

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS' COURT DIVISION

Estate of Helen D'Angelis, Deceased  
O.C. No. 1302 DE of 2011  
Control No. 112527  
Control No. 120084

O P I N I O N

***Introduction***

The preliminary objections in this matter raise the issue of whether an incapacitated person, through his guardian, can assert an election to take an elective share of his deceased wife's estate without a court order pursuant to 20 Pa.C.S. § 2206. For the reasons set forth below, the attempted spousal election in this case is invalid because the guardian of the incapacitated person failed to obtain the requisite court approval.

***Factual Background***

On September 13, 2011, George D'Angelis, Sr. ("George, Sr.") was adjudicated an incapacitated person and his son, George D'Angelis, Jr. ("George, Jr."), was appointed plenary guardian of his father's person and estate. Two days later, a document entitled "election to take an elective share" was filed by the guardian of George, Sr. on his behalf to take an elective share of "the property and conveyances" of his deceased wife, Helen D'Angelis, who had intestate died on June 28, 2011.<sup>1</sup>

Nearly two months later, on November 14, 2011, George Sr., through his guardian filed a petition seeking a citation directed towards George Sr.'s four other sons ( the "respondents" "Anthony Tempesta," "Michael Tempesta," "Joseph Tempesta," and "Gerald Tempesta") for an accounting of the assets that Helen allegedly had given away to these other sons within a year of her death "to enable your Petitioner to exercise his right to take his elective share" of his deceased wife's estate.<sup>2</sup> More specifically, he sought to "obtain one-third (1/3) of the property and conveyances of the decedent in accordance with 20 P.C.S.A. §2203(a).<sup>3</sup> Shortly after this petition was filed, George Sr. died on November 21, 2011.

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<sup>1</sup> 11/14/11 George D'Angelis, Sr. Petition, ¶ 1.

<sup>2</sup> 11/14/11 George D'Angelis, Sr., Petition, proposed order.

<sup>3</sup> 11/14/11 George D'Angelis, Sr. Petition, ¶¶ 14 & 9.

The respondents filed preliminary objections to the petition. They assert that the document filed on behalf of George D'Angelis, Sr. by his guardian purporting to be an election to take an elective share of his deceased wife's estate was invalid because it did not conform to 20 Pa.C.S. § 2206. Under Section 2206, they maintain, the right of election can be asserted by the guardian of an incapacitated person only upon order of Orphans' Court after a finding that such exercise was advisable.<sup>4</sup> No response was filed to the preliminary objections, which are sustained based on a review of the relevant statute and precedent.

### *Legal Analysis*

Under the PEF Code, a surviving spouse has a statutory right to take an elective share of his deceased wife's property. See 20 Pa.C.S. § 2203. Section 2203 outlines property which is subject to election and property not subject to election. It provides, for instance, that a surviving spouse has a right to an elective share of one-third (1/3) of "[p]roperty conveyed by the decedent during the marriage and within one year of his death to the extent that the aggregate amount conveyed to each donee exceeds \$3,000, valued at the time of conveyance." 20 Pa.C.S. § 2203(a)(6). There are specific rules as to who may exercise this power of election. A surviving spouse, for instance, may exercise his right of election "in whole or in part only during his lifetime by him or by his agent in accordance with section 5603(d)(relating to implementation of power of attorney)." 20 Pa.C.S. § 2206. There are special, more limited provisions for exercise of this power of election by a person who has been adjudicated an incapacitated person, such as George D'Angelis, Sr. In such cases, a guardian may exercise this spousal right of election only upon an order by a court of competent jurisdiction upon a finding that such an exercise is in the best interest of the incapacitated person:

§2206. Right of election personal to surviving spouse.

The right of election of the surviving spouse may be exercised in whole or in part only during his lifetime by him or by his agent in accordance with section 5603(d)(relating to implementation of power of attorney). In case of a minor spouse, the right of election may be exercised in whole or in part only by the spouse's guardian; in the case of an incapacitated spouse, the right of election may be exercised in whole or in part only by the spouse's guardian or by his agent in accordance with section 5603(d) if the power of attorney qualifies as a durable power of attorney under section 5604 (relating to durable

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<sup>4</sup> 1/10/12 Preliminary Objections.

powers of attorney); **provided, that, in each case, the election shall be exercised only upon order of the court having jurisdiction of the minor's or the incapacitated person's estate, after finding that exercise of the right is advisable.**

20 Pa.C.S. §2206 (emphasis added).

Long-standing Pennsylvania precedent that pre-dates this PEF code provision outlines in broad strokes the respective roles of the guardian of an incapacitated person and the court as to the exercise of the spousal right of election by an incapacitated person. Under this precedent, an incapacitated person is the ward of the court that appointed the guardian. As a consequence, “the guardian is simply its bailiff or agent in protecting him and his estate.” Gerlach's Estate, 127 Pa. Super. 293, 300, 193 A. 467, 470 (1937) (referring to incapacitated persons as “weak-minded or feeble minded persons” as was customary at the time). In terms of asserting a spousal election, it “is exclusively for the court, which is the real guardian of the incompetent, to determine whether such an election should be made, and well defined principles have been laid down as guides for the exercise of its discretionary power....” Peden Estate, 409 Pa. 194, 198, 185 A.2d 794, 796 (1962).

The representative or guardian of an incapacitated person has no statutory authority to elect against the estate of an incapacitated person's deceased spouse without the “sanction” of the court. Such an election is a judicial rather than a ministerial act, within a court's sound discretion. Gerlach Estate, 127 Pa. Super. at 300-301, 193 A. at 470. Whether such an election is in the best interest of the surviving spouse requires careful analysis and is not always clear. See, e.g., German's Estate, 318 Pa. 200, 178 A. 38 (1935)(court's weighing and balancing whether election against her husband's will was in the best interest of an incapacitated widow). The authority of a guardian to assert this election ceases with the death of an incapacitated person. Likewise, the power a court to approve such an election terminates upon the death of the incapacitated person. Gerlach Estate, 127 Pa. Super. at 300-302, 193 A. at 470-472.

In this case, the document labeled “election to take an elective share” by George D'Angelis, Sr. was not filed until two days after he had been adjudicated an incapacitated person. No petition was thereafter filed seeking court approval of this spousal election pursuant to 20 Pa.C.S. § 2206. Instead, on November 21, 2011 George D'Angelis died. Based on these facts, the spousal election was invalid based on Pennsylvania Supreme Court precedent directly on point except that it deals with spousal election against a will. This general analysis is applicable nonetheless to election against a deceased spouse's estate. In Gerlach Estate, 127 Pa.

Super. 293, 193 A.467 (1937), for instance, an election against a deceased wife's will by the guardian of an incapacitated person was deemed invalid where the election was filed during the incapacitated person's lifetime but a petition to obtain court approval of that election was not filed until after the incapacitated person's death. When the trial court subsequently approved the election nunc pro tunc, it was reversed as lacking the authority to do so after the death of the incapacitated person.<sup>5</sup> Similarly, in Peden Estate, 409 Pa. 194, 185 A.2d 794 (1962), two months after the death of her husband, his wife Bella Peden was adjudicated an incapacitated person. Bella's guardian a month later filed an election to take against her deceased husband's estate by letter and without court approval. Shortly thereafter, in July 1961 Bella died and her guardian filed an election to take against the husband's will. In analyzing these facts, the court concluded: "Since the election was filed by Bella's guardian in Bella's lifetime *without the authority of the Court*, it was a nullity; after Bella Peden's death the Court could not authorize or direct the guardian of her estate to file an election or take against or under his will." 409 Pa. at 198, 185 A.2d 796 (italics in original).

The analysis and results in Peden Estate and Gerlach Estate are in accord with numerous other cases concluding that the guardian of an incapacitated person cannot elect on behalf of his ward to take against a deceased spouse's will or estate without court approval. See Harris Estate, 351 Pa. 368, 382-83, 41 A.2d 715, 722 (1945)(guardian of a "weak-minded person cannot elect on behalf of the ward to take against the will of the latter's spouse unless empowered to do so by the court"); Stockton's Estate, 311 Pa. 189, 166 A. 648 (1933)(the right of a "lunatic" to elect against the will of a deceased spouse is within the discretion of the court which must take into consideration his interests as well as the terms of the will); Brooke's Estate, 279 Pa. 341, 344, 123 A. 786, 787 (1924)("the guardian has no right to make such an election without the approval of the orphans' court which may, in its discretion, permit such action, if found to be in the interest of the incompetent"); Strecker Estate, 20 Pa. D & C 2d 652 (Phila. O.C. 1960)(right of election of a surviving spouse is lost upon adjudication of incapacity and the incapacitated person's guardian may not elect unless empowered to do so by the court).

A final critical fact is that George Sr. died prior to seeking—and obtaining—court approval of his election against his deceased wife Helen's estate. Under Pennsylvania case law,

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<sup>5</sup> For the history of Orphans' Court jurisdiction over incapacitated persons' estates, see Strecker Estate, 20 Pa. D. & C. 2d 652 (Phila. O.C. 1960).

the right of election is personal to the surviving spouse and does not survive his or her death. If it is not exercised during the surviving spouse's lifetime, "it does not accrue to his or her personal representative." German Estate, 318 Pa. 200, 201, 178 A.38 (1935). Consequently, the guardian of George D'Angelis, Sr. would not have authority even as executor under George Sr.'s will to enforce or seek an election against the estate of Helen D'Angelis nor would this court have authority to approve such an election.

***Conclusion***

For these reasons the preliminary objections are sustained, and the petition by George D'Angelis, Sr., through his guardian George D'Angelis, Jr., for an accounting by four sons of decedent Helen D'Angelis of transfers made by Helen within one (1) year of her death and all assets held by decedent on the date of her death in order to enable the Petitioner to exercise his right to take his elective share of Helen's estate is dismissed.

BY THE COURT:

Date: April 23, 2012

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John W. Herron, J.