

**COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION**

**No. 77 DE of 2008**

**Estate of EDNA R. HOUCK, Deceased**

**Edna Houck (“Ms. Houck”) died on February 7, 2005 at the age of ninety-eight (98). At the time of her death Ms. Houck resided at the Germantown Home at 6950 Germantown Avenue, Apartment 202 in Philadelphia, Pennsylvania.<sup>1</sup> Ms. Houck was unmarried at the time of her death, and, was survived by Ruth D. Bardes, Maegan L. Bardes, Robyn R. Bardes, all of whom are believed to be either distant relatives or friends.**

**Ms. Houck left a valid will, dated February 6, 2003, which was duly probated. By the terms of her Will, Ms. Houck divided the Estate as follows: 35% to Ms. Phoebe A. Walker, 35% to Susan Riggs-Bardes, 15% to Ruth D. Bardes, and 15% to Mr. Sean Brennan, Ms. Houck’s accountant.**

**On May 31, 2002, at the age of ninety-five (95), Edna Houck executed a Power Of Attorney wherein she appointed Phoebe A. Walker (“Ms. Walker”), as her Agent or Attorney-in-Fact. At the time the Power of Attorney was executed, Ms. Houck was a resident of the Germantown Home and Ms. Walker was employed by the Germantown Home. From 2002 through 2005, the relevant time frame at issue,**

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<sup>1</sup> Germantown Home is part of NewCourtland, Inc. and NewCourtland Network (together “NewCourtland”), and owner and operator of numerous assisted living facilities and nursing homes throughout Pennsylvania.

**Ms. Walker served as an Administrative Assistant for the facility.<sup>2</sup> The Power of Attorney did not include a gifting provision.**

**On October 24, 2003, approximately a year and half after the aforementioned Power of Attorney was executed in her favor, Ms. Walker settled a pending bankruptcy action that had been filed against her.**

**In February of 2005, Ms. Walker filed a Petition for Letters of Administration and to Probate Ms. Houck's 2003 Will with the Register of Wills. On February 28, 2005, the Register admitted the Will to probate and granted Letters Testamentary to Phoebe Walker as the Executrix named in Item Twelfth of the Last Will and Testament of Edna Houck, Deceased.**

**On September 25, 2008, Ms. Walker filed the First and Final Account of the Executrix period. The Account of Phoebe Walker, as Executrix, is stated for the period from February 28, 2005 to August 21, 2008 and shows \$365,229.99 in combined receipts of principal and income; \$87,278.34 in distributions; \$264,565.00 in distribution to beneficiaries; and, a combined balance remaining of \$8,928.20 left for distribution to residuary beneficiaries.**

**On November 4, 2008, Mr. Brennan, a beneficiary of the Estate and the former Accountant for Ms. Houck, filed Objections to the First and Final Account of Phoebe Walker, Personal Representative of the Estate of Edna R. Houck, Deceased, and to the Accompanying Inventory, a Petition for Adjudication and Statement of Proposed Distribution.**

**In his Objections, Mr. Brennan took the position that Ms. Walker inappropriately withdrew funds from the Estate of Edna Houck and failed to**

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<sup>2</sup> Ms. Walker has been employed by the Germantown Home since 1996 in several capacities.

account for over \$220,000.00 in her First and Final Account. He argued in his Petition that the Estate should be reimbursed for these funds that were either inappropriately withdrawn and/or not accounted for by Ms. Walker. Mr. Brennan requested that Ms. Walker be surcharged the \$220,127.17 unaccounted for in the First and Final Account.

On June 4, 2009, Mannion Prior, LLP filed a Notice of Claim pursuant to Section 3532(b)(2) of the Probate, Estates and Fiduciaries Code. The Notice of Claim was in the amount of \$10,601.31 and was filed against the Estate of Edna R. Houck, Deceased, and against Ms. Walker, Individually and as Executrix of Will of Edna R. Houck.

On August 17, 2009, Mr. Brennan filed Petition for Attorney's Fees and Costs. The total fees stated equal \$20,677.40.<sup>3</sup> Mr. Brennan alleged in his Petition that the attorneys fees and costs in this case were necessitated by the fraud and defalcation by Ms. Walker while she was acting both in her capacity as Agent under the Power of Attorney and in her capacity as Executrix of the Estate.

On October 5, 2009, Mr. Brennan filed a Petition for Citation to Show Cause Why Ms. Phoebe A. Walker Should not be Removed as Executrix and for Leave of Court for the Estate to File an Action Against Germantown Home, NewCourtland, Inc. and Ms. Phoebe A. Walker. In his Petition, Mr. Brennan alleged that under Section 5601 of the Probates, Estates and Fiduciaries Code, Ms. Walker had no authority as Ms. Houck's Power of Attorney, as the Power of Attorney document lacked notice signed by the principal at the beginning of the document as

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<sup>3</sup> A copy of the attorney's fees and costs appear as Exhibit P-8 in the Record in this matter. The total to date, stated in the Post Trial Brief of Mr. Brennan, as of January 29, 2010, is \$41,727.83.

required by §5601(c) and the Power of Attorney document lacked the Acknowledgment executed by Ms. Walker as agent, which is required by §5601(d).

Additionally, Mr. Brennan asserted that the Power of Attorney is invalid under the Pennsylvania Code, the document violating 28 Pa. Code §201.26. Under 28 Pa. Code §201.26, as a Power of Attorney may not be assumed for a resident by an employee unless ordered by a court of competent jurisdiction. Mr. Brennan also pointed out that pursuant to 55 Pa. Code § 2600.20(b), if a home provides assistance with financial management or holds a resident's fund, a legal entity, administrator, or other staff persons of the home are prohibited from being assigned a Power of Attorney or guardianship of a resident or of a resident's estate.

Thus, Mr. Brennan requested that this Court remove Ms. Walker as the Executrix of the Estate of Edna Houck, Deceased. Mr. Brennan also asked for Leave of Court to initiate an action against Germantown Home, NewCourtland, Inc. and Phoebe A. Walker, once Ms. Walker is removed as Executrix. Finally, Mr. Brennan requested in his Petition that he be reimbursed for his attorneys' fees and costs related to the Petition from Ms. Walker and/or the Estate.

On November 06, 2009, a hearing was held before this Court on the consolidated filings. Mr. Brennan testified and was represented by Michael B. Dubin, Esquire. Mr. Dubin offered eleven exhibits that were entered into evidence as P-1 through P-11. Ms. Walker appeared Pro Se, as her attorney withdrew as her counsel prior to the hearing. She testified on her behalf but did not offer any exhibits into evidence.

**Objections of Sean Brennan, Beneficiary of the Estate of Edna R. Houck, Deceased, to the First and Final Account of Phoebe Walker, Personal Representative of the Estate of Edna R. Houck, Deceased, and to the Accompanying Inventory, Petition for Adjudication and Statement of Proposed Distribution (Control No. 083015)**

An executrix is an officer of the Orphans' Court and accountable to the Orphans' Court for all her actions of commission and omission in the performance of her fiduciary duties. In re Estate of Thompson, 232 A.2d 625, 628 (Pa. 1967). One of the fiduciary duties of the executrix is to "take possession of, maintain and administer all the real and personal estate of the decedent". 20 Pa. C.S. § 3311. The executrix bears the responsibility to "preserve and protect the property for distribution to the proper persons within a reasonable time period." In re Estate of Campbell, 692 A.2d 1098, 1101 (Pa. Super. 1997). In the performance of her fiduciary duties, the executrix is "required to exercise the same degree of judgment, skill, care and diligence that that a reasonable or prudent person would ordinarily exercise in the management of his or her own affairs." Id. at 1101-02.

When the executrix fails to fulfill her fiduciary duty of care, the court may impose a surcharge against her. In re Estate of Lux, 389 A. 2d 1053, 1057 (Pa. 1978) (citing In re Estate of Stephenson, 364 A.2d 1301, 1306 (Pa. 1976). A surcharge is a penalty imposed to compensate the beneficiaries of an estate for loss of estate assets due to a fiduciary's failure to meet her duty of care; however, a surcharge cannot be imposed merely for an error in judgment. Id.; In re Estate of Ellis, 333 A. 2d 728, 732 (Pa. 1975). A negligence standard is applied when

evaluating whether an executrix's management of an estate warrants a surcharge. In re Estate of Stephenson, 364 A.2d at 1306.

The party seeking to surcharge an executrix bears the burden of showing a failure to meet the required standard of care. Ellis, 333 A.2d at 730. However, the burden shifts to the executrix to present exculpatory evidence when a "patent error has occurred" or "when a significant discrepancy appears on the face of the record." Id.

Here, the credible evidence presented supports the finding that Ms. Walker breached her fiduciary duty of care to Ms. Houck, and as such should be surcharged in the amount of \$220,122.17.

Ms. Walker, in her role as Agent under the Power of Attorney and executrix of the Estate, failed to preserve and protect the property for distribution to the proper persons, as she distributed the property to herself for her own benefit. During Ms. Walker's power of attorney, she withdrew \$68,400.00 from Ms. Houck's savings account at Citizen's Bank. In her deposition, she admitted to making these withdrawals. N.T. 11/06/09, 19-21. In addition, \$87,396.50 was withdrawn from Ms. Houck's account at First Union. These ATM withdraws were made almost entirely in Levittown where Ms. Walker lives.<sup>4</sup> There were also excessive personal payments on Ms. Walker's Capital One credit card totaling \$4,471.81 and Country Wide Mortgage totaling \$9,292.36. The last withdrawal was on Ms. Houck's date of death. N.T. 11//06/09, 21-22. The evidence clearly demonstrates that Ms. Walker wrote several checks from Ms. Houck's bank accounts to herself in order to pay her own monthly mortgage payments during

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<sup>4</sup> A copy of the Edna Houck Transaction Detail by Account appears as Exhibit P-2 in the Record in this matter.

her tenure as Power of Attorney. While serving as Executrix of the Estate, Ms. Walker, failed to account for these missing funds, totaling \$116,054.96, in her First and Final Accounting.

This Court finds that Ms. Walker's claims that the funds were used for the benefit of Ms. Houck to be incredible. Ms. Walker testified that the reason the funds were not accounted for was because all her receipts were either lost in a flood or during the move of her office. N.T. 11/06/09, 60-61.

Additionally, the Court finds that Ms. Walker breached her fiduciary duty of care by intermingling Ms. Houck's funds with her own. Ms. Walker deposited eight (8) checks totaling \$13,173.21, into her personal Bank of America account. These checks were either interest or dividend checks that were payable to Edna Houck, that were endorsed and deposited into Ms. Walker's account.

Ms. Walker commingled two *other* residents' funds with her own in her Bank of America account. She deposited checks totaling \$12,993.80, which were originally payable to Katherine H. Ferguson and \$151.95 in checks, which were originally payable to Olga Debele.<sup>5</sup> N.T. 11/06/09, 23-25.

Furthermore, the Power of Attorney under which Ms. Walker was acting under when she misappropriated these funds is invalid on its face. The Power of Attorney document is flawed in that it was not executed in the requisite manner delineated by the Probate, Estates and Fiduciaries Code. The document lacked notice, signed by the principal, as required by 20 PACS §5601 (c). The document also lacked an Acknowledgment executed by Ms. Walker, as agent, which is required by 20 PACS §5601(d). N.T. 11/06/09, 59-60. Therefore, Ms. Walker had no

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<sup>5</sup> A copy of the Edna Houck Transaction Detail by Account appears as Exhibit P-3 in the Record in this matter.

authority to act as Agent and all of her actions taken in that regard are invalid. As such, Ms. Walker must be surcharged \$220,122.17.

In conclusion, Mr. Brennan's Objection to Ms. Walker's First and Final Account is granted. Ms. Walker is to be surcharged \$220,122.17. An appropriate decree will be entered.

**Petition to Remove Phoebe Walker as Executrix and for Leave of Court for the Estate to file an Action against Germantown Home, NewCourtland, Inc. and Phoebe Walker. (Control No. 092572)**

Based on the above facts and findings, this Court decrees that Ms. Walker should be removed as the Executrix of the Estate. As the record clearly demonstrates, Ms. Walker has repeatedly and illicitly removed large sums from the Estate's accounts for personal use. Ms. Walker's contention that the funds were for the benefit of the Estate were both without merit and without any corroboration or believable explanation. Due to Ms. Walker's actions, the solvency of the Estate is endangered and, thus, she must be removed.

Removal of a fiduciary, while within the sound discretion of this Court, is a drastic action that should only be taken when it is evident that the estate is actually endangered and the court intervention is necessary to protect the property interest of the estate. The removal of an executrix is particularly drastic because the executrix has been chosen by the testator, and her appointment represents an expression of trust and confidence in her. Matter of Estate of Velott, 365 Pa. Super. 313, 318 (1987); In Re. Francis Edward McGillick Foundation, 537 Pa. 194, 200 (1994).



Here, the credible evidence presented demonstrates that Ms. Walker has misappropriated \$220,122.17 for her own personal use, when she had no right to use the funds for herself. At the time the power of attorney was executed, when Ms. Houck was approximately ninety-five (95) years old, Ms. Walker took immediate steps to remove Ms. Houck from a position of being able to speak to others. Once Ms. Houck was without recourse to outside help, Ms. Walker immediately began using Ms. Houck's funds as her own personal account. Hence, though Ms. Houck may have expressed confidence in Ms. Walker previous to her death by appointing her as Power of Attorney and Executrix of the Estate, Ms. Walker's subsequent actions have shown that the trust and confidence was decidedly misplaced.

In determining whether an executor should be removed from his or her duties, a trial court must consult the Decedents, Estates, and Fiduciaries Code, 20 Pa.C.S. § 101 *et seq.* Specifically §3182(1) states that the Court can remove when the executrix is "wasting or mismanaging the estate, or is likely to become insolvent, or fails to perform any duty imposed by law." Similarly, under §3182(5), the Court can remove when, for any other reason, "the interests of the estate are likely to be jeopardized by its continuance in office." Id.

Ms. Walker greatly mismanaged the estate when she was power of attorney, and continued this misappropriation of funds when she later became executrix of the Estate. A significant amount of the money was removed, approximately \$220, 122.17, without one receipt being provided. This Court does not find Ms. Walker credible when she testified that the money expended was

solely for Ms. Houck's benefit, especially since this amount does not include an additional \$62,889.60 that was allegedly paid out for special caregivers for which Ms. Walker could produce no records.<sup>6</sup> All evidence supports Mr. Brennan's claim that Ms. Walker was grossly mismanaging the Estate, and has, thus, placed the Estate in serious jeopardy.

The Court may also remove an executrix when it has been found that a fiduciary's personal interest is in conflict with that of the estate, such that the two interests cannot be served simultaneously. In re Estate of Dobson, 417 A.2d 138, 142 (Pa. 1980). When a conflict of interest or self dealing on the part of the fiduciary is apparent from the circumstances, bad faith or fraudulent intent by the fiduciary need not be proven. Id.

Ms. Walker's bankruptcy status made her interests directly contradictory to her fiduciary duties as power of attorney and later Executrix, as she was greatly in need of money and given full and unsupervised access to the Estate's funds. Her bankruptcy case was discharged within roughly a year and half after becoming power of attorney. N.T. 11/06/09, 61-67. Ms. Walker must be removed as it is highly dubious that she will try to recover the \$220,122.17, since she is the one that misappropriated those funds. The record strongly supports the proposition that Ms. Walker has a serious personal conflict in being able to administer the Will and simultaneously return the missing funds, such that her continuance in the role of executrix is untenable.

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<sup>6</sup> A copy of the Edna Houck Transaction Detail by Account appears as Exhibit P-10 in the Record in this matter.

Lastly, the Court may also remove an executrix to protect the rights of creditors or parties in interest. 20 Pa. C.S. §3183. Ms. Walker has not fully settled out the accounts of the estate as there is a Claim against the Estate and her individually from her former attorney. In addition to Mr. Brennan and Ms. Walker, there are other beneficiaries under the will whose interests this Court would be protecting. Ms. Walker's removal as the executrix of the Estate will help to ensure that the outstanding Claim will be properly concluded, and that the beneficiaries of the Estate will receive their proper share of the Estate's funds.

The Court decrees that Ms. Walker must be removed as Executrix of the Estate. Her expenditures have clearly demonstrated that she has wasted and mismanaged the Estate's funds. Ms. Walker's personal financial troubles and the fact that was responsible for the waste of the Estate's funds suggest she cannot possibly be reasonably expected to continue administering the Estate further. Lastly, her removal will serve to ensure that outstanding claims against the Estate are settled and that the beneficiaries of the Will are properly compensated.

This Court also grants leave for Mr. Brennan to initiate an action against Germantown Home and NewCourtland, Inc., as this Court finds that Germantown Home was negligent and acted improperly by authorizing its employee, Ms. Walker, to act as an Agent under a Power of Attorney for Ms. Houck. N.T. 11/06/09, 51-53.

As a long term nursing care facility, Germantown is regulated by 28 Pa. Code § 201.1, et seq. The May 31, 2002 Power of Attorney directly violated 28 Pa.

**Code § 201.26, as a Power of Attorney may not be assumed for the resident by an employee unless ordered by a court of competent jurisdiction. The Power of Attorney was never notarized by a court. This Court does not find 55 Pa. §2600.20(b) persuasive because it was clear from the evidence that Germantown neither provided assistance with financial management nor held Ms. Houck's funds.**

**In addition to violating 28 Pa. Code § 201.26, Germantown Home and NewCourtland, Inc. were further negligent and acted improperly in authorizing a financially troubled employee, who was in bankruptcy, to act as an Agent for Ms. Houck, a woman in her mid-90's with no family or friends located near the Germantown Home. Through this negligent appointment, Germantown Home and NewCourtland gave authorization to a financially troubled employee, which resulted in the misappropriation of over \$220,000 of Ms. Houck's funds. At no point in time did a supervisor from Germantown Home or NewCourtland, Inc.: (1) review Ms. Walker's actions as an agent, (2) consult with Ms. Houck to determine whether she was competent to sign a valid Power of Attorney or whether she understood the document she signed, or (3) review Ms. Houck's finances to determine if Ms. Walker was satisfactorily meeting her duty as Agent. This neglect and inattention to Ms. Walker's actions as Agent enabled Ms. Walker to misappropriate over \$220,000 of Ms. Houck's funds.**

**Mr. Brennan's Petition to Remove Ms. Walker as Executrix and leave to sue Germantown Home and NewCourtland, Inc. and Phoebe Walker is granted. An appropriate decree will be entered.**

**Petition of Sean Brennan for Attorneys' Fees and Costs (Control No. 092146)**

In examining all of the evidence, this Court grants Mr. Brennan attorneys' fees and costs incurred in pursuing the aforementioned Petitions and that will be incurred through the conclusion of this matter in the amount of \$41,727.83 to be awarded out of Ms. Houck's Estate. Mr. Brennan's attorneys' fees and costs were necessitated by the improper conduct and misappropriation of funds by Ms. Walker while acting in her capacity as Executrix. The efforts of Mr. Brennan will result in substantial benefit to the Estate and its beneficiaries by increasing the assets available to the Estate. In accordance with the aforementioned facts, Mr. Brennan is entitled to be reimbursed from the Estate in the amount of \$41,727.83 representing attorneys' fees and costs incurred to date and fees and costs to be incurred through the conclusion of this matter.

In keeping with the foregoing discussion and findings, I hold that the Power of Attorney executed by Edna Houck on May 31, 2002 is null and void. Ms. Phoebe Walker shall be removed as Executrix of the Estate of Edna Houck and Mr. Sean Brennan shall be appointed Successor Executor. Mr. Brennan's Petition to Remove Ms. Walker as Executrix and leave to sue Germantown Home and NewCourtland, Inc. and Phoebe Walker is granted.

This Court Orders and Decrees that Mr. Brennan's Objection to Ms. Walker's First and Final Account is granted. Ms. Walker is to be surcharged \$220,122.17.

Mr. Brennan is entitled to be reimbursed from the Estate in the amount of \$41,727.83 representing attorneys' fees and costs incurred to date.

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

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

**BY THE COURT,**

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**O'KEEFE, ADM. J.**