

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Edward Fina, Deceased
O.C. No. 1408 DE of 2005
Control No. 083495

O P I N I O N

Factual Background

Throughout his lifetime, Edward Fina (“Edward”) stashed away a horde of cash. This cash, according to one daughter,¹ flowed from Edward’s activities as a numbers banker. With the assistance of his indomitable wife, Concetta Fina (“Concetta”), Edward kept that fortune hidden. Wily, shrewd and controlling, Concetta recruited her relatives—a niece and a nephew—to open safety deposit boxes in their names so that each could hide \$500,000 in stacks of \$10,000 bills for her husband.² The Finas were equally careful not to title any real property in Edward’s name. Their family residence at 2940 South Juniper Street in Philadelphia, for instance, was initially titled in Concetta’s name alone, then Concetta switched title to her two daughters, Loretta and Lorinda in 1976, ostensibly to protect it from law enforcement agencies, only to retitle it back in Concetta’s name in 1984.³ This pattern of hiding Edward’s wealth permeated all aspects of his and Concetta’s life. The new cars Edward drove were never titled in his name. He had no bank accounts or safety deposit boxes in his name.⁴

After Edward’s death intestate, Concetta continued this pattern of hiding his assets with the assistance of her daughter Lorinda. Concetta’s niece and nephew agreed for a time to maintain the safety

¹ Ex. P-27 (12/12/06 N.T. at 13) (Loretta Del Collo).

² Concetta’s niece, Lena Barone, testified that her safety box was opened in 1984. Edward’s money was not placed in it all at once; instead, Concetta gave her a few packs at a time. 5/4/09 N.T. at 22 (Lena Barone). According to Concetta’s nephew, Arthur Carrado, she asked him to open the safety deposit box in 1987 to hold Edward’s \$500,000. 5/4/09 N.T. at 40-41 (Arthur Carrado).

³ See Ex. C-5 (1961 Juniper Street deed) & Exs. P-41(1976 deed) & P-42(1984 deed). According to Concetta and Loretta Del Collo, Edward Fina never wanted his name on anything. 5/5/09 N.T. at 37 (Concetta); 5/5/09 N.T. at 164-65 (Loretta)(title was transferred to protect property from law enforcement agencies).

⁴ Ex. P-5 (11/14/06 N.T. at 58)(Concetta)(no bank accounts in Fina’s name); Ex. P-19 (12/11/06 N.T. at 6)(Concetta)(no new automobiles in Edward’s name). Concetta testified that Edward never had a safety deposit bank in his name. 5/5/2009 N.T. at 35 & 37 (Concetta).

deposit boxes to hide Edward's cash.⁵ After Edward's death, Concetta began distributing some of his assets to relatives based on his directions or her perception of their "needs" rather than according to the rules of intestacy.⁶ A central dispute concerns what—if any--distributions Concetta made to the Del Collo family. Concetta consistently maintained that shortly after her husband's death, she summoned her daughter Loretta and her family to Concetta's Juniper Street bedroom to distribute \$100,000 to Loretta, \$20,000 to Loretta's husband Daniel Del Collo, Jr. \$20,000 to her grandson Daniel Del Collo, III and \$20,000 to her grandson Christian Del Collo. Although uncertain as to the exact date of these distributions, Concetta was adamant that they occurred shortly after her husband's death in her bedroom on Juniper Street with the entire Del Collo family amassed together.⁷ The Del Collos deny that these distributions ever occurred.⁸ Both grandsons, however, sent effusive thank you letters to their grandmother that were introduced into evidence.⁹

Although Concetta maintained that she had made no distributions to her daughter Lorinda, Concetta did make a loan with Lorinda's consent to a relative Nick Martino in the amount of \$50,000. A written agreement typed by Lorinda specified that this sum was to be repaid to an account in Lorinda's name.¹⁰ There were also transfers of assets to CDs in the joint names of Concetta and Lorinda or to Lorinda, alone. Besides these gifts to her daughters, Concetta gave gifts of Edward's jewelry to Henry Barone and Arthur Carrado.¹¹

Edward's hidden assets would probably have remained hidden if Concetta had not become embroiled in a dispute with her daughter Loretta over the ownership of interests in a family corporation,

⁵ Arthur recalled that he emptied the box in 1998 and gave its contents to Lorinda. 5/4/09 N.T. at 45-46 (Arthur Carrado). Lena kept the box for Edward's money until 1997 when she gave it to Lorinda. 5/4/09 N.T. at 12 (Lena Barone).

⁶ See, e.g., Ex. P-5 (11/14/06 N.T. at 31)(Concetta gave Dan money because he "needed" it); Ex. P-19(12/11/06 N.T. at 37 (Edward told Concetta to give Loretta \$100,000).

⁷ See Ex. P-1(11/13/06 N.T. at 66-67, 71-74); Ex. P-19 (12/11/06 N.T. at 58); 5/4/09 N.T. at 90 (Concetta). See also Del Collo Ex. 1 and Ex. P-6 (Martino loan letter).

⁸ See, e.g., Ex. P-26 (12/11/06 N.T. at 180)(Loretta denying that Concetta gave her, her husband or her sons cash shortly after the death of Edward Fina).

⁹ Ex. P-36 (Thank you card from Chris dated 6/22/96); Ex. P-29 (Thank you from Dan dated 7/1/96).

¹⁰ Ex P-1 (11/13/06 N.T. at 141-42); Ex. P-5(11/14/06 N.T. at 33-34); Ex. P-11 (12/11/06 N.T. at 71-72) (Concetta). Ex. P-20(12/11/06 N.T. at 164-66)(Lorinda).

¹¹ Ex. P-1 (11/13/2006 N.T. at 155)(Concetta).

the Findel Corporation. Convinced that Loretta was trying to cheat the estate of its share of that corporation, Concetta obtained letters of administration on May 24, 2005 to prosecute a claim on the estate's behalf as its administratrix. In August 2005, Concetta filed suit asserting that Loretta, with the help of her husband and father-in-law, had deprived the Fina Estate of its right to a one-third interest in Findel stock.¹²

Loretta retaliated by filing a petition in Orphans' Court seeking an accounting. In that petition she asserted that Edward's estate consisted not only of Findel, Inc. stock but also of real property located at 2940 South Juniper Street in Philadelphia; real property located at 8607 Winchester Avenue, Margate New Jersey; cash; certificates of deposit and other financial instruments.¹³ The petition was granted and Concetta was ordered to file an account of her administration of her husband's estate. Concetta filed an account in May 2006. Loretta filed objections seeking a surcharge and asserting that she had not received the distributions set forth in page 4 of the account.

Four days of hearings were held on the account and the objections. After weighing the evidence presented, this court issued an audit memorandum and an amended audit memorandum that returned the account unaudited because it was inherently fraudulent and could not be confirmed due to its inaccuracies and the hidden, but undetermined, assets. These audit memoranda are incorporated herein. Concetta was removed as administratrix based, inter alia, on her testimony and inadequate accounts. A major concern was the accountant's admitted failure to pay Pennsylvania Inheritance tax.¹⁴

On March 19, 2008, Frank DeSimone was appointed Administrator *d.b.n.* of Edward Fina's estate. After his appointment, Mr. DeSimone sought to restore the estate and recover its assets which had either been hidden or improperly distributed by Concetta. In a yeoman's effort, he therefore filed an omnibus petition which sought the following relief: a determination that title to 2940 South Juniper Street, Philadelphia is quieted in the name of the Estate of Edward Fina, Deceased; a turnover of assets

¹² Ex. P-1 (11/13/06 N.T. at 27-29, 30-33, 129-30)(Concetta); 4/28/08 Amended Audit Memorandum for Estate of Edward Fina, O.C. No. 1408 DE at 2005 at 1. See also Ex. P-27 (12/12/06 N.T. at 58)(Loretta).

¹³ 11/16/2005 Del Collo Petition, ¶ 6.

¹⁴ Ex. P-3 (3/20/06 Concetta Account at 3) (listing \$20,176.73 in Pennsylvania Inheritance Tax and interest "to be paid").

from respondents Loretta Del Collo, Daniel Del Collo, Jr., Daniel Del Collo, III, Christian Del Collo and Lorinda Ann Fina; a surcharge of Concetta as Administratrix for breach of fiduciary duty; and the imposition of joint and several liability against Lorinda for her participation in Concetta's breaches.¹⁵

As administrator of the Fina Estate, Mr. DeSimone emphasized his dual capacity: while "he is the personal representative of the deceased, he acts at the same time as trustee for the latter's creditors, and in that capacity is bound to protect their interests."¹⁶ Until all the estate assets are marshaled the extent of the estate's tax liability is not known. The administrator has retrieved \$133,150 from a safety deposit box in Margate, but he had not received any of the funds in certificates of deposits or accounts titled in the names of Lorinda or Concetta as outlined in Ex. P-38. He is attempting to recover the Margate property for the estate. It is not clear what claims will be made by the taxing authorities—state or federal. Although Edward Fina filed tax returns for many years, there are some years when no tax returns were filed as well as many years for which no information is available.¹⁷

Two days of hearings were held on this omnibus petition, after which the parties submitted briefs. For the reasons set forth below, the omnibus petition is granted in part, and denied in part.

Legal Analysis

A. Concetta Must Be Surcharged for the Assets She Improperly Distributed From the Estate

The administrator seeks to surcharge Concetta for the assets she improperly distributed from her husband's estate. He also seeks recovery of the estate assets on behalf of any creditors such as the IRS, the Commonwealth of Pennsylvania and the City of Philadelphia. Concetta responds that she cannot be surcharged for any breach of fiduciary duty for actions that occurred prior to her appointment as administrator of Edward's estate in 2005. This raises a critical threshold issue since many of the disputed distributions occurred during the period shortly after Fina's death.

According to the administrator, Concetta can be held liable for her disposition of Edward Fina's assets prior to 2005 as an executor *de son tort*. The liability of an executor *de son tort* has ancient roots

¹⁵ 10/23/2008 Omnibus Petition, Proposed Order.

¹⁶ 6/4/09 Administrator's Brief at 5 (quoting West v Young, 332 Pa. 248, 251-52, 2 A.2d 745, 747 (1938)).

¹⁷ 5/5/09 N.T. at 40-50 (Harvey).

in Pennsylvania law that stretch back to English law. Stockton v Wilson, 3 Pen. & W. 129, 1831 Pa. LEXIS 81 (1831)(Pennsylvania law follows English law as to the liability of an executor *de son tort*) See also Nass v. Vanswearingen, 7 Serg. & Rawle 192, 1821 Pa. Lexis 74 (1821)(distinguishing between the liability of a rightful executor and an executor *de son tort*). Under Pennsylvania law, a person “who officiously intermeddles with the assets or administration of an estate and takes on the duties of the personal representative is an executor *de son tort*.” Moore Estate, 6 Fid. Rep. 2d 229, 231 (Allegheny Cty. Common Pleas 1984)(citations omitted). For this “officious intermeddling” to render someone an “executor *de son tort*, the individual must take possession or some other form of control over the decedent’s property.” Yancy Estate, 26 Fid. Rep. 2d 511, 516 (Chester Cty. O.C. 2006). An executor *de son tort* “has all the liabilities but none of the rights of a legally appointed representative.” Moore Estate, 6 Fid. Rep. 2d at 231 (quoting Smith, Grossman and Hollinger, Pennsylvania Fiduciary Guide, 4th Rev. Ed. at 25). The scope of liability for an executor *de son tort* is measured based on the scope or extent of his intermeddling with the decedent’s “goods” or assets. Nass v. Vanswearingen, 7 Serg. & Rawle 192, 1821 Pa. LEXIS at **7-8. An executor *de son tort* may be liable to suit by a rightful administrator or by a creditor. Stockton v. Wilson, 1831 Pa LEXIS at **7.

To establish Concetta’s liability as an executor *de son tort* for the period before she obtained letters of administration, the administrator must therefore establish the extent of her intermeddling with the assets of decedent Edward Fina or the extent to which she exercised control over them. Concetta—as a matter of fact—has already admitted in her March 20, 2006 account that she began exercising control over the decedent’s assets as early as April 25, 1996. That account stated that it covered the period from April 25, 1996 to March 20, 2006 and acknowledges principal receipts on April 25, 1996. It also documents Concetta’s distributions to beneficiaries—including herself—beginning in April 1996.¹⁸

The record created during the various hearings likewise establishes that Concetta seized control of the decedent’s assets immediately upon his death both by concealing them and by making distributions according to her own perception of the recipient’s need or on instructions conveyed by her deceased

¹⁸ See Ex. P-3 (3/20/2006 Concetta Account).

husband rather than the rules of intestacy.¹⁹ By taking control over her deceased husband's assets, Concetta became liable as an executor *de son tort* to the extent of the assets she controlled. Nass v. Vanswearingen, 7 Serg. & Rawle 192, 1821 Pa. LEXIS at **7-8.

Highly credible testimony by Arthur Carrado and Lena Barone—Concetta's niece and nephew-- confirmed that after her husband's death, Concetta asked them both to continue holding their respective safety deposit boxes containing \$500,000 of Edward Fina's money. Neither expressed any doubt that the money belonged to Edward since the boxes had been opened to hide his money prior to his death.²⁰ Concetta's more rambling testimony when carefully pieced together by the Administrator established that she had cash belonging to Edward in a safety box at St. Edmond's Federal Savings Bank; that testimony, however, is too vague to establish either the amount of money in that safety deposit box or Lorinda's connection to it.²¹ Arthur Carrado as well as Concetta confirmed that \$5,000 in cash had been stashed in a basement trap at the Juniper Street property.²² In addition, Concetta had distributed clothing with a value of \$3,000 and Edward's jewelry with a value that could only be estimated as \$15,000 since Concetta failed to keep a list of the jewelry or obtain an appraisal.²³ For ease of review, the Administrator prepared the following summary of estate assets that he claims Concetta controlled:

\$ 500,000	safety deposit box held by Arthur Carrado ²⁴
\$ 500,000	safety deposit box held by Lena Barone ²⁵
\$ 200,000	safety deposit box held by Concetta and Lorinda at St. Edmonds Federal Savings Bank ("St. Edmonds") ²⁶
\$ 5,000	cash in "trap" located in the Juniper Street residence ²⁷
\$ 3,000	clothing ²⁸

¹⁹ See Ex. P-3 (3/20/06 Concetta Account); 20 Pa.C.S. § 2102.

²⁰ 5/4/09 N.T. at 11-12, 22-23 (Lena Barone); 5/4/09 N.T. at 40-46 (Arthur Carrado).

²¹ See, e.g., 6/4/09 Administrator's Brief at 8 (citing Ex. P-1 at 51, 53 & 67)(Concetta). Concetta's testimony cited by the administrator establishes that she had a safety deposit box at St. Edmond's that contained her husband's cash. It does not, however, establish how much cash was stored there or Lorinda's connection with it. In her own testimony, Lorinda testified that she shared the St. Edmond's safety deposit box with her mother but the details were too vague to support the Administrator's claim that it contained \$200,000 in Edward's cash. According to Lorinda's recollection, it contained her jewelry and certificates of deposit. See, e.g., Ex. P-20 (12/11/06 N.T. at 133-35)(Lorinda).

²² 5/4/09 N.T. at 48 (Arthur Carrado).

²³ Ex. P.-1(11/13/06 N.T. at 57-59, 152-54)(Concetta); Ex. P-18 (Oldsmobile Sales Contract).

²⁴ 6/4/09 Administrator's Brief at 8 (citing 5/4/09 N.T. (Carrado)).

²⁵ 6/4/09 Administrator's Brief at 8 (citing 5/4/09 N.T. (Barone)).

²⁶ 6/4/09 Administrator's Brief at 8 (citing Ex. P-1 at 51, 53, & 67); P-1 at 62. See note 21 and accompanying text.

²⁷ 6/4/09 Administrator's Brief at 8 (citing 5/4/09 N.T (Carrado)).

\$ 15,000	jewelry ²⁹
\$ 24,115	1996 Oldsmobile automobile ³⁰
\$1,247,115	Total unaccounted for assets as of date of death

Although the Administrator seeks a total surcharge against Concetta of \$1,247,115, this amount must be decreased by \$200,000 due to the vague evidence as to the money held in the St. Edmond's safety deposit box. The administrator, however, has presented evidence that Concetta should be surcharged for certain funds that she maintained either in her name alone, or with Lorinda, in certificates of deposit and accounts totaling \$147,232.11 as set forth in Ex. P-38.³¹ This would result in a modified total surcharge of \$1,194,347.11. The Administrator acknowledges that any surcharge against Concetta should be reduced by the \$133,150 he obtained from the Margate safety deposit box as well as by charges in Concetta's account totaling \$14,977 for such things as funeral expenses that he does not challenge. This would result in a credit of \$148,127. Concetta will therefore be surcharged for the loss to the Estate in the amount of \$1,046,220.11 plus prejudgment interest of 6% from April 25, 1996. 20 Pa.C.S. § 3544; 41 P.S. § 202.

It is well established that an executor or administrator may be surcharged for loss to the estate due to the fiduciary's failure to meet his duty of care. In re Padezanin, 2007 Pa. Super. 350, 937 A.2d 475, 485-86 (2007). Among the primary duties of an administrator is "to take custody of the estate and to administer it so as to preserve and protect the property for distribution to the proper persons within a reasonable time." Estate of Campbell, 1997 Pa. Super. LEXIS 793, 798, 692 A.2d 1098, 1101 (1997). The administrator must also pay estate bills, keep estate accounts and record and file an account when ordered to do so. In re Estate of Frey, 693 A.2d 1349, 1352-53 (Pa.Super.), app.denied, 549 Pa. 717, 701 A.2d 578 (1997); In re Istocin's Estate, 126 Pa. Super. 158, 164, 190 A. 382, 385 (Pa. Super 1937). The

²⁸ 6/4/09 Administrator's Brief at 8 (citing Ex. P-1 at 57-58)

²⁹ 6/4/09 Administrator's Brief at 8 (citing Ex. P-1 at 57-59; Ex. P-3; Ex. P-1 at 152-54).

³⁰ 6/4/09 Administrator's Brief at 8 (citing Ex. P-18).

³¹ By decree dated May 5, 2009, certain of these funds were already ordered to be turned over to the Administrator. The accounts or certificates in Concetta's name alone, or in her joint name with Lorinda include: Commerce Bank CD 109025540 (\$30,347.14); Commerce Bank Account 365137280 (\$373.32);PNC Bank CD 3102274458 (\$9,059.89);PNC Bank CD 31800275009 (\$10,000); St. Edmond's CD 12603329 (\$42,408.57);St. Edmond's CD 980029698 (\$40,000); St. Edmond's Account 1900132 (\$15,036.90);Wachovia Bank Account 1010092382615 (\$6.29). Ex. P-38.

account that Concetta filed in response to a court order as outlined in the amended audit memoranda incorporated herein was deeply flawed and inherently fraudulent. It stated, for instance, that there had been total principal receipts of \$490,000,³² which was contradicted by the highly credible testimony of Arthur Carrado and Lena Barone that there was at least \$1,000,000 in cash belonging to Edward Fina stashed away in relatives' safety deposit boxes. The account stated no inheritance tax had been paid, while conceding that \$12,795.69 in Pennsylvania Inheritance tax was due based on the sums admitted in the account.³³

Concetta treated the estate assets as if they were her own to dispose of as she thought best based either on her perceived "needs" of the recipients or instructions by her husband. This cavalier treatment of assets in utter disregard of the rules of intestacy was a profound breach of the standard of care. It is imperative that to the extent possible, the assets of the Fina estate be restored so that the new Administrator can pay any outstanding taxes or valid debts and then make distributions to beneficiaries in accordance with the law. Concetta will therefore be surcharged in the amount of \$1,046,220.11 for loss to the estate plus the prejudgment interest calculated from April 25, 1996 based on the Administrator's recommendations as modified by this court.

The administrator is also seeking to recover for the estate a social security refund belonging to Edward Fina's estate in the amount of \$35,872.70 that Concetta received on September 1, 2005 with prejudgment interest at 6% from September 1, 2005. Although Concetta testified that she believed that she was entitled to this refund as her husband's legal money, in fact, it belongs to his estate.³⁴ This \$35,872.70 surcharge is likewise approved as to Concetta.

³² Ex. P-3 (3/20/06 Concetta account) at 1.

³³ Ex. P-3 (3/20/06 Concetta Account) at 3.

³⁴ 6/4/09 Administrator's Brief at 9; Ex.P-43(Social Security Letter); Ex. P-45; 5/4/09 N.T. at 72 (Concetta); Ex. P-19 (12/11/06 N.T. at 45-48)(Concetta felt entitled to her husband's legal money which is not acknowledged in the account).

B. Loretta Del Collo, Daniel Del Collo, Jr., Daniel Del Collo, III, Christian Del Collo and Lorinda Fina Must Return the Estate Assets Improperly Distributed to Them by Concetta

To marshal the assets of the estate, the Administrator seeks the return of assets, cash or certificates of deposit that Loretta, Daniel Del Collo Jr. (“Dan”), Daniel Del Collo III (“Danny”), Christian Del Collo and Lorinda Fina received from Concetta. When this issue was first raised in the context of the account hearings, this court concluded that Loretta had not received distributions in excess of \$100,000—largely due to the inconsistencies in Concetta’s testimony.³⁵ At the hearings on the omnibus petition, however, the Administrator’s cross examination of two key witnesses—Concetta’s grandsons-- made it clear that the Del Collos had received certain cash gifts from Concetta which should be returned to the estate for its proper administration.

Section 711(17) of the PEF code gives orphans’ court mandatory jurisdiction over the “adjudication of the title to personal property in the possession of the personal representative, or registered in the name of the decedent or his nominees, or alleged by the personal representative to have been in the possession of the decedent at the time of his death.” 20 Pa.C.S. §711(17). Concetta repeatedly maintained that shortly after Edward’s death, she summoned the Del Collo family to her bedroom on Juniper Street to give them some of his money, thereby acknowledging that the cash had been in decedent’s possession at the time of his death. Pennsylvania courts have held that while orphans’ court is of limited jurisdiction, it has “full and complete power to compel a third party to restore property to the estate of a decedent if such property was at one time in the possession of the administrator or executor, or if it was in the possession of the decedent at the time of his death.” Freed Estate, 86 Pa. D & C. 592, 593, 4 Fid. Rep. 119 (Phila. O.C. 1954)(Klein, P.J.)(citations omitted). The assets of an estate do not belong to an executor; instead she holds those assets in the capacity of her deceased husband’s personal representative “for the benefit of everyone having an interest in the estate, including the Commonwealth, creditors and decedent’s next of kin.” Id. 4 Fid. Rep. at 124.

³⁵ 4/28/08 Amended Audit Memorandum at 11-12.

Pennsylvania courts have long recognized the equitable principle that where “one has in his hands money which in equity and good conscience belongs and ought to be paid to another, an action for money had and received will lie for the recovery thereof.” First National Bank v. Carroll Township, 150 Pa. Super. 241, 246, 27 A.2d 527, 530 (1942). In an ancient opinion involving the heirs of William Penn, the Pennsylvania Supreme Court applied this principle to conclude that where a devisee receives more than her share from the sale of land by mistake, there may be an action to recover it. Durdon, Executor v. Gaskill, 2 Yeates 268, 1798 Pa. LEXIS **3, **10. (Pa. 1798). See generally Caskie v. Phila. Rapid Transit, 321 Pa. 157, 161, 184 A. 17, 19 (1936)(citing Durdon as recognizing a longstanding principle of Pennsylvania law). More recently, the Pennsylvania Supreme court has recognized the general principle that “where property is fraudulently converted and diverted from its proper use, the third person into whose hands the property falls without consideration, even though he be innocent of knowledge of any wrongdoing, has the obligation to restore to its rightful owner the property thus wrongfully appropriated.”³⁶

The administrator now seeks to recover for the Estate those assets Concetta improperly distributed to her family members. Because of the complex factual record, this analysis will focus first on distributions to the four members of the Del Collo family and then to Lorinda Fina.

1. Distributions to the Del Collo Family in Concetta’s Bedroom at the South Juniper Street Property

There is sharp disagreement over a distribution of assets to the Del Collo family shortly after Edward’s death. Concetta consistently maintained in her testimony at various hearings that shortly after Edward’s death, she summoned her daughter Loretta’s family to her bedroom at the Juniper Street property to distribute large sums of cash to Loretta, her husband Daniel, and her two grandsons—Danny

³⁶ Brubaker v. Berks County, 381 Pa. 157, 161, 112 A.2d 620, 622 (1955). To illustrate this general principle, the Brubaker court cited the following example which is apposite to the present issue: “Illustration No. 5, under Sec. 128, of *Restatement, Restitution*, is particularly a propos here: A is the beneficiary of a trust of share certificates. B is the trustee. In violation of his fiduciary duty, B gratuitously transfers the certificates to C who has no notice of A’s interest. B absconds, C refuses to return the certificates upon demand. C, as well as B, is under a duty of restitution to A.” Id.

and Christian. Although unsure of the exact date, Concetta consistently recalled that shortly after her husband's death:

I first handed Dan two packs of \$10,000, Danny two packs of \$10,000, Loretta ten packs of \$10,000, and Chris two packs of \$10,000. Dan responded by saying, "You're giving this to me?" and little Dan approached the bed to pick his up, and his father said, "Oh, look at Danny. He's already picking it up." Loretta was speechless, and Chris was shocked. This is all I could say to you.³⁷

She vividly described the location of each of her family members as she distributed their gifts:

I brought them up to my bedroom, and I definitely remember Dan, Loretta and Chris standing by the window, and Dan sitting at my left hand side. I had sixteen bundles of \$10,000 in cash. Each bundle was marked \$10,000, which I did not count. I just knew my husband marked it that way.³⁸

This testimony confirmed that the money Concetta gave to the Del Collo family came from her husband's estate.³⁹ Concetta was questioned about this event numerous times at the hearings on November 13, 2006,⁴⁰ the hearing on December 11, 2006,⁴¹ as well as during the later hearings on the administrator's omnibus petition.⁴² Each time her description of the location for the distributions, the entire family amassed to share in the cash gifts, and the size of the gift was consistent.

Each of the Del Collos denies that they received these distributions. Loretta denied that her mother gave her \$100,000 at the Juniper Street bedroom and maintained that neither her sons nor her husband were given those sums in her presence.⁴³ Unfortunately for her credibility, both of her sons sent thank you letters to their grandmother which were introduced into evidence. In a letter dated July 1, 1996, Danny wrote to Concetta:

I am writing to thank you for both your amazing generosity concerning your gift and also for letting me and Chris stay with you last weekend. The French toast and the five star accommodations allow us to sail better and faster than usual. I am still in shock due to your gift, and since that day, Chris and I have been researching and brainstorming ideas as to how to invest it wisely, and make it grow. Again, it is your gift that has made our lives easier and less anxious and we appreciate the fact that you gave your gift while still alive so that you too can share in our happiness.⁴⁴

³⁷ Ex. P-1 (11/13/06 N.T. at 71)(Concetta).

³⁸ Ex. P-1(11/13/06 N.T. at 66-67) (Concetta).

³⁹ Ex. P-1 (11/13/06 N.T. at 66-67, 77); P-19 (12/11/06 N.T. at 58) (Concetta).

⁴⁰ Ex. P-1 (11/13/06 N.T. at 66-67, 71-74) (Concetta).

⁴¹ Ex. P-19 (12/11/06 N.T. at 58)(Concetta).

⁴² 5/4/09 N.T. at 90 (Concetta). See also Ex. Del Collo 1.

⁴³ See, e.g., P-26 (12/11/06 N.T. at 180) (Loretta); P-27 (12/12/06 N.T. at 62)(Loretta).

⁴⁴ Ex. P-29 (Danny Del Collo).

With similarly enthusiastic gratitude, Christian wrote in a June 22, 1996 note:

Wow! I am so grateful! Grandmom thank you so much for your surprising and generous gift. I am extremely excited and I have made many plans on what to do to make my gift work for me. While in your room that night, I had no idea that you would share your wealth with us. I was astonished when you brought out two hand fulls of green cheer!

Some ideas that I hope to act upon are: starting a sailing business, investing in certain stock none of which I know anything about—but I'll learn quickly-and developing a water ice stand. Do you have any ideas?

Grandmom your generosity has set me a step ahead. Part of my future success comes from your love and care.⁴⁵

In Concetta's mind, these thank you notes were in response to the gifts she made in her Juniper street bedroom.⁴⁶ But when her two grandsons were questioned about those gifts during the omnibus petition hearings, Christian initially disputed Concetta's testimony and denied that he had received cash from his grandmother shortly after Edward's death:

Q: I asked you earlier whether you were aware of certain testimony by your grandmother. One of the things she testified to was that within a few weeks or so after your grandfather's death in her bedroom in her house on Juniper Street, she gave you and your brother Daniel \$20,000 cash. Are you aware that that's her testimony?

A: Yes.

Q: Did you receive that money?

A: No.

Q: That never happened?

A: Never happened.

Q: Let's turn to Ex. P-36, specifically the second page. This is the thank you card that you wrote to your grandmother June 22nd 1996; is that correct?

A: Yes.

Q: And that's your handwriting, correct?

A: Yes.

Q: And you refer to what you say to your grandmother was, "The surprising and generous gift." Do you see that, sir?

A: I do.

Q: And then it refers to, "While in your room that night, I had no idea that you would share your wealth with us." What are you referring to there, sir?

A: I was referring to an evening that I believe it was at the shore. It was a regatta weekend, a sailboat weekend; we race sailboats, and we were about ready to go to sleep and my grandmother called us in to her room, and she handed us some cash, my brother and I.

Q: So your grandmother did hand you some cash after your grandfather's death; is that correct?

A: Yes.

Q: How much did she hand you?

A: I believe it was a few hundred dollars.

⁴⁵ Ex. P-36 (Christian Del Collo)(emphasis added).

⁴⁶ Ex. P-1 (11/13/06 N.T. at 125-26)(Concetta).

Q: And so where you're referring to having no idea that your grandmother would share her wealth with you, you were referring to this few hundred dollars, is that your testimony?

A: Yes.

Q: Well, your next sentence says that you, "were astonished when she brought out two handfuls of green cheer." Is that the couple of hundred dollars that you were referring to, sir?

A: Yes.

Q: And you were going to take that couple of hundred dollars and you were thinking about starting a sailing business. That's what it says in the note, right?

A: Yes.

Q: You were going to invest it in stocks?

A: Yes.⁴⁷

This testimony lacked credibility for at least three reasons. First, after initially denying that he had received cash from his grandmother, Christian contradicted himself to admit that he received cash in Concetta's bedroom. Secondly, the note was extravagant. Not only did it express gratitude to Concetta for sharing her "wealth" with "two hand fulls of green cheer," but it suggested Christian's ambitious plans for investing the gift, which are inconsistent with a gift of a few hundred dollars. Finally, his testimony was effectively impeached by prior deposition testimony in which Christian stated he was unable to recall any details about the gift.⁴⁸

Likewise, the testimony by Daniel Del Collo, III (Danny) concerning Concetta's cash gift to him after his grandfather's death lacked credibility. First, he denied receiving such a gift; then he minimized it:

Q: Now, did you receive cash from your grandmother in the weeks after your grandfather's death?

A: No.

Q: No, you did not receive it, or no, you don't recall?

A: No. I did not receive cash the weeks after my grandfather's death from my grandmother.

Q: Well, let's go to Exhibit P-29. Do you recognize Exhibit P-29 as a copy of a thank you card you sent to your grandmother dated July 1st, 1996?

A: Yes.

Q: And this is your handwriting, correct?

A: Yes.

Q: Now, just toward the bottom third of the left-hand side of the page, it says, "I am still in shock due to your gift, and since that day, Chris and I have been researching and brainstorming ideas as to how to invest it wisely and make it grow." What were you referring to there, sir?

A: My grandmother had given me and my brother a gift over the weekend. It was in late June and I was telling her all the things that you tell your grandmother when you receive a gift.

⁴⁷ 5/5/09 N.T. at 106-108 (Christian Del Collo).

⁴⁸ 5/5/09 N.T. at 117-18 (Christian Del Collo). See Ex. P-32 (Christian Del Collo 10/18/06 depo. excerpts at 91-92).

Q: What gift is it that your grandmother gave you that you're referring to in this letter?
A: It was a couple of hundred dollars in cash.
Q: So you did receive a couple of hundred dollars in cash from your grandmother after your grandfather's death?
A: I did.
. . . .
Q: So when Christian testified that your grandmother came out with two fistfuls of cash, this is the time that you received some money from your grandmother, correct?
A: Yes
Q: How much did you receive?
A: It was a couple of hundred of dollars.
. . . .
Q: It was that couple of hundred of dollars that you were in shock from receiving, right?
A: You know it's something that I told my grandmother that I was in shock. Whether I was—I was fortunate and happy to get the money but perhaps the word "shock" was an exaggeration in a letter to my grandmom.⁴⁹

This disjuncture between the thank you note's statement that Concetta's gift left him in "shock" and Daniel's subsequent minimization of Concetta's gift as several hundred dollars fatally undermined his credibility especially when impeached by prior deposition testimony denying memory of the details of the gift that inspired his note.⁵⁰ The testimony of both Christian and Daniel appeared rehearsed, contrived and untruthful.

By impeaching the testimony of Loretta's sons with their thank you notes and deposition testimony, the Administrator effectively impeached Loretta's testimony that neither she nor her husband or sons had received the cash gifts Concetta described as occurring in her Juniper Street bedroom. Based on this record, therefore, Loretta will be required to return \$100,000 to the estate; Christian, Daniel Del Collo III and Daniel Del Collo, Jr. will each be required to return \$20,000 to the Estate. The administrator therefore properly identified these assets that must be returned to the estate.⁵¹

⁴⁹ 5/5/09 N.T. at 122-25 (Daniel Del Collo, III).

⁵⁰ See 5/5/09 N.T. at 126-27 (Daniel Del Collo, III); Ex. P-28 (Daniel Del Collo III 10/17/06 depo. at 49). At the time of his deposition, Daniel had no recollection of writing this note.

⁵¹ The administrator identifies these sums as having been distributed to each of the 4 Del Collos shortly after Edward's death. 6/4/09 Administrator's Brief at 11-12.

a. The Record Supports Claims that Concetta Gave Additional Gifts to Her Grandsons from the Fina Estate

The \$20,000 gifts that Concetta gave her grandsons in her Juniper Street bedroom were not the only gifts she gave them. The administrator presented testimony and receipts from St. Edmond's Bank to establish that Concetta gave her grandson Daniel four certificates of deposit from estate assets. When he cashed them in, Daniel received \$10,669.28.⁵² Christian Del Collo acknowledged that his grandmother had purchased certificates of deposit and an IRA for him with assets from Edward's estate totaling \$19,000.⁵³ In total, therefore, Concetta improperly distributed \$39,000 to Christian and \$30,699.28 to Daniel from Edward's estate. As the Administrator urges, these sums "in equity and good conscience" must be returned to the estate.⁵⁴

b. The Record Does Not Support Claims of Certain Gifts to Loretta and Her Husband Daniel

The Administrator seeks to recover certain other sums of money from Loretta and her husband which Concetta allegedly gave to them. During the hearings, for instance, Concetta claimed that during a visit to Loretta's Moorestown New Jersey home, she gave Loretta \$20,000 in cash from the Fina Estate for kitchen renovations and for tuition for her grandson's (i.e. Chris) final year at high school.⁵⁵ Loretta emphatically denied receiving this \$20,000.⁵⁶ Concetta concedes that she did not document this gift in her account.⁵⁷ In light of the conflicting testimony by highly interested parties, a lack of independent documentary support, and Concetta's concession about her failure to include this claim in the account, this claim for \$20,000 cannot be recognized. Similarly, the Administrator seeks to recover \$11,000 that Concetta allegedly gave to Loretta from the Fina Estate to pay for her attorney.⁵⁸ Concetta's account

⁵² Ex. P-30. See also 5/5/09 N.T. at 121-22 (Daniel Del Collo, III). Daniel used this money to pay a portion of his law school tuition.

⁵³ See 5/5/09 N.T. at 101-05 (Christian). See also Ex. P-33 (St. Edmond's certificates of deposit for \$12,548.30); Ex. P-34 (\$1,000 IRA); Ex. P-35 (\$5,499 PNC certificate of deposit); Ex. P-1 (11/13/06 N.T. at 84-86)(Concetta).The Administrator states in his brief that Concetta purchased 2 CDs for \$5,000 for Christian at St. Edmond's , but Ex. P-33 lists a value of \$12,548.30 as confirmed during the hearing. See 5/5/09 N.T. at 102 (Christian Del Collo). Hence, Christian will be required to return a total of \$39,000.

⁵⁴ 6/4/09 Administrator's Brief at 11.

⁵⁵ 6/4/09 Administrator's Brief at 11; See also Ex. P-1(11/13/06 N.T. at 103-04, 108, 110)(Concetta)

⁵⁶ Ex. P-26 (12/11/06 N.T. at 181)(Loretta).

⁵⁷ Ex. P-1 (11/13/06 N.T. at 109)(Concetta)(conceding that "gift" was not set forth in her account).

⁵⁸ 6/4/09 Administrator's Brief at 11.

states that \$10,000 was given to Loretta on April 28, 1999 with an additional \$1,000 on July 1, 1999.⁵⁹ The check, however, bore the notation “loan,” while Concetta conceded that at least part of it had been repaid; Loretta therefore convincingly established that this “gift” had in fact been a loan that was repaid.⁶⁰

There is no dispute, however, that Concetta gave Loretta Edward’s 1996 Oldsmobile,⁶¹ which the Administrator established with documentary evidence had a value of \$24, 115.⁶² Loretta will therefore be required to return that amount to the estate as well.

The Administrator also seeks to recover additional sums from Loretta’s husband, Daniel Del Collo, Jr. He relies on Concetta’s testimony that she gave Dan \$50,000 for kitchen renovations.⁶³ Concetta also testified that Dan returned at least \$42,000.⁶⁴ Loretta recalled that Concetta had given Dan money to hold in an escrow account to hold for Concetta and all of that money was returned.⁶⁵ There is no indication in Concetta’s formally filed account of this distribution of \$50,000 to Daniel Del Collo, Jr.⁶⁶ In light of this conflicting testimony and dearth of documentation, this claim for the remaining \$8,000 from Concetta’s alleged gift of \$50,000 to Dan must be denied.

2. Lorinda Relinquished Any Interest in Certain Accounts and Certificates of Deposit Bearing Her Name Sought by the Administrator for the Edward Fina Estate

a. *The Mélange of Accounts in the Names of Lorinda or Concetta Totaling \$259,404.72 as Set Forth In Ex. P-38 Belong to the Estate*

After her husband’s death, Concetta began adding her daughter Lorinda’s name to various accounts and certificates of deposit. She testified that in 1999, she added Lorinda’s name to the Margate

⁵⁹ Ex. P-3 (3/20/06 Concetta Account) at 4.

⁶⁰ Ex. P-27 (12/12/06 N.T. at 4-5 (Loretta); Ex. P-4 (\$10,000 check to Mary Vidas from Concetta with notation “loan to Loretta”). Concetta conceded, in fact, that she received money back from the law firm which she failed to note in the account because “I just didn’t remember it. That’s all.” Ex. P-1 (11/13/06 N.T. at 115) (Concetta)

⁶¹ Ex. P-1 (11/13/06 N.T. at 133)(Concetta)(describing the Oldsmobile as belonging to Edward though titled in her name).

⁶² See, e.g., 6/4/09 Administrator’s Brief at 8; 8/5/09 Del Collo Brief at 5 (conceding receipt of the Oldsmobile); Ex. P-18(sales contract for Oldsmobile at \$24,115).

⁶³ 6/4/09 Administrator’s Brief at 11 (citing Ex. P-1 (11/13/06 N.T. at 30-32)(Concetta)). This cite should have been to Ex. P-5.

⁶⁴ Ex. P-5 (11/14/06 N.T. at 31-32) (Concetta).

⁶⁵ Ex. P-27 (12/12/06 N.T at 8-10)(Loretta)).

⁶⁶ See Ex. P-3(3/20/06 Concetta Account).

safety deposit box that contained estate money.⁶⁷ In 1999, Concetta purchased or transferred a \$30,000 certificate of deposit to Lorinda.⁶⁸ After Edward's death, Concetta emphasized, she had control over his money. No one else had control.⁶⁹ Concetta's testimony as to her transfers of funds in and out of certificates is frequently confusing. Fortunately, the Administrator presented an exhibit, P-38, prepared by Concetta's former counsel, summarizing the bank accounts sought by the estate.⁷⁰ The list consists of twelve certificates of deposit or accounts in four banks in the individual or joint names of Concetta and Lorinda with total assets of \$259,404.72. During the hearing on the omnibus petition, Lorinda made no claim to any of those accounts. Instead, she identified the following accounts as belonging to the Fina Estate:

\$30,347.14	Commerce 109025540 (joint names of Lorinda & Concetta)
\$ 373.32	Commerce 365137280 (joint names of Lorinda & Concetta)
\$10,000.00	PNC 31800275009 (joint names of Lorinda & Concetta) ⁷¹

Lorinda conceded she had contributed no money to the following accounts and had no interest in them:

\$23,296.10	St. Edmond's 12603182 (Lorinda's name, alone)
\$16,442.36	St. Edmond's 12604838 (Lorinda's name, alone) ⁷²

Finally, she disavowed any claim to the following accounts:

\$42,434.15	St. Edmond's 12710789 (Lorinda's name alone) ⁷³
\$30,000.00	St.Edmond's 12713457 (Lorinda's name, alone)
\$ 6.29	Wachovia 1010092382615 (joint, Concetta & Lorinda) ⁷⁴

⁶⁷ Ex. P-1 (11/13/06 N.T. at 104-06 & 140-41)(Concetta). Concetta testified that at some point she put the balance of the Estate money that had been located in her house in the Margate safety deposit box. Ex. P-19 (12/11/06 N.T. at 27) (Concetta).

⁶⁸ Ex. P-1 (11/13/06 N.T. at 143); Ex. P-5 (11/14/06 N.T. at 41); Ex. P-19 (12/11/06 N.T. at 52-53) (Concetta).

⁶⁹ Ex. P-19 (12/11/06 N.T. at 70-71) (Concetta).

⁷⁰ 5/5/09 N.T. at 91- 92 (Mannion).

⁷¹ 5/5/09 N.T. at 60-61 (Lorinda) & Ex. P-38. Lorinda did not give a chance to answer a question as to PNC account ending in 4458 (\$9,059.89) but the chart (Ex. P-38) indicates this account belonged to Concetta. Concetta specifically conceded that the \$30,000 in the Commerce 5540 Account came from Edward Fina's assets. 5/4/09 N.T. at 67 (Concetta).

⁷² 5/5/09 N.T. at 62 (Lorinda) & Ex. P-38.

⁷³ 5/5/09 N.T. at 63 (Lorinda); Ex. P-38; Ex. P-8(St. Edmond's Account ending in 10789).

⁷⁴ 5/5/09 N.T. at 62-63 (Lorinda).

In total, Lorinda disavowed any interest in certificates of deposit and accounts totaling \$152,899.36 that were either in her name alone or her name together with Concetta. Lorinda did, however, claim ownership of the assets set forth in Ex. P-45,⁷⁵ which counsel for the administrator stated was not claimed by the Estate.⁷⁶ Based on Lorinda's forthright concessions and admissions by Concetta,⁷⁷ the accounts or certificates of deposit in Lorinda's name or in her joint name belong to the estate. By decree dated May 5, 2009, TD Bank, a/k/a Commerce Bancorp, PNC Bank and St. Edmonds Federal Savings Bank were ordered to release designated funds to Frank DeSimone, Administrator of the Estate of Edward Fina.⁷⁸

The money that was placed in the Wachovia Safety deposit box in Margate in the joint names of Concetta and Lorinda was inventoried by counsel for the Administrator on March 20, 2008. He testified that the box contained \$133,150 organized in 13 separate packets of cash in various denominations.⁷⁹ Since the administrator has already retrieved this asset for the Estate, he will credit the surcharge against Concetta for this amount.⁸⁰

b. The \$50,000 Loan to Nick Martino that Was Repaid to Lorinda's Account Is An Asset of the Estate

Concetta testified that she made a loan of \$50,000 to a relative, Nick Martino, from her husband's estate.⁸¹ Before giving the loan to Nick, Concetta had obtained Lorinda's consent; in fact, Lorinda typed the promissory note that the loan would be repaid into Lorinda's account.⁸² Concetta explicitly

⁷⁵ 5/5/09 N.T. at 85-86 (Lorinda).

⁷⁶ 5/5/09 N.T. at 90 (Mannion).

⁷⁷ See, e.g., 5/4/09 N.T. at 67; Ex. P-1 (11/13/06 N.T. at 143) (Concetta).

⁷⁸ More specifically, the May 5, 2009 decree ordered that the following be turned over to Frank DeSimone, Administrator: TD Bank, a/k/a Commerce Bankcorp CD No.109025540; TD Bank, a/k/a Commerce Bankcorp, Account No. 365137280; PNC Bank Certificate of Deposit No. 3100274458; PNC Bank Certificate of Deposit No. 31800275009, and St Edmond's Certificate of Deposit No. 980029698.

⁷⁹ 5/5/09 N.T. at 41-42 (Harvey).

⁸⁰ 6/4/09 Administrator's Brief at 8.

⁸¹ Ex. P-1 (11/13/06 N.T. at 141-42) (Concetta).

⁸² Ex. P-20 (12/11/06 N.T. at 164-66)(Lorinda)

characterized this \$50,000 as Lorinda's share of the estate.⁸³ This loan, likewise, belongs to the Estate as Lorinda concedes in her brief.⁸⁴

C. The Request That Lorinda Be Held Jointly and Severally Liable for Concetta's Breach of Fiduciary Duty Is Too Broad and Draconian Based on the Record

Even though Lucinda has relinquished any claim to bank accounts or certificates of deposit totaling \$152,899.36 that were in her name alone or jointly with Concetta,⁸⁵ the Administrator requests that she be held jointly and severally liable with Concetta, which would be in the adjusted amount of \$1,046,220.11 plus prejudgment interest. There are two alternative theories the administrator presents to support this liability. First, he argues that Lorinda can be held jointly liable because she participated in Concetta's breach of trust. Alternatively, he argues that Lorinda can be held jointly liable as an executor *de son tort*.

1. Lorinda Is Not Jointly and Severally Liable With Concetta for Breach of Trust

According to the administrator, Lorinda can be held jointly and severally liable with Concetta because she participated in a wrongful breach of trust. To establish a basis for this claim of breach of trust, the administrator invokes a treatise-- George G. Bogert, The Law of Trusts and Trustees (Rev. 2d ed. 1983)—and Restatement (Second) of Trusts Section 326. Section 326 of the Restatement (Second) of Trusts provides: "A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." No Pennsylvania precedent is presented, however, that adopted Section 326 or applied it to facts analogous to the present case.⁸⁶

Instead, the administrator relies on 2 cases that are distinguishable in fact and legal principle. He first invokes Pa. Co. for Ins. v. Ninth Bank & Trust Co., 306 Pa. 148, 158 A. 251 (1932) as a case where a

⁸³ Ex. P-5 (11/14/06 N.T. at 33-34); Ex. P-19 (12/11/06 N.T. at 71-72) (Concetta).

⁸⁴ 8/7/09 Lorinda Brief at 1 ("Lorinda concedes that the loan from Nicky Martino is an asset of the Estate").

⁸⁵ See Ex. P-38; 5/5/09 N.T. at 59-60 (Lorinda).

⁸⁶ See, e.g., 6/4/09 Administrator's Brief at 14-15; 8/14/09 Administrator's Brief at 5-6.

bank “was held liable for participation in a breach of trust.”⁸⁷ The basis for the bank’s liability is not section 326 of the Restatement but the “well settled”—but narrower—principle that “one who accepts a check drawn on a trust account to the order of the trustee in payment of a personal debt of the trustee is liable to the beneficiary if the trustee has committed a breach of his obligation.” Pa. Co. for Ins. v. Ninth Bank, 306 Pa. at 152, 158 A. at 252. In that case, a trustee of an estate who was also Vice President of the bank wrote a check that on its face bore the name of a decedent’s estate to cover an overdraft in the trustee’s own account. The court found the bank liable both in its capacity as a creditor and a depository for accepting the check drawn from a trust account and crediting it as payment of the trustee’s personal debt to the bank. The other case the Administrator relies on, Zagrans v. Cohn, 404 Pa. 315, 317, 172 A.2d 291 (1961), likewise does not cite the Section 326 but instead emphasizes that for “more than half a century this court has invariably held that where a trustee takes title to trust property in his own name as an individual, the cestui que trust has the option to accept the investment or require the trustee to account for the purchase money with interest.” In Zagrans the sellers of a taproom who knew that the trustee/buyer used trust funds to purchase the property were held liable for breach of trust. Their liability was limited, however, to damages measured by the checks they accepted in payment of the taproom. Id., 404 Pa. at 318-19.

These narrow precedents hardly support the broad liability the Administrator seeks to impose on Lorinda. Instead of blurring their roles in the administration of the Fina estate, it is necessary to step back and focus on each. As the administrator of her husband’s estate, it was Concetta who was “a fiduciary no less than is a trustee, and as such, primarily owes a duty of loyalty to his trust.” In re Noonan’s Estate, 361 Pa. 26, 30, 63 A.2d 80,83 (Pa. 1949). As an administrator, she had a duty to pay estate taxes, and her failure to do so can result in personal liability. Estate of Geniviva, 450 Pa. Super. 54, 64, 675 A.2d 306, 310-11(1996). As the administrator of Edward’s estate, Concetta had the responsibility to take custody of the estate to administer it so that there would be “distribution to the proper persons within a reasonable

⁸⁷ 8/14/09 Administrator’s Brief at 5.

time.” Estate of Campbell, 692 A.2d at 1101. It was Concetta’s duty to pay estate bills and keep thorough records. In re Estate of Frey, 1997 Pa. Super. LEXIS 1276, 693 A.2d at 1352-53.

Concetta failed to fulfill her responsibilities in numerous ways that were outlined in this court’s audit memorandum and amended audit memorandum based upon consideration of the account she filed and the objections thereto. Concetta failed to pay Pennsylvania Inheritance Tax for the estate.⁸⁸ She understated that principal receipts in the account as only \$490,000 at the time of Edward’s death, despite various safety deposit boxes holding more than one million dollars in cash. She admitted that figures set forth in her account were inaccurate.⁸⁹ She never opened a bank account for the estate.⁹⁰ She distributed estate assets as she saw fit rather than in accordance with the law of intestacy. She kept no records—and in fact stated that she did not even count—cash assets that were being held by Arthur Carrado and Lena Barone.⁹¹

As an intestate heir to her father’s estate, Lorinda bore none of the specific duties of the administratrix for administering her father’s estate nor can she be faulted with Concetta’s failures—or refusal-- to keep accurate records, pay the requisite taxes or make the proper distributions. Nonetheless, the Administrator seeks to impose joint liability on Lorinda because she helped Concetta conceal Edward’s cash assets in safety deposit boxes, she helped Concetta conceal the origins of cash by depositing cash in her personal account and then withdrawing it; she held title to CDs that were purchased with estate assets; and she held title together with Concetta to two safety deposit boxes that held estate cash.⁹² If liability for breach of trust is premised on Lorinda’s actions in helping Concetta conceal Edward’s assets, then logically it must also extend to Arthur Carrado and Lena Barone who opened safety deposit boxes in their own names to hide Edward’s cash over the course of many years. If general

⁸⁸ Ex. P-3 (3/20/06 Concetta Account at 3) (Pennsylvania Inheritance Tax **yet to be paid** \$12,795.69).

⁸⁹ See, e.g., Ex. P-1 (11/13/2006 N.T. at 36)(Concetta)(responding when asked about the \$490,000 listed as principal receipts: “well, it was—I thought between \$475,000 and \$490,00, so I’m assuming”)

⁹⁰ Ex. P-1 (11/13/06 N.T. at 116-17) (Concetta).

⁹¹ Ex.P-1 (11/13/06 N.T. at 43, 106, 144-45)(Concetta).

⁹² 8/14/09 Administrator Brief at 4.

liability for breach of trust can be imposed on Lorinda for accepting certificates of deposits from estate assets, then logically general liability would also have to extend to the Del Collos.

Rather than extend a general liability to Lorinda on a breach of trust theory treating her as a co-equal to Concetta in malfeasance, the better approach is suggested by Zagrans that would limit her liability to the actual estate assets she received in the form of certificates of deposits or accounts. These certificates and accounts have already been conceded by Lorinda.

2. Lorinda Cannot Be Held Jointly and Severally Liable as an Executor *De Son Tort*

Alternatively, the Administrator argues that Lorinda can be held jointly liable with Concetta as an executor *de son tort* because “she officiously intermeddled with the assets or administration of the Estate, taking on duties of a personal representative.”⁹³ As previously discussed, for this officious meddling to render someone liable as an executor *de son tort*, “the individual must take possession or some other form of control over the decedent’s property.” Yancy Estate, 26 Fid. Rep. 2d at 516. Significantly, the scope of liability for an executor *de son tort* is measured based of the scope or extent of his intermeddling with the decedent’s assets. Nass v. Vanswearingen, 7 Serg. & Rawle at 196, 1821 Pa. Lexis at **7.

It was Concetta, not Lorinda, who took control over the assets of Edward Fina’s estate. As Concetta testified, she—and no one else—had control over Edward’s money.⁹⁴ She recruited her niece and nephew to open safety deposit boxes to hide her husband’s cash assets. She instructed Lorinda to make the deposits and withdrawals of estate cash into Lorinda’s personal accounts as a means of laundering the money. She decided who would receive what and when from the estate. Lorinda clearly helped Concetta maintain her control over Edward’s assets—but so did Concetta’s niece and nephew. Concetta’s sway over Lorinda was deeply rooted in their familial relationship. Lorinda, who never married or had children, lived with her mother.⁹⁵ Since 1999, Lorinda cared for Concetta on a regular basis. She transported Concetta to her doctor appointments; she took her to banks and markets; she ran Concetta’s errands and purchased her money orders; she paid Concetta’s bills with Concetta’s funds.

⁹³ 8/14/09 Administrator’s Brief at 6.

⁹⁴ Ex. P-19 (12/11/06 N.T. at 70)(Concetta).

⁹⁵ Ex. P-20(12/11/06 N.T. at 154)(Lorinda).

According to Lorinda, her sister Loretta has not been involved in this care. In fact, they have lost contact since 2002.⁹⁶

The interrelated financial arrangements of Lorinda and Concetta were complex and not always clear. Concetta titled certain accounts or certificates of deposit at St. Edmond's bank in Lorinda's name even though Lorinda had no personal interest in them. There were other accounts in which both Lorinda and Concetta had an interest.⁹⁷ Lorinda shared a safety deposit box with her mother at the Wachovia Bank in Margate that became a repository for the balance of Edward's estate.⁹⁸ She also shared a safety deposit box with her mother at St. Edmond's bank, which was closed in 2005.⁹⁹ The prime mover in all the openings and closings of accounts based on the record was Concetta.

Lorinda was aware that her cousins Arthur Carrado and Lena Barone kept a safety deposit box to hold her father's cash, but she denied giving Arthur or Lena funds to place in the boxes.¹⁰⁰ Although she had access rights to Lena's box, Lorinda did not have the key.¹⁰¹ She conceded that the money in those safety deposit boxes belonged to her father's estate and that she went to the bank to retrieve the contents and deliver it to her mother.¹⁰² She speculated that the money was thereafter placed in the Wachovia safety deposit box at the shore.¹⁰³ Based on the credible testimony of Lena, Arthur, Lorinda—and even Concetta—Lorinda served as a conduit for Concetta's actions. She was a bailee not a co-conspirator.

On various occasions, Lorinda conceded, she had made deposits of sums of money into an account, only to withdraw it a few days later.¹⁰⁴ When asked to explain the reason for these deposits and withdrawals, Lorinda testified that she was following her mother's directions without questioning them. She stated did not realize that the purpose of these entries and withdrawals was to "clean" the cash

⁹⁶ Ex. P-20 (12/11/06 N.T. at 157-58)(Lorinda).

⁹⁷ Ex. P-20 (12/11/006 N.T. at 109-10)(Lorinda).

⁹⁸ Ex. P-20 (12/11/06 N.T. at 124 (Lorinda).

⁹⁹ Ex. P-20 (12/11/06 N.T. at 133-35)(Lorinda).Lorinda could not recall when this box was opened, but believed it contained jewelry, CDs but no cash.

¹⁰⁰ Ex. P-20 (12/11/06 N.T. at 138-39)(Lorinda).

¹⁰¹ Ex. P-20 (12/11/06 N.T. at 139-40)(Lorinda).

¹⁰² 5/5/09 N.T. at 53-55 (Lorinda).

¹⁰³ 5/5/09 N.T. at 66 (Lorinda).

¹⁰⁴ Ex. P-20 (12/11/06 N.T. at 113-120)(Lorinda).

although she realized that the money came from one of the safety deposit boxes.¹⁰⁵ As she explained, “my mother is a controlling person. We have had arguments over her ability or inability to control me. I don’t agree with everything she says and does; however, I’m guilty of, I guess, not being my own person.”¹⁰⁶ Lorinda consistently—and convincingly-- maintained that Concetta was a very strong willed and independent person who could not be influenced by her daughter. Lorinda maintained that she never had any control or possession of the assets of her father’s estate. She never directed her mother to take any actions regarding those actions.¹⁰⁷ Concetta likewise confirmed Lorinda’s passive or submissive role by observing that Lorinda “never rebelled.”¹⁰⁸

Based on the testimony of both Concetta and Lorinda, it is clear that there was only one executor *de son tort* who exercised control over the Edward Fina Estate and that was Concetta. Lorinda was an accomplice who has agreed to turn back to the estate those assets that she improperly received from her mother.

D. The Evidence Was Inconclusive That the 2940 South Juniper Street Property Should be Considered an Asset of Edward Fina’s Estate

The administrator seeks a determination that the South Juniper Street property should be considered an asset of the Estate of Edward Fina. Beginning in 1961, the Fina family resided at 2940 Juniper Street as their family residence. When the property was purchased in 1961 for \$12,000, the deed was in Concetta’s name alone.¹⁰⁹ In 1976, title to this property was transferred to Lorinda and Loretta, and then back again to Concetta. In 1984, title was transferred back to Concetta.¹¹⁰

Upon review of Concetta’s account, the objections thereto, and the subsequent hearing, this court issued an audit memorandum that the Juniper street property should be considered an asset of Edward Fina’s estate since “the purchase of 2940 South Juniper Street property was part of a concerted scheme

¹⁰⁵ 5/5/09 N.T. at 57-58 (Lorinda).

¹⁰⁶ 5/5/09 N.T. at 58(Lorinda).

¹⁰⁷ Ex. P-20 (12/11/06 N.T. at 156) (Lorinda)

¹⁰⁸ Ex. P-1 (11/13/06 N.T. at 140)(Concetta).

¹⁰⁹ Ex. C-5.

¹¹⁰ Exs. P-41 & P-42.

by Concetta to conceal the funds amassed by Edward Fina in an effort to defraud creditors, rightful heirs and taxing authorities.”¹¹¹ On further reflection, however, this court issued an Amended Audit Memorandum that concluded that it was for the substitute administrator to make the initial determination as to the status of the Juniper street property. This was because, inter alia, the factual record was incomplete; for instance, the original deed listing Concetta as the grantee of that property for \$12,000 had not been presented at the hearing on the objections to the account.¹¹²

The administrator now takes the position that the Juniper street property should be considered part of the Edward Fina estate because it “was purchased with Edward Fina’s funds” but titled in “others’ names to conceal the origin and nature of his assets.”¹¹³ There was, however, no explicit evidence presented at the hearing on the omnibus petition to establish that Edward’s funds were used to purchase the property except for vague testimony by Loretta—a highly interested party.¹¹⁴ Moreover, evidence presented by the administrator ultimately bolstered Concetta’s contrary position.

Concetta consistently asserted that she paid for the property with the money she saved while working from the time she was eighteen.¹¹⁵ At the first series of hearings on the objections to the account, no concrete evidence had been presented as to Concetta’s earnings prior to 1961 except for anecdotal testimony by Concetta or her niece Lena Barone, who worked with Concetta at the United Fund for a period of time. The administrator, in contrast, in his impressive massing of evidence to support his omnibus petition, presented FICA records for Concetta’s earnings for the period 1951 to 1976.¹¹⁶ Those records document that as of 1961, Concetta had a total earnings of approximately \$25,000. Throughout this period, Concetta had been married to Edward. She maintains that she kept her money separate from his and that he permitted her to save that money which she then deposited in savings accounts and

¹¹¹ 1/15/2008 Audit Memorandum at 22.

¹¹² 4/28/2008 Amended Audit Memorandum at 22.

¹¹³ 6/4/09 Administrator’s Brief at 4.

¹¹⁴ See 6/4/09 Administrator’s Brief at 4 and n.1 (relying on Loretta’s testimony to support claim that 2940 South Juniper Street was purchased with Edward’s money).

¹¹⁵ Ex. P-5 (11/14/06 N.T. at 14-15)(Concetta); 5/4/09 N.T. at 62 (Concetta).

¹¹⁶ Ex. P-40.

certificates of deposits at local banks.¹¹⁷ At the omnibus petition hearing, Concetta produced a copy of the 1961 deed transferring title from Carmen and Alda Graziano to Concetta Fina for consideration in the amount of \$12,000. The \$25,000 reflected in the FICA statement of her earnings (i.e. 1951-1961) would have more than sufficed to pay for this property.

The administrator sought to undermine Concetta's claim that she paid for the Juniper street property by expressing skepticism as to Concetta's related assertions that she had paid for a myriad of familial expenses such as the Iseminger Street Property, the Margate property, her daughters' private high school and college education from her own earnings.¹¹⁸ Those purchases and expenses came later, however, and are not dispositive as to whether Concetta paid for the Juniper street property in 1961.

The only explicit evidence that contradicted Concetta's assertion that she had purchased the Juniper Street property with her own funds was testimony by Loretta.¹¹⁹ At both the hearings on the objections to Concetta's account and the hearing on the omnibus petition, Loretta testified that her father owned the Juniper Street property.¹²⁰ This testimony, however, was conclusory and unsupported by any documentation whatsoever. Moreover, Loretta was a highly interested witness. She admitted that her family's "dynamic" had always been strained due to her efforts to get her parents to "do the right thing."¹²¹ She explained that her father had been a numbers banker who hid his earnings to avoid taxes.¹²² In her effort to get her father to do the right thing, she encouraged him in 1983 to become involved in Findel Corporation as a partner with her husband and father-in-law.¹²³ As part of the deal, Edward Fina put up the entire purchase price of \$11,500 for the corporation's Christian Street property.¹²⁴ Ironically, Loretta apparently saw no problem with accepting Edward's money for that venture.

¹¹⁷ 8/5/2009 Concetta Brief at 1-2. In fact, Concetta produced a savings account from her high school days to demonstrate a life long habit of savings—albeit in very small sums. See Ex. C-1.

¹¹⁸ 6/4/09 Administrator's Brief at 4-5.

¹¹⁹ The only apparent basis for the assertion that Edward Fina's funds were used to purchase the Juniper Street property was Loretta's testimony. See 6/4/09 Administrator's Brief at 3-7.

¹²⁰ Ex. P-27 (12/12/06 N.T. at 48) (Loretta). Loretta also testified that her father's money had been used to purchase the family's property at Margate, which was initially placed in her Aunt's name. *Id.* at 13-14 & 42-43.

¹²¹ Ex. P-27 (12/12/06 N.T. at 23) (Loretta).

¹²² Ex. P-27 (12/12/06 N.T. at 5-6 & 13)(Loretta).

¹²³ P-27 (12/12/06 N.T. at 25-26)(Loretta).

¹²⁴ P-27 (12/12/06 N.T. at 27) (Loretta).

Ultimately, however, a dispute broke out over ownership of the corporation. When her father offered in 1987 to put the property in trust for her children, Loretta rejected this offer: “it shouldn’t skip us and go to our children, that it was our property, held jointly, and it should not pass to our children.”¹²⁵ In light of this strained familial history fueled by bitter financial disputes and competition, Loretta’s testimony as to the source of the funding for the Juniper street property is suspect.

In light of this factual record, it is therefore not necessary to address the legal issue of whether there is a viable claim for unjust enrichment to support a constructive trust to convey the property back to Edward Fina’s estate. Because the record did not establish that Edward’s money had been used to purchase the Juniper Street property, analysis of whether any unjust enrichment occurred to benefit Concetta is without the requisite factual predicate.

Conclusion

A primary task confronting the Administrator is to restore the Estate of Edward Fina so that its total assets can be determined for the calculation of taxes due and payment of any creditors. Once those responsibilities have been satisfied, the Administrator will be able to make fair, equitable and legal distributions to the beneficiaries of the estate. In turning back certain assets they were improperly given by Concetta, the beneficiaries will facilitate the equitable administration of their father’s estate. The Omnibus Petition addressed complex factual and legal issues. Upon consideration of the record, the Omnibus Petition is granted in part and denied in part as follows:

1. Concetta Fina, as the former administratrix of the Estate of Edward Fina, is surcharged in the following amounts:
 - a. Concetta Fina surcharged \$ 1,046,220.11 with interest at 6% from April 25, 1996 until the date of the contemporaneously issued decree.
 - b. Concetta Fina is surcharged \$35,872.70 for the social security refund to Edward Fina with interest at 6% from September 1, 2005.
 - c. This surcharge will be reduced based on any actual amounts received from certificates of deposit set forth in this Court’s May 5, 2009 decree or by any amounts received from the other recipients pursuant to this Decree.

¹²⁵ P-26 (12/11/06 N.T. at 176, 175) (Loretta)).

- d. Concetta Fina, as the former Administratrix of Edward Fina's Estate, will be surcharged in the amount of any interest and/or penalties that are assessed against the Estate on any additional taxes, interest and/or penalties that may be due. Because the extent of the additional taxes, interest and/or penalties due cannot be determined at this time, the Administrator is directed to address this issue when he files his account, and an appropriate surcharge will be entered at that time.
2. Loretta Del Collo, Daniel Del Collo, Jr., Daniel Del Collo, III, Christian Del Collo and Lorinda Ann Fina are ordered to deliver to the Administrator within 30 days the following assets determined to belong to the Estate:
 - a. Loretta Del Collo shall return to the Estate \$ 124,115.
 - b. Daniel Del Collo, Jr. shall return to the Estate \$ 20,000.
 - c. Daniel Del Collo, III, shall return to the Estate \$30,699.28.
 - d. Christian Del Collo shall return to the Estate \$ 39,000.00.
 - e. Lorinda Ann Fina shall return to the Estate \$152,899.36 from the certificates of deposit or bank accounts in her name or joint name: Commerce 5540; Commerce 7280; PNC 5009; Wachovia 2615; and the four St. Edmond's certificates of deposit (3182, 4838, 10789, 3457) as set forth in Ex. P-38.
 - f. Lorinda Ann Fina shall return to the Estate the \$50,000 in loan repayments she received from Nicholas Martino.
 3. Lorinda Ann Fina is not jointly and severally liable with the Surcharge of Concetta Fina;
 4. Title to 2940 South Juniper Street, Philadelphia, is not quieted in the name of the Estate of Edward Fina, Deceased.

Date: _____

BY THE COURT:

John W. Herron, J.