IN THE COURT OF COMMON PLEAS OF PHILADELHIA

ORPHANS' COURT DIVISION

O.C. No. 608 DE of 2005

Control No. 143577

THE ESTATE OF MARGARET NAGY MCFADDEN, Deceased

OPINION SUR APPEAL

Factual and Procedural History

Margaret Nagy McFadden (hereinafter "Decedent") died a widow on December 26, 2003, a resident of Philadelphia County. She was survived by three children: Ralph, Eileen, and Ronald McFadden. The primary asset of the estate was Decedent's home, located at 408 S. 43d St., Philadelphia (hereinafter "the Property"), which Ronald McFadden (hereinafter "Appellant") and Eileen McFadden occupied at the time of Decedent's death. No will was produced at the time of death, and Letters of Administration were granted to Martin Kleinman, Esq. (hereinafter the "Administrator").

Because the estate was otherwise insolvent, it became necessary to sell the Property to satisfy the outstanding debts and obligations, including the Commonwealth's assessment of inheritance taxes in the amount of approximately $10,000, plus interest. The Administrator therefore attempted to obtain an appraisal

on the Property, but Appellant refused to admit the appraiser. Upon the issuance of a Citation to Show Cause why Appellant and Eileen McFadden should not be compelled to vacate the Property, Appellant and Eileen McFadden, acting *pro se*, filed a handwritten answer on June 10, 2005, to which they attached a document purported to be an after-discovered will of Decedent, dated February 5, 2001. This document, in addition to making several bequests of miscellaneous personal property, granted Appellant and Eileen McFadden the right to live in the Property for their lives, or until they "don't want to anymore." This purported will was submitted to the Register of Wills, but was later withdrawn in accordance with a family settlement agreement which purported to carry out the general dispositive effect of the will.[1] The family settlement agreement was proposed by Mr. Kleinman and approved by Decree of Judge Lazarus dated March 8, 2006.

Unable to secure the funds to pay the inheritance taxes and court-ordered Administrator's commission and attorney's fees, Appellant executed a mortgage with World Savings and received loan proceeds of $117,865.64. In order to mortgage the Property, Appellant and the Administrator executed a deed dated June 13, 2006, from Mr. Kleinman as Administrator to Appellant, which contained trust language pursuant to the family settlement agreement.

[1] The Court has never ruled on the genuineness of this document.

Appellant makes the currently unproven claim that he used the loan proceeds to pay the inheritance taxes and the Administrator's commission.

However, because Mr. Kleinman and Apellant transferred the property from the estate without Court approval, and because one beneficiary alleged that her signature on the family settlement agreement was forged, and further, because Appellant could not account for all of the proceeds of the mortgage loan, Judge Lazarus, by decree dated January 23, 2007, ordered the property sold and ordered Appellant to reimburse the estate $17,000, being the amount not accounted for from the loan proceeds. Mr. Kleinman was also ordered to deduct any fees generated by the unauthorized transfer from his commission. Any remaining proceeds were to be distributed to Decedent's intestate heirs. To date, the Decree is still outstanding, exceptions to the Decree never filed, an appeal never taken, and the property not sold.

Between May of 2007 and May of 2008, various petitions were filed and dismissed in this matter, including a Petition to Revoke Letters of Administration,[2] a Petition to, among other things, hold Mr. Klienman personally liable for losses caused by Appellant and be held in contempt for failure to comply with prior Decrees of the Court,[3] an emergency Petition to hold Appellant in contempt for returning to

[2] Filed by Appellant on May 16, 2007, and Dismissed by decree of Judge Lazarus dated June 14, 2007.
[3] Filed by Eileen McFadden, acting *pro se*, on January 31, 2008, and dismissed by Decree of Judge Lazarus dated September 5, 2008.

the Property,[4] and a Petition for Mr. Kleinman to post bond and indemnify the estate against future damage.[5]

By Decree dated August 5, 2008, World Savings Bank (which would become Wachovia, and then Wells Fargo) was granted leave to intervene.

The Property at this point was in poor condition. Between 2008 and 2010, work was gradually performed, at the expense of the estate, to repair the Property and return it to saleable condition.

In January of 2010, the Honorable Anne Lazarus, the trial judge to whom this case was assigned and who entered the above decrees, ascended to the bench of the Pennsylvania Superior Court and this matter was assigned to the calendar of the undersigned judge.

In May of 2010, Mr. Kleinman petitioned for leave to resign as administrator, which was denied by Decree of Judge Carrafiello dated July 7, 2010, until tasks relating to repairing the property and relisting it for sale were complete.

In 2014, Robert H. Bembry, III, Esq. was appointed Administrator D.B.N. by the Register of Wills office. Attorney Bembry (hereinafter "Administrator D.B.N.")

[4] Filed by Eileen McFadden, acting *pro se*, on February 15, 2008, and dismissed by Decree of Judge Lazarus dated September 5, 2008.
[5] Filed by Eileen McFadden, acting *pro se*, on May 14, 2008, and dismissed by Decree of Judge Lazarus dated September 5, 2008.

filed a Petition with the Trial Court on November 4, 2014, averring that Appellant was still living in the Property and was again refusing the administrator access to the premises and thereby was hindering the sale of the Property as required by numerous Decrees of this Court, and therefore requested that Appellant be removed from the Property and surcharged with the back rental value of the Property. After considering Appellant's answer filed through counsel, this Court issued a Decree dated July 15, 2015 ordering Appellant to cooperate with the Administrator D.B.N. and allow the Property to be appraised and sold. The Decree further provided that if Appellant did not comply, Mr. Bembry was to enter an affidavit of non-compliance upon which the Court would issue a writ of possession in favor of the Administrator D.B.N. Mr. Bembry filed such an affidavit on August 17, 2015.

On August 10, 2015, twenty seven (27) days after this Court's order dated July 15 of the same year, Appellant filed Exceptions, which asserted the validity of the Decedent's purported will, the family settlement agreement, or both, and on the strength of these documents opposed the sale of the Property as ordered.

By Decree dated August 24, 2015, the Appellant's Exceptions were overruled as untimely, and Appellant was granted a fifteen (15) day grace period in which to cooperate with the administrator. By Affidavit dated October 19, 2015, the Administrator D.B.N. averred that while Appellant had allowed an appraiser access to the Property and it was listed for sale, Appellant still would not allow the Property

to be shown to proposed buyers, and that Wells Fargo had filed a foreclosure action against Appellant regarding the Property.

Appellant appealed the Decree of this Court overruling his Exceptions by a Notice of Appeal filed September 15, 2015. This Court entered an Order dated September 21, requiring Appellant to file a statement of matters complained of pursuant to Pa. R.A.P. 1925(b).

Issues

Pursuant to order of the Trial Court, the Appellant timely filed his 1925(b) Statement of Matters Complained Of, which contained four issues, the first of which contained eight subsections.

He first alleges that a formal hearing was never scheduled by the Trial Judges, whereupon Appellant would have had the opportunity to have set forth his position. The eight subsections are recitation of alleged facts. The second matter complained of alleges that the Court failed to give weight to the evidence as it would if a "formal hearing" had been held.

The third matter complained of is that the Appellant has complied with the Trial Court's Decree of August 24, 2015 in that the Administrator D.B.N. "has had an appraisal of said real estate."

The last matter complained of is that "it appears that the Hearing Judges were more concerned with the payments of the estate expenses and inheritance tax than to the provisions set forth in the will and family settlement agreement."

The Trial Court has taken the liberty to consolidate and rephrase these matters complained of into issues which may be most efficiently addressed, together with adding an issue of threshold importance omitted by Appellant, the apparent late Filing of Exceptions to the Trial Court's Decree of July 15, 2015. It has also added issues raised by it and this Honorable Superior Court but not included by Appellant.

The issues as restated are as follows:

1. Did the Trial Judges properly overrule Appellant's exception for being filed past the twenty day deadline, and if so, is this untimely appeal properly before this Honorable Court?

2. Has Appellant preserved all issues listed in his 1925(b) statement of matters complained by means of a timely appeal, or as raised by timely exceptions?

3. Is this an impermissible interlocutory appeal pursuant to the Pennsylvania Rules of Appellate Procedure and should it be dismissed/quashed as such, and Appellant and his Counsel be sanctioned?

4. Did the Hearing Judges, by failure to hold a "formal hearing," as alleged by Appellant, prevent Appellant from setting forth his position?

5. Had the appraisal as ordered by this Court and as referred to in its July 15, 2015 Decree taken place by the date of that Decree, thereby making the relevant Decree erroneous?

6. Did the Hearing Judges err by being improperly concerned with the payment of estate expenses and inheritance taxes?

Discussion

1. The exceptions to the Decree of July 15, 2015 were not filed until August 10, 2015, after the expiration of the twenty day limitation for filing, thereby rendering them a nullity. This, together with Appellant's failure to consider this as a contested issue in his Pa R.A.P. 1925(b) Statement renders this appeal untimely.

Pennsylvania Orphans' Court Rule 7.1 (a) provides that "except as provided in subsection C, no later than twenty days after the entry of an order, decree or adjudication, a party may file Exceptions to an order, decree or adjudication." Appellant took Exceptions to this Court's July 15, 2015 Decree on August 10, 2015, which is 27 days from the date of the Trial Court's Decree, and, therefore filed after twenty days and therefore, dismissed as untimely.

Neither Appellant or his attorney requested that this matter be accepted *nunc pro tunc*, and never offered any explanation for its lateness and, though an obvious issue especially since it was raised by the Trial Court in its Decree of August 24, 2015, but was not included as a matter complained of in Appellant's Pa. R.A.P. 1925(b) Statement.

Therefore, since the Exceptions to the Trial Court's Decree of July 15, 2015 were not filed until after twenty days and were dismissed by the Trial Court as not timely filed, nor was any attempt made to gain leave of Court to file *nunc pro tunc*, those Exceptions should be considered a nullity and any appeal therefrom dismissed.[6]

2. Appellant should be precluded from raising any issues presented in his 1925(b) Statement since they were not preserved by timely exceptions, or by even those exceptions filed out of time.

Since appellant chose to proceed by means of exceptions instead of an immediate appeal and those exceptions were not timely filed, the appeal itself is out of time and should be dismissed and the issues as presented in his 1925(b) statement never reached.

[6] It should be further noted that if the exceptions are untimely, so would be the appeal which was filed on September 15, 2015, two months after the July 15, 2015 Decree.

Even if, for the sake of argument, the exceptions were to be considered effective, because they did not raise the issues as set forth in the 1925(b) statement, they have been waived and are not subject to appellate review.

3. The appeal is impermissible since the Decree appealed from was not final and did not concern title to real estate, but was an attempt to compel Appellant to comply with lawful decrees of the Trial Court.

This appeal was impermissibly taken as it is interlocutory, and is not permitted by the applicable Rules of Appellate Procedure. Appellant attempts to mask this Court's July 15, 2015 Decree as "an order determining an interest in real or personal property," under Pa. R.A.P. 342(a). While Appellant claims that by selling the real estate he will be divested of title, the Decree entered by Trial Court did not determine an interest in real property but merely furthered the administration of this estate, and was required by Appellant's illegal sale and purchase of the realty, and subsequent mortgage of the same along with his blatant failure to account for the proceeds of the mortgage loan, all of which resulted in Judge Anne Lazarus' Decree of January 23, 2007, which ordered the property sold and proceeds returned to the Estate.[7]

It is inescapable that the principal, or only, asset is real estate occupied by Appellant, and that this is the source from which the costs of administration will

[7] No exceptions were ever filed in response to this Decree, and it was never appealed.

have to be paid. At some time, those having an interest in said realty, irrespective of who they are, shall have to bear the burden of taxes and costs of its administration. Further, since no attempt to reenter the putative will into probate has occurred, any interest Appellant has in the realty will await administration of the estate.

Because the realty should have been sold per Judge Lazarus' Decree of January 23, 2007 and the proceeds returned to the estate, the right of the personal representative to "take possession of, administer and maintain real estate so occupied by an heir or a devisee if this is necessary to protect the rights of claimants or other parties" if so directed by the Court, is especially applicable in this case. 20 Pa.C.S. § 3311(a). By hindering the administration of the Estate, Appellant effectively prevents the other beneficiaries and claimants from receiving their share of the Estate, and increases the risk that the Estate's limited assets will meanwhile be dissipated in fees and costs.

Further, the Court has made no determination whatsoever as to who was interested in this realty, but even accepting Appellant and Appellant's Counsel's assertion that Appellant has a life estate in the property, the property still needs to be appraised and valued for administration purposes. The facts make it abundantly clear that Appellant, with the assistance of his attorney, has taken measures to keep this matter from proceeding. The Trial Court has given Appellant the opportunity

to comply with the mandated appraisal, or to have the real estate liquidated, with distribution to await **future** determination of interests.[8]

4. The Trial Court did not err in not holding a "formal hearing" because there were numerous record hearings and conferences held and the issues are not subject to any factual disputes.

The claim that a "formal hearing" was never held is one that the Trial Court finds most difficult to intelligibly answer. There were many hearings held in this case, some of them dispositive of extremely important issues. Appellant's counsel is no stranger to Orphans' Court practice or its procedures and yet uses imprecise language which is of no assistance to our task. It can only be assumed that such imprecision is no mistake but is calculated to support these spurious claims.

Perhaps Counsel considers a "formal hearing" one on objections filed on audit of the account to be filed, after all preliminary petitions and matters have been heard. In fact, this Court's decree of July 15, 2015, in an attempt to speed this matter toward such a resolution, ordered that "any outstanding petitions or issues in this matter shall be reserved for audit." Despite complaints to the contrary, every attempt to

[8] The Premises were ultimately appraised on or about September 5, 2015, over eight years since it was ordered by Judge Lazarus.

bring this matter to a "formal hearing" is met by tactics designed to prevent the issues from meeting the light of day.

It is therefore respectfully submitted that this issue was raised for no legitimate purpose, is needlessly overbroad and not susceptible to response. Further, it was not raised on exceptions, and therefore is waived.

5. While an appraisal was performed on the realty in question, it was not performed until September 5, 2015. While Appellant ultimately did not prevent the appraisal from being performed, he has prevented the property from being shown to perspective buyers.

Appellant takes the position that since he permitted the Administrator D.B.N. and appraiser access to the premises, he is therefore in compliance with this Court's Decrees. Unfortunately, this one belated acquiescence does not satisfy the July 15, 2015, Decree ordering the sale because of Appellant's long pattern of noncooperation and hindering all attempts to sell the property. Even that Decree was generous in that it gave Appellant an additional thirty days from its date to comply before the court would enter a writ of possession in favor of the Administrator D.B.N.

What is made clear is that even timely cooperation in the appraisal (let alone the untimely and ineffectual "cooperation" extended here) would not have

forestalled the property being listed for sale. The untimeliness of Appellant's "cooperation" in permitting the appraisal of September 5, 2015, is the very cause of the mortgage foreclosure proceedings that were commenced against said realty on July 17, 2015. Also clear is that Appellant, preventing the appraisal for as long as he did and totally preventing the property from being shown to prospective buyers, all of which resulted in Judge Lazarus' Decree entered almost nine years ago, has and will cause injury to those others who have an interest in the estate.

That this would even be listed an as issue is befuddling, since to accuse the Trial Court of ordering repetitive appraisals in its 1925(a) Statement, but not raise this during the litigation nor preserving it in his Exceptions, or even the response mandated by this Honorable Superior Court, casts great doubt upon the motivation of Counsel and his client. Certainly if there were an appraisal that could be considered reliable, the Trial Court would not have pursued the extreme methods it did in its July 15, 2015 Decree.

6. The Trial Judges showed no impermissible preference in protecting the creditors of the estate but rather enforced the law pursuant to its statutory mandate.

The Trial Court is baffled by this assertion in two respects. First, Appellant labels the "preference" impermissible, but gives no further indication, by argument,

statute, or case law as to why it is impermissible. Certainly marshaling assets of the Estate to pay the cost of administration and inheritance tax is not only permissible but is required by our Fiduciary Code. Section 3392 of the Code clearly states the order in which claims against an estate must be satisfied, with "the costs of administration" first, then several other claims including those "by the Commonwealth and the political subdivisions of the Commonwealth," finally followed by "all other claims," which includes distributions to beneficiaries. 20 Pa. C.S. § 3392. Here, the Trial Court has done nothing more than compel Appellant to do what he and his Counsel should have permitted without their inexplicable refusals.

Second, we are confounded that Appellant's Counsel, though a longtime Estate Practitioner, would raise such an unsustainable issue (together with others) and await submission of his brief to see how he articulates his reasoning to justify the expenditure of assets caused the Estate and his client by such clear misstatements of the law.

Conclusion

It is respectfully submitted that this appeal has been untimely filed, both as to exceptions to the Trial Court's Decrees, and as to the ultimate appeal to this Honorable Court. Neither of these late filing were filed with leave of Court, nor with

an explanation of whatever causes would have excused the late filing. Therefore the appeal before this Court is improvident and should be stricken or quashed.

The allegation that this is a matter which concerns title to real estate thus giving this Honorable Court jurisdiction to hear this appeal of an interlocutory Decree belies the fact that the Decree in question did anything but decide title. It was the Trial Court's attempt to remediate the Appellant's outrageous behavior in the purchase and mortgage of the real estate asset, of which he owned at best a fractional interest, and the conversion and failure to account for $17,000 of proceeds from the mortgage transaction, the majority of which would have gone to heirs, all without Trial Court approval.

The temerity of Appellant and his attorney in torturing such a series of wrongful acts into a claim of deprivation of titled interest is like blaming the chickens for providing the fox's feast. Appellant has suffered no injury, but instead has caused injury and expense to those rightfully deserving to share in this estate.

While improper use of the law to gain tactical advantage, for one reason or another, is all too common, here it is bewildering to consider what advantage Appellant seeks to gain by such actions. Appellant has permitted the premises to face foreclosure proceedings, and eventually his contumacious behavior will require the Trial Court to use its powers of compulsion which would be to his great expense

and possibly loss of personal freedom. It seems that the wiser choice would have been to have comply, so that the losses he caused might be mitigated.

It is therefore respectfully requested that this appeal be stricken and/or quashed for all the reasons mentioned above.

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CARRAFIELLO, A.J.

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Date

Robert Bembry, Esq.

Murray Dolfman, Esq.