

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF FRANK STANLEY	:	IN THE SUPERIOR COURT OF
KRAFICK A/K/A/ FRANK S. KRAFICK,	:	PENNSYLVANIA
A/K/A/ FRANK KRAFICK, DECEASED	:	
	:	
APPEAL OF: DOLLY BOTTLES,	:	
A/K/A DOLLY KRAFICK	:	
	:	
	:	
	:	No. 1426 WDA 2011

Appeal from the Order of August 5, 2011
In the Court of Common Pleas of Armstrong County
Orphans' Court at No(s): 03-07-409

BEFORE: MUSMANNO, BOWES, and WECHT, JJ.

MEMORANDUM BY WECHT, J.:

Filed: February 7, 2013

Dolly Bottles ("Appellant") appeals from an August 5, 2011 order confirming account and directing distribution in the Estate of Frank Krafick ("Decedent"). We affirm.

The trial court summarized the factual history as follows:

Mr. [Frank] Krafick died intestate, survived by eight children. One daughter, Mary Catherine Davis, opened an estate and was granted Letters of Administration. [Appellant] then filed a Caveat to the Grant of Letters. In it, she averred that she was decedent's common[-]law wife and that, as such, she should have been granted the Letters of Administration instead of Ms. Davis. In addition, [Appellant] filed a Complaint in Equity against the estate and Ms. Davis ["the Estate"], seeking to be declared decedent's common-law wife and to receive certain injunctive relief.

On November 16, 2007, the [c]ourt transferred the equity action ... to the pending Orphan[s'] Court proceeding.... The [c]ourt entered an order granting [Appellant] certain temporary injunctive relief and scheduled a non-jury trial for January 25,

2008 for the express purpose of determining the watershed issue as to whether [Appellant] was decedent's common-law wife.

Just minutes before the trial was to begin, [Appellant's] counsel made an unanticipated oral motion. In chambers, he asked the [c]ourt to find that the factual averments contained in [Appellant's] Caveat and Complaint in Equity had been admitted due to [the Estate's] failure to respond.¹ No prior notice was given to the [E]state. After some discussion, the [c]ourt postponed the trial², took the motion under advisement, and ordered the parties to file briefs. While the motion was still pending, [the Estate] filed a Response to the Caveat and an Answer to the Complaint. [Appellant] then filed a Motion to Strike [the Estate's] Answers to the Complaint and Response to the Caveat.

¹ The original oral motion was for admission. [Appellant] now characterizes her original request as a Motion for Judgment on the Pleadings. ... Local Rule of Civil Procedure 1034 states, "At the time of filing, all motions for judgment on the pleadings shall be accompanied by a separate brief in support thereof, addressing all issues raised in the motion. The motion must also be accompanied by a proposed order for the purpose of scheduling an argument thereon" It was clearly a violation of that rule for [Appellant] to spring this motion on the [c]ourt just minutes before trial.

² The [c]ourt was reluctant to postpone trial because just days prior, the President Judge Valasek refused [Appellant's] Motion for a Continuance and this judge sought to maintain consistency.

On March 6, 2008, the [c]ourt issued a Memorandum and Order denying [Appellant's] Motion for a Judgment on the Pleadings and Motion to Strike [the Estate's] Answer and Response. On March 24, 2008, the [c]ourt conducted the trial on the issue of whether there was a common-law marriage between [Appellant] and decedent at the time of his death. On March 31, 2008, it rendered its verdict and a memorandum in support, finding that [Appellant] and decedent did not have a common-law marriage. On April 17, 2008, [Appellant] appealed the [c]ourt's rulings. On May 12, 2008, [Appellant] filed a Statement of Matters Complained of on Appeal, raising twelve issues.

Trial Court Opinion (“T.C.O.”), 7/9/2008, at 1-2.

That 2008 appeal was quashed as interlocutory. 755 WDA 2008 (unpublished). On August 5, 2011, a decree confirming account and directing distribution issued. On August 31, 2011, Appellant filed a notice of appeal from the August 5 decree.¹ Instead of issuing a new opinion, the trial court relied on its July 9, 2008 opinion.²

Appellant raises two issues on appeal:

- I. Where a defendant fails to file a responsive pleading as required by Pa.R.C.P. 1026 as of the date set for trial, does Pa.R.C.P. 1029 mandate that the defendant admits all averments of fact in the complaint and caveat as a matter of law?
- II. Where a defendant files a responsive pleading more than two months later than required by Pa.R.C.P. 1026, and where the plaintiff moves to strike that untimely responsive pleading, does the trial court abuse its discretion when it allows the untimely filing without requiring the defendant to demonstrate just cause for the delay[?]

Appellant’s Brief at 4.

We examine Appellant’s second issue first. If the trial court did not err in refusing to strike the Estate’s responsive pleadings, then those responsive

¹ On September 7, 2011, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On September 20, 2011, Appellant filed her statement.

² The July 9, 2008 opinion references and incorporates both a March 6, 2008 Memorandum and Order that disposed of Appellant’s motions for judgment on the pleadings and to strike the Estate’s answer and response, and a March 31, 2008 Memorandum in support of the verdict finding that there was no common-law marriage.

pleadings were properly filed, and they sufficed to deny Appellant's averments. If that is the case, the question of whether Appellant's averments should have been deemed admitted because there was no responsive pleading becomes moot.

Appellant argues that its motion to strike was improperly denied. Appellant contends that, once a motion to strike has been made, the party who filed the late pleading must demonstrate just cause for the delay. Appellant further contends that, once just cause has been demonstrated, the moving party must show prejudice arising from the late filing. Appellant argues that the trial court did not require the Estate to show just cause nor give Appellant the opportunity to demonstrate prejudice. Appellant also contends that, while a trial court may disregard a procedural error, it should not have done so in this case because the Estate made no attempt to comply with the rules. Appellant's Brief at 19-22.

The Estate asserts that Appellant has waived her argument because she did not raise the Estate's failure to provide just cause for its delay before the trial court. The Estate avers that Appellant did not assert a lack of just cause for delay in its Motion to Strike nor in her concise statement of errors complained of on appeal. Because the issue was not included in the concise statement, the trial court never addressed it in any of the court's memoranda or opinions. The Estate further contends that, if the argument had been properly preserved, there was just cause stemming in part from

the fact that Appellant's pleadings were improperly filed and the fact that Appellant orally moved for admissions/judgment on the pleadings at the last minute. The Estate argues that Appellant suffered no prejudice inasmuch as the Estate and Appellant had already been in litigation over Appellant's requested injunctive relief and the parties had exchanged documents in preparation for trial; that is, both parties were well aware of the contested facts and issues. Finally, the Estate contends that the trial court properly exercised its discretion in allowing the late filing, because the rules are to be liberally construed. Estate's Brief at 18-22.

The trial court did not directly address the issue of just cause for delay. Instead, in its Memorandum and Order disposing of Appellant's motions, the trial court stated that it was acting within its discretion to allow a late pleading. Trial Court Memorandum ["T.C.M."], 3/6/2008, at 12-13. The court ruled that it could disregard a procedural error when there was no prejudice to another party. There was no prejudice to Appellant because she would still have a full hearing on the disputed issue. *Id.*

The question becomes whether Appellant has waived this issue. To be preserved on appeal, an issue must first be raised in the trial court. Pa.R.A.P. 302. The purpose of this rule is "to provide that court with the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal." *Gustine Uniontown Assocs., Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 835 (Pa.

Super. 2006); *see In re F.C. III*, 2 A.3d 1201, 1212 (Pa. 2010) (“By requiring that an issue be considered waived if raised for the first time on appeal, our courts ensure that the trial court that initially hears a dispute has had an opportunity to consider the issue.”).

Here, Appellant never presented to the trial court the issue of whether the Estate provided just cause for its delay. A review of the motion to strike shows that Appellant did not address either just cause for delay or prejudice. Motion to Strike, 2/15/2008. The Estate filed a response to the motion and supporting brief that maintains there is no prejudice to Appellant, but does not assert just cause for delay. Response, 2/25/2008. Shortly thereafter, the trial court denied the motion to strike. T.C.M. at 13. Appellant filed its initial notice of appeal and concise statement of errors complained of on appeal. The concise statement does not mention Appellant’s motion to strike, although it does claim the trial court erred in allowing the answer to be filed. Concise Statement, 5/12/2008, ¶13. No motion for reconsideration was presented. Appellant filed its second (and current) notice of appeal and a second concise statement. This second concise statement still does not raise the motion to strike, except to indicate the trial court erred in allowing the answer to be filed.

There was no way for the trial court to realize that Appellant was asserting a lack of just cause for delay until Appellant made the argument in her appellate brief. The case continued for approximately three years

between the court's denial of the motion to strike and the instant appeal. During that time, there is no indication from the record that Appellant ever raised the issue of lack of just cause before the trial court. The court was denied the opportunity "to consider the issue, rule upon it correctly, and obviate the need for appeal." ***Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc.***, 892 A.2d at 835.

We conclude that Appellant did not properly preserve this issue for our review. This issue is dispositive of Appellant's first issue: if the Estate's answer was properly filed, the averments in Appellant's complaint and caveat cannot be deemed admitted. Therefore, we affirm.

Order affirmed. Jurisdiction relinquished.