



court failed to comply with the provisions of Civ.R. 53. She further contends that the order of the trial court is against the manifest weight of the evidence.

{¶ 2} We conclude that the probate court did not violate the provisions of Civ.R. 53 in rendering its decision. We further conclude that, absent a transcript of the hearing before the magistrate, we must accept the findings of fact as made by the magistrate. Finally, we cannot say that, given the filings in this record, the order is against the manifest weight of the evidence.

{¶ 3} The judgment of the trial court is Affirmed.

I

{¶ 4} Decedent Irma D. Lucas died, testate, on August 1, 2006. Elmore was appointed executor of the estate on September 15, 2006. In December, the probate court issued an order to show cause why Elmore had failed to file a Certificate of Probate. Another show cause order was issued in January, 2007 requiring Elmore to show cause for failing to file an inventory in the estate. Thereafter, Elmore filed an inventory.

{¶ 5} During 2007, Elmore sought extensions of the time for administering the estate. On January 8, and April 2, 2008, the probate court issued orders requiring Elmore to show cause why she had failed to file an account in the estate. In May 2008 an order was issued requiring Elmore to appear before the court. She filed an account on August 15, 2008. After reviewing the account, the probate court issued an order setting a hearing thereon upon a finding of "irregularities" in the account.

{¶ 6} A hearing was conducted before the magistrate in October 2008. Elmore did not attend, but her attorney was present. Following the hearing, the magistrate issued an order noting that it was unable to reconcile the issues before it and setting the matter for further hearing. The magistrate specifically noted that Elmore should be present at the hearing and ready to address the following matters: (1) failure to timely file a notice of probate; (2) discrepancies noted by the court between the Inventory and the Account; (3) failure to submit a copy of the closing statement regarding the realty held by the estate; (4) apparent overpayment of a bequest to a beneficiary; (5) payment of attorney fees without consent of the probate court; and (6) failure to provide an accounting for fees paid to Elmore as Executor.

{¶ 7} Elmore filed objections to that magistrate's decision. Thereafter on October 31, 2008 a further hearing was had before a different magistrate. On November 12, 2008, the magistrate made the following findings of fact:

{¶ 8} "1. The Fiduciary is unable to explain the discrepancy between the balance remaining in the estate checking account and the balance remaining in the Fiduciary's hands as listed on the account;

{¶ 9} "2. The Fiduciary is unable to explain why certain gifts of money were paid to people and charities not listed as heirs or beneficiaries in the decedent's will;

{¶ 10} "3. The Fiduciary was unable to explain or justify various expenditures made by the Fiduciary in the administration of the estate;

{¶ 11} "4. The Fiduciary had paid attorney fees without proper application or approval of the Court;

{¶ 12} “5. The Fiduciary has failed to file a Certificate of Notice of Probate of Will in this estate;

{¶ 13} “6. The Fiduciary has failed to provide the Court with a copy of the closing statement regarding certain real property sold by the fiduciary as required by local Court rule;

{¶ 14} “7. The Fiduciary repeatedly listed on the account various items as paid which have not been paid;

{¶ 15} “8. The Fiduciary took fiduciary fees without any computation of fiduciary fees;

{¶ 16} “9. The Fiduciary took additional fees from the estate for travel, packing and meals that do not appear to be justified;

{¶ 17} “10. The Fiduciary has failed to list all of the assets of the estate.”

{¶ 18} The magistrate thus recommended that the Probate Court reject the Account filed by Elmore and remove her as Executor. The magistrate further recommended that Elmore and the attorney for the estate repay the funds distributed to them. The trial court adopted the magistrate’s decision as its order the same day the decision was entered. Elmore did not file any objections to the second magistrate’s decision. From the trial court’s order of November 12, 2008, Elmore appeals.

## II

{¶ 19} Elmore’s First Assignment of Error states as follows:

{¶ 20} “THE DECISION OF THE TRIAL COURT IS CONTRARY TO LAW IN

THAT IT DID NOT PROPERLY FOLLOW THE REQUIREMENTS OF OHIO CIVIL RULE 53 IN THE HANDLING OF THIS CASE.”

{¶ 21} Elmore contends that the trial court erred by failing to rule on the objections filed in regard to the first magistrate’s decision of October 10, 2008.

{¶ 22} Pursuant to Civ.R. 53(D)(2)(a)(i), a magistrate may “enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.” A review of the magistrate’s order of October 10, 2008, reveals that it merely re-set the matter for further hearing and notified Elmore of the nature of the issues that were not capable of being resolved during the first hearing. That order did not purport to resolve any issues then pending. In other words, the order was merely procedural in nature. The order was not dispositive of any of the issues then pending.

{¶ 23} Essentially, Elmore is contending that the magistrate erred by proceeding with the hearing on October 31, 2008, without the trial court’s having ruled on Elmore’s objection to the order setting that date for hearing. This may have been a basis for objecting to the magistrate’s decision of November 12, 2008, which resulted from the October 31<sup>st</sup> hearing. But Elmore did not object to the magistrate’s decision of November 12, 2008.

{¶ 24} “Except for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any specific factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).” Civ.R. 53(D)(3)(b)(iv).

{¶ 25} The November 12, 2008 order from which this appeal is taken adopted all of the factual findings and legal conclusions in the magistrate's decision of the same date. Thus, Elmore cannot assign error in the trial court's adoption of those findings and conclusions, unless the error assigned can be said to constitute plain error. Without a transcript of the October 31, 2008 hearing before the magistrate, we cannot say that the result in this case would clearly have been otherwise had the magistrate deferred that hearing until after the trial court had ruled on Elmore's objection to the order scheduling that hearing.

{¶ 26} Absent the existence of plain error, we cannot, under Civ.R. 53(D)(3)(b)(iv), review the propriety of the trial court's adoption of the magistrate's findings and legal conclusions, in the order of the trial court from which this appeal is taken. In other words, Elmore's earlier objection to the magistrate's order scheduling the hearing did not preserve that issue for appellate review; that issue merged into the subsequent decision of the magistrate on the merits, and she was required to object to that decision in order to preserve the scheduling issue for appellate review, should the trial court choose to adopt the magistrate's decision on the merits as its own order.

{¶ 27} Furthermore, Elmore's exception to the scheduling order, while denominated as an objection, was more properly a motion to set aside a magistrate's procedural order, authorized under Civ.R. 53(D)(2)(b), because the scheduling order was not dispositive of the matter referred to the magistrate, to which an objection would lie under Civ.R. 53(D)(3). A motion to set aside a magistrate's procedural order must be filed within ten days of the filing of the order to which it refers. Civ.R.

53(D)(2)(b). The scheduling order was filed October 10, 2008, and the “objection” to that order was not filed until October 24, 2008, which was more than ten days later. Therefore, the “objection,” which was really in the nature of a motion to set aside a magistrate’s procedural order, was not timely filed, and the trial court was not required to rule upon it.

{¶ 28} The First Assignment of Error is overruled.

### III

{¶ 29} Elmore’s Second Assignment of Error states:

{¶ 30} “THE DECISION OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 31} Elmore contends that the decisions of the magistrate and probate court are not supported by the evidence. In support, she relies upon the claim that the probate court ignored, and failed to rule upon, her objections filed with regard to the October 10 decision of the magistrate.

{¶ 32} We begin by noting that Elmore has failed to file a transcript of either magistrate’s hearing. Civ.R. 53(D)(3)(b), which governs the procedure for filing objections to a magistrate’s decision with the trial court, requires that an objecting party must support any objections to a magistrate’s factual findings with a transcript of the proceedings before the magistrate or an affidavit of the evidence. If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate’s factual findings and limit its review to the magistrate’s legal conclusions.

*Ross v. Cockburn*, Franklin App. No. 07AP-967, 2008-Ohio-3522, ¶ 5. On appeal

of a judgment rendered without the benefit of a transcript or affidavit, an appellate court only considers whether the trial court correctly applied the law to the facts as set forth in the magistrate's decision. *Ross* at ¶ 6.

{¶ 33} Elmore failed to file a transcript from either the first hearing before the magistrate or the subsequent hearing. Therefore, we cannot say that either magistrate made incorrect findings of fact. Indeed, from our review of the filings in the record, we conclude that the findings made by the magistrates and by the probate court find support in the record. The values listed for six of the assets listed in the Inventory filed by Elmore do not correspond to the values of the same assets listed in the Account filed later. Indeed, some of the numbers listed in these documents are grossly divergent and no explanation is provided for the discrepancies. The record also shows that Elmore made donations from the estate assets to organizations not listed in Lucas's will as beneficiaries. These payments total \$119,800. Again, no explanation was provided for these disbursements. Numerous other unexplained disbursements were also made.

{¶ 34} Thus, based upon this record, we cannot say that the trial court erred by removing Elmore as Executor and ordering the repayment of attorney fees.

{¶ 35} Accordingly, the Second Assignment of Error is overruled.

IV

{¶ 36} Both of Elmore's assignments of error having been overruled, the order of the trial court from which this appeal is taken is Affirmed.

.....

DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Herbert Creech  
Raymond W. O'Neal, Sr.  
Laura D. Sykes  
Mary Carter  
C. Denise Henderson  
Rust College  
Kathryn Mitchell  
Caye Deidre Elmore  
William Larry Lucas  
Lillian Saunders  
Yvonne Fay Reese  
Reana Jackson  
Gladys Gunn  
Carol Dale Thompson-Amanti  
Tougaloo College  
Bethel Baptist Church  
George W. Lucas memorial Scholarship      Fund  
Hon. Alice O. McCollum