IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

ORPHANS' COURT DIVISION

William F Binnig, Deceased

20130001205046

O.C. No. 12 DE of 2013

Control # 131568

Estate of WILLIAM F. BINNIG, deceased

OPINION SUR APPEAL

Appellant Kimberly Hensel appeals the Trial Court's Adjudication of the First and Final Account of William J. Binnig, Executor of the Estate of William F. Binnig, Deceased, dated March 16, 2015.

Facts and Procedural History

Decedent William F. Binnig, (hereafter referred to as "Decedent"), died testate on February 5, 2012. His Will dated October 28, 2005 was duly probated and Letters Testamentary were issued to decedent's son, William J. Binnig. At the time of his death, decedent's wife had predeceased him, but he was survived by his son, William J. Binnig (Appellee), and his three granddaughters, Kimberly Hensel (Appellant), Barbara Dymbowski, and Debra Moshinski. His Will provided that Appellee would receive fifty (50%) percent of the estate with the remaining fifty

(50%) percent to be divided equally among his three granddaughters. (N.T. p. 13-14).

During his lifetime, Decedent executed a Durable Power of Attorney, dated October 28, 2005, appointing Appellee as his agent. In July 2011, Appellee began paying bills as agent under the Power of Attorney. (N.T. p. 58-59). On or about August 4, 2011, the Decedent's granddaughters, including Appellant, and Appellee and his wife Linda Binnig, met with attorney Gerald Clarke, Esquire to discuss Medicaid planning strategies to preserve Decedent's assets. (N.T. p. 14-16; 59-60). The Decedent was not present at the meeting or consulted with the plan devised by his family. Id.

The plan implemented as a result of that meeting, involved the Appellee, acting under the power of attorney, transferring $373,017.34 from Decedent's various accounts into a new account owned solely by Appellee at Police and Fire Federal Credit Union, identified as account number 81925001, and referred to by Appellant as the "Medicaid Planning Account." (N.T. p. 59-60; 108-12).

In addition to moving funds from the various accounts, the Appellee also changed the beneficiary designations on the Decedent's life insurance and annuity policies. (N.T. p. 76-77).

Appellee filed two separate formal Accounts, one in his capacity as agent under the Power of Attorney and the second in his capacity as executor of the

Decedent's Estate. Objections were filed to both Accounts by Kimberly Hensel, Appellant herein, alleging breach of fiduciary duty, and objecting to the asset transfers, gifts, and changes to beneficiary designations.

The Accounts and accompanying Objections were consolidated for trial on April 10, 2014. Following review of post-trial submissions, the Trial Court issued its Adjudication of the Power of Attorney Account finding that the Appellee's actions as agent under the power of attorney were improper. The Trial Court voided the beneficiary changes and the transfers from the various accounts, imposed Surcharges totaling $384,118.38 against Appellee, and found that the balance remaining at Decedent's death was $553,425.50. No appeal to the Trial Court's Adjudication of the Power of Attorney Account was taken by any party.

In reviewing the Executor's Account, the Trial Court again examined the voided transactions, tracing the funds back to the original accounts from which they came, to determine their characteristics. The Wells Fargo Bank account was titled jointly with the Decedent and thus was a multiple-party account subject to 20 Pa. C.S. Section 6301, *et seq*. The Police and Fire Federal Credit Union (hereinafter referred to as "PFFCU") account was titled "ITF William J. Binnig," and was therefore subject to 20 Pa. C.S. Section 6301, *et seq*. of the Multiple-Party Account Act. The funds from the remaining accounts were originally held by the Decedent alone.

The Trial Court issued its Adjudication of the Executor's Account finding that the accounts originally held jointly with the Decedent and Appellee or held in trust for the Appellee were non-probate assets; that the funds transferred from those accounts retained those characteristics; and that the proceeds from the life insurance and annuity policies were non-probate assets subject to distribution in accordance with their original beneficiary designations. After subtracting those funds from the amount determined by the Court under the Power of Attorney Account, the remaining balance was awarded in accordance with the Decedent's Will: one-half to Appellee, 1/6th to Appellant, 1/6th to Barbara Dymbowski, and 1/6th to Debra Moshinski.

Appellant timely appealed the Trial Court's Adjudication of the Executor's Account, and filed her Concise Statement of Matters Intended to be Raised on Appeal pursuant to Pa. R.A.P. 1925(b).

Statement of the Issues

The issues as framed by the Appellant's 1925(b) Statement contain twelve separate issues. The Trial Court has taken the liberty to rephrase the issues to facilitate its explanation of the specific reasons for its decision. The issues as restated are as follows:

1. **DID THE TRIAL COURT ERR IN DETERMINING THAT THE DECEDENT'S WELLS FARGO ACCOUNT ENDING 3692 AND THE POLICE AND FIRE FEDERAL CREDIT UNION ACCOUNT ENDING 3301 WERE MULTIPLE-PARTY ACCOUNTS?**

2. **DID THE TRIAL COURT ERR IN FAILING TO SURCHARGE $11,000.00 FOR LIFE INSURANCE PROCEEDS NOT LISTED IN ACCOUNT?**

3. **DID THE TRIAL COURT ERR IN NOT AWARDING COUNSEL FEES TO APPELLANT'S ATTORNEY?**

4. **DID THE TRIAL COURT ERR IN FAILING TO AWARD APPELLANT HER PROPORTIONATE SHARE OF DECEDENT'S PERSONAL PROPERTY?**

5. **DID THE TRIAL COURT ERR IN AWARDING APPELLEE EXECUTOR'S COMMISSION OF $12,474.00 AND ADDITIONAL FEES OF $7,600.00?**

6. **DID THE TRIAL COURT COMMIT "AN ERROR IN OVERRULING THE OBJECTION THAT THE ACCOUNTANT BREACHED HIS FIDUCIARY DUTY AND ENGAGED IN SELF-DEALING WHERE ALL THE FUNDS FROM THE MEDICAID PLANNING ACCOUNT WERE TRANSFERRED TO THE ACCOUNTANT AFTER DECEDENT'S DEATH?"**

Discussion

1. **The Trial Court did not err in finding that the Decedent's Wells Fargo account ending 3692 and the Police and Fire Federal Credit Union account ending 3301 were multiple-party accounts.**

The Trial Court properly concluded that the Wells Fargo and Police and Fire Federal Credit Union accounts were multiple-party accounts. The Multiple-Party Account Act is contained at 20 Pa. C.S. Section 6301, *et seq.* and provides that a multiple-party account is defined as "either a joint account or a trust account." A

joint account is defined as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." 20 Pa. C.S. Section 6301. A trust account means "an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sum on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement." 20 Pa. C.S. Section 6301.

a. The Wells Fargo Account ending 3692 was a joint account which belonged to the Decedent during his lifetime, and upon his death passed to the Appellee by right of survivorship.

The parties identified the Decedent's Wells Fargo account as a joint account with Appellee in their Stipulated Facts, as follows:

> 8. . . . checking account that decedent held at Wells Fargo which was jointly owned with William J. Binnig identified as account number 1000036313692.
>
> 10. The decedent owned a checking account with Wells Fargo with a balance on July 22, 2011 of $104,815 identified as 1000036313692. This account was owned jointly with William J. Binnig. On August 8, 2011, William J. Binnig transferred $97,267 from this account into the new account at PFFCU (identified as account number 81925001). . . ..

(Exhibit C-1, Stipulated Facts).

During the lifetime of the parties to a joint account, ownership is determined by the "net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." 20 Pa. C.S. Section 6303(a).

The evidence showed and the Trial Court found in its Adjudication of the Power of Attorney Account that the Accountant "did not contribute to the joint account during the Decedent's life." Therefore, pursuant to Section 6303(a) of Title 20, the funds in the joint account belonged to the Decedent during his lifetime. The Trial Court surcharged the Appellee for transfers totaling $97,267.00 into the Medicaid Planning Account, and voided those transfers. The effect of voiding the transfers was to return the funds to the *status quo ante*, as if the transfers never occurred, so that the $97,267.00 was constructively returned to the joint account and remained in the joint account at the Decedent's death. See In re Tarrence Estate, 23 Fiduc. Rep.2d 143, 146 (O.C. Montg. Co. 2002) (holding that joint tenant's attempt to change a joint account by replacing her name with that of her daughter's was not effective for lack of authority, and, therefore, the joint account retained its characteristics as originally created).

The Appellee's removal of the funds from the joint account, although improper, did not sever the joint tenancy. The determination of whether a joint tenancy has been terminated hinges on whether the power of a joint tenant to withdraw funds has been "exercised in good faith for the mutual benefit of both . . .

[or has been] . . . exercised by the fraudulent withdrawal of the corpus of the funds for the exclusive use of one for the purposes of depriving the other of any use thereof or title thereto." Estate of Allen, 412 A.2d 833, 837 (Pa. 1980) (citing Berhalter v. Berhalter, 173 A. 172, 173 (Pa. 1934); In re Estate of Beniger, 296 A.2d 773 (Pa. 1972)). Moreover, "the bad faith requisite to severance of a joint tenancy will not be presumed on the basis of withdrawal alone, if the joint tenant has placed the money elsewhere in his or her name, retaining it in its entirety." In re Eyer's Estate, 317 A.2d 203, 204 (Pa. 1974). Appellee's removal of funds was exercised in good faith, for the benefit of the Decedent. Thus, there was no severing of the joint tenancy of the account.

Funds remaining in a joint account at death of a party belong to the surviving party "as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created." 20 Pa. C.S. Section 6304(a). No testimony was presented regarding any contrary intent on the part of the Decedent when the account was created or at any time thereafter. Appellee testified that his name was on the joint account with both of his parents, well before 2005, and remained on the account after his mother's name was removed by the Decedent following her death. (N.T. p. 58, 83). Appellant testified that she thought the account was titled jointly for convenience for check writing purposes, (N.T. p. 49-50), but admitted that she was not present when the

account was established. (N.T. p. 40). The Trial Court found Appellee's testimony more credible that Appellant's on this issue.

The funds remaining in the Wells Fargo account at the Decedent's death were not subject to distribution in accordance with the Decedent's Will. The statute makes clear that transfers resulting from the application of Section 6304 are nontestamentary. 20 Pa. C.S. Section 6306. Accordingly, the funds remaining in the Wells Fargo joint account at the Decedent's death, together with the returned funds due to the Court's voiding the transfers, passed by operation of law, to Appellee as the survivor.

b. The PPFCU Account ending 3301 was a trust account which belonged to the Decedent during his lifetime, and upon his death passed to the Appellee by right of survivorship.

Appellant asserts that the Trial Court erred in concluding that the PFFCU Account Number 00333301 was a multiple-party trust account to the extent of the $156,215.00 transferred to the Medicaid Planning Account during life and the $60,609.00 remaining at death. The Trial Court correctly determined that the PFFCU account was a multiple-party account subject to 20 Pa. C.S. Section 6303(b) during life and Section 6304(b) at death.

The parties' Stipulated Facts concerning the PFFCU account and transfers are as follows:

6. The decedent owned an IRA account held at PFFCU which he inherited from his wife identified as account number 00333301. The balance of $1,869.00 was transferred by William J. Binnig on August 4, 2011 into the new account at PFFCU (identified as account number 81925001) and the IRA account was closed.

7. The decedent owned an IRA account held at PFFCU that had a balance on August 1, 2011 of $9,445. A required minimum distribution was received on December 15, 2011 equaling $741.53 which was deposited to a savings account owned by the decedent at PFFCU identified as account number 00333301. The balance of this IRA account at the death of the decedent was $8,717 which the parties agree is a probate asset of the estate of the decedent.

8. The decedent owned a savings account held at PFFCU that had a balance on August 1, 2011 of $226,945 identified as account number 00333301, and comprised of S1 Savings and a Certificate of Deposit. A total of $156,215 was transferred by William J. Binnig into the new account at PFFCU (identified as account number 81925001). Theses{sic} transfers were made on the following dates: 8/4/2011 - $16,201.86 and 11/21/2011 - $140,012.91. In addition, on December 19, 2011 William J. Binnig transferred $2,000 from this account into a checking account that decedent held at Wells Fargo which was jointly owned with William J. Binnig identified as account number 1000036313692. This account had a date of death balance of $60,609. The balance of this account was transferred on 3/2/2012 into PFFCU account with account number 81925001.

(Exhibit C-1, Stipulated Facts).

At trial, Appellee testified to a conversation with his father after his mother's death, that his father was changing the title of his accounts, and stated: "I'm thinking about putting money in trust for you." (N.T. p. 82). Appellee presented a one page account statement from the PFFCU Account for the period from 02/01/11 to 02/28/11 identified as R-1. Objection was made to the use of the statement,

however, the Trial Court ruled that "the bank statement is so obvious and so pivotal that, I'm sorry, in the interest of justice I'm going to permit it." (N.T. p. 33.) Appellant identified the document, the owner of the account, and that it was marked: "ITF William J. Binnig," meaning it was in trust for (N.T. p. 34), but she never spoke with or had any conversation with her grandfather regarding the titling of the account. (N.T. p. 35-36).

Further Objection was made to the introduction of Exhibit R-1 into evidence and whether an IRA account could be titled as "in trust for." (N.T. p. 144-148). The Trial Court ruled that the document would be introduced into evidence for whatever probative value it had, and that the Court would make the decision. (N.T. p. 147-148).

Exhibit R-1 on its face is an account statement for the period from 02/01/11 to 02/28/11 for PFFCU account number 00333301. The statement shows the account title as William Binnig ITF William J. Binnig, and lists beginning and ending balances for six products: S1 Savings, S5 Money Mkt Plus, S6 IRA Money Mkt, Visa Accumulation, Certificate 177144 and Certificate 367527.

"[T]he opponent of the survivorship right has the burden to produce evidence so clear, direct, weighty, and convincing that the fact finder could without hesitation, come to a clear conviction that Decedent, in fact, ha[d] not intended a

right of survivorship regardless of how the accounts were created." In re Estate of Cella, 12 A.3d 374, 380 (Pa. Super. 2010) (internal citations omitted).

The thrust of Appellant's argument is that regardless of how the accounts were titled, it was her grandparents' intention that they would be distributed according to the Will. (N.T. p. 50-51). She testified that her grandfather was a careful person, did not understand bank terminology, but admitted she did not know his motivation for titling the account. (N.T. p 50-51).

Appellee testified to his Sunday rituals with his father reviewing the accounts and checkbooks. (N.T. p. 96-97). His father was "organized, detailed" and "intelligent about his finances." (N.T. p 96). His accounts were diversified in annuities, IRA's and certificates. (Id.) Up until about 10 years ago, he would give Appellee "a written statement of every bank account that he had, where it was, and how much money was in there." (N.T. p. 97). The Trial Court found the testimony of Appellee more credible than that of Appellant concerning the Decedent's financial knowledge. Further, Appellant's general knowledge of her grandfather's intention was not sufficient to overcome the statutory presumption of survivorship.

No clear and convincing evidence having been submitted by Appellant that the Decedent intended that title to the PFFCU account would be anything other

than as contained on the face of the account statement, the Trial Court found that the PFFCU Account was titled In Trust For Appellee.

The Trial Court having voided the transfers to the Medicaid Planning Account from the PFFCU account under its Adjudication of the Power of Attorney Account, the funds were constructively returned to the ITF account where they retained their trust characteristics, and together with the funds remaining in the account, passed by operation of law, at death of the Decedent, to Appellee as survivor.

The Trial Court's determination that the PFFCU account was a multiple party account during the life of the Decedent and at his death was proper.

2. The Trial Court did not err in failing to surcharge Appellee $11,000.00 for life insurance proceeds not listed in Account.

Decedent was a Philadelphia police officer, and had two life insurance policies, one with the City, and one with the union. According to Appellee, both policies listed Appellee's mother, as the beneficiary, and there was no contingent beneficiary. (N.T. p.77.). Appellee testified that he changed the beneficiary to himself to have a living beneficiary. (N.T. p. 84). The policy proceeds totaling $11,000.00 were not listed in the Account.

Appellant testified that she recalled a conversation with her father that her uncle, the Appellee, had requested her mother's death certificate, in connection

with a life insurance policy left to himself and Peg, her mother, "that I can't claim because I need to prove that Peg is not with us." (N.T. p. 43, 44). Appellant presented no further testimony confirming that the life insurance policy was payable to either the Decedent's estate or to herself as issue of her deceased mother.

Neither party presented any documentary evidence of the life insurance policies at issue, the original beneficiary designations, nor the policies' default provisions in the event of the death of a named beneficiary or failure to name a contingent beneficiary. The Trial Court, in its Adjudication of the Power of Attorney Account, found Appellee's change of beneficiary designation to be improper and voided the change, thereby, causing the beneficiary designations to revert to the original named beneficiary, any named contingent beneficiary, or in accordance with the policy provisions. Without any evidence of the policy provisions in the event of the death of the named beneficiary and failure to name a contingent beneficiary, the Trial Court was unable to determine whether the proceeds were payable to and includable in the Decedent's Estate.

3. The Trial Court did not err in failing to award counsel fees to Appellant's attorney.

The general rule is that each party is required to pay his or her own counsel fees, and only in exceptional cases will an objectant to an executor's account be

allowed counsel fees. In re Sowers' Estate, 119 A.2d 60, 64 (Pa. 1956), Harrison's Estate, 70 A. 827, 827 (Pa. 1908). The determination of whether counsel fees should be awarded is within the discretion of the Trial Court. Harrison's Estate, 70 A. at 827. Where no new assets or additional funds are created, denial of counsel fees is appropriate. In re Sowers' Estate, 119 A.2d at 64.

In the instant matter, Appellant's Objections were to the title and ultimate distribution of the assets. No new fund or additional fund was created. The Decedent's Estate Account disclosed the Wells Fargo joint checking account, the PFFCU ITF account, the annuity, and all of the transfers made within one year of the Decedent's death by Appellee under the power of attorney. The majority of the funds transferred which were subsequently voided by the Court retained their joint or trust status and were intended by the Decedent to pass to the Appellee upon his death. The Trial Court's actions in not awarding counsel fees to Appellant's attorney was proper.

4. The Trial Court did not err in failing to award Appellant her proportionate share of decedent's personal property.

Appellant failed to sustain her burden of proving that she did not receive her proportionate share of the Decedent's personal property. The Account listed household contents of $2,000.00 and distribution of personal effects in that amount to various family members in February 2012. At Trial, Appellant presented no

inventory of personal property which would contradict the $2,000.00 value listed in the Account. She did not testify to any specific items that she requested that were not given to her. She described her grandparents' house as "outdated, probably the 60's, 70's, it was not updated," and stated: "We were invited if we wanted anything that the house was being cleaned out." (N.T. p. 45, 54). Her husband received her grandfather's military uniform, and her brother received their mother's old bedroom set from the back room. (N.T. 54). She failed to present any testimony as to the value or identity of household items and/or tangible personal property for which she was claiming an interest that she did not receive. The Trial Court properly overruled Appellant's Objection to Accountant's failure to distribute Decedent's household contents and tangible personal property.

5. The Trial Court's award of executor's commission and additional fees was proper.

A fiduciary is entitled to "reasonable and just" compensation for services provided, and such determination is left to the discretion of the trial court. In re Estate of Sonovick, 541 A.2d 374 (Pa. Super. 1988). Viewed as a percentage of the gross probate estate as listed on the Account, the fee taken by the Executor and approved by the Trial Court in the instant matter was approximately 4.5%, which the Court found to be reasonable.

The additional amount of $7,600.00 paid to Appellee as listed in the Account under Administrative Expenses and approved by the Trial Court was for reimbursements for repairs to the house for expenses and time spent preparing the house for sale. Appellee testified that he practically "gutted" the house, and with the help of his sons-in-law removed and replaced carpeting in the hall and three bedrooms, removed paneling, patched walls, tiled the bathroom and kitchen floors, installed a new bathroom vanity, blinds throughout the house, light fixtures, and new gas range. He had three contractors who removed wallpaper, painted and finished the hardwood floors. (N.T. p. 90-92). While Appellant did not see the house before it was sold, she knew that it had to be updated and a significant amount of work done to "make it look nice for sale," and she knew that her uncle paid himself for making the repairs. (N.T. p. 47, 56).

The Trial Court's allowance of the above amounts was entirely proper and within its discretion.

6. The Trial Court committed no error "in overruling the objection that the Accountant breached his fiduciary duty and engaged in self-dealing where all the funds from the Medicaid Planning Account were transferred to the Accountant after decedent's death."

As stated above, the Trial Court found that the funds in the Medicaid Planning Account included joint funds and trust funds payable to the

Accountant/Appellee as the survivor. Therefore, there was no breach of fiduciary duty or self-dealing by the Appellee in transferring funds to which he was entitled.

Conclusion

This matter involves another difficult family situation, where the Appellant, who was very close to her grandparents as a child, due to the untimely death of her mother, believes that she is entitled to a certain distribution of her grandfather's assets, regardless of whether they passed outside his estate, and if so, to whom they were titled. Her grandfather, the Decedent, managed his finances during his lifetime, and had his money in three different banks, a credit union, and an annuity. His checking account at Wells Fargo was titled jointly, and the funds in his PFFCU credit union account were titled in trust for his son, the Appellee. While the family, without Decedent's apparent participation or knowledge, attempted to preserve the Decedent's assets, they did so improperly, requiring the Trial Court to void transfers from various accounts to the Medicaid Planning Account. On Decedent's death, the majority of the voided transfers, retaining their original trust or joint status, passed by operation of law to the Appellee as survivor, outside of Decedent's Will.

Had the Decedent participated in the creation of the Medicaid Planning Account or expressed his desire at the time that account was created, there may

have been a different outcome, but no such evidence being presented, the Trial Court was compelled to enter its decision based upon the facts presented.

It is respectfully submitted that the Trial Court's Adjudication of the Executor's Account be affirmed.

9-9-15

CARRAFIELLO, A.J.

Gerald R. Clarke, Esquire

Joseph P. McGowan, Esquire