COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Joseph D'Alessio,
Deceased
1997 DE of 1244

Sur First and Final Account of Rose Calandra, Executrix

The account was called for audit April 6, 1998 before Judge Frank O'Brien and for the Deferred Audit List of November 1, 2004

By: **HERRON, J.**

Counsel appeared as follows:

Joseph J. Agozzino, Jr., Esquire - for the Accountant
David J. Averett, Esquire – for the Objectors
Peter J. Tucci, Esquire – for the Commonwealth of Pennsylvania, Department of Revenue

ADJUDICATION

Joseph D'Alessio died on February 2, 1995. By Will dated January 18, 1990, he named his brother Charles D'Alessio as executor, or if he was unable to serve, his sister Rose Calandra. By decree dated May 23, 1995, letters testamentary were granted to Rose Calandra and proof of their publication was presented. Joseph D'Alessio was not survived by a wife or children, but he was survived by a brother and three sisters: Charles D'Alessio, Lola Coia, Rae Trollo and Rose Calandra. Under paragraph SECOND of his will, Joseph D'Alessio bequeathed his estate in equal shares to his four siblings.

In August 1997, a petition was filed for a citation directed at Rose Calandra to file an account of her administration of the estate. On January 30, 1998, Rose Calandra filed an account, which was scheduled for the April 1998 Audit List before Judge Frank O'Brien. On March 17, 1998, objections were filed to the account by Rae Trollo, Lola Coia, and by the

surviving children of Charles D'Alessio, who are Jeffrey D'Alessio and Charles D'Alessio, Jr.

The objectors asserted, inter alia, that substantial sums of the estate had been removed by Rose Calandra's daughter, Lillian Saggese. More specifically, they allege that within one year before the death of Joseph D'Alessio, Ms. Saggese redeemed two of his certificates of deposit (a Mellon Bank C.D. No. 61429419 valued at $27,166.54, redeemed on May 25, 1994 and a Mellon C.D. No. 61486770 valued at $58,113.24 redeemed on Mach 25, 1994) and placed in a joint account with Lillian Saggese named with a right of survivorship.[1] At the time these assets were removed from Joseph D'Alessio's account, the objectors alleged, he was disoriented, incapacitated and unable to look after his finances.

On August 5, 1998, a hearing on these objections was held before the Honorable Frank O'Brien. Inexplicably, he rendered no ruling and issued no adjudication. Counsel for the accountant subsequently made a telephone call request for an adjudication so that the estate issues might be resolved. This court subsequently scheduled a hearing for March 23, 2004. No testimony was presented at this hearing. Instead, the prior record was referenced and incorporated.[2]

Initially at the March 2004 hearing, the objectors reasserted objections they had previously raised about the executor's failure to account for certain household items as well as

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1 Objections, ¶ 9, a & b. The objectors also claimed that other assets had been diverted from the estate such as furniture and retirement checks, but they have not pursued these objections. See 3/23/2004 N.T. at 19-22.

2 The objectors introduced as evidence the deposition of Dr. Michael J. Pisano regarding the health of the decedent, which was admitted pursuant to the prior order of Judge O'Brien. They also presented the testimony of the 8/5/1998 Hearing and Mellon Bank records of the savings account history for account number 035-760-5476, account number 035-760-5377 and account number 014-548-4581 as well as bank statements for account number 1-879-063. No testimony or explanation of these bank documents was offered. See 3/23/2004 N.T. at 9-12.

The estate offered as evidence the first and final account, a copy of the inheritance tax return, the inventory, the Pennsylvania Inheritance Tax Return, the approval of the Pennsylvania Inheritance Tax Return; a letter from Rae Trollo to Lillian Saggese dated January 30, 1994; request for attorney fees in the sum of $1,700; findings of fact and conclusions of law previously filed for Judge O'Brien; a request for counsel fees in the amount of $3,388, and

for the claim of $3,388 in attorney fees,[3] but their counsel subsequently conceded that the objectors had previously waived their objections concerning the household effects and the $3,388 in attorney fees. 3/23/04 N.T. at 23. The sole issue before this court, therefore, is the validity of the inter vivos transfer of the two certificates of deposit into a joint account in the name of the decedent and Lillian Saggese.

The only testimony on this issue was presented during the August 5, 1998 hearing before Judge O'Brien. The objectors presented two witnesses on the critical issue of the creation of the joint account: Rae Trollo, the decedent's sister, and Rose Calandra, the executrix as well as the decedent's sister. They also presented the deposition testimony of Dr. Michael Pisano as to the decedent's health during the relevant period of 1994.

Ms. Trollo testified that she practically lived with the decedent during 1994, the year before his death. She did housework and ran errands for her brother who was unable to leave the house or care for himself.[4] She stated that her niece, Lillian Saggese, took care of Joseph's banking.[5]

Ms. Trollo testified that in March 1994, Joseph asked her to take two of his certificates of deposit (for $46,000 and $26,000) to the bank and roll them over into one year certificates of deposit. He then gave the certificates to Ms. Trollo. Lillian Saggese, who was present when Joseph gave the certificates to Ms. Trollo, accompanied her to the bank. When they reached the bank, Ms. Saggese suggested that they wait for Jody Ricci, a Mellon bank counselor. Ms. Trollo gave the certificates to Jodi Ricci, and told her that Joseph wanted them to be rolled over for one

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finally the Wachovia estate account statement dated 11/29/03 to 12.31/03 showing an estate balance of $14,073.95.

3 3/23/04 N.T. at 7-8.

4 8/5/98 N.T. at 7-9.

5 8/5/98 N.T. at 12.

year. Ms. Ricci told Ms. Trollo that the certificate for $26,000 had not yet matured, so she would put them in a vault and take care of the transaction when the other c.d. matured. According to Ms. Trollo, Lillian Saggese never had the certificates in her hands during this transaction.[6] Ms. Trollo testified that she never heard from Ms. Ricci and subsequently discovered when she went to the bank that Ms. Ricci had left. She attempted to find out the status of the certificates and approached the bank manager, whose name she did not remember. He was unable to give her any information about the account because her name was not on it; he did note, however, that Lillian Saggese's name came up.[7] Although Ms. Trollo concluded that apparently Ms. Ricci had failed to follow the directions to roll over the certificate of deposits, she testified that she did not advise any bank official that Ms. Ricci had not performed her duties as directed.[8] Moreover, although she stated that Joseph had never indicated to her that he wanted Lillian Saggese's name on the account,[9]on cross-examination she conceded she had no knowledge whether Joseph might have wanted the accounts jointly held with Lillian.[10]

The objectors then presented the testimony of Rose Calandra as if on cross-examination. She testified that she was 96 years old and that Lillian Saggese is her daughter. When asked about her brother Joseph, she stated that she never discussed his business or financial affairs with him and that "I don't know anything."[11] When asked if she know that Lillian Saggese's name had been placed on a joint account with Joseph D'Alessio, once again Rose stated that "I don't

6 8/5/98 N.T. at 15-18.
7 8/5/98 N.T. at 18.
8 8/5/98 N.T. at 36.
9 8/5/98 N.T. at 19.
10 8/5/98 N.T. at 37.
11 8/5/98 N.T. at 43.

know nothing about that."[12] She also denied any knowledge concerning Lillian's involvement with Joseph's finances. She stated that she never did any banking or paid any bills for her brother prior to his death. When asked if she had reviewed the accounting that was filed for the estate, she said no even though she was the executrix.[13] She elaborated by stating that she really did not know who went over the account.[14] When asked what she had done with the contents of Joseph's home, she stated that she left it in the house and "asked the family if they wanted anything," but she could not identify whom she had asked.[15]

Finally, the objectors presented the deposition testimony of Dr. Michael Pisano.[16] Dr. Pisano stated that he first began treating Joseph in January 1994 up until his death on February 2, 1995, but that his father had treated Joseph since the mid-1980's.[17] According to Dr. Pisano, Joseph had suffered from chronic obstructive pulmonary disease since the 1980's as well as vertigo and arterial sclerotic disease which affected the blood flow to his brain.[18] Because of his serious breathing problems, Joseph was essentially confined to his home. He had to rely on others to do his errands, his banking and his shopping.[19] When asked whether he had an opinion based on a reasonable degree of medical certainty as to whether Joseph D'Alessio was competent to make financial decisions during the period between January 1994 and his death in February 1995, Dr. Pisano stated that Mr. D'Alessio was not competent.[20]

The objectors essentially argue that the certificates of deposit that were deposited into a

12 8/5/98 N.T. at 44.
13 8/5/98 N.T. at 45-47.
14 8/5/98 N.T. at 46-47. Even when her attorney reminded her that they had gone over the account together, she stated that "I can't recall everything." 8/5/98 N.T. at 51.
15 8/5/98 N.T. at 48-49.
16 8/5/98 N.T. at 51.
17 Pisano depo. at 7.
18 Pisano depo. at 8-10.
19 Pisano depo. at 25.

joint checking account in the names of Joseph D'Alessio and Lillian Saggese should be returned as assets of the estate. The law in Pennsylvania relating to joint banking accounts changed with the passage of Chapter 63 of the Probate, Estates and Fiduciary Code, 20 Pa.C.S.A. §§ 6301-6306. Wilhelm v. Wilhelm, 441 Pa. Super. 230, 236, 657 A.2d 34, 37 (1995). Consequently, the ownership of funds in a joint account is presently governed by this statute. Estate of Meyers, 434 Pa. Super. 165,170, 642 A.2d 525, 527 (1994). The statute defines a joint account as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." 20 Pa.C.S.A. §6301. The statute also has specific provisions concerning the effect of the death of a party to a joint account and the right of survivorship. Section 6304 provides:

> **(a) Joint account** – Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created. 20 Pa.C.S.A. § 6304(a).

In determining the ownership of funds in a joint account, "the statute favors the surviving party over the estate of the decedent." Estate of Meyers, 434 Pa. Super. at 171, 642 A.2d at 528. The legislature has thus created a statutory presumption which the Meyers court explains as follows:

> By 20 Pa. C. S. § 6304, the legislature has created a statutory presumption that survivorship rights are intended when a joint account is created. This presumption can be overcome only by clear and convincing evidence of a contrary intent. The burden of establishing a contrary intent is on the party who opposes the presumption of survivorship.
> Estate of Meyers, 434 Pa. Super. at 171, 642 A.2d at 528 (citation omitted).

The burden placed on the party seeking to overcome the presumption of survivorship is thus very high. As the Superior Court noted in Estate of Heske, 436 Pa. Super. 63, 65, 647 A.2d

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20 Pisano depo. at 26.

243, 244 (1994), the standard of "'[c]lear and convincing evidence' is the highest burden in our civil law and requires that the fact-finder be able to 'come to clear conviction, without hesitancy, of the truth of the precise fact in issue.'" While precedent prior to the effective date of section 6304 suggested that if a confidential relationship existed between the donor and donee at the time an account was opened, the burden shifted back to the donee to establish that the gift was free of undue influence or deception, under section 6304 the existence of a confidential relationship does not alone shift the burden to the donee. Rather, it is "necessary to consider the facts which constitute the relationship together with all other evidence in determining the intent of the decedent when the accounts…were issued." Estate of Meyers, 434 Pa. Super. at 171, 642 A.2d at 528 (quoting Smelzer Estate, 4 Fiduc. Rep.2d 9 (1983)).

The record presented by the objectors does not meet the burden facing them for a variety of reasons. In their proposed statement of facts, the objectors concede that the Mellon Bank account at issue—number 35-760-5476—is a joint account for Lillian Saggese and Joseph D'Alessio with a right of survivorship. The objectors assert that Lillian Saggese "without the consent or authorization of Joseph D'Alessio redeemed" C.D. No. 61429419 in the amount of $27,166.65 and C.D. No. 61486770 in the amount of $58,113.24 and then deposited the proceeds into the joint account.[21] They fail, however, to present evidence to flesh out these allegations.

First, since the objectors concede that the joint account was in Lillian Saggese's name she would enjoy the presumption of ownership under 6304. They therefore have the burden of showing by clear and convincing evidence that Joseph D'Alessio had a contrary intent at the time the account

21 Objectors' Proposed Statement of Facts, ¶¶ 8- 9.

was created. The objectors presented testimony by Rae Trollo as to the creation of the account, since she was the person Joseph asked to deliver the two certificates of deposit to the bank. Her testimony, however, revealed a lack of knowledge as to the formation of the joint banking account. She conceded that she personally delivered the two certificates to the bank official Jodi Ricci with instructions that it be rolled over into a one year certificate and that Lillian Saggese had no physical control over the certificates during this transaction. 8/5/98 N.T. at 14-18. Ms. Trollo then testified that she subsequently learned about the fate of this transaction at an unspecified time in the following conversation with a bank manager after learning that Ms. Ricci was no longer with the bank:

> Well, I had to identify myself, who I was, and he said your name is not on this bank account. I said I know that, I said, but I want to find out about my brother's bank account and what's the balance and he said he couldn't give me any information, because as he ran the computer Lillian Saggese's name came up and he said this isn't the name that's on this account. He said is your name on the account. I said, no, it isn't. 8/5/98 N.T. at 18.

When asked whether she had any knowledge as to whether Joseph D'Alessio had ever wanted Lillian's name on the account, she replied: "No, not all. None whatsoever." Id. at 19. On further questioning, Ms. Trollo responded that she would have had no knowledge as to whether Joseph D'Alessio wanted a joint account with Ms. Saggese:

> Q. Within the scope of your knowledge you wouldn't know whether Mr. D'Alessio wanted them (i.e. the c.d.'s) jointly held with Ms. Saggese, or Mr. D'Alessio told Ms. Ricci put one in the a checking account and put another one in a C.D.? You wouldn't know any of that information, would you?
> R. No, sir. I wouldn't. Id. at 37.

The fate of the certificates of deposit and the formation of the joint account is thus not explained by Ms. Trollo's testimony. The individuals who might have resolved this mystery—Lillian Saggese and Jodi Ricci -- were not called by the objectors. More significantly, Ms.

Saggese is not presently a party in interest to this account. Since she is the presumptive owner of the joint account, this court cannot adjudicate the title of her interests in her absence. See, e.g., Estate of Dobson, 490 Pa. 476, 483 n.7, 417 A.2d 138, 142 n.7 (1980)(it is improper for the court to adjudicate the interests of a corporation that was not a party to the action).

The other witness presented by the objectors – Rose Calandra as on cross examination--was even less helpful in explaining how the joint account came into existence. Ms. Calandra displayed a nearly total lack of knowledge about the decedent's intent or even that the account filed under her name as executrix. 8/5/98 N.T. at 43-50. She has agreed, however, that she should be replaced by a new executor. After distribution of the assets pursuant to this adjudication, Rose Calandra shall be removed as executrix upon the filing of a petition by a party in interest pursuant to 20 Pa.C.S.A. §3183. Once a new executor or administrator has been appointed by the Register of Wills, that person may proceed with any action that may be deemed warranted against Lillian Saggese or Jody Ricci on behalf of the estate.

The objectors also request that Rose Calandra be surcharged $1,155.03, and thus not be paid the commission she is claiming, because of her failure to perform or understand her duties as executrix.[22] This court agrees. As a fiduciary, an executor "is required to use such common skill, prudence and caution as a prudent man, under similar circumstances, would exercise in connection with the management of his own estate." Estate of Geniviva, 450 Pa. Super. 54, 64, 675 A.2d 306, 310 (1996). A party seeking to impose a surcharge against an estate for mismanagement bears the "burden of proving the executor's wrongdoing." In this case, the testimony of Rose Calandra revealed a total ignorance of the account that had been filed under

22 Objectors' Proposed Findings of Fact, ¶¶ 1 & 2 and Conclusion of Law, ¶ 2.

her name. When asked if she was aware of the joint account for Lillian Saggese and Joseph D'Alessio, she responded "I don't know nothing about that."[23] When asked if she reviewed the account that was filed, she replied, "no."[24] When asked who went over the accounting if she did not, Ms. Calandra replied "I really don't know."[25] Moreover, the account was filed only after the beneficiaries under the will filed a petition for a citation to compel the account. Because of this lack of knowledge or participation in the administration of the estate, Ms. Calandra did not earn a commission. She is nonetheless entitled to her distributive share as an heir under the will of Joseph D'Alessio.

The Accountant states that all parties of interest had notice of the audit. According to the accountant, Pennsylvania transfer inheritance tax in the amount of $1,000 was paid on December 13, 1995 and $3,369.44 with $368.69 in interest was paid on January 19, 1998. At the April 6, 1998 Audit, an attorney for the Commonwealth of Pennsylvania made an entry of appearance claiming such Transfer Inheritance Tax as may be due and assessed without prejudice to the right of the Commonwealth to pass on DEBTS and DEDUCTIONS. Any award pursuant to this adjudication shall be subject to this claim. Because of the passage of time since the filing of the original account, by order dated September 10, 2004 counsel for the accountant was ordered to file an amended statement of distribution as well as an updated summary of account with notice to all parties in interest. At the November 2004 Audit, counsel for petitioner and counsel for the objectors appeared and no objections were raised as to the amended proposed distribution as follows:

Distributee	Proportion

23 8/5/98 N.T. at 44.

Rose Calandra	One-fourth
Rita Bove	One-fourth
Frank Trollo	One-fourth
Jeffrey D'Alessio	One-fourth

The accountant attached the following list of unpaid creditors:

Joseph J. Agozzino, Jr.	$1,778.21 (estate administration)
Rose Calandra	1,155.03 (estate administration)
Caiazzo and Caiazzo	218.75 (estate administration)
Water Revenue Bureau	153.01
City of Philadelphia	440.30
Phila. Gas Works	472.16
PECO	403.45
South Phila. Pathology Assoc.	6.26
South Phila. Cardiology Group	51.56
EEC of Phila., Inc.	16.50
Nestico, Davis, Battaglia	
South Phila. Cardiovascular Ctr.	221.69
St. Agnes Cardiology	51.56
Greater Media Cable	255.88

As previously discussed, the claim of $1,155.03 by Rose Calandra for estate administration is disallowed, although she is still entitled to her one-fourth distributive share of the estate residue. Otherwise, all other payments set forth in the petition and amended statement may be tendered.

The original account did not set forth the balance of principal or income before distribution. At the November 2004 Audit, counsel for the accountant submitted an updated "summary of account" which lists principal receipts of $36,896.87 with disbursements of $22,512.94 for a "balance available for distribution" of $14,383.93. This sum, composed as

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24 8/5/98 N.T. at 46-47.
25 8/5/98 N.T. at 47.

stated in the account, plus income or credits received since the filing thereof, subject to distributions already properly made and subject to any additional tax as may be due are awarded as set forth in the Accountant's Petition and the amendments submitted. In a separate petition dated October 29, 2004 that was submitted but not formally filed, counsel for the accountant requests a fee of $5,707.50. No objection having been filed or presented by counsel for the objectors at the November 2004 Audit, this fee is approved.

Leave is hereby granted to the accountant to make all transfers and assignments necessary to effect distribution in accordance with this adjudication.

AND NOW, this _____ day of NOVEMBER 2004, the account is confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of the issuance of the Adjudication. An Appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of the Adjudication. See Phila. O.C. Rule 7.1A and Pa. O.C. Rule 7.1. as amended, and Pa.R.A.P. 902 and 903.

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John W. Herron, J.