

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

ROBERT FRY AND	:	IN THE SUPERIOR COURT OF
WILLIAM RICHARD SMITH	:	PENNSYLVANIA
	:	
v.	:	
	:	
OIL REGION MUSIC PRESERVATION	:	
MUSEUM "DeBENCE MUSEUM"	:	
	:	
APPEAL OF: E.A.A. FRANKLIN SPORT	:	
CHAPTER #988, INC., INTERVENOR,	:	No. 1301 WDA 2012
	:	
Appellant	:	

Appeal from the Order, June 28, 2012,
in the Court of Common Pleas of Venango County
Orphans' Court Division at No. OCD No. 35-2010

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 5, 2013

This appeal is taken from the decision of the trial court appointing a successor trustee for the corpus of a constructive trust¹ under the *cy pres* doctrine. Finding no error, we affirm.

The corpus of this trust is an antique aircraft, a Franklin Sport Model A, originally constructed in Venango County. As noted by the trial court, the settlors of this trust, Robert Fry and William Richard Smith, purchased the

* Retired Senior Judge assigned to the Superior Court.

¹ There are no trust documents. The various parties agree, however, that the circumstances under which the DeBence Museum originally acquired the corpus as trustee amounted to a constructive trust.

airplane in Ohio and eventually donated it in trust to the DeBence Museum in Venango County. The settlors had dual purposes in creating this trust; first, to keep the aircraft operable and flying; and second, to preserve the aircraft for the enjoyment of the people of Venango County. After the airplane was taken over by DeBence, it was initially properly stored in a hangar. After a few years, however, it was improperly stored in a damp garage where it deteriorated badly. Ultimately, one of the settlors discovered the airplane and “kidnapped” it.

On their own initiative, the settlors sought another entity to preserve this airplane in an operable condition and eventually recruited the Golden Age Air Museum located in Bethel, a community quite distant from Venango County. Once the settlors filed their petition to determine a new trustee, E.A.A. Franklin Sport Chapter #988 (“E.A.A.”), a club of aircraft enthusiasts located in Venango County, were permitted to intervene in an effort to become the new trustee of the aircraft. E.A.A. would keep the aircraft in display condition in Venango County, but by their own concession, not in flightworthy condition. As described by the trial court, a continuation of this trust has become impossible because there is no entity in Venango County that can keep the aircraft flightworthy. Thus, the trial court was faced with choosing which of the two original purposes of the settlors to satisfy: keep the airplane flying, or keep the airplane in Venango County.

The court employed Pennsylvania's *cy pres* statute in reaching its decision:

§ 7740.3. Charitable trusts - UTC 413

(a) General rule.--Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (3) the court shall apply *cy pres* to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific.

20 Pa.C.S.A. § 7740.3(a).

Ultimately, the trial court chose to keep the aircraft flying and appointed the Golden Age Air Museum as the successor trustee. E.A.A. now brings this timely appeal.

Initially, we must point out that this Court employs a highly deferential standard of review of the orphans' court's determination as to whom should be accorded *cy pres* beneficiary status. *In re Women's Homeopathic Hospital of Philadelphia*, 393 Pa. 313, 142 A.2d 292 (1958). The orphans' court enjoys broad discretion in this respect and will not be reversed absent a clear abuse of discretion. *Id.* "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence

or the record, discretion is abused." *Id.* at 294 (quoting *Echon v. Pennsylvania Railroad Company*, 365 Pa. 529, 76 A.2d 175, 178 (1950)).

In re Estate of Elkins, 32 A.3d 768, 777 (Pa.Super. 2011) (*en banc*), *appeal denied*, ___ Pa. ___ 57 A.3d 71 (2012). We find no abuse of discretion on the part of the trial court.

Unlike the usual *cy pres* situation where the settlor is long deceased and the trial court must divine the settlor's intent from the language of the trust and from circumstantial evidence, we have here living settlors. Settlor Robert Fry testified at the hearing and repeatedly stated that it was his desire that the airplane be kept flying. (Notes of testimony, 10/4/11 at 70-72, 76-79.) Fry noted that it was the other settlor, William Richard Smith, who discovered Golden Age Air Museum. (*Id.* at 75.) Fry stated that E.A.A.'s plan to make the aircraft a display would destroy the aircraft. (*Id.* at 77-78.) He stated that he would rather see it flying than in storage. (*Id.* at 79.) He decried the fact that as a mere display, the aircraft was no longer an airplane but merely a piece of equipment. (*Id.* at 84.) Ultimately, when asked whom he would prefer to succeed as trustee, Fry responded that he preferred the Golden Age Air Museum in Bethel so the airplane could return to flying condition again. (*Id.* at 78-79.)

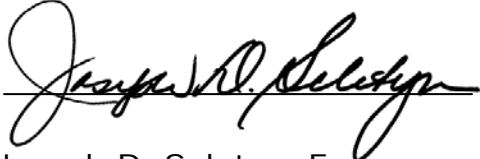
It is clear from this testimony that the primary intent of the settlors was that this aircraft be returned to flying condition. That intent superseded a secondary intent to keep the aircraft in Venango County. Thus, we find no

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abuse of discretion by the trial court in appointing Golden Age Air Museum as successor trustee. Accordingly, we will affirm that decision.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath the name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013