

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN RE: CROATIAN FRATERNAL UNION : IN THE SUPERIOR COURT OF
SCHOLARSHIP FOUNDATION, INC., : PENNSYLVANIA
Appellant :
: :
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: No. 562 WDA 2012

Appeal from the Order entered November 18, 2011,
Court of Common Pleas, Allegheny County,
Orphans' Court at No. 021005937

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 19, 2013

Croatian Fraternal Union Scholarship Foundation, Inc. ("the Foundation") appeals from the November 18, 2011 order entered by the Court of Common Pleas, Allegheny County, granting the petition for an accounting filed by Donna Jambrosic as executrix of the estate of Matthew J. Mavretic ("Petitioner"). After careful review, we vacate the orphans' court's order.

The orphans' court aptly summarized the background of this case:

By Petition dated December 2, 2010, [Petitioner] filed her Petition to Show Cause Why an Inventory and Accounting Should Not be Filed by the Respondents, the Croatian Fraternal Union of America and Foundation. Both the Croatian Fraternal Union of America ('CFA') and [the Foundation] are non-profit Pennsylvania corporations under 15 Pa. C.S.A. § 5301 et. seq.

The Petition alleges that Matthew J. Mavretic [] during his lifetime donated in perpetuity approximately \$210,000.00 to the Foundation for the expressed purpose of benefiting a certain class of

students with scholarship assistance. The Petitioner did not expressly state in its Petition or Brief that Mr. Mavretic created a trust or that the Foundation was a trustee for the benefit of the students who were to receive scholarships. The Petitioner did refer to Mr. Mavretic's February 24, 2003 letter to the [Foundation's] National Secretary/Treasurer where he stated that his donation was to be in the form of a special endowment fund ['the Fund'] but that he was not familiar with the kind of formal document necessary to establish such a fund specifically. In this letter, he requested that conditions be placed upon receipt of his donation by a student in need. Mr. Mavretic and the Foundation stipulated that – among other things, the applicant (1) must be a member of the [CFA] for at least 3 years; (2) must be insured on a permanent life insurance certificate of \$5,000.00 or more in face value; and (3) must have at least one parent who is also a member of the [CFA].

The Petitioner further alleges that Mr. Mavretic, during his lifetime, became suspicious that there may have been mishandling of the donated funds and requested that the Foundation provide him with an accounting. Prior to his death, Mr. Mavretic began making several requests to the Respondents for an informal accounting of the Fund, namely a history of contributions, disbursements, and investment returns to reconcile the shortfall and to confirm his desire that the monies be maintained in perpetuity. The Foundation responded to his request by advising him that the decline in the bond market had caused a large depletion in the donated funds. The principal of the Fund had declined by more than [f]ifty [p]ercent (50%) between the end of 2007 and the end of 2009 and is less than the original contribution in March of 2003, despite additional contributions of [] \$110,000.00[] to the Fund between the end of 2005 and the end of 2009. The Fund was to continue in perpetuity because only the interest generated from the endowments would be used for the scholarships, not the principal. After Mr. Mavretic's

death on September 23, 2010, [Petitioner] followed up with his request and filed the Petition.

CFA and the Foundation filed a Request for Dismissal, which the [c]ourt treated as Preliminary Objections ('PO's' [*sic*]) to the Petition. The PO's [*sic*] state that the [c]ourt lacks jurisdiction over this matter and that [Petitioner] lacks standing to [s]ue the CFA and the Foundation.

On June 6, 2011 Judge Kelly entered an [o]rder finding that the Petitioner had alleged sufficient facts that, if proven, would establish that a charitable trust exists in this case (and that the [c]ourt therefore had jurisdiction). That [o]rder also dismissed [CFA] as a party from the case, and directed the Foundation to file an Answer to the Petition, which the Foundation did on June 24, 2011.

The Honorable Robert A. Kelly, who presided over this case from its inception, retired and the matter was reassigned to [the Honorable John A. Zottola]. A Status Conference was held and this [c]ourt took further argument from the parties on November 17, 2011 and, by [o]rder entered the following day, concluded that Judge Kelly previously found that a charitable trust exists in this case and directed that the Foundation provide the Accounting sought in the [] Petition. [The Foundation filed exceptions to the order, which the orphans' court denied on February 28, 2012].

Orphans' Court Opinion, 5/29/12, at 1-3.

On appeal, the Foundation raises four issues for our review:

- A. Was it legal error for the trial court to conclude that it had jurisdiction and the petitioner had standing where the pleading that commenced the underlying action contains no allegations with respect to jurisdiction, and a single conclusory allegation with respect to standing?

- B. Was the [o]rder appealed from premised on a misunderstanding of an earlier [o]rder issued by the now[-]retired judge, and the context for the case generally?
- C. Was it legal error for the [orphans'] court to conclude that a 'charitable trust' exists in the underlying case where the record contradicts that legal conclusion, and demonstrates that if a trust exists at all, it is a private trust only?
- D. Was it legal error for the [orphans'] court to conclude that the petitioner had proper standing where the record contradicts that legal conclusion, and demonstrates that the petitioner is not among the class of persons statutorily authorized to sue a Pennsylvania non-profit such as the Foundation?

The Foundation's Brief at 4.

Because its resolution is dispositive of this appeal, we begin by addressing the last issue raised by the Foundation challenging Petitioner's standing. In response to the Foundation's preliminary objections, Petitioner asserted that she had standing to seek the accounting under 15 Pa.C.S.A. § 5793(a)¹ because Mr. Mavretic was "an active member in the [CFA] and donor to the Foundation during his lifetime," and thus, as executrix of Mr.

¹ This statute states:

§ 5793. Review of contested corporate action

(a) General rule.--Upon petition of any person whose status as, or whose rights or duties as, a member, director, member of an other body, officer or otherwise of a nonprofit corporation are or may be affected by any corporate action, the court may hear and determine the validity of such corporate action.

15 Pa.C.S.A. § 5793(a) (footnote omitted).

Mavretic's estate, Petitioner was permitted to assert this claim on his behalf after his death. Petitioner's Brief in Response to Preliminary Objections, 5/11/11, at 7 (citing 20 Pa.C.S.A. § 3373²). In the alternative, Petitioner averred that she had standing based upon her "special interest" in the charitable trust created by Mr. Mavretic as executrix of his estate and the belief that the Foundation was mishandling the money donated by Mr. Mavretic during his lifetime. *Id.* at 7-8; *see Valley Forge Historical Soc. v. Washington Mem'l Chapel*, 493 Pa. 491, 498, 426 A.2d 1123, 1127 (1981) (stating that a person who has a "special interest in the trust" has standing to seek enforcement of the charitable trust).³

² Section 3373 of the Probate Code states: "An action or proceeding to enforce any right or liability which survives a decedent may be brought by or against his personal representative alone or with other parties as though the decedent were alive." 20 Pa.C.S.A. § 3373.

³ In 2006, the Pennsylvania Legislature amended the Probate Code to codify the Uniform Trust Code. One of the amendments included the addition of 20 Pa.C.S.A. § 7735, entitled "Charitable purposes; enforcement - UTC 405." Subsection (c) of the statute, which dictates who may bring an action to enforce a charitable trust, states:

(c) Proceeding to enforce trust.--A proceeding to enforce a charitable trust may be brought by the settlor during the settlor's lifetime or at any time by the Attorney General, a charitable organization expressly named in the trust instrument to receive distributions from the trust or any other person who has standing to do so.

20 Pa.C.S.A. § 7735(c).

Section 7735 became effective on November 6, 2006, but for reasons unknown to this Court, neither party nor the orphans' court cite to

After concluding that the Fund was a charitable trust, the orphans' court found that Petitioner had standing to enforce the trust, and thus seek an accounting, based upon Petitioner's special interest in the trust. Orphans' Court Opinion, 5/29/12, at 8-9. It found a special interest based upon the five-factor test announced in *In re Milton Hershey Sch.*, 867 A.2d 674 (Pa. Cmwth. 2005), *rev'd*, 590 Pa. 35, 911 A.2d 1258 (2006).⁴ In arriving

subsection (c) either below or on appeal, instead relying upon case law that preceded its passage. To date, no appellate case has cited or interpreted Section 7735(c). The comment to the statute states, however, that "persons with special interests" continue to have standing under the statute "to enforce either the trust or their interests." *Id.* (Uniform Law Comment). The only change to existing law made by the statute is the recognition of "the settlor's right to initiate a proceeding to enforce a charitable trust." *Id.* (Jt. St. Govt. Comm. Comment – 2005). As such, we discuss both Section 7735(c) and the cases predating the passage of the statute in deciding this issue.

⁴ The five factors announced in *In re Milton Hershey School* as the test for private party standing to enforce a charitable trust are: "(1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general's availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances." *In re Milton Hershey Sch.*, 867 A.2d at 689 (citing Mary Grace Blasko et. al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 61-78 (1993)).

Our Supreme Court reversed the Commonwealth Court's decision in *In re Milton Hershey School* based upon its conclusion that the petitioner did not have standing under the special interest doctrine. *In re Milton Hershey Sch.*, 590 Pa. 35, 44, 911 A.2d 1258, 1263 (2006). It did not comment on the five-factor test relied upon by the Commonwealth Court. Although not determinative of the outcome of this case, we note that this test has dubious precedential value based upon the Supreme Court's reversal of the Commonwealth Court's decision, the fact that neither the test nor the law review article relied upon have ever again been cited or relied upon in another Pennsylvania case, and the fact that this Court is not bound

at its conclusion, the orphans' court stated, *inter alia*, "this case requires [*sic*] the 'special interest' of the Petitioner in this matter as Mr. Mavretic, a member of this organization, would undoubtedly have standing under 15 Pa.C.S. § 5793(a) if he were still alive, however he passed away soon after he began his inquiry into the Foundation and the Fund last year." Orphans' Court Opinion, 5/29/12, at 9.

The Foundation argues that the orphans' court erred by finding standing pursuant to the special interest doctrine because there is no support in the record or under the law that she was entitled to such treatment. The Foundation's Brief at 19-20. The Foundation also took issue with the orphans' court's finding that Mr. Mavretic, if still alive, would have had standing under 15 Pa.C.S.A § 5793 based upon his membership in the CFA, as he was not a member of the Foundation. The Foundation's Brief at 20-21.

Standing to sue is a prerequisite to a party's entitlement to seek judicial resolution of a controversy.⁵ ***Step Plan Services, Inc. v. Koresko***, 12 A.3d 401, 417 (Pa. Super. 2010). "Where a statute delineates the class

by decisions of the Commonwealth Court (*see Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania*, 7 A.3d 278, 285, n.9 (Pa. Super. 2010)).

⁵ Although standing is a necessary requirement to filing suit, an objection to a party's standing to sue is waived if not timely raised before the court below. ***See In re Adoption of Z.S.H.G.***, 34 A.3d 1283, 1289 (Pa. Super. 2011). In the instant case, the Foundation preserved its objection by raising Petitioner's lack of standing in its preliminary objections. ***See*** Request for Dismissal, 3/18/11, at 2.

of members who can assert a claim under the statute, standing is governed by the language of the statute itself." ***Bricklayers of W. Pennsylvania Combined Funds, Inc. v. Scott's Dev. Co.***, 41 A.3d 16, 22 (Pa. Super. 2012) (*en banc*), *appeal granted in part on other grounds*, __ Pa. __, 58 A.3d 748 (2012). "Threshold issues of standing are questions of law; thus, our standard of review is *de novo* and our scope of review is plenary." ***Id.***

Standing requires a showing that the litigant is aggrieved, in that he is "negatively affected by the matter he seeks to challenge" and has "a substantial, direct, and immediate interest in the outcome of the litigation." ***In re Milton Hershey Sch.***, 590 Pa. at 42, 911 A.2d at 1261-62. Private parties generally do not have standing to enforce charitable trusts. ***Id.*** at 42, 911 A.2d at 1262. "[T]he rationale for barring a member of the general public from enforcing a duty owed by a charitable organization [...] is to protect the trustees from frequent suits perhaps based on cursory investigation and brought by irresponsible parties." ***Valley Forge Historical Soc.***, 493 Pa. at 499, 426 A.2d at 1128.

As noted above, the legislature has conferred standing to bring actions to enforce a charitable trust on a very limited group.⁶ **See** 20 Pa.C.S.A. §

⁶ For the sake of this argument and the disposition of the appeal, we assume that the orphans' court correctly determined that the Fund is a charitable trust. Based on our conclusion that Petitioner lacks standing to pursue the action for an accounting, we need not determine whether the orphans' court erred in this regard. We observe, however, that if the Fund is, in fact, a charitable trust, the Attorney General has the authority to

7735(c); *supra* n.3. Although our Supreme Court has stated that a person with a special interest in the charitable trust has standing to bring an action to enforce it, the Court has historically afforded that status conservatively. Our review of existing case law reveals that our Supreme Court has found special interest standing for a party to initiate an action to enforce a charitable trust only where the party is directly involved with, or directly affected by, the administration of the trust. ***Compare Valley Forge Historical Soc.***, 493 Pa. at 499, 426 A.2d at 1127 (finding standing based upon, *inter alia*, the trust relationship that existed between the two parties), ***and In re Francis Edward McGillick Found.***, 537 Pa. 194, 199, 642 A.2d 467, 469-70 (1994) (finding that the Catholic diocese had standing to enforce a trust which required “[t]he integral involvement of the diocese in the awarding of scholarships [provided for in the trust] and its prerogative to participate in the establishment of a vocational school under the trust”),

investigate whether the Foundation is acting in accordance with the express wishes of Mr. Mavretic. If necessary, the Attorney General has authority to commence an action to enforce the settlor’s wishes. **See** 20 Pa.C.S.A. § 7735(c); *supra*, n.3. This, of course, presumes that the Attorney General is advised of the matter.

In this regard, Petitioner states “to date, the Office of the Attorney General has not presented itself in the matter herein[.]” Petitioner’s Brief at 15. There is no indication in the record, however, that Petitioner (or the Foundation) notified the Attorney General of this proceeding. The Pennsylvania Orphans’ Court Rules require that the Attorney General receive notification of actions “involving or affecting a charitable interest.” **See** Pa.O.C.R. 5.5. Curiously, neither the orphans’ court nor either of the parties raised this concern. Because the Foundation did not raise this issue below or on appeal, and based upon the manner by which we resolve this appeal, we do not address it further.

with In re Milton Hershey Sch., 590 Pa. at 43-45, 911 A.2d at 1262-63 (differentiating *Valley Forge* and *McGillick* and finding that the Alumni Association lacked standing to enforce a trust created for the benefit of orphaned children because “[n]othing in [the] litigation would affect the Association itself; it loses nothing and gains nothing”).

Petitioner did not plead any interest in the Fund other than that arising from her position as executrix of Mr. Mavretic’s estate, nor did Petitioner aver that the estate would be adversely impacted if not granted the relief sought. It does not appear that the estate has any interest in the money given by Mr. Mavretic other than to ensure his wishes were being carried out. There is no trust relationship between Petitioner and the Foundation, and Petitioner had no involvement in the disbursement or management of the Fund. Rather, like the Alumni Association in *In re Milton Hershey School*, Petitioner “loses nothing and gains nothing” as a result of the litigation.

Moreover, Section 7735(c) specifically states that the settlor of the trust only has standing to enforce the trust **during his or her lifetime**. 20 Pa.C.S.A. § 7735(c). The plain language of the statute thus bars suits to enforce a trust by the executor or executrix of a deceased settlor’s estate, as it limits a settlor’s standing to enforce the trust to his or her lifetime. Therefore, granting Petitioner standing based upon the special interest doctrine when her sole interest in the Fund was based upon her position as

executrix of Mr. Mavretic's estate is in contravention to the Legislature's stated intention. **See** 1 Pa.C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); 1 Pa.C.S.A. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). As such, the orphans' court erred by concluding that Petitioner had standing to bring an action to enforce the trust.

We also disagree with the orphans' court and Petitioner that Mr. Mavretic would "undoubtedly have standing under 15 Pa.C.S. § 5793(a) if he were still alive" based upon his membership in the CFA and his status as a donor to the Foundation. Orphans' Court Opinion, 5/29/12, at 9; **see also** Petitioner's Brief at 13-14. The record reflects that the CFA and the Foundation are separate nonprofit corporations. **See** Request for Dismissal, 5/18/11, at ¶¶ 2-3 (stating that the CFA is organized under 26 U.S.C.A. § 501(c)(8) (bestowing tax-exempt status to fraternal beneficiary societies, orders, or associations) and the Foundation is organized under 26 U.S.C.A. § 501(c)(3) (bestowing tax-exempt status to, *inter alia*, foundations operated for charitable or educational purposes)); **see also** Orphans' Court Opinion, 5/29/12, at 1-2 (referring to the CFA and the Foundation as separate corporations). Petitioner does not contest this assertion. Although Mr. Mavretic was a member of the CFA during his lifetime, Petitioner does not

aver, and the Foundation denies, that he was ever a member of the Foundation. Neither the orphans' court nor Petitioner cites any authority (or makes an argument) to support a finding that a member of the CFA is necessarily also a member of the Foundation.

As 15 Pa.C.S.A. § 5793(a) strictly limits those who may petition for the review of a contested corporate action to, *inter alia*, "a member" of the nonprofit corporation, and there is nothing in the record to support a finding that Mr. Mavretic was a member of the Foundation, he would not have been entitled to bring an action challenging the Foundation's actions under Section 5793 during his lifetime.⁷ Thus, the orphans' court's conclusion to the contrary is likewise in error.

The orphans' court and Petitioner state that "[i]t would be unjust and inequitable" to deny Petitioner standing because Mr. Mavretic passed away prior to initiating this legal action. Orphans' Court Opinion, 5/29/12, at 9; Petitioner's Brief at 15. To the extent that this equitable consideration is based on a belief that some wrong doing will go unchecked, the concern is unjustified. As noted, if the Fund is in fact a charitable trust, the Attorney

⁷ Because Mr. Mavretic was not a member of the Foundation, Section 5793(a) also forecloses Petitioner's argument that she had standing to seek the accounting pursuant to 20 Pa.C.S.A. § 3373 which allows, *inter alia*, a personal representative to enforce a right which survives a decedent. Petitioner's Brief at 13-14; Petitioner's Brief in Response to Preliminary Objections, 5/11/11, at 7; *see supra*, n.2.

General, if duly notified, has the authority to enforce the Trust. **See** 20 Pa.C.S.A. § 7735(c); *supra*, n.6.

Having concluded that the orphans' court erred in finding that Petitioner had standing in this matter, we will not consider any of the other issues raised by the Foundation on appeal. Because Petitioner lacks standing on the bases alleged, we vacate the orphans' court's order granting the Petitioner's request for an accounting of the Fund.

Order vacated. Jurisdiction relinquished.