IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

ORPHANS COURT DIVISION

O.C. No. 1318 AP of 2013

SUPERIOR COURT No. 1280 EDA 2014

THE ESTATE OF ZOFIA GRALAK, Deceased

OPINION SUR APPEAL

The above appeal was filed after the Trial Court overruled Appellant's preliminary objections to Adam Witek's appeal of the Decree of the Register of Wills admitting the July 2, 2012 Will of Zofia Gralak into probate. A companion appeal was filed by the same appellant to an order contemporaneously issued by the Trial Judge overruling similar preliminary objections in the matter involving Appellant's administration as agent under a Power of Attorney granted to him by decedent.

Factual And Procedural History

The Appellant is Edward Mendys (hereinafter Appellant), Decedent's caretaker. The Appellee is Decedent's nephew, Adam Witek.

As this appeal was entered before trial without permission, the Trial Court did not have an opportunity to make findings of facts, but certain facts seem to be uncontested and are hereinafter recited for the purpose of providing the Appellate Court with necessary background.

Zofia Gralak (hereinafter Decedent), a widow, passed from this life on October 7, 2012, at the age of 81 and is survived by her nephews, Adam Witek (hereinafter Appellee) and George Andrew Witek-McManus, and Decedent's husband's niece, Boguslawa Czarnecka.

The Appellant first became acquainted with Decedent around 1986 while Decedent lived with and cared for her now deceased husband and mother. Decedent occasionally employed Appellant as a handyman to perform tasks for her, and as she did not own a car, to occasionally drive her. [1]

It has been alleged (but not admitted) that between January and February 2005, after Decedent's mother's death, Decedent declared that when she died, all her assets would be left to Decedent's nephews and Ms. Czarnecka. It has further been alleged that the Decedent owned approximately 38 financial accounts with an

[1] Petition for Citation at 3; Answer at 3.

estimated aggregate value of $1.1 million, all of which listed Decedent's nephews and Ms. Czarnecka as beneficiaries in 2005.[2]

It has been further alleged that Decedent was first diagnosed with early stage dementia in July of 2005, following a short hospital stay as a result of a "nervous breakdown." Appellant began providing Decedent with daily care in late 2005.[3] Appellee has alleged that between 2005 and Decedent's death, Appellant gradually isolated Decedent from her family and long time friends.[4]

Decedent was hospitalized for three weeks in September of 2009, after she was found unresponsive in her home by Appellant.[5] It has been alleged that during Decedent's hospital stay several brain scans revealed atrophy and Decedent was only able to speak Polish despite being formerly fluent in English.[6]

Decedent was released from the hospital September 25, 2009.[7] Two weeks later, on October 12, Decedent executed a power of attorney naming Appellant her agent. On October 28, 2009, Decedent executed a will naming Appellant the executor and sole beneficiary of her estate. Decedent did not have a will prior to

[2] Petition for Citation at 4.
[3] Petition for Citation at 4, 7.
[4] Petition for Citation at 4.
[5] Petition for Citation at 6; Answer at 6.
[6] Petition for Citation at 6.
[7] Petition for Citation at 6.

the 2009 Will.[8] Appellee has alleged that the 2009 Will and the Power of Attorney were the products of undue influence by Appellant.[9]

In 2010, Decedent's physician told her she could no longer live alone and suggested that she be placed in a facility. Decedent continued to live in her home and was cared for by Appellant until 2011, when Appellant became ill and Appellant's daughter, Bozena Kull, began to care for Decedent.[10]

On July 2, 2012, Decedent executed a new Will naming Appellant executor and sole beneficiary of her estate and naming Bozena Kull alternate executrix and beneficiary. Appellee has alleged that the 2012 Will was also a product of undue influence by Appellant, and that Decedent lacked testamentary capacity at the time of execution.[11]

It has been alleged that between October 12, 2009 and October 7, 2012, many of Decedent's accounts were retitled to name Appellant as a joint owner, either in his individual capacity or as agent, and additional joint accounts were opened.[12] Appellee further alleges that accounts naming Decedent's nephews or Ms. Czarnecka as beneficiary were placed into the name of Appellant, his daughter Boneza Kull, or other members of his family, and that Appellant spent money from

[8] Petition for Citation at 5.
[9] Petition for Citation at 7.
[10] Petition for Citation at 8; Answer at 8, 9.
[11] Petition for Citation at 11.
[12] Petition for Citation at 9. Answer at 10.

accounts titled to Decedent's nephews, (including Appellee) or Ms. Czarnecka rather than withdraw funds from accounts titled to Appellant or his family members.[13]

Decedent died on October 7, 2012, and the 2012 Will was probated. Letters testamentary were issued to Appellant by Decree of the Register of Wills of Philadelphia dated October 19, 2012. Appellee, represented by Attorney Adam T. Gusdorff, Esquire appealed the Decree of the Register of Wills dated October 19, 2012 to Orphan's Court on October 17, 2013, and contemporaneously filed a Petition for Citation to Show Cause why the Appeal from the Register of Wills should not be sustained. A Citation was awarded on November 12, 2013, and served on December 2, 2013. Appellant, represented by Attorney Clayton H. Thomas, Jr., Esquire filed Preliminary Objections to the Petition for Citation, which were overruled by Decree dated March 25, 2014. On April 14, 2013, Appellant then filed an Answer to the same Petition; Appellant thereafter timely appealed the March 25 Decree. (Also appealed was the Order entered the same day overruling similar preliminary objections to the Petition filed requesting Appellant Account for his administration, under the Power of Attorney).

Appellant filed a 1925(b) Statement of the Errors Complained of on Appeal on May 19, 2014, pursuant to the Orphans' Court Decree dated April 28, 2014.

[13] Petition for Citation at 9-10.

The issues as presented in Appellant's 1925(b) are incapable of meaningful response because they are unfairly stated, compound, and are based upon facts assumed uncontested, which are still at issue, having never been judicially determined. Further, Appellant has not addressed why he has appealed the Trial Court's interlocutory Decree as a matter of right.[14]

The Court has therefore restated the issues in a form more capable of fair discussion and amenable to fulfilling this Court's mandate under 1925(a). As restated, they are as follows:

Issues

1. Is this appeal properly before Superior Court where the appeal is interlocutory, not of a Final Order, and taken without permission of court?

2. Even if this Superior Court overlooks the interlocutory nature of this appeal, can this matter be reviewed where the last pleading of record is Appellant's answer, which alleges unresolved issues of fact?

[14] While in his docketing statement appellant cited Pa. R.A.P. 342(a)(5) as the pretextual justification for filing the appeal as of right, that section has no relationship whatsoever to any conceivable permission for this appeal.

3. Under all relevant circumstances, did the Trial Court err (according to Appellant) "By granting to petitioner... the status of intestate beneficiary of Decedent's estate, and granting them standing to appeal from probate of her 2012 Will?"

Discussion

1. **In violation of Court Rules, Appellant has improperly appealed an interlocutory order, and the appeal should be quashed.**

The order of the Trial Court here appealed without permission and while the proceeding was still at issue, is the Decree dated March 25, 2014, which overruled Appellant's Preliminary Objections to Appellee's Petition for Citation.

It is respectfully suggested that this Honorable Superior Court may examine whether the order was appealable as of right, without judicial permission, because if so the Superior Court, by its own holding, has no jurisdiction to review the appeal. *Estate of Considine v. Wachovia Bank*, 996 A.2d 1148 (PA. Super. 2009).

A review of controlling Rules of Appellate Procedure will disclose that Appellant had no basis for this appeal (as well as the appeal in the companion appeal) and will further disclose that the Docketing Statement filed with the reviewing Court was at best, negligently prepared, at most artfully designed to permit Appellant and his Attorney from truthfully admitting the absence of jurisdiction for this appeal.

Pennsylvania Rule of Appellate Procedure 341(b), which defines a final order, requires that the order either (1) dispose of all claims and of all parties, or (2) is expressly defined as a final order by statute, or (3) is entered as a final order pursuant to subsection (C) of this rule. Section (C) is not applicable, rendering subsection (3) likewise inapplicable. Subsection (2) of Rule 341(b) is also not applicable. Pa. R.A.P.341(b). Therefore, the March 25 Decree overruling Appellant's preliminary objections cannot be a final order because no claims or parties were dismissed. *See Chase Manhattan Mortgage Co. v. Hodes*, 784 A.2d 144 (Pa. Super. 2001). "An order overruling preliminary objections and directing the filing of an answer is interlocutory and unappealable." *Id.* 145.

Pennsylvania Rule of Appellate Procedure 342(a) enumerates the following as appealable interlocutory Orphans' Court orders: (1) Orders confirming an account or authorizing a distribution (2) determining the validity of a will or trust (3) interpreting a document that forms the basis of a claim against an estate or trust

(4) interpreting, modifying, or terminating a trust (5) determining the status of fiduciaries, beneficiaries, or creditors (6) determining an interest in real or personal property (7) orders issued after an inheritance tax appeal has been taken to Orphans' Court or (8) orders otherwise appealable as provided by Chapter 3 of these rules. Pa. R.A.P.342(a). Since the order issued by the Trial Court does not fall under any of the above categories, Pa. R.A.P.342(a) provides no justification for this interlocutory appeal.

Generally, interlocutory Orders may only be appealed as of right, in accordance with Pennsylvania Rule of Appellate Procedure 311, when those orders are (1) affecting judgments (2) attachments (3) change of criminal venue (4) injunctions (5) preemptory judgment in mandamus (6) new trials (7) partitions or (8) appealable by statute. Pa. R.A.P.311. Rule 311 gives Appellant no sanction for appealing this Order, nor do any other rules permit an interlocutory Order appeal without permission under these circumstances.

Because the order at issue does not decide the status of any party or determine the validity of any document, it is interlocutory and unappealable as of right, except as above permitted. Pennsylvania Rule of Appellate Procedure 312 provides that "an appeal from an interlocutory Order may be taken by permission, pursuant to Chapter 13 (interlocutory appeals by permission)." However, Appellant has not availed himself of this rule, nor has he attempted to comply with any of its

provisions. Without judicial permission to appeal the interlocutory Order, the Superior Court lacks jurisdiction to review this matter.

It is therefore respectfully submitted, that for the above reasons alone this appeal should be quashed.

2. **Even if the reviewing Court were to overlook Appellant's failure to obtain permission for this Appeal, the Appeal is still premature because Appellant's Answer raised contested issues of fact.**

Upon this Court overruling Appellant's Preliminary Objections to Appellees' Petition for Citation on March 25, 2014, Appellant filed an Answer to the same petition on April 14, 2014. The Answer placed in contest factual issues relevant to the ultimate disposition of this matter. The answer also waived any possible pre trial issue as to the propriety of the Trial Court's ruling.

Even if the Honorable Reviewing Court were inclined, in the interest of justice, to entertain this appeal, Appellant's own actions in answering the petition and raising controverted issues, prevents the appeal from going forward until those issues are resolved by the Trial Court.

The scenario before us would certainly have been less complicated if Appellant had filed his improper Appeal after the denial of Preliminary Objections without then answering Appellee's factual allegations and placing the facts at issue. By doing so, even if permitted to appeal as of right, Appellant has waived any right to pursue interlocutory review until those factual issues are determined, as shall be further explained below.

3. The Trial Court did not err in overruling Appellant's demurrer, as unresolved questions of material fact require resolution before the status of Appellee as heir at law can be determined.

Appellant's preliminary objections argue that Appellee has no standing to appeal the decision of the Register of Wills because Appellee is not named in either the 2012 Will or Decedent's prior 2009 Will. Appellant further argues, inaccurately citing *Estate of Briskman* and *Estate of Luongo*, that Appellee is too far removed from any interest in Decedent's estate to be considered an aggrieved

party under 20 Pa. C.S.A. §908.[15] *In re Estate of Briskman*, 808 A.2d 928 (Pa. Super. 2002); *In re Estate of Luongo*, 823 A.2d 942 (Pa. Super. 2003).

In this assumption, Appellant fails to give due consideration to Appellee's status as an intestate heir of Decedent's estate. And while invoking *Estate of Luongo* for his position that Standing is a prerequisite to the prosecution of a will contest, Appellant has failed to recognize its equally clear mandate that an intestate heir need only show a "realistic possibility of success in challenging the prior wills" to have standing to contest the probated will. *In re Estate of Luongo*, 823 A.2d 942, 958 (Pa. Super. 2003). In *Luongo*, (unlike the present matter) Superior Court found that Appellant lacked standing because prior wills excluded the Appellant, **and** Appellant had previously conceded that at least one of Decedent's prior wills was valid. *Id.* 958.

The facts in *Luongo* are easily distinguished from the facts at issue because Appellee, an intestate heir, raises allegations that, if proven, would invalidate the 2012 will *and* Decedent's prior 2009 Will. The facts alleged by Appellee, if proven, show a "realistic possibility" that the 2009 Will would also be invalidated if subsequently probated, and Decedent's estate would then pass by intestacy.

[15] Memorandum of Law in Support of Preliminary Objections of Respondent at 4, *citing* Estate of Briskman, Deceased, 808 A. 2d 928 (Pa. Super. 2002).

The facts in Appellant's other cited authority, *Estate of Briskman*, are also distinguishable from the matter at hand *In re Estate of Briskman*, 808 A.2d 928 (Pa. Super. 2002). The Appellate Court held there that the appellant's connection to the estate as successor trustee under a prior will was too tenuous to establish standing. The Court further clarified the limits of *Briskman* by stating the Appellant's "interest as an intestate heir would arise only if both the 1993 and the 1984 wills were determined to be invalid." *Id.* at 932.

Briskman poses no challenge to Appellee's standing in the matter at issue as Appellee here has alleged that all known purported wills of Decedent's are invalid, which would allow Decedent's estate to pass to him and Mr. McManus via intestacy. In fact, under the sternest application of *Briskman* he has alleged facts that, if proven, are sufficient to meet *Luongo's* "realistic possibility" standard. Therefore, as mandated by Appellant's own cited authority the Trial Court was compelled to recognize Appellee's standing, at least preliminarily, and until all factual issues have been determined.

The Trial Court is prevented from sustaining preliminary objections where factual issues are in contest. Pa. R.C.P. 1028 (c)(2). Since the evidentiary issues were never presented to the Trial Court for determination (by depositions or otherwise), it properly refused to accept <u>without proof</u> the factual conclusion that

Appellee did not have a "realistic possibility" of successfully challenging all outstanding wills.

Further, by answering the petition any possible claim to interlocutory relief has been waived, and review of any error alleged must now wait until either exceptions to or appeal of the Trial Court's final order/judgment.

Conclusion

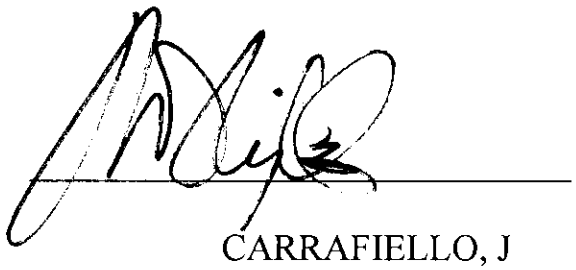
It is respectfully submitted that the present appeal is before this Honorable Superior Court improperly and that the flawed attempt at appeal has deprived it of jurisdiction. Further, even if we were to imagine that this matter were properly before the Court, any argument by Appellant is based upon flawed interpretations of controlling precedent and applicable procedural rules.

While it is understandable that parties may have difficulty understanding some of the rules for interlocutory appeals, the controlling rules here are plain and concise. When Appellant was required to submit a Docketing Statement, since no rule sanctioned this appeal, he simply used one that was inapplicable. Instead, Appellant should have voluntarily withdrawn this appeal, and its companion.

Further, Appellant either chose to ignore, or negligently failed to read and understand in full the controlling precedents upon which he used. Those authorities hold that it is not necessary (if even possible) to appeal the probate of all wills, either at once or otherwise; it is only necessary to demonstrate the "realistic possibility" that the contest of the probated and non-probated wills will be successful in order to confer standing to prosecute a contest of all wills.

It is unfortunate that these improper appeals (this as well as the companion appeal) shall have the effect of needlessly expending assets of the parties, not to mention the judiciary together with delaying a just resolution of this matter. The burden of providing a timely hearing and just determination is one in which the Trial Court expects counsel and the parties to take just as seriously as it does. While the Trial Court welcomes vigorous representation of parties' interests, it expects counsel to fairly, accurately and with candor cite and follow controlling precedent and procedure.

It is therefore respectfully submitted that by the standards set by our Appellate Rules and this Honorable Superior Court, this appeal should be quashed.



CARRAFIELLO, J

Date: June 24, 2014

Clayton H. Thomas,Jr., Esquire

Adam T. Gusdorf, Esquire