NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ESTATE OF: ALICE MARIE RIGHTER, DECEASED	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: ALICE MOORE AND CLARA MURTAUGH	No. 228 EDA 2012

Appeal from the Order Entered December 30, 2011
In the Court of Common Pleas of Philadelphia County
Orphans' Court at No(s): 1715 DE 2008

BEFORE: MUSMANNO, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 11, 2013

Appellants, Alice Moore and Clara Murtaugh, appeal from the order entered in the Philadelphia County Court of Common Pleas affirming the first and final account of Appellee, John P. Fitzmaurice, executor of the estate of Alice Marie Righter, ("Decedent"). Appellants contend that because Appellee failed to comply with Pa.O.C.R. 5.6, the burden of proof shifted to Appellee to prove the accounting was full and complete. We affirm.

The orphans' court summarized the facts of this case as follows:

> [Decedent] died on February 4, 2008, leaving a Will dated May 22, 2006, which was duly probated. [Decedent] was unmarried at the time of her death, and,

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* Former Justice specially assigned to the Superior Court.

was survived by three children[, Appellants], and Harry Andracchio, and, a grandson[, who is Appellee].

Letters Testamentary were granted to [Appellee] on February 11, 2008; proof of publication of the grant of same was submitted.

* * *

By the terms of her Will, [Decedent] gave her real property located at 2114 South Philip Street, Philadelphia, Pennsylvania ["Realty"] to [Appellee]. She gave the specific sums of $5,000.00 each to [Appellants], and the sum of $2,500.00 to her adopted son, Harry Andracchio. She directed that the residue of her estate be divided into two equal shares to be distributed to [Appellants]. . . .

The First and Final Account of [Appellee] is now before this Court for audit.

The Account . . . is stated for the period February 4, 2008 to February 4, 2009, and, shows receipts totaling $47,692.31, and, disbursements totaling $24,495.30. [Appellee] charges himself with receipts as follows: cash in Prudential Savings Bank in the amount of $22,892.31, tangible personal property described as "Miscellaneous Furniture & Appliances And Jewelry," valued at $200.00, and [Realty] valued at $24,600.00. [Appellee] takes credit for disbursements in the amount of $24,495.39. [Appellee] takes credit for distributions in the amount of $12,050.00 as follows: $4,775.00 to [each Appellant], and $2,500.00 to Harry Andracchio. [The Account] lists a principal balance after distributions and disbursements of $11,146.92 which is composed of [Realty] at a value of $24,600.00, and, a cash deficit of $13,453.08.

[Appellants] have filed Objections to the Account of [Appellee].

In their Objections, [Appellants] state that they have received only $4,775.00 each, and assert that they are each entitled to the specific bequest of $5,000.00.

> In their Objections, [Appellants] assert that there are cash assets of at least $30,000.00 which are not accounted for in this First and Final Account.
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> In their Objections, [Appellants] assert that there is jewelry and tangible personal property which has been omitted from the Account.

Trial Ct. Op., 12/30/11, at 1-3.

A hearing was held on Appellants' objections on July 26, 2011. On December 30, 2011, the trial court confirmed the first and final account. This timely appeal followed. Appellants were not ordered to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The court filed a Pa.R.A.P. 1925(a) opinion incorporating its December 30, 2011 opinion.

Appellants raise the following issue for our review: "[Appellee] failed to give notice to the beneficiaries as required by Rule 5.6 of the Orphans Court Rules. Should the burden of proof shift to [Appellee] as a result of the breach of duty to prove the accounting was full and complete?"[1] Appellants' Brief at 5. Appellants argue that "[t]he burden of proof in an objection to an accounting should shift to the Executor to prove the accounting was full and complete when the executor breached his fiduciary duty and failed to give notice to the beneficiaries as required by Rule 5.6 of the orphans court rules." ***Id.*** at 9. Appellants cite no legal authority for the assertion that non-compliance with Rule 5.6 results in a shifting of the burden of proof. They assert that "this appears to be a case of first impression, and this Court

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[1] There is no notice in the record.

has not previously decided the remedy for failure to comply with Rule 5.6."

Id. at 12. We find no relief is due.

Our standard of review is well-established:

> When an appellant challenges a decree entered by the Orphans' Court, our standard of review "requires that we be deferential to the findings of the Orphans' Court." ***In re Estate of Miller***, 18 A.3d 1163, 1169 (Pa. Super. 2011) (*en banc*).
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> > [We] must determine whether the record is free from legal error and the court's factual findings are supported by the evidence. Because the Orphans' Court sits as the fact-finder, it determines the credibility of the witnesses and, on review, we will not reverse its credibility determinations absent an abuse of that discretion. However, we are not constrained to give the same deference to any resulting legal conclusions. Where the rules of law on which the court relied are palpably wrong or clearly inapplicable, we will reverse the court's decree.
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> ***Id.*** . . .

In re Estate of Brown, 30 A.3d 1200, 1206 (Pa. Super. 2011).

Rule 5.6 provides, in pertinent part:

> **(a) Requirement of Notice.** Within three (3) months after the grant of letters, the personal representative to whom original letters have been granted or the personal representative's counsel shall send a written notice of estate administration in the form approved by the Supreme Court to:
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> (1) every person, corporation, association, entity or other party named in decedent's will as an outright beneficiary whether individually or as a class member[.]

* * *

> **(e) Failure to File Certification.** Upon the failure by the personal representative or the personal representative's counsel to file the certification on a timely basis, the Register shall, after ten (10) days prior written notice to the delinquent personal representative and his counsel, notify the Court of such delinquency.
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> *Explanatory Note*: The 1998 amendment to subdivision (e) is not intended to limit **the inherent power of the Court to impose sanctions upon a delinquent personal representative or counsel**.[2]
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> **(f) Effect of Notice.** This Rule shall not alter or diminish existing rights or confer new rights.

Pa.O.C.R. 5.6(a)(1), (e), (f) (emphasis added).

The personal representative shall give notice, *inter alia*, to "every person, corporation, association, entity or other party named in decedent's will as an outright beneficiary whether individually or as a class member." Pa.O.C.R. 5.6(a)(1).

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[2] Subdivision (e), prior to the 1998 amendment, provided:

> **(e) Failure to file certification.** Upon the failure by the personal representative or his counsel to file the certification on a timely basis, the Register shall, after ten (10) days prior written notice to the delinquent fiduciary and his counsel, notify the Court of such delinquency along with a request that the Court conduct a hearing to determine whether sanctions should be imposed upon the delinquent personal representative or his counsel.

Pa.O.C.R. 5.6(e).

Applying this rule in ***In re Hydock***, 2006 WL 445937 (Pa. Com. Pl. 2006),[3] the court of common pleas addressed the issues

> of whether a disclaimer of interest executed by the sole heir should be set aside for alleged fraud committed by the administratrix and/or whether the disclaimer should be set aside on legal grounds for failure to issue the notice of beneficial interest required by Pennsylvania Orphans' Court Rule 5.6.

Id. at *1. The court set aside the disclaimer based upon fraud and failure to give notice to the sole heir. ***Id.*** The court found:

> The fiduciary in this case, Danielle Stauffer, clearly had a personal interest in obtaining her father's disclaimer of interest in his son's estate. By procuring a disclaimer from her father without disclosing the size of the estate or that he was its sole beneficiary, Danielle Stauffer became a beneficiary of her brother's estate. She therefore had a clear personal interest in the procurement of her father's disclaimer such that it might have affected her judgment.
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> Based on the record presented, this court further concludes that Danielle Stauffer obtained her father's disclaimer by fraudulently representing to petitioner that it was necessary to sign the disclaimer so that the state would not receive the estate proceeds, and on that basis, petitioner signed the disclaimer without reading or understanding the true nature of the document.

Id. at *3 (footnotes omitted). The court also found the disclaimer should be set aside because the administratrix failed to comply with Rule 5.6(a). ***Id.*** at *4.

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[3] "We recognize that decisions of the Court of Common Pleas are not binding precedent; however, they may be considered for their persuasive authority." ***Hirsch v. EPL Techs. Inc.***, 910 A.2d 84, 89 n.6 (Pa. Super. 2006).

Appellants do not claim that the purpose of Rule 5.6 was undermined by the failure to give notice. ***See*** Aplnts' Objection to Account, 12/3/10, at 1-2. Appellants contend the remedy for noncompliance with Rule 5.6 is a shift in the burden of proof in an objection to an accounting. However, the explanation to the rule recognizes a remedy for non-compliance, *viz.*, the court can impose sanctions upon a delinquent personal representative for failing to give notice. ***See*** Pa.O.C.R. 5.6(e).

In ***Estate of Sewell***, 409 A.2d 401 (Pa. 1979), our Supreme Court addressed, by analogy, the duty of a fiduciary to give notice to beneficiaries upon the filing of an account and the remedy for failing to do so.

> The trustees' argument is that they had no "actual knowledge" of appellant's [the "adopted child of . . . one of testator's children who predeceased testator's wife"] status and, in their view, cannot be surcharged for failing to recognize appellant's status as an income beneficiary. This view is based on an analogy to the duty owed by a fiduciary to beneficiaries upon the filing of an account. Under the Probate, Estates and Fiduciaries Code, a trustee "shall give written notice of the filing of his account" to unpaid claimants who give written notice of a claim and "to every other person known to the accountant to have an interest in the estate as beneficiary, heir, or next of kin." . . .

Id. at 403 (citation omitted). The appellant "did not receive notice of the first accounting and was not otherwise aware of it." ***Id.*** at 404. The Supreme Court concluded:

> Only a subsequent decree of court, rendered following a proceeding at which appellant's right to trust income could have been put at issue, would provide the trustees the protection they now seek. In light of ***Tafel*** [***Estate***, 296

> A.2d 797 (Pa. 1972),] the trustees could have obtained such a decree. ***See also*** Restatement (Second) of Trusts, [§] 259 [1959] ("(t)he trustee is entitled to apply to the court for instructions as to the administration of the trust if there is reasonable doubt as to his duties or powers as trustee"). Here, however, the trustees failed to do so. Instead, they acted at their own peril and paid trust income exclusively to Beatrice Sewell Brown [one of testator's three children]. Because this was error, we hold that the trustees must be surcharged.

Id. (some citations omitted).

In light of the foregoing authority, we hold that the remedy for failing to comply with Rule 5.6 is the imposition of sanctions, *e.g.*, a surcharge, imposed by the court. ***See id.***; Pa.O.C.R. 5.6(e). Appellants have not cited any, and we have not uncovered any, authority to support their claim that when an executor fails to provide notice under Rule 5.6, the burden of proof shifts to the executor to prove the accounting was full and complete.

Instantly, the trial court concluded no surcharge was warranted and opined:

> In regard to items of [Decedent's] tangible personal property which are alleged to have been omitted from the Account, [Appellants] have the burden of proving that the "omitted" items were owned by the decedent at death; proving the fair market value of the "omitted" items at the time of death; proving the accountants breached a fiduciary duty by failing to collect and administer the "omitted" items; proving that said breach of fiduciary duty resulted in a loss to the estate; and, proving the amount of said loss. . . .
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> [Appellants] offered no testimony or evidence in support of their allegation that [Appellee] omitted cash assets of at least $30,000.00 from his Account. Accordingly, the Objection to the "omission" of said assets from the Account is dismissed.

> [Appellants] offered vague and unconvincing testimony in support of their allegation that [Appellee] omitted jewelry and tangible personal property from his Account. Alice's testimony revealed that her visits to her mother in the years preceding her mother's death were few and far between. . . . The speculative and uncorroborated nature of Alice Moore's testimony is **insufficient to support a surcharge in any specific amount**. Accordingly, the Objection to the "omission" of said items from the Account is dismissed
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> There are insufficient remaining assets to complete the bequests of $5,000.00 to [Appellants]. According, (sic) the Objection to the failure to distribute the entire $5,000.00 is dismissed.
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> All objections having been addressed and adjudicated, the First and final Account of . . . [Appellee], as filed, shows a cash deficit, after distributions of ($13,453.08) leaving no assets for further distribution.

Trial Ct. Op. at 6-7 (emphasis supplied). We discern no abuse of discretion or error of law. ***See Brown***, ***supra***.

Order affirmed.