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Because Dinslage committed a Class IIIA felony, the trial court could have sentenced her to up to 5 years' imprisonment.[27] But, despite a substantial criminal record, the court elected to sentence Dinslage to probation. The court did not abuse its discretion in imposing the maximum term of incarceration as a condition of Dinslage's probation.

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

[27] See Neb. Rev. Stat. § 28-105 (Reissue 2008).

IN RE ESTATE OF FAUNIEL F. MUNCILLO, DECEASED. CHRISTINE MUNCILLO, APPELLEE, AND GREGORY MUNCILLO, APPELLANT, V. ANGELA MUNCILLO AND BARBARA L. HOSFORD, PERSONAL REPRESENTATIVE OF THE ESTATE OF FAUNIEL F. MUNCILLO, DECEASED, APPELLEES.

789 N.W.2d 37

Filed October 8, 2010. No. S-09-1224.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
5. **Decedents' Estates: Final Orders.** Proceedings under the Nebraska Probate Code are special proceedings within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
6. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right, not a mere technical right.
7. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is not affected when that right can be effectively vindicated in an appeal from the final judgment.

8. **Decedents' Estates: Executors and Administrators: Final Orders: Appeal and Error.** A probate court's denial of an application for the appointment of a special administrator, brought pursuant to Neb. Rev. Stat. § 30-2457(2) (Reissue 2008), is a final, appealable order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
9. **Decedents' Estates: Executors and Administrators.** A special administrator should not be appointed every time a potential beneficiary disagrees with the personal representative's administration decisions, absent some showing that the personal representative is not lawfully fulfilling his or her duties under the Nebraska Probate Code.
10. **Decedents' Estates: Executors and Administrators: Proof.** A showing that the personal representative is not lawfully fulfilling his or her duties necessitates, at minimum, an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or cannot act to preserve the estate, or the existence of some other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty.

Appeal from the County Court for Douglas County: CRAIG Q. MCDERMOTT, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Jason M. Bruno and Laura K. Woods, of Sherrets, Bruno & Vogt, L.L.C., for appellee Angela Muncillo.

Donald C. Hosford, Jr., for appellee Barbara L. Hosford.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

At the time of Fauniel F. Muncillo's death, she had three bank accounts, listing her daughter, Angela Muncillo, either as the joint owner or as the payable-on-death beneficiary. Her other children, Christine Muncillo and Gregory Muncillo, objected to the distribution of the accounts to Angela, claiming that her signatures on the account agreements had been obtained by undue influence. Christine and Gregory applied for the appointment of a special administrator to pursue the accounts for the estate, claiming that the appointed personal representative was not pursuing the matter. However, the county court determined that the accounts were nonprobate assets and that the personal representative could adequately protect the

interests of the estate. The county court denied the appointment of a special administrator, and Gregory appeals. For the following reasons, we affirm the judgment of the county court.

BACKGROUND

Fauniel died on March 14, 2009. Fauniel's attorney, Barbara L. Hosford, petitioned for formal probate, a determination of heirs, and the appointment of a personal representative to represent Fauniel's estate. The court admitted Fauniel's will and a later codicil to formal probate. The will and codicil provided that Angela, Christine, and Gregory would share Fauniel's estate in equal shares. The court appointed Hosford as personal representative of the estate.

At the time of her death, Fauniel owned three bank accounts, which contained a total of over $260,000. Fauniel had three corresponding account agreements with the bank, each specifying the type of account and whether there existed a payable-on-death beneficiary. One of the account agreements was a multiple-party account, listing Fauniel and Angela as co-owners with rights of survivorship. The other agreements were single-party accounts in Fauniel's name with Angela designated as the payable-on-death beneficiary.

Hosford petitioned the county court for review of Fauniel's bank account agreements to determine whether the accounts were subject to probate. Christine then filed an objection to the distribution of any funds from the accounts, alleging that the designation of Angela as beneficiary or joint owner was the result of undue influence. Christine sought a constructive trust for the account funds and claimed that she was entitled to one-third of those amounts. Hosford then filed a motion to dismiss her petition for review of the account agreements. The court dismissed Hosford's petition without prejudice.

Angela brought a separate but related action against Christine in the district court, alleging that Christine's interference with the accounts prevented Angela's lawful access to the funds. Gregory apparently filed a petition in intervention in the district court case. In the county court, Christine and Gregory filed an application for the appointment of a special administrator to pursue the bank accounts as estate assets, as Hosford had

dismissed her petition for review of the accounts and was no longer pursuing the matter. Upon questioning by the court as to whether Christine and Gregory were intimating that Hosford was not in a position to properly collect and maintain the estate assets, Christine and Gregory noted that Hosford could become a witness in the district court case and asserted that Hosford "may not feel comfortable in handling it herself."

The county court denied Christine and Gregory's application to appoint a special administrator, finding that a special administrator was not necessary because Hosford could adequately protect the assets of the estate. The court noted that Hosford regularly appeared in probate court and that the court found her to be forthright, straightforward, and honest. Gregory appeals from the order denying the application for the appointment of a special administrator.

ASSIGNMENT OF ERROR

Gregory assigns that the county court erred in denying the application for the appointment of a special administrator.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

[2-4] Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[4]

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[1] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010).

[2] See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[3] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009); *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[4] See *id.*

ANALYSIS

Was County Court's Order Final?

Before reaching the merits of this appeal, we settle a jurisdictional matter. Angela argues that the order of the county court denying the application for the appointment of a special administrator is not a final, appealable order. We have determined that orders relating to the removal of a personal representative qualify as final orders.[5] However, we have yet to address whether an order denying the appointment of a special administrator is a final, appealable order.

Neb. Rev. Stat. § 25-1902 (Reissue 2008) defines three types of final orders: (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. We note that the order denying the appointment of a special administrator did not determine an action or prevent a judgment, nor was it an order made on summary application in an action after judgment was rendered. We therefore address whether the order affected a substantial right made in a special proceeding.

[5] A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[6] Gregory and Christine's application for the appointment of a special administrator was brought pursuant to the Nebraska Probate Code, specifically, Neb. Rev. Stat. § 30-2457 (Reissue 2008), located in chapter 30 of the Nebraska Revised Statutes. Our law is clear that proceedings under the Nebraska Probate Code are special proceedings within the meaning of § 25-1902.[7] We therefore find that the order at issue here was made in a special proceeding within the meaning of § 25-1902 and must next answer whether the order affected a substantial right.

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[5] See, e.g., *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). See, also, *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

[6] *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[7] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007); *In re Estate of Rose, supra* note 6.

[6,7] A substantial right is an essential legal right, not a mere technical right.[8] We have noted that a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.[9] But here, the denial of the application for the appointment of a special administrator cannot be effectively vindicated on appeal from the final judgment in which the probate estate is finally established, and thus affects an essential legal right.

[8] Under § 30-2457(2), an interested person has a right to petition for a special administrator, who will be appointed if necessary to preserve the estate or to secure its proper administration. If a probate court wrongfully denies the application to appoint a special administrator, the petitioner's right to have a special administrator appointed cannot be vindicated upon appeal from entry of the later final judgment. It is not uncommon for the probate of an estate to remain open for years,[10] and a special administrator cannot go back in time and preserve or administer the estate long after the application to appoint has been denied. Because the denial of the application for the appointment of a special administrator cannot be effectively vindicated on appeal from the final judgment of the probate court, it affects an essential legal right of the petitioner, and thus affects a substantial right within the meaning of § 25-1902. Accordingly, we conclude that the probate court's ruling in this case affected a substantial right of the appellant in a special proceeding, and is therefore a final, appealable order within the meaning of § 25-1902.

Did County Court Err in Denying Appellant's Application?

Gregory argues that the appointment of a special administrator is necessary to protect the estate pursuant to § 30-2457, which reads, in relevant part:

> A special administrator may be appointed:
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> . . . .

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[8] *In re Estate of Rose, supra* note 6.

[9] *In re Estate of Potthoff, supra* note 7; *In re Estate of Rose, supra* note 6.

[10] See *In re Estate of Potthoff, supra* note 7.

> (2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Under § 30-2457(2), Gregory must show that the appointment of a special administrator is necessary to preserve the estate or to secure its proper administration. Gregory argues that because the personal representative once questioned the account agreements, but then demonstrated an "unwillingness to pursue assets of the estate," a special administrator is necessary to protect estate assets.[11] But the county court determined that the bank accounts did not qualify as estate assets because they transferred immediately to Angela upon Fauniel's death under Neb. Rev. Stat. § 30-2715 (Reissue 2008). Gregory does not contest this determination. Rather, Gregory correctly notes that under Nebraska law, challenges to the transfer of nonprobate assets like the accounts at issue here must be brought in the district court. Gregory contends that it is unclear whether he has standing to challenge the accounts in the district court.

Before the adoption of the Nebraska Probate Code, we permitted an heir to maintain an action to enforce an obligation owed to the estate when an administrator refused to act.[12] We have not determined whether that exception is still permitted after the adoption of the code.[13] However, the issue of whether Gregory has standing to pursue the bank accounts in district court is not properly before us now, and therefore, we do not address it. Rather, we address whether the county court erred in refusing to appoint a special administrator.

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[11] Brief for appellant at 8.

[12] See *Prusa v. Everett*, 78 Neb. 250, 113 N.W. 571 (1907).

[13] *In re Estate of Hedke, supra* note 3.

Gregory argues that because the personal representative is unwilling to further pursue the accounts, and because Gregory might not have standing to pursue the accounts in district court, the county court erred when it denied the application for the appointment of a special administrator. A similar question was addressed by the Montana Supreme Court in *Matter of Estate of Long*.[14] In that case, the appellant beneficiary sought the appointment of a special administrator under the Montana equivalent of § 30-2457(2). Upon the decedent's death, her bank accounts transferred to her friends, the appellees. The appellant claimed that the account documents naming the appellees as joint owners were procured by undue influence. The appellant informed the personal representatives of the decedent's estate of the possible claim of undue influence. However, after reviewing the evidence, the personal representatives declined to pursue the matter on behalf of the estate. The appellant requested that a special administrator be appointed to pursue the assets, but the probate court denied the request.

The Montana Supreme Court found that absent a showing of fraud, collusion, conflict of interest, inability to act, or other special equitable circumstance, a decision by the personal representatives not to bring an action against decedent's friends was not grounds for the appointment of a special administrator under the Montana Probate Code. *Matter of Estate of Long* also noted that the removal of the personal representative was not warranted:

> [The personal representatives] reviewed the information made available by the appellant. Simply because appellant did not agree with the co-personal representatives on what to do about a potential claim does not mean, as the lower court correctly concluded, that they improperly administered the estate such that they should be removed and a special administrator appointed.[15]

[9,10] We find the reasoning of *Matter of Estate of Long* to be persuasive. A special administrator should not be appointed

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[14] *Matter of Estate of Long*, 225 Mont. 429, 732 P.2d 1347 (1987).

[15] *Id.* at 436-47, 732 P.2d at 1352.

every time a potential beneficiary disagrees with the personal representative's administration decisions, absent some showing that the personal representative is not lawfully fulfilling his or her duties under the code. We determine that such a showing, at minimum, necessitates an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or cannot act to preserve the estate, or the existence of some other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty.

Gregory made no such showing. At the hearing on his motion, Gregory presented the court with no evidence supporting his application. Gregory argued below that Hosford "will become a witness, I believe, upstairs in the District Court and perhaps, in being a witness, she may not feel comfortable in handling it herself." The record does not show that Gregory ever unequivocally challenged the competency of the personal representative, nor does it show that the personal representative in any way failed to adequately perform her duties. The record reflects that Hosford was aware of the accounts, that she petitioned for their review, that the account agreements were produced, and that Hosford moved to dismiss her petition. The most that can be extrapolated from the record is that Hosford was aware of the accounts, obtained the account agreements, and decided not to pursue the accounts as estate assets.

A putative beneficiary's disagreement with a personal representative over the proper course of action for a potential claim does not necessitate the appointment of a special administrator, absent a showing of fraud, collusion, conflict of interest, inability to act, or other special equitable circumstance. Absent such a showing, Gregory did not prove that the appointment of a special administrator was "necessary to preserve the estate" under § 30-2457(2). And because Gregory produced no evidence of any of the aforementioned circumstances, we cannot say that the county court erred in denying his application.

Because nothing in the record indicates that the appointment of a special administrator is necessary to protect Fauniel's

estate, we cannot say that the county court's decision to deny the application was arbitrary, capricious, or unreasonable. Gregory's assignment of error is without merit.

CONCLUSION

The county court did not err in finding that a special administrator was not necessary to protect Fauniel's estate. Therefore, the county court's judgment is affirmed.

AFFIRMED.