

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: GERALDINE M. CLIFFORD

APPEAL OF: JOHN CLIFFORD, JR.,

Appellant

v.

IN RE: GERALDINE M. CLIFFORD,
ESSA BANK & TRUST GUARDIAN

APPEAL OF: ESSA BANK & TRUST, THE
GUARDIAN OF THE ESTATE OF
GERALDINE M. CLIFFORD

Appellee

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 1035 EDA 2012 AND
1278 EDA 2012
CONSOLIDATED
CROSS-APPEALS

Appeal from the Orders entered February 15, 2012,
in the Court of Common Pleas of Pike County,
Orphans' Court, at No(s): 13-OC-2003

IN RE: JOHN A. CLIFFORD, SR.

APPEAL OF: JOHN CLIFFORD, JR.,

Appellant

v.

IN RE: JOHN CLIFFORD, SR., ESSA BANK & TRUST GUARDIAN

APPEAL OF: ESSA BANK & TRUST, THE GUARDIAN OF THE ESTATE OF JOHN A. CLIFFORD, SR.

Appellee

No. 1037 EDA 2012 AND
1285 EDA 2012
CONSOLIDATED
CROSS-APPEALS

Appeal from the Orders entered February 15, 2012,
in the Court of Common Pleas of Pike County,
Orphans' Court at No(s): 14-OC-2003

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 18, 2013

John Clifford, Jr., (“Appellant”), appeals from the trial court’s identical orders at dockets 1035 EDA 2012 and 1037 EDA 2012, respectively. ESSA Bank & Trust (“ESSA”) cross-appeals from the same orders docketed at 1278 EDA 2012 and 1285 EDA 2012. After careful review, we reverse in part and affirm in part.

This case has a protracted factual and procedural history, which the trial court explained as follows:

*Retired Senior Judge assigned to Superior Court.

John Clifford, Sr. and Geraldine Clifford, his wife, were residents of Brooklyn, New York. Due to reasons of age and health, they moved to Pike County, Pennsylvania, to be near their daughter, Elizabeth, who resides there. Mr. and Mrs. Clifford became residents of a private nursing care facility. This court was not informed as to when this move occurred, although it was certainly prior to 2003. They still retained ownership, however, of their home in Brooklyn.

In 2003, petitions were filed with the Orphans' Court Section of the Court of Common Pleas of Pike County seeking an adjudication of incapacity and appointment of a plenary guardian for both Mr. and Mrs. Clifford. Apparently due to a conflict between two of the Cliffords' children, Elizabeth and [Appellant], the Court appointed [ESSA] as guardian of the estates. The bulk of the estates consisted of the residence in Brooklyn and United States Savings Bonds.

Geraldine Clifford died on March 17, 2004. John Clifford, Sr., died on February 28, 2006.

Thereafter, [ESSA] filed accountings of its administration of the guardianship estates in the Orphans' Court on November 8, 2006. On December 15, 2006, [Appellant], filed "objections" to the accountings.

The Pike County Court then appointed Arthur Ridley, Esquire, as "special auditor", to hear the objections and make recommendations to the court. Mr. Ridley did not conduct a hearing, as such. Instead, he met privately with counsel for [Appellant] and with counsel for [ESSA]. At each meeting, counsel submitted evidence to Ridley in support of their clients' contentions. No record was made of these proceedings before the auditor. As far as can be determined, neither party objected to the procedure proposed by the auditor. Mr. Ridley filed an extensive report and recommendation to the court on July 30, 2008. There is no need to discuss the contents of the report at length, as it is part of the record. In summary, however, Ridley found that most of [Appellant's] objections were without merit. He did conclude, however, that [ESSA] breached its fiduciary duty as guardian in the management and protection of the Brooklyn home.

[ESSA] did not dispute that the real estate remained vacant during the period of the guardianships, and sustained

significant water damage. It contended, however, that the property could not have been rented due to its state of disrepair. Prior to the adjudications of incapacity, [Appellant] (the objector) had commenced renovations to his parents' property, which he suspended once a guardian was appointed. Nonetheless, the auditor concluded that the guardian had a duty to repair the property, and at least attempt to rent it. This court agrees with the auditor's assessment.

Following the filing of the auditor's report, both sides filed "exceptions" in September, 2008. Thereafter, the matter languished for nearly three years, as argument on the exceptions was continued numerous times at the request of one party or the other. In 2010, counsel for [Appellant] filed a motion seeking to disqualify counsel for ESSA due to an asserted "conflict of interest". There are two judges in Pike County, and they both then recused themselves from further participation in the matter. This writer was assigned to these cases as a senior judge in June, 2011.

Ultimately, this court determined that counsel for ESSA did not have a conflict, and that [Appellant] did file timely objections. Thereafter, argument was held on the exceptions to the auditor's report.

Trial Court Opinion, 4/25/12, at 2-4 (footnotes omitted).

On February 13, 2012, the trial court issued its identical orders under each of the dockets, overruling Appellant's exceptions to the auditor's report, and providing "that the [e]xceptions to the [a]uditor's report filed by ESSA are sustained, in part: the finding that ESSA is liable for lost rental income in the amount of \$1,200 per month is amended to provide that the period of such liability shall be from August 1, 2004 to February 28, 2006. In all other respects, the exceptions of [ESSA] are overruled." The trial court's February 13, 2012 orders were entered on the trial court dockets on February 15, 2012. Orders, 2/15/12, at 1.

On March 1, 2012, Appellant filed exceptions to the trial court's February 15, 2012 orders. On March 9, 2012, ESSA filed cross-exceptions to the February 15, 2012 orders. On the same date, the trial court denied Appellant's exceptions. The trial court's March 9, 2012 orders were docketed on March 13, 2012. The March 13, 2012 orders do not reference ESSA's exceptions. Our review of the record reveals no trial court orders formally denying ESSA's exceptions to the February 15, 2012 orders. However, the lack of trial court orders affirmatively denying ESSA's exceptions to the February 15, 2012 orders is of no moment based on our discussion below.

Appellant did not appeal from the trial court's February 15, 2012 orders. Rather, on April 5, 2012, Appellant filed a notice of appeal of the trial court's March 13, 2012 orders. ESSA did not file a notice of appeal to the trial court's February 15, 2012 orders. On April 16, 2012, ESSA filed a notice of cross-appeal to Appellant's appeal of the March 13, 2012 orders.

While the trial court did not order compliance with Pa.R.A.P. 1925, it issued an opinion dated April 20, 2012. The trial court's April 20, 2012 opinion was docketed on April 25, 2012.

Appellant presents the following issues for our review:

1. Is the Special Auditor's Report legally insufficient?
2. Does the Special Auditor's Report fail to comply with the Procedural Rules of Orphan's [sic] Court?
3. Did the Trial Court fail to assess damages for a Breach of Fiduciary Duty?

4. Does the Special Auditor's Report fail to adequately compensate the Decedent's Estate for waste of real property and unnecessary incursion of attorney's fees and costs?
5. Is the Trial Court's Order of February 13, 2012 to which Exceptions were filed and subsequently denied by Order of March 9, 2012 unsupported by the Record?
6. Did the Special Auditor fail to adequately investigate damages causing the Appellant to incur further damages?
7. Did the Trial Court improperly deny the Decedent's Estate the ability to substantiate damages due to the Estate by denying the prayer for further Discovery?

Appellant's Brief, docket 1035 EDA 2012 and 1037 EDA 2012, at 5.

ESSA presents the following "counterstatement of questions involved":

- A. Should [Appellant's] appeal be dismissed for failure to preserve issues for appellate review?
- B. Should [Appellant's] appeal, which seeks a remand for an evidentiary hearing, be denied?
- C. Did the Orphans' Court abuse its discretion and/or commit an error of law when it surcharged ESSA for lost rental income in an amount exceeding \$20,000.00?

ESSA's Brief, docket 1278 EDA 2012 and 1285 EDA 2012, at 1.

Initially we note that Orphans' Court Rule 7.1 provides:

- (a) Except as provided in Subdivision (e), no later than twenty (20) days after entry of an order, decree or adjudication, a party may file exceptions to any order, decree or adjudication which would become a final appealable order under Pa.R.A.P. 341(b) or Pa.R.A.P. 342 following disposition of the exceptions. If exceptions are filed, no appeal shall be filed until the disposition of exceptions except as provided in Subdivision (d) (Multiple Aggrieved Parties). Failure to file exceptions shall not result in waiver if the grounds for appeal are otherwise properly preserved.

- (g) Exceptions shall be the exclusive procedure for review by the Orphans' Court of a final order, decree or adjudication. A party may not file a motion for reconsideration of a final order.

Pa.O.C.R. 7.1(a) and (g).

It is significant in this case that the trial court cited Pa.O.C.R. 7.1(g) in denying Appellant's exceptions to its February 15, 2012 orders, because it treated Appellant's pleading as an impermissible motion for reconsideration. *See Orders, 3/13/12, at 1; see also Trial Court Opinion, 4/25/12, at 1-2.* Our review of Appellant's exceptions to the trial court's February 15, 2012 orders supports the trial court's treatment of Appellant's exceptions as a motion for reconsideration. Appellant's exceptions only generally allege that the trial court's determinations are unsupported by the record, and that "it is in the interest of justice to vacate the Order of February [15], 2012 and to grant the [e]xceptions to the [a]uditor's [r]eport filed by [Appellant]." Appellant's Exceptions to Order, 3/1/01, at 1.

Moreover, while ESSA's exceptions were more detailed, ESSA's exceptions repeatedly asserted that the trial court "failed to consider" various arguments raised by ESSA, and ended with ESSA's request that the trial court "**reconsider** its Order of February [15], 2012 and grant its [c]ross-[e]xceptions." ESSA's Cross-Exceptions, 3/9/12, at 1-4 (emphasis added).

However, were we to treat Appellant's exceptions and ESSA's cross-exceptions as impermissible motions for reconsiderations under Pa.O.C.R. 7.1(g), rather than as exceptions that extend the parties' time to appeal as provided by Pa.O.C.R. 7.1(a), the instant appeals by Appellant, and cross-appeals by ESSA, would be untimely. *See* Pa.R.A.P. 903(a) (a party has 30 days from the date of its entry to appeal a final order). Appellant and ESSA would have been required to file their notices of appeal to the trial court's February 13, 2012 orders, which were docketed on February 15, 2012, no later than March 16, 2012. We decline to treat Appellant's exceptions and ESSA's cross-exceptions to the February 15, 2012 orders as motions to reconsider, and therefore, we will not dismiss the instant appeals and cross-appeals as untimely.

Turning to the merits of the parties' issues, we find that the trial court erred in imposing a surcharge on ESSA, and we therefore address ESSA's cross-appeal first and reverse accordingly. We further find that Appellant waived his claims due to his lack of citation to proper legal authority. Waiver notwithstanding, we find Appellant's issues to be without merit.

ESSA contends that the trial court "ignored ESSA's evidence and/or failed to apply the statutory provisions of 20 Pa.C.S.A. §§ 5141 and 7203 and related case law. Accordingly, the surcharge against ESSA should be reversed and dismissed." ESSA's Briefs, 1278 EDA 2012 and 1285 EDA 2012 at 15. We agree.

Under 20 Pa.C.S.A. § 5141, Pennsylvania law provides that:

The guardian of the estate of a minor appointed by the court until it is distributed or sold shall have the right to, and shall take possession of, maintain and administer, each real and personal asset of the minor to which his appointment extends, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to such real or personal property of the minor.

20 Pa.C.S.A. § 5141.

The Prudent Investor Rule found in 20 Pa.C.S.A 7203 provides in relevant part:

(a) General rule.--A fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the trust.

* * *

(c) Considerations in making investment and management decisions.--In making investment and management decisions, a fiduciary shall consider, among other things, to the extent relevant to the decision or action:

- (1) the size of the trust;
- (2) the nature and estimated duration of the fiduciary relationship;
- (3) the liquidity and distribution requirements of the trust;
- (4) the expected tax consequences of investment decisions or strategies and of distributions of income and principal;
- (5) the role that each investment or course of action plays in the overall investment strategy;
- (6) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries,

including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary's activities with the community where that asset is located;

(7) to the extent reasonably known to the fiduciary, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument; and

(8) to the extent reasonably known to the fiduciary, the income and resources of the beneficiaries and related trusts.

20 Pa.C.S.A. §7203(a) and (c)(1)-(8).

The record shows that the trial court considered the prudence of ESSA's actions vis á vis the Decedents' assets. Specifically, the trial court explained:

The remainder of [Appellant's] objections...center on the failure of [ESSA] to liquidate the savings bonds. ESSA responds that it would have been imprudent to do so. This court agrees. The rate of return the savings bonds were earning could not have been equaled by any other prudent investment at the time. Further, the tax consequences to the [Decedents] would have been great. Accordingly, these objections were denied, as were [ESSA's] exceptions to the auditor's findings.

Trial Court Opinion, 4/25/12, at 5. However, the trial court did not find that ESSA showed equal prudence regarding the Decedents' home in Brooklyn.

The trial court determined:

[] [T]he auditor had concluded that [ESSA] knew or should have known that it needed to fix up the [Decedents'] property and try to rent it when it received an appraiser's report in August, 2004. Further, he concluded that the lost rental was \$1,200 per month. He recommended to the court that ESSA be surcharged that amount from August, 2004 "and continuing through the termination of ESSA's position of guardian." This

court could find no reason to disagree with his conclusion, but felt it necessary to provide a date for that termination. Accordingly, the surcharge is to end as of the date of death of John Clifford, Sr., when control of the realty would have passed to his executor.

Trial Court Opinion, 4/25/12, at 5 (footnote omitted).

We recognize:

“If the court's findings are properly supported, we may reverse its decision only if the rules of law on which it relied are palpably wrong or clearly inapplicable.” Owens v. Mazzei, 847 A.2d 700, 706 (Pa. Super. 2004) (citing In re Estate of Harrison, 745 A.2d 676, 678–79 (Pa. Super. 2000), appeal denied, 563 Pa. 646, 758 A.2d 1200 (2000)).

In re Estate of Fritts, 906 A.2d 601, 606 (Pa. Super. 2006).

Our review of the record comports with ESSA's succinct recitation of the evidence as follows:

Th[e] conclusion, that ESSA could have rented the subject property for a rental price of between \$1,100.00 and \$1,300.00 per month, is based on speculation (see R.R. 96a through 98a). The record does not identify the name(s) of any potential renters who were willing and able to rent the property. Furthermore, the [auditor's] report does not consider or off-set the cost of repairs to the home in order to make it habitable so that it could be rented. The report also does not consider or off-set the costs associated with obtaining a full guardianship in New York so that ESSA, as a Pennsylvania-appointed Guardian, could proceed to sign contracts as a Guardian in New York. The report also fails to detail the time delays associated with obtaining a New York Guardianship, followed by the time needed to complete the renovations that were initially started by [Appellant] (see R.R. 90a through 98a and 459a through 676a). The report also fails to acknowledge that the [Decedents'] real estate doubled in value during ESSA's guardianship (see R.R. 644a through 646a and 664a through 666a).

ESSA's Brief, docket 1278 EDA 2012 and 1285 EDA 2012, at 7.

We have explained:

A surcharge is the penalty imposed for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care. The standard of care imposed upon a trustee is that which a man of ordinary prudence would practice in the care of his own estate. If a fiduciary has greater skill than that of a person of ordinary prudence, then the fiduciary's standard of care must be judged according to the standard of one having this special skill.

Estate of Pew, 655 A.2d 521, 541 (Pa. Super. 1994) (internal citations omitted). Moreover, “[a] trustee cannot be surcharged for a breach of duty unless the breach caused a loss to the trust.” *Id.* at 543 (internal citation omitted).

Here, the speculative nature of the potential rental of the Decedents' property, the unknown cost of the repairs needed to make the home habitable, and the property's increase in value over time as reflected in the appraisal report, do not support the finding that ESSA caused “a loss” to the estate due to ESSA's failure to act as a prudent investor, and to “exercise common prudence, skill and caution in the performance of its fiduciary duty.” Therefore, we respectfully reverse the portion of the trial court's orders which assess ESSA with a surcharge. **See** 20 Pa.C.S.A 7203; **see also Pew**, 655 A.2d at 541, 543.

As to Appellant's claims, we note that Appellant's briefs at both docket 1035 EDA 2012 and 1037 EDA 2012 are identical. Appellant contends the auditor “should have held a hearing on all the issues complained of in the

Objection to the Special Auditor's Report and taken evidence developed through Discovery." Appellant's Briefs, 1035 EDA 2012 and 1037 EDA 2012, at 14. Appellant argues:

Since the Orphans [sic] Court Rules of Procedure set forth the manner in which an [a]uditor is to render his report and since logically speaking, Findings of Fact can only occur after an evidentiary hearing, the [a]uditor's report in this case is legally insufficient. By definition the [a]uditor's [r]eport failed to comply with the applicable Rules of Civil Procedure for Orphans' Court. As such the Trial Court in its [sic] Orders of February 15, 2012 could not have decided that the [a]uditor adequately assessed the damages for a breach of fiduciary duty nor could it have adequately compensated the Decedent's Estate for waste of property and the unnecessary incursion of attorney's fees and costs, nor [could] the Trial Court decision have been supported by the record since no record existed.

Id. at 14-15.

Other than Pennsylvania Orphans' Court Rule 8, Appellant cites no jurisprudence for his proposition that the auditor's report was "legally insufficient", thereby effecting a waiver of his claim. *Id.* at 14. ***See Giant Food Stores, LLC v. THF Silver Spring Development, L.P.***, 959 A.2d 438, 444 (Pa. Super. 2008) ("Appellant's issue on appeal is waived because [Appellant] has failed to set forth in its appellate brief any citation to legal authority pertaining to [Appellant's] argument"). Further, Appellant only cites ***Dominick v. Hanson***, 753 A.2d 84 (Pa. Super. 2000), a personal injury case involving the discoverability of surveillance videos, for the general proposition that discovery "is designed to provide litigants the opportunity to acquire knowledge and to allow for a full and fair [t]rial on the

merits.” Appellant’s lack of substantiation for his claims of trial court error and abuse of discretion effects waiver. ***Korn v. Epstein***, 727 A.2d 1130, 1135 (Pa. Super. 1999) (“arguments not *appropriately* developed are waived) (emphasis in original) (internal citations omitted).

Waiver notwithstanding, Appellant’s claims are meritless. All of Appellant’s issues require our review under an abuse of discretion standard. ***See In re Estate of Cherwinski***, 856 A.2d 165, 167 (Pa. Super. 2004). An abuse of discretion exists where the trial court’s determination overrides or misapplies the law, its judgment is manifestly unreasonable, or is the result of partiality, prejudice, bias, or ill-will. ***See Majczyk v. Oesch***, 789 A.2d 717, 720 (Pa. Super. 2001). Our review of the record reveals that the trial court did not err in deeming the auditor’s report to be legally sufficient and declining to hear further evidence.

Appellant concedes that Pennsylvania Orphans’ Court Rule 8 “does not specifically state that an auditor shall hold hearings...” Appellant’s Briefs at 1035 EDA 2012 and 1037 EDA 2012 at 13. Additionally, as noted by ESSA, “while [Appellant] references Pa.O.C.R. 8.1 to support his position that discovery is required during the audit process, [Appellant] offers no explanation as to why he never sent discovery requests to ESSA...during a four-year period of time...” ESSA’s Briefs at 1278 EDA 2012 and 1285 EDA 2012, at 19-20.

Further, the trial court explained:

Since there was no record of the proceeding before the auditor, counsel sought to relitigate all issues which had been raised in the objections and exceptions. It became apparent that the dispute between the parties had now devolved into a dispute between the attorneys. Given the fact that the "objections" had been pending for more than five years, that failure to resolve the guardianship case prevented conclusion of the administration of the decedent's estate, that Ridley's report was substantial and detailed, and that a further evidentiary hearing would take months to schedule, hear, and decide, this writer declined to hear further evidence, and proceeded to adjudicate the matter solely on briefs and argument.

Trial Court Opinion, 4/25/12, at 4.

The trial court's rationale recognizes that "[I]itigants are given their opportunity to present their cause and once that opportunity has passed, we are loathe to reopen the controversy for another airing, **save for the greatest of need.**" *See Reilly v. SEPTA*, 489 A.2d 1291, 1301 (Pa. 1985) (emphasis added). Finding no "great need" in this case, we affirm the trial court's determination not to hold an evidentiary hearing to revisit the issues raised before the auditor.

Orders reversed in part and affirmed in part. Jurisdiction relinquished.