfully dissent.

{¶20} As the majority correctly notes, the only matters within the probate court's jurisdiction are those set forth by statute. Besides those matters specifically enumerated, "[t]he probate court has plenary power at law and in equity to dispose fully of any matter that is *properly before the court*, unless the power is expressly otherwise limited or denied by a section of the Revised Code." (Emphasis added.) R.C. 2101.24(C). Only the matters enumerated in R.C. 2101.24(A) and (B) are properly

before the probate court. *Corron v. Corron* (1988), 40 Ohio St.3d 75, 77, 531 N.E.2d 708 ("Those matters that may be properly placed before the court are enumerated and limited in scope by R.C. 2101.24 * * *").

{¶21} The majority concludes that the probate court possesses exclusive jurisdiction over appellant's tort claims by virtue of R.C. 2101.24(A)(1)(e) because they are based upon appellees' actions allegedly taken while they were serving as appellant's guardians. See ante, ¶13. But the cases upon which the majority relies in reaching this conclusion are inapposite because they involve matters that, while within the probate court's exclusive jurisdiction, are not present in the instant case.²

² See, e.g., *Gilpin v. Bank One Corp.*, Clermont App. No. CA2003-09-073, 2004-Ohio-3012 (probate court had jurisdiction over estate's lawsuit against bank for negligent authorization of unlawful transfers from estate account, by virtue of the probate court's express power to direct and control the conduct of fiduciaries and settle their accounts, under R.C. 2101.24[A][1][m]); *In re Guardianship of Jadwisiak* (1992), 64 Ohio St.3d 176, 593 N.E.2d 1379 (probate court could properly exercise plenary power to maintain control over "any personal injury settlement entered into on behalf of a ward [currently] under its protection * * *;" jurisdiction was founded upon R.C. 2101.24[A][1][e], which grants the probate court the power to settle guardians' accounts); *Rowan v. McLaughlin*, Cuyahoga App. No. 85665, 2005-Ohio-3473 (probate court had exclusive jurisdiction over suit against then-serving guardian alleging negligence, intentional infliction of emotional distress, and slander, arising out of the guardian's fiduciary relationship with the then ward pursuant to R.C. 2101.24[A][1][e], which allows probate court to direct and control conduct of currently serving guardians); *Goff v. Ameritrust Co.* (May 5, 1994), Cuyahoga App No. 66016 (probate court had exclusive jurisdiction over beneficiary's action against co-guardians and co-executors of decedent's estate, brought while the estate was still being administered, for breach of fiduciary duties, pursuant to probate court's authority to regulate conduct of currently serving fiduciaries, under R.C. 2101.24[A]); *Holik v. Lafferty*, Ashtabula App. No. 2005-A-0005, 2006-Ohio-2652 (probate court had exclusive jurisdiction over fraud and legal malpractice claims brought against an administrator with will annexed, arising out of his administration of the estate, pursuant to R.C. 2101.24[A][1][c]); *State ex rel. Lewis v. Moser* (1995), 72 Ohio St.3d 25, 647 N.E.2d 155 (general division lacked jurisdiction over beneficiaries' conversion and breach of fiduciary duty action against estate's executor and attorney because probate court had exclusive jurisdiction under R.C. 2101.24[A][1][c], [j] and [l]); *Ohio Farmers Ins. Co. v. Huntington Natl. Bank* (Sept. 28, 2000), Cuyahoga App. No. 76303 (probate court had exclusive jurisdiction over fiduciary bond issuer's action to recover embezzled assets, after paying the successor guardian, because suit was brought pursuant to R.C. 2109.50, which expressly confers jurisdiction on the probate court; express grant of jurisdiction rendered immaterial the fact that the guardianship had been terminated); *Ohio Farmer's Ins. Co. v. Bank One* (Aug. 21, 1998), Montgomery App. No. 16981 (fiduciary bond issuer's common law subrogated and assigned claims against bank for conveying guardianship assets to the former guardian in violation of the letters of guardianship, brought after the plaintiff paid the successor guardian's claim against the bond, was within the probate court's jurisdiction because: (1) the case turned upon the interpretation of a standard Ohio probate form, and (2) the court viewed the case as if the successor guardian herself were a party because the subrogee stood in the successor guardian's

{¶22} In my view, the fact that appellant's tort claims concern actions taken while appellees served as guardians does not defeat the inescapable effect that the termination of the guardianship had upon the probate court's jurisdiction. This case does not invoke the probate court's jurisdiction over the conduct or account of a "guardian," as that term is used in R.C. Chapter 2101,³ because appellant is no longer a "ward"⁴ and the probate court is no longer his "superior guardian."⁵

{¶23} Pertinent authority supports the notion that the probate court loses jurisdiction over former guardians and former wards upon termination of the guardianship. The Supreme Court of Ohio recently held that, "[w]hen a guardianship is predicated exclusively on a ward's minor status, the guardian's power and the probate court's jurisdiction both terminate when the ward reaches the age of majority." *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, syllabus. When a guardianship terminates, the probate court's plenary power does not extend the court's jurisdiction to other matters, even those that arise out of actions taken while the guardianship was pending. *Id.*; see, also, *In re Guardianship of Layshock* (Dec. 28, 2001), Mahoning App. No. 00-CA-198; *In re Altomare* (Jan. 23, 2001), Columbiana App. No. 99-CO-26.

shoes for purposes of restoring the funds to the existing guardianship account, thereby invoking the probate court's exclusive jurisdiction to control guardianship accounts under R.C. 2101.24[A]).

³ "Guardian," * * * means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor." R.C. 2111.01(A).

⁴ "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code." R.C. 2111.01(B).

⁵ "At all times, the probate court is the superior guardian of wards who are subject to its jurisdiction * * *." R.C. 2111.50(A)(1).

{¶24} The present case is a tort action by a *former* ward against his *former* guardians, arising out of actions the defendants allegedly took while acting in their capacities as guardians. Utterly determinative is the fact that the only guardianship involving these parties has been terminated. Appellant is no longer a "ward," appellees are no longer his "guardians," and there no longer exists any guardianship involving these parties through which the probate court is deemed appellant's superior guardian. Consequently, this case does not involve any of the probate court's enumerated powers, and presents no "matter that is properly before the [probate] court"⁶ that would sanction the exercise of the probate court's plenary power. Accordingly, this action could not be maintained in the probate court no matter where it was originally commenced. Moreover, the general division of the court of common pleas does have jurisdiction over the various tort claims contained in the complaint.⁷

{¶25} For these reasons, I would sustain appellant's first assignment of error, overrule the second assignment of error as moot, reverse the judgment of the court of common pleas, general division, and remand this matter for further proceedings in the general division. Because the majority has determined otherwise, I respectfully dissent.

⁶ R.C. 2101.24(C).

⁷ R.C. 2305.01.