PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of S. McDowell Shelton, Deceased
O.C. No. 1569 DE of 1994

OPINION

Introduction

The petition presently pending before this court raises the issue of whether counsel for an estate can be surcharged where the executor violates a court order that prohibited distribution of estate assets except for certain carefully limited purposes. Based on the record presented after days of hearings, this court concludes that to restore the assets improperly distributed from the estate, the attorney can be surcharged based on the breach of his standard of care that caused serious loss to the estate.

Factual Background

1. Genesis of the 1999 Order

Between 1991 through June 10, 2008, James M. Cleary served as attorney for Daman Mayim, who was executor of the Will of Bishop S. McDowell Shelton.[1] Bishop McDowell Shelton died on October 31, 1991. In his September 30, 1977 Will, Bishop McDowell Shelton named seven individuals as beneficiaries of his estate. After providing that 1 per cent would go to "our son, Johnsey Scott a/k/a Elder Daman Mayim," Bishop Shelton's Will provided that the balance of the estate was to be divided and distributed to the testator's six named adopted sons in

[1] 10/7/08 N.T. at 7 (Cleary). Although Cleary stated that he had served as attorney for Mayim through April 21, 2008, his petition to withdraw as counsel was not granted until a decree dated June 10, 2008.

equal shares "as shall survive me, and shall be members in good standing of the APOSTOLIC faith at the time of my death:"

> 1st Prince Regent, Elder Shelton Nehemiah a/k/a Elder Roddy J. Nelson Shelton I at law
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> Prince Jonathan, Deacon Jonathan Shelton a/k/a Deacon Arthur D. Franklin Shelton at law
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> Prince II Ysaac, the Merciful; Elder Shelton Ysaac a/k/a Elder Erik Shelton at law
>
> Prince III Benjamin Jude, Elder Shelton Benjamin Jude a/k/a Elder W. Edward B. Shelton at law
>
> Prince Asher, Minister Shelton Asher a/k/a Minister Fincourt B. C. Shelton at law
>
> Prince VII Yediduth-Limmud Omega, Elder Shelton Yediduth Limmud Omega a/k/a Elder Kenneth Norton Thomas Shelton at law.

Shortly after Mayim's appointment as executor, his attorney Cleary began to consult with the beneficiaries named in the Will to identify the estate's assets—particularly Fincourt, Eric and Bishop Kenneth Shelton.[2] Cleary recalled that during the early phases of the estate administration, Mayim and several others affiliated with the Church visited Cleary at his office with a large black bag containing $150,000 in $100 bills that they characterized as personal assets of the S. McDowell Shelton estate. This money was deposited in Fidelity Bank, presently Wachovia. Cleary subsequently met with Fincourt Shelton, Bishop Kenneth Shelton and Eric Shelton at the decedent's personal residence located in a high rise condominium at 2400 Pennsylvania Avenue to discuss obtaining appraisals for the decedent's jewelry and other personal property.[3]

In 1992, Cleary traveled to Canada and Switzerland with Mayim to locate estate assets, especially in the Swiss banks Credit Suisse and Banque Cantonale Vaudoise (hereinafter "BCV"). Bishop Kenneth, Eric and Fincourt Shelton also went to Switzerland as witnesses and

[2] 10/7/08 N.T. at 12 (Cleary).
[3] 12/2/08 N.T. at 99-101 (Cleary).

in their capacities as beneficiaries. Upon his return, Cleary prepared a status report of the assets and appraisals for the beneficiaries.[4] In April 1992, he also arranged for the distribution of certain items of jewelry that had been previously appraised, informing the beneficiaries that any jewelry they took would be credited against future distributions.[5] A month earlier in March 1992, Cleary had made partial distributions of $60,000 to the six individual beneficiaries, including petitioner Bishop Kenneth Shelton, with an additional distribution of $80,000 as a loan to Fincourt Shelton on June 29, 1994.[6] In 1996, three other beneficiaries—Arthur, Eric and Bishop Kenneth Shelton—were given $80,000 as loans.[7] Cleary received $130,000 in fees for his services as estate counsel before 1999.[8]

As Cleary was attending to the administration of Bishop McDowell Shelton's estate, a bitter dispute broke out over control of his church and its assets. Prior to his death on October 13, 1991, Bishop Shelton had served as General Overseer of the Church of the Lord Jesus Christ of the Apostolic Faith and President of the Church Corporation known as the Trustees of the General Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc. After Bishop Shelton's death, litigation was initiated in the civil trial division of the Philadelphia Court of Common Pleas over control of the church and its assets among Bishop Kenneth Shelton, Roddy Shelton and Bishop Anthonee Patterson.[9] By 1994, as many as three equity actions were filed with the Civil Trial Division of the Philadelphia Court of Common Pleas to

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[4] See Ex. C-4 (4/21/92 Status Report); 12/2/08 N.T. at 103-05 (Cleary); 10/7/08 N.T. at 15, 26-27 (Cleary). The Status Report listed assets valuing $4,195,319.88 or $ 3,762,576.69 if two disputed certificates of deposit at First Trust Bank were not included. According to Cleary, the funds in Canada were transferred to the First Union Bank. The Banque Cantonale Vaudoise funds remained in Switzerland, while the Credit Suisse account was closed between 1992 and 1996. 12/2/08 N.T. at 109-12 (Cleary).

[5] 10/7/08 N.T. at 13 (Cleary); 12/2/08 N.T. at 113-15 (Cleary).

[6] 12/2/08 N.T. at 122-25 (Cleary); Ex. P-11(1996 Interim Account at 4-5).

[7] 12/2/08 N.T. at 125 (Cleary); Ex. C-2 (6/13/08 Account at 8).

[8] 12/2/08 N.T. at 137 (Cleary). Cleary stated that he received nothing from the Estate after the 1999 order. Id. at 138 (Cleary).

[9] See generally, Church of the Lord Jesus Christ of the Apostolic Faith, Inc. v. Fincourt Shelton, et al., No. 376 C.D. 2000, slip op. (Pa. Comm. April 10, 2001); Anthonee Patterson v. Kenneth Shelton, et al., No. 1967 C.D. 2006, slip op. (Pa. Comm. January 31, 2008).

determine who had the right to control the church corporation and its assets.[10] The complex details of this litigation are outlined in an opinion dated December 31, 2008 dealing, inter alia, with the surcharge of Daman Mayim, and that opinion is incorporated herein.

This civil litigation spilled over into the Orphans' Court division as early as December 20, 1994 when a petition for a citation was filed to compel Johnsey Scott a/k/a Daman Mayim to file an account as executor of his administration of the estate. Daman Mayim filed his interim account on February 27, 1996. Various objections were filed to that account. On May 2, 1996 objections were filed by the Trustees of the General Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.; on April 1, 1996 objections were filed by Roddy J.N. Shelton, II, and on June 20, 1997 objections were filed by Bishop Anthonee Patterson as President and on behalf of the Board of Trustees of the General Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.

Since the issues raised in the civil litigation were relevant to the pending objections, on January 19, 1999, Judge Pawelec of the Philadelphia Orphans' Court issued the following order (hereinafter the "1999 Order"):

> AND NOW, this 19th day of January 1999 pursuant to the Petition filed by the heirs of Roddy J.N. Shelton, and the conference held by the Court on January 11, 1999, it is hereby ORDERED and DECREED that there shall be no further distribution from the Estate [of Bishop S. McDowell Shelton] except water and sewer rents and real estate taxes pertaining to the real property of Supernol, Inc., without further order of the Court."[11]

2. Mayim's Transfer of $1,609,567 ($ 1.6 million) from the Estate Account at Wachovia Bank to Bishop Patterson and his Church in Violation of the 1999 Order

Cleary testified that it was not until 1996 when he filed his first interim account that he learned that various churches were asserting claims to the assets in Bishop McDowell Shelton's

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[10] See, e.g., Fincourt Shelton et al v. Kenneth Shelton et al, June 1992, No. 1887; Church of the Lord Jesus Christ of the Apostolic Faith v. Fincourt Shelton and Anthonee Patterson, July 1994, No. 914; Church of the Lord Jesus Christ of the Apostolic Faith and Roddy J. Shelton et al. v. Kenneth Shelton, et al., August 1994, No. 3654.

[11] See January 19, 1999 Order by Judge Pawelec.

estate.[12] Mayim identified three different church groups asserting these claims: the Church led by Bishop Kenneth Shelton at 22nd and Bainbridge Street; the Church of Rodney Nelson Shelton at Penn Street, and; the Church of Bishop Anthonee Patterson known as the Darby Church.[13] According to Cleary, at this point between 1996 and 1999, he advised Mayim that the estate had to stay removed from the civil action.[14]

The 1999 order by Judge Pawelec gave unequivocal legal force to prohibiting future distributions from the estate except for the specifically identified exceptions. Cleary testified that he informed Mayim of the order and repeatedly emphasized that there could be no distributions from the estate.[15] In Cleary's mind, the 1999 0rder was very clear in its prohibition of distributions from the estate.[16] Mayim concurred that Cleary had advised him to make no distributions from the estate.[17]More generally, Cleary advised Mayim that the Estate should not become involved in the civil litigation so that once the proper successor was determined, it could come into Orphan's Court to make a claim for the estate assets.[18]

Mayim, however, began to assert a more autonomous role as executor. In the early phase of the estate administration, Cleary had maintained control of the estate check book and would prepare checks for Mayim's signature since Mayim, alone as executor, had signatory authority.[19] In June 2002, Mayim took control of the estate check book, and as a consequence, bank statements no longer were sent to Cleary but instead went to Mayim at his 8036 Lowber street

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[12] 10/7/08 N.T. at 12 (Cleary); 12/2/08 N.T. at 117-18 (Cleary). Cleary noted that in the early phase of estate administration, none of the 3 beneficiaires (Fincourt, Kenneth or Eric Shelton) indicated that the assets belonged to the church. 12/2/08 N.T. at 102 (Cleary).

[13] 9/16/08 N.T. at 29 (Mayim).

[14] 12/2/08 N.T. at 131 (Clearly).

[15] 10/7/08 N.T. at 10, 16-17, 27-28 (Cleary).

[16] 10/7/08 N.T. at 52 (Cleary)("I don't believe that that order affords an opportunity for a person to make an interpretation of it. I think it's pretty clear on its face").

[17] See, e.g., 9/16/08 N.T. at 36, 79-82(Mayim).

[18] 12/2/08 N.T. at 132 (Cleary).

[19] 10/7/08 N.T. at 18-19 (Cleary).

address.[20] Mayim on multiple occasions suggested trips to Switzerland to check bank account assets, but Cleary maintains that he only went in 1992 and after the 1999 order, he advised Mayim that they could not go until the court determined whether those assets belonged to a church or to the estate.[21]

In July 2007, Mayim traveled to Switzerland together with Bishop Patterson and Fincourt Shelton. Cleary testified that he had no advance knowledge of this trip, but learned about it when he received a telephone inquiry from John Brown, who represented the 22nd and Bainbridge Church.[22] Once Cleary learned that Mayim was in Switzerland with Bishop Patterson and Fincourt Shelton, he called Mayim to remind him of the 1999 court order not to distribute assets of the estate.[23] Cleary also faxed a letter to his last contact at the Banque Cantonale Vaudoise, Mr. Rictle, asking that he "take any action necessary to prevent the removal of any funds in the account or any safety deposit box that may be located at your bank," because he wanted to prevent Mayim from doing anything harmful to the estate.[24]

Upon Mayim's return from Switzerland, he met with Cleary in his office on August 8, 2007.[25] Bishop Patterson was also present. Towards the end of the nearly two hour meeting, Mayim told Cleary "that he believed he could, under the terms of the will, settle a claim against the estate and that was the claim of Bishop Patterson and the Church of the Lord Jesus Christ of the Apostolic Faith located in Darby."[26] Cleary advised Mayim that he could not do so because of the court order, but both Mayim and Bishop Patterson "like a tag team" reiterated that the

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[20] 12/2/08 N.T. at 136 (Cleary); 9/16/08 N.T. at 76-77 (Mayim).
[21] 12/2/08 N.T. at 138-39 (Cleary). Cleary also testified that the 1999 court order precluded access to the Swiss assets or expenditure of estate assets to pay for travel expenses. 10/7/08 N.T. at 25 (Cleary).
[22] 10/7/08 N.T. at 28 (Cleary). Mayim likewise testified that he had not informed Cleary of this trip to Switzerland. 9/16/08 N.T. at 78-79 (Mayim).
[23] 10/7/08 N.T. at 32 (Cleary).
[24] 12/2/08 N.T. at 140-41 (Cleary); Ex. P-4 (7/30/07 fax transmission from Cleary to Rictle).
[25] 10/7/08 N.T. at 46 (Cleary).
[26] 10/7/08 N.T. at 34 (Cleary).

Will gave the executor this authority.[27] When asked whether he believed Mayim intended to transfer funds from the estate account, Cleary replied in the affirmative: "I believe he was talking about transferring the funds that were held in Wachovia Bank and Wachovia Securities, yes."[28]

Mayim and Bishop Patterson left. Approximately two hours later, Cleary received a phone call from Wachovia Securities "and they advised me that Mr. Mayim was there and he was about to transfer the account balance in Wachovia securities:"

> Q: What did you do?
> A: I asked the gentleman at the bank if I could speak with Mr. Mayim and he put him on the phone and again I restated for Mr. Mayim that he could not take the action that he was about to because of the court order.
> Q: Why did you tell him that?
> A: Because it was in violation of the Court Order and he couldn't make a disbursement from the estate account.
> Q: At the end of that discussion did Mr. Mayim indicate that he's still going to go ahead with it or leave that open?
> A: I'm not sure that he indicated one way or the other but he did say to me, however, I am with them now. I didn't know what that meant. It didn't sound as though it meant anything very good, but that was basically his final statement to me. I am with them now.[29]

Cleary conceded that when the Wachovia representative called on August 8, 2007, Cleary did not tell him about the 1999 court order that prohibited distributions from the estate.[30] Cleary also did not send Wachovia a copy of the court order.[31]Although Cleary testified at the hearing that he did not know when Mayim transferred the assets out of the Wachovia account,[32] he conceded in a prior deposition that he had learned of the transfer by the end of August 2007.[33]

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[27] 10/7/08 N.T. at 34-35 (Cleary).
[28] 10/7/08 N.T. at 36 (Cleary).
[29] 10/7/08 N.T. at 36-37 (Cleary).
[30] 10/7/08 N.T. at 46 (Cleary).
[31] 10/7/08 N.T. at 47 (Cleary).
[32] 10/7/08 N.T. at 38 (Cleary)(testifying that he did not remember exactly when he found out about the transfer of funds but it was confirmed for him in April 2008 when he received the bank statements from Mayim that he needed to prepare the account).
[33] See, e.g., 10/7/08 N.T. at 55-56 (Cleary)(stating he did not specifically recall that in his deposition he stated he had learned of this withdrawal by the end of August 2007); 12/2/08 N.T. at 30 (Cleary). In his September 14, 2008

Mayim testified that he transferred $1.6 million to Bishop Patterson's Church (the "Darby Church") on August 8, 2007.[34] Bank documents, however, show that $142,000 was withdrawn from the Wachovia account on August 8, and then five days later on August 13, 2007, $1,467,567.62 was transferred out of the account.[35] Consequently, a total of $1,609,567.62 (hereinafter "$1.6 million") was transferred from the Wachoiva account to Bishop Patterson in during this 5 day period.[36] Cleary admitted that he made no efforts during this 5 day period to prevent the transfer of these assets nor did he attempt to research whether the transfer had taken place.[37]

Mayim substantiated his attorney's testimony that Cleary had consistently warned Mayim not to make any transfer of estate assets because it was prohibited by the 1999 order.[38] Mayim confirmed that during their meeting on August 8, 2007, Cleary had told him not to transfer the Wachovia funds and referred specifically to the 1999 order.[39] In fact, Mayim acknowledged that Cleary had repeatedly told him not to transfer estate funds.[40] Mayim nonetheless believed he had authority to transfer the $1.6 million out of the Wachovia account based on the language of the Will, a decision by an Arbitrator favorable to Bishop Patterson, and church doctrine.[41]

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deposition which was read into the record without contemporaneous objection, Cleary conceded that he probably learned of these transfers "sometime before the end of August 7, '07." Id. When counsel for Bishop Kenneth Shelton proposed reading Cleary's deposition into the record, 12/2/08 N.T. at 22(Dennis), counsel for Cleary did not object to this general proposal but instead reserved the right to interject specific objections, if necessary. 12/2/08 N.T. at 23 (Schwabenland). No objection was raised to the admission that Cleary learned of the transfer of assets by the end of August 2007. See, e.g., 12/2/08 N.T. at 30-31 (Cleary depo.). Moreover, Cleary's counsel also read excerpts of his client's deposition into the record. See, e.g., 10/2/08 N.T. at 183-90.

[34] 9/16/08 N.T. at 28 (Mayim). Bishop Patterson testified that he provided Mayim with the number of a church account, though he did not recall that number. 10/7/08 N.T. at 125 (Bishop Patterson).

[35] Ex. P-3; 10/7/09 N.T. at 47 (Cleary). Cleary testified that he used this document in preparing his supplemental account. Id. He did not see it, however, until March or April 2008. 10/7/08 N.T. at 118-19 (Cleary).

[36] This is the amount set forth both in the Wachovia checking account records for August 1 through August 31, 2007 which is Ex. P-3 and in the June 13, 2008 Account (Ex. C-2) filed by Cleary.

[37] 10/7/08 N.T. at 55, 93-94 (Cleary).

[38] 9/16/08 N.T. at 80-81 (Mayim); 10/7/08 N.T. at 72 (Cleary).

[39] 9/16/08 N.T. at 36 & 80-81 (Mayim).

[40] 9/16/08 N.T. at 80 (Mayim).

[41] 9/16/08 N.T. at 69 (Mayim).

Cleary testified that he did not inform the court immediately after the transfer took place because he was attempting instead to persuade Mayim and Bishop Patterson to return the money.[42] He conceded, however, that neither Mayim nor Bishop Patterson ever gave any indication that they would return the funds.[43] He maintained, however, that by filing the court ordered account in April 2008, he notified the court of the violation of the 1999 order.[44] He failed to notify the court sooner, he explained, because he believed he was precluded from doing so by the attorney-client privilege.[45] Nonetheless, Cleary had no doubt that the 1999 order clearly prohibited any distributions.[46] He therefore made repeated attempts to get Mayim and Bishop Patterson to return the money.[47] Cleary testified that every time he met with Mayim after the transfer he told him the money had to go back to the estate so that the court could determine the proper recipient of those assets.[48] In addition, he made a telephone call to the attorney general's office, though he sent nothing in writing to him.[49]

Yet in April 2008, Cleary filed another document with the court that asserted that since Daman S. Mayim was appointed Executor of the Estate of S. McDowell Shelton on October 18, 1991 he "has continued as Executor fulfilling his duties as required by law."[50] Cleary acknowledged that he signed this document, knowing that Daman Mayim had transferred $1.6

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[42] 10/7/08 N.T. at 63-64 (Cleary).
[43] 12/2/08 N.T. at 39 (Cleary depo.)(no contemporaneous objection by counsel for Cleary).
[44] 12/2/08 N.T. at 189 (Cleary depo)(read into record by counsel for Cleary).
[45] 10/7/08 N.T. at 49-50 (Cleary).
[46] 10/7/08 N.T. at 52 (Cleary).
[47] 10/7/08 N.T. at 63-64 & 121 (Cleary).
[48] 12/2/08 N.T. at 147 (Cleary).
[49] 10/7/08 N.T. at 66 (Cleary).
[50] See Ex. P-6 (4/15/08 Answer to Citation to Show Cause, in (sic) any there be (a) why Daman S. Mayim, Executor, should have access to the Bank Assets titled in the name of the Estate that are currently located at Banque Cantonale Vaudoise in Switzerland, and (b) why this court should not order the transfer to a bank or financial institution within the jurisdiction of the Orphans' Court Division of Philadelphia Court of Common Pleas of Bank Assets titled in the name of the Estate of S. McDowell Shelton, Deceased that are currently located at Banque Cantonale Vaudoise in Switzerland, ¶2)(emphasis added).

million dollars in violation of the 1999 court order.[51] In retrospect, Cleary stated that "I would say at the time filing this answer to the petition that was filed that I should have worded that differently, yes."[52]

In contrast to Cleary's silence when actually approached by a Wachovia representative, he took a more activist role in warning the Swiss bank officials not to allow distributions from the BCV account. On July 30, 2007, he faxed a letter to Mr. Rictle urging him to take "any action necessary" to prevent withdrawal of funds from that account or safety deposit box.[53] Cleary also sent a copy of the 1999 order to Mr. Dietsheim, the attorney who was representing Mayim, Fincourt Shelton and Bishop Patterson in Switzerland.[54] Nonetheless, Cleary conceded that in March 2008 that he provided Mayim's Swiss counsel with basic information about his status as executor and an apostille.[55] Shortly after Mayim was removed as executor of the estate of S. McDowell Shelton by decree dated April 21, 2008, Cleary sent an e-mail to Rolf Diteshiem alerting him that Mayim was no longer executor and urging that no action be taken to transfer assets from the present account at BCV.[56]

3. The Indemnification Agreement to Protect Mayim and Cleary from Liability for the Prohibited Transfer of $1.6 Million from the Wachovia Account in August 2007

With the transfer of the Wachovia funds, Bishop Patterson executed an indemnification agreement that was dated August 8, 2007—the same date as the initial transfer of funds out of the Wachovia Account. The indemnification agreement was between Bishop Anthonee Patterson and Daman S. Mayim.[57] Mayim, Cleary and Bishop Patterson all testified that Cleary

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[51] 10/7/08 N.T. at 61-62 (Cleary) ("That appears to be what I said, yes.').
[52] 10/7/08 N.T. at 62 (Cleary).
[53] Ex. P-4; 10/7/08 N.T. at 53-54 (Cleary).
[54] Ex. P-5;10/7/08 N.T. at 56 (Cleary).
[55] Ex. P-13; 12/2/08 N.T. at 143-44 (Cleary).
[56] Ex. P-14 (e-mail correspondence between Cleary and Ditesheim); 12/2/08 N.T. at 145 (Cleary).
[57] Ex. C-1 (8/8/07 Indemnification Agreement).

had no role in drafting the indemnification agreement, although Cleary stated that he did see it sometime after August 8, 2007 when it was mailed to him by Bishop Patterson or given to him by Mayim.[58] According to Bishop Patterson, he prepared the indemnification agreement with the help of Florida attorneys.[59] The indemnification agreement, however, states that;

> WHEREAS, Mayim/Indemnitee, after consultation with his attorney, James M. Cleary, Esquire, has independently decided to settle the claims of the The Church of the Lord Jesus Christ of the Apostolic Faith against the Estate of S. McDowell Shelton in accordance with the Sixth Clause of the Last Will and Testament of S. McDowell Shelton, which states as follows….[60]

According to Bishop Patterson, the indemnification agreement references Cleary because Cleary had wanted such an agreement for Mayim before the transfer occurred.[61] Cleary conceded that the indemnification agreement was related to the transfer of assets.[62] Mayim likewise testified that Cleary had asked him if he had such an agreement but "played no part in it."[63] Under the terms of the agreement, the corporation/indemnitor agreed to indemnify Mayim and his respective agents against any claim related to Mayim's "conveyance of certain assets" to the indemnitor.[64]

4. The Uncertain Fate of the Transferred Funds

Bishop Patterson was called to testify concerning the fate of the $1.6 million that Mayim had transferred to his church account. When asked whether that money was still in a church account, Bishop Patterson initially replied that it was not: "The money is used. It was spent."[65] The money had been spent, Bishop Patterson explained, on lawyers and on repairs of the

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[58] 10/7/08 N.T. at 44-45 (Cleary); 9/16/08 N.T. at 83-84 (Mayim); 10/7/08 N.T. at 151(Bishop Patterson).
[59] 10/7/08 N.T. at 150-51 (Bishop Patterson).
[60] Ex. C-1.
[61] 10/7/08 N.T. at 152-53 (Bishop Patterson).
[62] 10/7/08 N.T. at 63 (Cleary).
[63] 9/16/08 N.T. at 83-84 (Mayim).
[64] Ex. C-1(8/8/07 Indemnification Agreement).
[65] 10/7/08 N.T. at 127 (Bishop Patterson).

Bishop's former residence at 2401 Pennsylvania Avenue which had a renovation contract for $1.5 million dollars, though $600,000 or $700,000 was actually spent on the renovations.[66] Bishop Patterson was unable to provide documentary support for these expenses, however, because his computer had crashed, and the original receipts had been shredded.[67]

In recounting the history of this transfer, Bishop Patterson noted that after the $1.6 million was transferred to the church account it was transferred to several other church accounts but "I don't know all of them right now but it went from that account to a church account either here or wherever there was a need."[68] There were church accounts "all over, in Florida, Houston, Maryland and Charlotte and other places."[69] Bishop Patterson noted that he had ultimate authority to determine where the $1.6 million was transferred,[70] that he had made all the payments to the contractor and signed all checks for the church and that he had possession of the financial records for the Darby Church.[71] He also acknowledged that he was the person who oversaw the account into which the $1.6 million was transferred, he prepared the financial records and there was no accountant.[72]

5. Mayim's Distributions of Estate Assets Prior to August 2007 in Violation of the 1999 Order

The supplemental April 2008 account that Cleary filed in response to a March 4, 2008 court order provided clear evidence that Mayim had repeatedly violated the 1999 order by making expenditures that were precluded by it. The supplemental account revealed expenditures for repairs or maintenance of the 8036 Lowber Street property beginning in 2005. According to

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66 10/7/08 N.T. at 127-30 (Bishop Patterson).
67 10/7/08 N.T. at 130-31(Bishop Patterson).
68 10/7/08 N.T. at 131-32 (Bishop Patterson).
69 10/7/08 N.T. at 132 (Bishop Patterson).
70 10/7/08 N.T. at 132 (Bishop Patterson).
71 10/7/08 N.T. at 168-69 (Bishop Patterson).
72 10/7/08 N.T. at 187 (Bishop Patterson).

the June 2008 Account, the repair expenditures totaled $55,194.89. Both the April and June 2008 accounts showed disbursements for travel expenses of the Church of the Lord Jesus Christ incurred during the trips to Switzerland in 2007.[73]

Cleary maintains that he did not learn of these prohibited expenditures by Mayim until he received the bank records necessary for preparation of the account. Since Mayim had taken control of the estate check book in 2002, Cleary did not get copies of the various checks until he obtained them as part of preparing the supplemental account.[74] He maintained that he had advised Mayim that the court order precluded expenditures for repairs, which Mayim would have to pay for himself.[75]

6. Mayim's Failure to Account for Rental Income from the 8036 Lowber Street Property

Daman Mayim, in addition to being the executor of Bishop McDowell Shelton's estate, had served as the bishop's personal aide for 25 years during his life time, caring for him and his home.[76] He testified that he had lived at 8036 Lowber Street since 1975. That property was listed as an estate asset in the 1996 interim account.[77] Mayim stated, however, that he had never paid rent nor did his former wife who also lived there.[78] Cleary testified that he had told Mayim that he had to pay rent;[79] he also was unaware that there was another tenant residing at 8036 Lowber Street without paying rent.[80]

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[73] See, e.g., Ex. P-2 (April 2008 Account). Several months later in June 2008, an amended account was filed. See Ex. C-2 (June 2008 Account).
[74] 10/7/08 N.T. at 22- 25, 39-40 (Cleary).
[75] 10/7/08 N.T. at 24-25 (Cleary).
[76] 9/16/08 N.T. at 27 (Mayim).
[77] See Ex. P-11 at 2; 9/16/08 N.T. at 51 (Mayim).
[78] 9/16/08 N.T. at 61 (Mayim).
[79] 10/7/08 N.T. at 83 (Cleary).
[80] 12/2/08 N.T. at 37 (Cleary depo.).

7. Cleary's Handling of Tax Issues

Cleary also testified concerning his handling of estate taxes. Sometime during the early phase of estate administration, Cleary learned that Bishop McDowell Shelton had not filed individual income tax returns. Cleary therefore prepared Pennsylvania and Federal individual income tax returns for the period 1983 through 1991 which were filed sometime in 1995.[81]

Cleary admitted that he never filed a Pennsylvania inheritance tax return although he prepaid $200,000 in Pennsylvania inheritance taxes which were due 9 months after decedent's death. He did not seek an extension of time to file the return nor did he explore whether it might be possible to get a refund for that prepayment.[82] His excuse for failing to file the Pennsylvania inheritance tax return is his belief that there might be deductions for the income taxes the decedent may have owed but did not pay since 1983 until his death.[83] Cleary likewise stated that he failed to file a Federal estate tax return on behalf of the estate which was due nine months after decedent's death.[84]

Cleary conceded as well that he did not file either federal or Pennsylvania income tax returns for the estate for the period January 1, 1996 through December 31, 2007 nor did he pay any tax for this period.[85] He explained that he stopped filing returns for this period because of the claims by the various churches—all of which would have been tax exempt organizations-- to the estate assets.[86]

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[81] 12/2/08 N.T. at 119 (Cleary). He based these filings on information provided by the two Swiss banks and the Canadian banks.
[82] 10/7/08 N.T. at 73-74 (Cleary). See also Kenneth Shelton 2/10/09 Memorandum at 39.
[83] 10/7/08 N.T. at 74-75 (Cleary); See also Kenneth Shelton 2/10/09 Memorandum at 39-40.
[84] 12/2/08 N.T. at 87 (Cleary); See also Kenneth Shelton 2/10/09 Memorandum at 36.
[85] 12/2/08 N.T. at 86 (Cleary).
[86] 12/2/08 N.T. at 122 (Cleary).

Finally, Cleary was unable to explain certain discrepancies between the Pennsylvania and federal fiduciary income tax returns he filed for the period 1992 through 1994,[87] and the interim account he filed in 1996. More specifically, he could not explain why the total income reported for the returns for 1993-1995 was $255,000 while the interim account listed the total income for that period as $460,351.[88]

8. Expert Testimony on the Rules of Professional Conduct and Cleary's Standard of Practice

Both the petitioner and respondent presented expert testimony on the Rules of Professional Conduct as it applied to the Cleary's representation of Mayim and the estate. The expert for the petitioners, Lawrence Fox, reviewed prior testimony and the depositions of Cleary and Mayim to analyze the rules of conduct for an attorney in Cleary's position as attorney for a fiduciary who was operating under a clear court order not to make any distribution of assets from the estate. According to Mr. Fox, Cleary had been put on notice of his client's intention to violate that order. At that point, he had a number of differing, escalating obligations. First, he had to instruct Mayim not to violate the court order, which Cleary did.[89]

According to Mr. Fox, when it became clear that his client did not intend to follow this advice, Rule of Professional Conduct 3.3(b) requires an attorney representing a client in an adjudicatory proceeding who realizes that his client intends to act in a way that is a fraud on the beneficiaries, on Wachovia Bank, and on the court, to take remedial measures. One remedial measure Cleary took but which failed was his warnings to his client. Alternatively, Cleary might have notified Wachovia bank if that would have been effective. If notifying Wachovia would

[87] Ex. P-10 (Federal Fiduciary Income Tax Return); 12/2/08 N.T. at 81-83 (Cleary).
[88] Exs. P-10(Federal Fiduciary Income Tax Return) & P-11(1996 Interim Account); 12/2/08 N.T. at 77-83 (Cleary).
[89] 12/2/08 N.T. at 54-56 (Fox).

not have been effective, he would have been obliged to notify the court before—and after—the transfer occurred because Rule 3.3(b) would apply in both instances.[90]

More generally, Mr. Fox observed that Rule 3.3(b) had been adopted to preserve the integrity of adjudicatory proceedings. Rule 3.3(c) provides that the obligations of an attorney under both 3.3(a) and 3.3(b) would trump the attorney's obligations of confidentiality that are set forth in Rule of Professional Conduct 1.6.[91]

G. Bradley Rainer, as the expert witness for Cleary, emphasized that as an attorney, Cleary represented the executor, Mayim, who was his client. Mr. Rainer offered the opinion that Cleary had properly advised his client not to make any distributions of estate assets in violation of the 1999 order. In contrast to petitioner's expert witness, Mr. Rainer did not find Rule 3.3(b) applicable to the facts of this case because it applies when a client is engaged in a crime or a fraud, and, in Mr. Rainer's opinion, Mayim was engaged in neither. Mayim's violation of the 1999 order was neither a fraud nor a crime, because he interpreted the Will as giving him authority to settle a claim against the estate. Moreover, Mr. Rainer did not believe that Cleary was required to talk to the Wachovia bank official on August 8, 2007 but was required instead to maintain client confidentiality In Mr. Rainer's opinion, Cleary took reasonable remedial measures to get back the money as required by Rule 3.3(b).[92]

9. Petitioner's Motion to Preclude Testimony and Deposition of Cleary at the December 2, 2008 Hearing Is Without Merit

At the December 2, 2008 hearing, counsel for Kenneth Shelton read into the record excerpts from Cleary's deposition. See 12/2/08 N.T. at 24-39. Later on in the hearing, Cleary's attorney likewise read excerpts from his deposition into the record. See 12/2/08 N.T. at 183-190.

[90] 12/2/08 N.T. at 56-58 (Fox).
[91] 12/2/08 N.T. at 58-62 (Fox).
[92] 12/16/08 N.T. at 22-40 (Rainer).

On December 15, 2008, Cleary filed a petition to strike certain testimony that was presented at the December 2, 2008 hearing. In particular, Cleary sought to strike the deposition testimony of Cleary that petitioner had read into the record because it related to the issue of the distribution of funds in violation of the 1999 order after that issue was closed by the court on October 7, 2008.

As petitioner points out neither party had formally rested as to that issue. Moreover, when counsel for petitioner suggested reading that deposition testimony into the record, Cleary raised no contemporaneous objection to its general introduction, reserving instead the opportunity to raise specific objections if merited. See 12/2/08 N.T. 23. Cleary thereby waived his objection to the introduction of the deposition testimony. Walker v. General Motors, 383 Pa. Super. 400, 557 A.2d 1 (1989), *app.denied*, 526 Pa. 444, 587 A.2d. 308 (1991)(objections waived by failure to raise them in timely fashion). Morover, his motion failed to cite any specific objection that was raised. Finally, his own counsel read excerpts from Cleary's deposition into the record, thereby undermining any argument that its general admission is somehow improper.

Legal Analysis of Surcharge Issues

A. **Based on the Record, Cleary is Surcharged for the Loss to the Estate of $1,609,567 ($1.6 million) due to the August 2007 Transfer of Estate Assets by his Client in Clear Violation of the 1999 Order**

Kenneth Shelton filed a petition in April 2008 seeking to surcharge Daman Mayim, as executor, and James Cleary, as legal counsel, for the loss of estate assets due to Cleary's failure to meet his duty of care as legal counsel to the estate of S. McDowell Shelton.[93] After a hearing and consideration of the record, by orders dated September 24, 2008, October 13, 2008 and October 20, 2008, this court ordered Damin Mayim to return to the estate those sums.

[93] See 4/21/08 Shelton Petition, Proposed Decree.

($1,678,250.86) distributed in patent violation of Judge Pawelec's 1999 Order.[94] In addition, Bishop Patteson was ordered to return the $1,609,567 that he received from Mayim as well as other specified sums.[95] The purpose of these orders was to enforce Judge Pawelec's order and to restore the McDowell Shelton estate to assure an orderly judicial determination of the appropriate beneficiaries for the ultimate distribution of its assets.

The September 24, 2008 order requiring Mayim to restore the estate assets was predicated on his fiduciary duty. It is "well-settled in this Commonwealth that a fiduciary who has negligently caused a loss to an estate may properly be surcharged for the amount of such loss." Lohm Estate, 440 Pa. 268, 273, 269 A.2d 451, 454 (1970). Section 3311 of the PEF code gives an executor the authority to take possession of the real and personal estate of a decedent. 20 Pa.C.S. § 3311. Under Pennsylvania law, an executor of an estate bears the responsibility to "preserve and protect the property for distribution to the proper persons within a reasonable time.'" Estate of Campbell, 692 A.2d 1098, 1101 (Pa. Super. 1997). Both an executor and a decedent's estate are under the control of the Orphans' court and, as a consequence, an executor is an officer of the court to which he is accountable. Estate of Westin, 2005 Pa. Super. 158, 874 A.2d 139, 144 (2005).

As counsel for Mayim from 1991 for nearly 17 years, James Cleary's liability for his client's transgression is now at issue. Cleary seeks initially to limit his liability by arguing that as counsel employed by an executor, he did not represent the estate or the heirs but only the personal representative of the estate.[96] In support of this argument, he cites Dorsett v. Hughes, 353 Pa. Super. 129, 509 A.2d 369 (1986). Dorsett, however, is factually distinguishable since it

[94] This sum included distributions in addition to the $1,609,567 that Mayim distributed to Bishop Patterson in August 2007. See, e.g., 9/24/08 order.
[95] See, e.g., 10/20/08 order.
[96] 3/19/08 Cleary Memorandum at 34.

focuses on the much narrower issue of whether estate counsel who is discharged by an executor can assert a claim for fees based on the gross value of the estate. It does not address a case like the present one in which the actions of estate counsel resulted in loss to the estate and its beneficiaries.[97]

The issue of an attorney's liability to an estate where that attorney represented the executor was addressed head on in Estate of Westin, 2005 Pa. Super. 158, 874 A.2d 139 (2005)—precedent both parties rely on as establishing the requisite standard of review and care on this surcharge issue.[98] The attorney in Westin likewise argued that "since he acted only as legal counsel to the estate, he had no attorney-client relationship with the appellant-creditors nor did he owe him any fiduciary duty." Westin, 874 A.2d at 146. The court rejected this argument, noting that it "focuses on the wrong relationship. At issue is his relationship to the estate, not to the appellants." Id. The Westin court emphasized that "[i]t is well-established that Pennsylvania courts may impose surcharges against counsel for an estate or counsel for the executor when there is a breach of the standard of care." Id. (citations omitted)

Cleary next seems to attempt to limit the scope of his surcharge liability by invoking Lohm Estate, 440 Pa. 268, 273-74, 269 A.2d 451 (1970) and Estate of Albright, 376 Pa. Super. 201, 545 A.2d 896 (1988), which he characterizes as limiting the amount of surcharge to the claimed attorney fees.[99] To his credit, however, Cleary admits that the Lohm court noted that if the tax loss to the estate was finally determined to exceed the conceded amount, a separate claim

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[97] Cleary also cites Pew Trust, 16 Fid. Rep. 80, 84 (Montgomery Cty. O.C. 1995) in which Judge Traxis observed that while the only client for counsel of a fiduciary is the fiduciary "this non-client relationship does not absolve counsel for the fiduciary from being charged with certain duties and obligations to the beneficiaries." His opinion cited authority from various jurisdictions to observe that "where the client is the fiduciary, the fiduciary's lawyer may be charged with special obligations in dealing with a non-client beneficiary. Hence, (law firm's) duties run not only to its clients, but also to the non-client trust beneficiaries." Id.

[98] See, e.g., 2/10/08 Kenneth Shelton Memorandum at 10-11; 3/19/09 Cleary Memorandum at 35-36 (Cleary notes that "[t]he principle of surcharging counsel to an estate or counsel to the executor of the estate was articulated in Westin.").

[99] 3/19/09 Cleary Memorandum at 36.

could be brought against the responsible party.[100] The Westin court, however, explicitly addressed the prior precedent that limited the surcharge against an attorney to his fees and concluded that where the loss to an estate far exceeded those fees, the attorney could be held liable for that loss:

> We recognize that the total loss to the Westin estate greatly exceeds the normal or expected counsel fees. However, we see no reason why that quantitative comparison should alter the underlying principle propounded in Lohm and Albright when counsel to an estate or to an estate's executor negligently causes loss of financial assets to the estate, the court can impose a surcharge against counsel for that loss.
> Westin, 874 A.2d at 147-48 (emphasis added).

As a general rule, the party seeking a surcharge has the burden of proof except where a "patent error has occurred" or a "significant discrepancy appears on the face of the record." Westin, 874 A.2d at 145. Examples of such patent errors or discrepancies are embezzlement of estate funds by its law firm or overpayment of taxes. In such cases, the burden shifts to the respondent. Estate of Westin, 874 A.2d at 146; Lohm Estate, 440 Pa. at 274, 269 A.2d at 454.

In the present case, a patent error or significant discrepancy appears on the record due to the distribution of $1.6 million from the S. McDowell Shelton estate in direct contravention of the 1999 order. Consequently, the burden shifted to Cleary.[101] Based on the record, Cleary failed to meet this burden in two ways: first, he failed to take appropriate actions to prevent the transfer of the $1.6 million once he had been placed on notice of his client's intent to do so; second, he participated in the fraud of concealing this transfer from the parties in interest including the court.

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[100] Lohm Estate, 440 Pa. 268, 279, 269 A.2d 451, 457 (1970); 3/19/09 Cleary Memorandum at 36.

[101] See generally 9/16/08 N.T. at 22-23. Counsel for Cleary conceded this point. 10/7/08 N.T. at 80 (Schwabenland).

a. Cleary's Failure to Take Appropriate Steps to Prevent the Loss to the Estate of $1,609,567 ($1.6 million) in August 2007

As the long-term counsel to the executor, Cleary was intimately aware that with his 1999 order Judge Pawelec had prohibited any distributions from the S. McDowell Estate except for certain carefully limited exceptions. Cleary testified that he repeatedly advised his client that this order prohibited any distributions.[102] In August 2007, however, he was put on notice of his client's imminent intent to violate that order by making a distribution to Bishop Anthonee Patterson. According to his testimony, when Cleary met with Mayim and Bishop Patterson on August 8, 2007, they revealed to him their efforts to interpret the Will in such a manner that would permit a distribution as a settlement of a claim.[103] In so doing, they clearly put him on notice of their intention to violate the 1999 order. In fact, at the October hearing, Cleary admitted he had such suspicions.[104] When specifically asked whether he believed Mayim intended to transfer funds from the estate account, Cleary replied: "I believe he was talking about transferring the funds that were held in Wachovia Bank and Wachovia Securities, yes."[105]

Approximately two hours later, Cleary received a telephone call from a Wachovia representative. This call from the bank where the estate assets had been deposited should have solidified any doubts Cleary had about his client's intent to violate the court order. Nonetheless, Cleary inexplicably failed to take the simple expedient of informing the Wachovia representative about the 1999 order.[106] That order was a matter of public record. It was not a private confidence between attorney and client. Disclosing it would not have violated any confidence. Yet Cleary passed up this opportunity to try to prevent the loss of $1.6 million dollars to the estate.

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[102] See, e.g., 10/7/08 N.T. at 10, 16-17, 27-28 (Cleary).
[103] 10/7/08 N.T. at 34 & 36 (Cleary).
[104] 10/7/08 N.T. at 36-37 (Cleary).
[105] 10/7/08 N.T. at 36 (Cleary).
[106] 10/7/08 N.T. at 46 (Cleary).

Cleary argues that he did not speak with the Wachovia representative but chose instead to speak directly with Mayim in an attempt to deter his client from violating the court order because of his a concern with protecting the attorney-client relationship of confidentiality.[107] This justification, however, lacks credibility based on the record of Cleary's actions regarding the estate assets located in Switzerland. When Cleary learned in July 2007, for instance, that Mayim had traveled to Switzerland with Bishop Patterson and Fincourt Shelton, Cleary not only called Mayim to persuade him not to disturb the estate assets at the BCV, but Cleary also faxed a letter to his last contact at BCV urging him to "please take any action necessary to prevent the removal of any funds in the account or any safe deposit box that may be located at your bank."[108] Three months later, in October 2007 Cleary contacted Mr. Dietsheim, the attorney who was representing Mayim, Bishop Patterson and Fincourt Shelton in Switzerland, to forward to him a copy of the 1999 order.[109] In contrast to these initiatives regarding the Swiss assets in which Cleary took direct action to prevent loss to the estate by revealing the existence of the 1999 order, in August 2007 when he was contacted by a Wachovia official, Cleary failed to respond appropriately. Cleary's failure to simply reveal the existence of the 1999 order when directly contacted by a Wachovia representative was a serious breach of his duty to the estate. In essence, that 1999 court order established the standard of care that was imposed on him as counsel and as an officer of the court. By failing to take this step to prevent the loss of estate assets, he thereby breached his duty to the estate.

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[107] See generally 3/19/09 Cleary Memorandum at 45 (citing Rainer's opinion that "it was not advisable for Mr. Cleary to speak directly with the Wachovia Bank representative on August 8, 2007 since he was speaking directly with his client that day and anything else would be a violation of the confidentiality mandate under 1.6"); 10/7/08 N.T. at 63-64 (Cleary).

[108] Ex. P-4 (7/30/07 fax from James Cleary to Mr. Rictle, BCV); 10/7/08 N.T. at 53-54 (Cleary)

[109] Ex. P-5 (10/19/07 letter from James Cleary to "To Whom It May Concern"). See also 10/7/08 N.T. at 56 (Cleary).

The execution of an indemnification agreement with the same date as the first prohibited transfer of estate funds is further evidence of Cleary's breach of his duty to the estate. The indemnification agreement specifically states that Mayim "after consultation with his attorney, James M. Cleary, Esquire, has independently decided to settle the claims of The Church of the Lord Jesus Christ of the Apostolic Faith against the Estate of S. McDowell Shelton in accordance with the Sixth Clause of the Last Will and Testament of S. McDowell Shelton."[110] The intent of this document was obviously to provide an aura of legal protection for Mayim as he violated the court order. Although Bishop Patterson, Mayim and Cleary testified that Cleary did not play a role in executing the agreement, the record establishes that Cleary played a role in suggesting that Mayim obtain this agreement prior to the transfer. It is highly unlikely that Mayim would have come up with the need for such an agreement on his own, and it would not benefit Bishop Patterson. In fact, Bishop Patterson testified that Cleary had wanted such an agreement for Mayim before the transfer took place:

> Because Mr. Cleary had asked if Daman was going to do this. Without his sanctions or blessings, he wanted to make sure that he got an indemnity agreement from us.[111]

Mayim, likewise, testified that Cleary asked if he had an indemnity agreement but "played no part in it."[112] With this suggestion, Cleary thus served to facilitate Mayim's improper conduct rather than prevent it.[113] Incidentally, since the "protections' under this document would extend to Mayim's agents, Cleary, himself, is also claiming coverage under it.[114]

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[110] Ex. C-1.
[111] 10/7/08 N.T. at 152-53 (Patterson).
[112] 9/16/08 N.T. at 83-84 (Mayim).
[113] Cleary conceded that when he eventually saw the agreement, he realized it was related to the distribution. 10/7/08 N.T. at 63 (Cleary).
[114] See, e.g., 3/19/09 Cleary Memorandum at 61 (Although the respondent played no part in the transference of funds in August 2007 to the Darby Church or the drafting of the Indemnification Agreement, the wording in the Indemnification Agreement **would not only cover Mayim but also Cleary as Mayim's representation)**(emphasis added).

Finally, Cleary testified that despite his suspicions that Mayim intended to withdraw the funds from the Wachovia account and the telephone call from Wachovia, he made no effort to learn whether the funds had, in fact, been transferred.[115] According to the record, the entire $1,609,567.62 was not withdrawn on August 8, 2007 but instead, the withdrawals were done in two phases: first $142,000 was withdrawn on August 8, and then on August 13,th $1,467,567.62 was withdrawn.[116] There was thus a narrow window of opportunity for preventing the significant loss to the estate that Cleary missed by failure to act.

b. Cleary's Perpetuation and Participation in the Fraudulent Acts of His Client

While Cleary can be surcharged based on this failure to take action to prevent the loss of estate assets, he is also accountable for perpetuating or participating in the fraudulent acts of Mayim. Under Pennsylvania law, "fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth or look or gesture." Mellon Bank NA. v. Maris Equipment Co., 53 Pa. D. & C. 4th 209, 214 (Phila. Ct. Common Pleas 2000)(citation omitted). Significantly, the "concealment of a material fact can amount to a culpable misrepresentation no less than does an intentional false statement." Moser v. DeSetta, 527 Pa. 157, 163, 589 A.2d 679, 682 (1991). Proof of fraud is by clear and convincing evidence. Id.

As late as April 2008, Cleary believed only he, Bishop Patterson, Shelton and Mayim were aware that $l.6 million had been transferred out of the Wachovia account to the Darby Church in August 2007.[117] His reason for keeping this transfer of assets secret was his belief that the appropriate approach was for him to speak to his client directly. Consequently, during the

[115] 10/7/08 N.T. at 55 & 93 (Cleary).
[116] Ex. P-3 (Wachovia Bank Checking Account Record for August 1-31, 2007); 10/7/09 N.T. at 47 (Cleary).
[117] 12/2/09 N.T. at 35 (Cleary depo.)(no contemporaneous objection).

months after the transfer of assets, Cleary attempted repeatedly to convince Mayim and Bishop Patterson to return the money. Cleary suggests, however, that he did alert the court—and by extension the beneficiaries--to the transfer by filing the supplemental account on April 7, 2008.[118]

This argument is disingenuous on at least two scores. First, Cleary only filed the supplemental account in April 2008 because he had been ordered to do so by decree dated March 4, 2008. Secondly, on April 15, 2008, Cleary filed a response to Kenneth Shelton's petition for a citation to show cause why Mayim should have access to the BCV account which stated that since Mayim's appointment as executor on October 18, 1991 "Daman Mayim has continued as Executor fulfilling his duties as required by law**."**[119] This statement to the court that Mayim was fulfilling his duties as required by law was made nearly 8 months after Cleary learned Mayim had violated the 1999 court order by transferring estate funds out of the Wachovia account. By signing this document as counsel, Cleary did not just fail to alert the court to the violation of the 1999 court order; he participated in the fraud.

During the hearings, expert testimony was presented as to the standard of care for an attorney in Cleary's situation in light of the Rules of Professional Conduct.[120] Rule 1.6, for instance, which addresses the confidentiality of information between an attorney and client, is the general principle that Cleary relies on in defending his failure to disclose his client's violation of the 1999 order. Rule 1.6(b), however, provides that a "lawyer may reveal such information if necessary to comply with the duties stated in Rule 3.3," the rule petitioner emphasizes. Rule 3.3 addresses "Candor Toward the Tribunal." According to Rule 3.3(b), a

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[118] 3/19/09 Cleary Memorandum at 41-42.

[119] Ex. P-6 (4/15/2008 Mayim Response to Petition for Citation, ¶2)(emphasis added).

[120] See, e.g. 12/2/08 N.T. at 54 (Lawrence Fox)(for Shelton); 12/16/08 N.T. at 21-80 (G. Bradley Rainer)(for Cleary).

"lawyer who represents a client in an adjudicative proceeding, and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[121] Rule 3.3(c) cautions that the duties stated in Rule 3.3(b) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"[122] or confidentiality of information. As the expert witnesses for both parties agreed, where a client is engaging in fraudulent activity, candor to the court trumps confidentiality.[123]

In analyzing the import of these rules of professional conduct, it is important to differentiate between standard of care and ethical standards. Breach of the rules of professional conduct would not "give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[124] These rules thus are relevant in this case not to determine the standard of care for Cleary but to determine what ethical limitations there may have been on him regarding his client's violation of the 1999 court order.

By stating in the answer he filed on April 15, 2008 that Mayim since his appointment in 1991 "has continued as Executor fulfilling his duties as required by law,"[125] Cleary crossed the line from failing to disclose that his client had violated the 1999 court order to helping him do so. Similarly, by encouraging his client to obtain an indemnification agreement from Bishop Patterson, Cleary did not take the "reasonable remedial measures" contemplated by Rule of

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[121] Rule of Prof. Conduct 3.3(b).

[122] Rule of Prof. Conduct 3.3(c).

[123] 12/2/08 N.T. at 60 (Fox); 12/16/08 at 33 (Rainer). Rainer, who was the expert witness for Cleary, did not believe that Rule 3.3(b) was applicable in this case because in his opinion Mayim was not engaging in fraudulent activity. 12/16/08 N.T. at 27 (Rainer).

[124] Rules of Prof. Conduct, Preamble and Scope [19]. This seems especially so where Rule 3.3 is at issue. See Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 262, 602 A.2d 1277, 1288 (1992)("Obviously there are some disciplinary rules, such as Rule 3.3 of the Pennsylvania Rules of Professional Conduct, (Candor toward the Tribunal) which, if violated, may not give rise to civil liability").

[125] Ex. P-6.

Professional Conduct 3.3(b) when an attorney realizes that his client intends to engage in fraudulent behavior. Finally, by failing to notify the Wachovia official of the 1999 order when he called Cleary on August 8, 2007, Cleary missed another critical opportunity to prevent the loss of assets by the estate. Disclosure of that order would not have violated a confidence protected by Rule of Professional Conduct 1.6. It would have been a "reasonable remedial measure" under Rule of Professional Conduct 3.3(b).

The 1999 order by Judge Pawelec prohibiting distributions from the Estate of S. McDowell Shelton represented a clear-cut standard of care which Cleary breached by not notifying the Wachovia representative of the 1999 order, by suggesting that his client obtain an indemnification agreement, by not notifying the beneficiaries or the court of the improper transfer until he filed a court ordered account nearly 8 months after the order was violated. He must therefore be subjected to a surcharge of $1,609,567 to compensate the estate for its loss. Westin, 874 A.2d at 147-48. Obviously, if Mayim or Bishop Patterson return those assets to the estate, the surcharge against Cleary will be expunged.

B. Cleary Shall Not Be Surcharged for the Distributions by Mayim in Violation of the 1999 Order of which Cleary Had No Notice

Petitioner asserts that Cleary should be surcharged for failure to keep sufficient and accurate financial records for the estate from 2002 to June 10, 2008. Petitioner invokes Lohm Estate, 440 Pa. 268, 269 A.2d 451 (1970) in support of his argument that as an attorney with experience overseeing 50-75 estates, Cleary should be held to a "standard that takes those skills into consideration."[126] Both Cleary and Mayim testified, however, that in 2002, Mayim took control of the estate check book and as a consequence, bank statements were sent to Mayim

[126] 2/10/09 Shelton Memorandum at 50.

rather than Cleary.[127] Cleary testified that he therefore had no knowledge that Mayim had used estate assets for repairs of his residence at 8036 Lowber Street in violation of the court order.[128] Petitioner cites no authority that would impose a specific duty that counsel for the estate maintain control of the estate check book. While this court by decree dated September 24, 2008 surcharged Mayim for his improper expenditure of estate assets for, inter alia, repairs and maintenance of the real property at 8036 Lowber Street, on the record presented Cleary shall not be surcharged for those distributions.

C. Cleary Shall Not Be Surcharged for Mayim's Failure to Pay Rent for Residing at 8036 Lowber Street

Along similar lines, Petitioner argues that Cleary, as legal counsel, should be surcharged for Mayim's failure to pay rent for residing at 8036 Lowber Street based on "the standard of care in accordance of his special skills" as generally set forth in Estate of Lohm, 269 A.2d at 454.[129]

Daman Mayim had served as Bishop Shelton's personal aide prior to his death, and he had lived at 8036 Lowber Street since 1975. The property at 8036 Lowber Street was an asset of the McDowell Shelton estate.[130] Mayim testified that he had never paid rent nor had his former wife who also lived there.[131] Cleary, as his counsel, testified that he had informed Mayim of his obligation to pay rent; Cleary also testified that he had been unaware of other tenants residing rent free at 8036 Lowber Street.[132]

The Lohm Estate precedent invoked by petitioner is not a case where an executor ignored the legal advice of his estate counsel regarding his responsibilities. Instead, the issue in the Lohm Estate centered, inter alia, on a large overpayment of taxes due to counsel's negligent

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[127] 12/2/08 N.T. at 136 (Cleary); 9/16/08 N.T. at 76-77 (Mayim).
[128] 10/7/08 N.T. at 22-25 (Cleary).
[129] 2/10/09 Shelton Memorandum at 53.
[130] Ex. P-11 at 2 (1996 Interim Account).
[131] 9/16/09 N.T. at 60-61 (Mayim).
[132] 10/7/08 N.T. at 83 and 12/2/08 N.T. at 37 (Cleary depo.)(no contemporaneous objection).

failure to file timely tax returns. The executors of the Lohm estate had hired an attorney specifically for his tax expertise. To take advantage of the "alternative valuation date" for federal tax purposes, it was critical that the federal tax return be filed by a specific date. The tax attorney, however, failed to do so, resulting in significantly higher taxes for the estate. Based on these facts, the Pennsylvania Supreme Court concluded that the executors were guilty of supine negligence in failing to ascertain the legal deadline for filing the tax return, and their negligence could not be excused by claiming they had relied on counsel hired for his tax expertise. Estate of Lohm, 269 A.2d at 270, 273-76. Likewise, the attorney hired specifically for his tax expertise was penalized for his failure to file timely taxes resulting in loss to the estate.

The facts of Estate of Lohm are thus not apposite to this case where counsel for the estate properly advised the executor of his obligation to pay rent, but the executor willfully neglected to do so. Mayim's hostility to the suggestion that he pay rent for residing at 8036 Lowber Street was evident during his testimony at the hearing. When asked whether he was "working on payment of rent from you to the estate," Mayim replied:

> I'm the caretaker of the place. That's what I was put there—30 years ago—and I'm doing the same job today as I was doing then. He moved me as the executor. I'm still in the place. I got to take care of it. I'm not going to let it fall down. No, I'm not working on paying that rent.[133]

While Mayim, as executor, will be surcharged as set forth by the decree dated September 24, 2008 for his failure to pay rent in defiance of advice by counsel,[134] there is no basis for a surcharge against Cleary on this record.

[133] 9/16/08 N.T. at 61 (Mayim).

[134] The September 24, 2008 decree notes that the total amount of this surcharge on Mayim will be determined at a later date.

D. **Cleary Shall Not Be Surcharged as Counsel for Allegedly Failing to Protect Estate Assets at BCV and for Causing Petitioner to Incur Legal Fees to Protect Those Assets**

Petitioner relies on the general principles set forth in Lohm Estate that would impose a higher duty on an attorney with special skills to argue that Cleary should be surcharged for failing to protect the estate assets at BCV. More specifically, petitioner maintains that Cleary should be required to pay the $77,857.43 in legal fees that petitioner Kenneth Shelton incurred to Swiss Counsel, BMG Avocats, in defending the Swiss assets.[135] Once again, a careful focus on the facts of this case as compared to those of Lohm Estate, leads to the conclusion that Cleary should not be surcharged based on his reaction to the Swiss litigation.

Cleary's actions in response to his client's efforts to gain access to the estate's Swiss assets were contradictory, but on balance he took direct intervention at two key points to prevent that access. Cleary testified that he had no prior knowledge that Mayim intended to go to Switzerland with Fincourt Shelton and Bishop Patterson in July 2007. Indeed throughout their relationship, Cleary had consistently rejected Mayim's repeated proposals that he go to Switzerland.[136] When Cleary first learned in late July 2007 that Mayim had traveled to Switzerland with Bishop Patterson and Fincourt Shelton, Cleary called Mayim to remind him of the 1999 court order and its prohibition against distributions from the estate.[137] More significantly, Cleary faxed a letter to his last contact at the Banque Cantonale Vaudois, Mr. Rictle, requesting that he "take any action necessary to prevent the removal of any funds in the account or any safety deposit bank that may be located at your bank."[138] As petitioner concedes, "[t]hereafter, on August 2, 2007, Petitioner BISHOP KENNETH SHELTON successfully obtained the Swiss Order which froze assets titled in the name of the Estate held at BCV and thus

[135] 2/10/09 Shelton Memorandum at 56 & 60.
[136] 10/7/08 N.T. at 25 & 28 (Cleary).
[137] 10/7/08 N.T. at 31-32 (Cleary).
[138] 12/2/08 N.T. at 140-41 Cleary; Ex. P-4 (7/30/07 fax transmission).

thwarted Mayim's efforts to access those assets and distribute them to ANTHONEE PATTERSON or the Darby Church."[139]

Several months later in October 2007, Cleary sent a copy of the 1999 order to Mr. Dietsheim, the attorney representing Mayim, Bishop Patterson, and Fincourt Shelton in Switzerland. The cover letter addressed to "Whom it May Concern" specifically quoted the 1999 order as "directing the Executor 'that there shall be no further distribution from the Estate, except water and sewer rents and real estate taxes pertaining to the real property of Supernol, Inc. without further order of the Court."[140] Petitioner, in contrast, is critical of this letter, which he characterizes as an example of how Cleary "overtly sought to help MAYIM gain access to the Estate assets held at BCV by sending a letter to Rolf Ditesheim."[141] Yet this criticism misses the mark and ignores (1) the attachment of the 1999 order and (2) the direct quotation of the prohibitions placed on the Executor by that order. While the letter did state that the "attached court order does not prevent the Executor from completing his fiduciary duties" and that he is "still charged with his fiduciary duties until relieved by the court,"[142] the inclusion of the 1999 order should have made it clear that distributions from the estate were precluded by court order and adherence to it was integral to Mayim's fiduciary duties.

Finally, by e-mail dated April 26, 2008, Cleary informed Mr. Ditesheim that Mayim had been removed as Executor by decree of the Philadelphia Orphans' court and "Mr. Mayim no longer has the authority to take any action relating to the assets held at Banque Cantonale Vaudoise."[143] Admittedly, when Kenneth Shelton filed a petition in this court seeking a citation to show cause why Mayim should have access to the Swiss accounts, Cleary filed the answer

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[139] 2/10/09 Shelton Memorandum at 57.
[140] Ex. P-5 (letter dated 10/10/07 from Cleary); 12/2/08 N.T. at 144-45 (Cleary); 10/7/08 N.T. at 56 (Cleary).
[141] 2/10/09 Shelton Memorandum at 57.
[142] Ex. P-5.
[143] Ex.P-14 (series of e-mails between Cleary and Ditesheim).

stating that Mayim had fulfilled his duties as executor "as required by law."[144] That response, however, had no practical impact on the Swiss litigation since Mayim was removed as executor shortly thereafter.

Based on this record, therefore, Cleary shall not be surcharged for the expenses Kenneth Shelton incurred in the Swiss litigation to protect estate assets.

G. Any Determination of a Surcharge against Cleary for His Handling of the Estate Taxes Is Premature as Petitioner Concedes in His Memorandum

Petitioner argues that Cleary should be surcharged for mishandling of the various taxes related to the estate under the standard set forth in Estate of Lohm, which did focus on surcharging estate counsel with special tax expertise for his negligent late filing of tax forms. In particular, petitioner asserts that Cleary should be surcharged for the following acts and failures to act:

> Cleary failed to file the Federal Estate Tax Return which was due 9 months after the death of the decedent;
>
> Cleary failed to file a Pennsylvania Inheritance Tax Return on behalf of the estate which was due 9 months after the death of the decedent, but he made a $200,000 prepayment of Pennsylvania inheritance tax within 3 months of the decedent's death. He has failed to seek a refund of that prepayment;
>
> Cleary failed to file fiduciary income tax returns in 1991 and for the period January 1, 1996 through December 31, 2007;
>
> Cleary filed fiduciary income tax returns for the estate for the years 1992, 1993, 1994, and 1995 that were inaccurate.[145]

After outlining the first of these tax derelictions, the petitioner concludes:

> Accordingly, Cleary should be surcharged for his clear and inexcusable failure to file a Federal Estate Tax return for the Estate, which failure constitutes yet another beach of Cleary's duty of care to the Estate. The amount of the surcharge shall be an amount equal to the interest and penalty which the Estate owes after a Federal Estate Tax Return

[144] Ex. P-6.

[145] 2/10/09 Shelton Memorandum at 35-50; 12/2/08 N.T. at 86.

> for the Estate is filed and Federal Estate Tax, interest, and penalty are determined and agreed to by the Internal Revenue Service.
>
> As this Court indicated, attempts to find a successor administrator for this Estate have been unsuccessful. Without a successor administrator to reconstitute the Estate, the amount of this surcharge claim is unknown at this time. The court indicated its willingness to identify an individual who would be a repository for the physical elements of the Estate, but without the duty to administer the estate. The role for such individual is an "auditor of accounts of fiduciaries." The amount of this surcharge claim can be determined upon the appointment of an auditor of accounts of fiduciaries.[146]

After a discussion of each subsequent tax dereliction, petitioner references this language to conclude "the amount of this surcharge claim can be determined upon the appointment of an auditor of accounts of fiduciaries."[147]

By decree dated May 12, 2009, William G. Chadwick, Esquire, was appointed as receiver for the assets titled in the name of the estate of S. McDowell Shelton, deceased at the Banque Cantonale Vaudoise in Switzerland. As Receiver, Mr. Chadwick's responsibility was specifically limited to the transfer of the Swiss Bank assets to a bank or financial institution within the City of Philadelphia. Upon submission of a petition and proposed list of auditors of the account, an auditor will be appointed to assess the potential tax liabilities of the Estate by filing a supplemental account setting forth any surcharge of Cleary that may be appropriate. Before this account is filed, however, the underlying issue of whether the estate assets belong to the estate or to a tax-exempt church organization would have to be determined.

H. Cleary Shall Be Surcharged the $130,000 He Has Received in Fees

Finally, petitioner seeks to surcharge Cleary for the $130,000 in fees he has already received as counsel for the estate.[148] The Pennsylvania Supreme Court in Lohm Estate observed that the "award of counsel fees presupposes not only that legal services were performed but that

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[146] 2/10/09 Shelton Memorandum at 38-39 (emphasis added).
[147] 2/10/09 Shelton Memorandum at 43. See also id. at 44, 46,48, 50.
[148] 2/10/09 Shelton Memorandum at 60. Cleary stated testified that he had received $130,000 in fees. 12/2/

they were performed satisfactorily." Lohm Estate, 440 Pa. at 278, 269 A.2d at 456. Based on the record, this court concludes that the Estate of McDowell Shelton lost $1,609,567 in assets due, in part, to Cleary's breach of his standard of care. There was also evidence that Cleary mishandled the estate's taxes with a total loss to be determined at a later period. In Westin, the court observed that where counsel for an estate fails to exercise the "required degree of skill, knowledge and diligence, and such negligence results in loss or waste to the estate, the court may impose a surcharge by way of awarding reduced compensation on no compensation at all." Westin, 874 A.2d at 146-47 (citations omitted). In light of his clear breach of his standard of care, therefore, Cleary is not entitled to the $130,000 in fees which must be returned to the estate together with the $1,609,567.

Conclusion

The surcharge imposed on James Cleary, like the previously imposed surcharges on Daman Mayim and Bishop Patterson by decrees dated September 24 and October 20, 2008, seek to enforce Judge Pawelec's 1999 decree and to restore the estate assets so that they can be distributed to the appropriate beneficiaries upon an orderly, judicial resolution of the objections filed to the accounts. If the assets are restored to the estate by any of these three individuals, the specific surcharges will be reduced accordingly.

Date: _____ BY THE COURT:

_____
John W. Herron, J.