

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

2 May 98

No. 924 of 1996

Estate of BENNIE FREEMAN, Deceased

**Sur account entitled: First Account of Anthony Freeman Rhaney,
Sr., Executor**

Before PAWELEC, J.

This account was called for audit May 4, and, June 1 and 30, 1998

Counsel appeared as follows:

RICHARD A. MC DANIEL, ESQ. - for the Accountant

FRANCIS X. GRIMES, ESQ., - for Eric Rhaney, Objectant

Bennie Freeman died on October 25, 1994, leaving a will dated November 18, 1985, which was duly probated. He was unmarried at the time of his death and was survived by two children, namely, Anthony Freeman Rhaney, Sr., and Eric Fitzgerald Rhaney.

Letters Testamentary were granted to the accountant on November 4, 1994; proof of publication of the grant of same has been submitted and is annexed hereto.

It is stated that the accountant paid \$1,218.00 on account of transfer inheritance tax, on March 9, 1998, but, said payment has not been duly vouched.

By the terms of his will, a copy of which is annexed hereto, the testator gave his 1978 Buick Regal automobile to his son, Anthony Freeman Rhaney, Sr., and, gave the residue of his estate to his sons, Anthony Freeman Rhaney, Sr., and Eric Fitzgerald Rhaney, in equal shares. He appointed Anthony Freeman Rhaney, Sr., to serve as executor of his will.

It is stated that the family exemption has not been claimed.

It is stated that notice of the audit has been given to all parties having a possible interest in the estate.

Eric Fitzgerald Rhaney, son of the testator and residuary beneficiary, has appeared by counsel and filed Objections to the instant account of his brother as executor.

In his inventory and account, the executor charges himself with receipt of the following tangible personal property: a 1978 Buick Regal automobile, carried at a value of \$700.00; and, "Household contents", carried at a value of \$650.00. In his first Objection, Eric Rhaney contends that, "The Executor has not provided a detailed list of the personal property of the deceased."

In his account, the executor charges himself with receipt of two accounts at "MidAtlantic" Bank, being: Account No. 000-024224-8, carried at a value of \$1,922.24; and, "Burial Reserve Account" No. 480-406709-0, carried at a value of \$5,014.99. In his second Objection, Eric Rhaney contends that, "The Executor has not provided proof of Bank Balances at the time of death of the deceased."

The "Summary of Account and Index", on Page (2) of the account, includes the following four entries: "Principal Receipts" of \$28,287.23; "Income Receipts" of \$3,265.24; "Distributions to Beneficiaries" of \$1,144.10; and, "Disbursements" of \$10,685.06. Instead of the "Combined Balance on Hand" of \$20,771.88, which appears on Page (2) of the account, the aforementioned entries produce a true balance of \$19,723.31. Nevertheless, the "Combined Principal and Income on Hand", on Page (9) of the account, totals \$20,771.88 and includes the following three entries: premises 3323 Huntingdon Street, Philadelphia, carried at a value of \$20,000.00 and stated to be "under agreement of sale"; "Household contents" carried at a value of \$650.00; and, a bank account carried at a value of \$121.88. In his third Objection, Eric Rhaney contends that, "The accounting provided by the Executor does not balance."

In his fourth and final Objection, Eric Rhaney contends that, "The Executor does not provide sufficient information regarding the Lease Agreement of the deceased property since the date of death."

Eric Rhaney refuses to believe that his father died owning only a house and \$7,000.00 in the bank. Hence, Eric's first and second Objections seeking a detailed list of personal property and proof of bank balances. He who would surcharge a personal representative for failure to marshal and administer property of a decedent must identify the missing property; prove that it was owned by the decedent at death; prove the value of said property at the time of death; prove that failure to marshal and administer the missing property constituted breach of a fiduciary duty; prove that said breach of fiduciary duty resulted in a loss to the estate; and, prove the amount of said loss. See Cutler's Estate, 225 Pa. 167 (1909), Schwartz Estate, 68 D.&C. 154 (O.C., Phila., 1949), Conway Estate (No. 2), 12 Fiduc. Rep. 283 (O.C., Montg., 1962), Dunn Estate, 54 D.&C.2d 760 (Mercer, 1972), Estate of Stetson, 463 Pa. 64 (1975), and, Miller's Estate, 345 Pa. 91 (1942).

Testifying in support of his first Objection, Eric Rhaney stated that he and the accountant were the only persons who had keys to their father's house. Eric admitted that he took a bedroom set. According to Eric, he and Anthony agreed that their step-sisters should get some personal property from the house. Eric went on to testify about a chandelier and a refrigerator.

Testifying in his own defense, Anthony Rhaney stated that he did not change the locks on his father's house, and, that Eric and their two step-sisters all had keys to the house. Anthony admitted that he had never

made a "list" of the contents of the house. Anthony insisted that none of the furniture was sold, but, that some of it was taken by Eric. Anthony admitted that the amount of \$650.00 represented his best guess as to the value of the furniture.

Anthony Rhaney offered several Exhibits in connection with bank accounts. Exhibit "A-1" is a copy of a statement for "MidLantic" Bank checking account No. 000-024224-8, in the name of the decedent, for the period October 6 to November 3, 1994. The balance on deposit in said account, on October 25, 1994, the date of death, was \$2,888.45. On October 26, 1994, said balance was drawn down to \$1,931.07 by the clearance of the following items: two checks totaling \$522.38; a MAC withdrawal of \$400.00; and, an automatic debit of an insurance premium of \$35.00. On October 27, 1994, said balance was further drawn down to \$1,916.61 by clearance of a check in the amount of \$14.46.

Exhibit "A-2" is a copy of a statement of "MidLantic" Bank checking account No. 060-137188-3, in the name of the decedent's estate, for the period November 17, 1994 to December 8, 1994. Said estate account was opened on November 17, 1994 with a deposit of \$1,922.24.

Exhibit "A-3" is a copy of a statement of "MidLantic" Bank "Burial Reserve Account" No. 480-406709-0, in the name of the decedent, for the period October 12, 1994 to October 31, 1994. Said account had an opening balance of \$5,009.17 on October 12, 1994, and, a closing balance of \$5,014.99 on October 31, 1994.

Having considered the testimony and Exhibits concerning personal property and bank balances, this Court holds that the Objectant has failed to meet his burden of proving the identity, ownership and value of allegedly missing property of the decedent. It may be hard for Eric Rhaney to believe that his father owned only a house and a modest amount of money in the bank, but, Eric has failed to prove otherwise. Accordingly, the first and second Objections are dismissed.

Objectant correctly observes that the account does not balance. However, in disposing of the third Objection, this Court notes that the Objectant has the duty of proving that the accountant has breached an applicable fiduciary duty, and, that a related loss has occurred. See Estate of Stetson, 463 Pa. 64, 84, 345 A.2d 679 (1975). This is because,

"Surcharge is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care." Miller's Estate, 345 Pa. 91, 93 (1942)

In charging himself with possession of assets valued at \$20,771.88, instead of the true balance of \$19,723.31, the accountant damages himself and not the decedent's estate. Accordingly, the third Objection is dismissed.

The decedent owned premises known as 3323 West Huntington Street in Philadelphia. Exhibit "A-5" is a copy of a Lease whereby the accountant rented said premises to Folana D. Jackson for the period October 15, 1997 to October 15, 1998. Said Lease is dated October 1, 1997, and, provides for a security deposit of \$500.00 and a monthly rent

of \$250.00. Attached to Exhibit "A-5" is a copy of a check to the order of the decedent's estate in the amount of \$750.00. Said check is numbered 113, and, dated October 10, 1997. Exhibit "A-6" is a copy of an Agreement of Sale whereby the accountant sold premises 3323 West Huntington Street to Folana D. Jackson for the sum of \$20,000.00, of which: \$1,500.00 is due on execution of the Agreement, and, \$18,500.00 is due at settlement. Said Agreement is dated October 1, 1997, and, was approved by the accountant on October 9, 1997. It provides for settlement to be held within eighteen (18) months from the execution of the Agreement. The Buyer agrees to take the property in "as is" condition. The Buyer may terminate the Agreement if she does not obtain financing satisfactory to her. Exhibit "A-5" includes a copy of a check to the order of the decedent's estate in the amount of \$1,500.00. Said check is numbered 114, and, dated October 10, 1997.

Testifying in support of his fourth Objection, Eric Rhaney described his father's house as having four bedrooms, a porch, and, a garage. Eric opined that other houses in the area rent for \$300.00 to \$350.00 a month. Eric also opined that his father's house is worth \$30,000.00 to \$40,000.00. Eric testified that he had found a buyer who was ready to pay \$25,000.00 for the house, but, that this buyer could not get a mortgage.

Testifying in his own defense, Anthony Rhaney stated that his father's house was vacant on the date of death, and, that it had been vacant

for some three years thereafter. Anthony stated that he had tried to sell the house for more than three years, and, that he had it appraised for \$22,000.00 in 1995. According to Anthony, he hired a broker who had been recommended by Eric, but, this broker did not sell the house. Also according to Anthony, he signed an Agreement to sell the house to a buyer who had been recommended by Eric, but, this sale was not consummated. Anthony testified that he found Folana D. Jackson, and, that she expressed an interest in renting and buying the house.

Having considered the testimony and Exhibits concerning the decedent's house, this Court holds that the Objectant has failed to meet his burden of proving that the rental and sale thereof constitute breaches of fiduciary duty which have resulted in losses to the estate. The opinion of Eric Rhaney, on these matters, is unpersuasive because it is in conflict with that of his brother, and, because it is not supported by any independent evidence. This Court is not convinced that the house has a fair rental value in excess of the rent for which it has been rented by the accountant. Nor is it convinced that the house has a fair market value in excess of the price for which it has been sold by the accountant. Accordingly, the fourth and final Objection is dismissed.

All Objections having been addressed and dismissed, the account shows a "Combined Balance on Hand", before distributions, of

\$1,915.98

which, composed as indicated in the account, is awarded as follows: 1978 Buick Regal automobile, at an appraised value of \$700.00, to Anthony Freeman Rhaney, Sr.; and the balance then remaining, or residue, in equal, one-half (1/2) shares, to Anthony Freeman Rhaney, Sr., and Eric Fitzgerald Rhaney.

The account shows unconverted real estate appraised at \$ 20,000.00

being premises 3323 West Huntington Street, Philadelphia, Pennsylvania, which is awarded as follows: an equal, undivided, one-half (1/2) interest therein, as tenant in common, to each of Anthony Freeman Rhaney, Sr., and Eric Fitzgerald Rhaney.

The above award of premises 3323 West Huntington Street, Philadelphia, is made subject to the terms of the aforementioned Lease and Agreement of Sale.

The above awards of residue are made subject to the following distributions of cash which appear at Page (5) of the account, to wit: \$139.10 to Anthony Freeman Rhaney, Sr., and, \$305.00 to Eric Fitzgerald Rhaney.

A schedule of distribution, to contain only a recital of the award of real property, described as provided and containing all certifications required by Rule *72, shall be filed with the clerk within ninety (90) days of absolute confirmation of the account.

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

AND NOW, _____, unless exceptions are filed to this adjudication within twenty (20) days, the account is confirmed absolutely.

J.