COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

No. 673 AP of 2009
Control Nos. 160904 and 161152

Estate of SYDNEY ROTHBERG, Deceased

OPINION SUR APPEAL

Sidney Rothberg, Appeal From Register

OVERTON, J.

Lynn Kearney has filed an appeal of this Court's April 15, 2016 Decree sustaining the Preliminary Objections filed in response to Lynn Kearney's Petition for Declaratory Judgment.

Facts and Procedural History[1]

In brief summary, Lynn Kearney (hereinafter "Appellant") was born on January 6, 1953. (Pet. for Decl. Judg. at ¶ 4(c)). Appellant always thought that her father Sydney Rothberg had died in the late 1950s as a result of a car accident. (*Id.* at ¶ 5). However, in 2004, Appellant learned that Sydney Rothberg was alive and she searched for him. (*Id.* at ¶ 6). In response to Appellant's inquiries, on June 10, 2004, Saranne Rothberg-Marger indicated that after speaking with Decedent, he stated that Appellant was in "no way" related to him. (*Id.* at ¶ 4(b)). By that point, Decedent Sidney Rothberg's Will had been executed on January 21, 2002 and did not provide for Appellant but instead provided for Saranne Rothberg, Michael Rothberg, and Nellie Ingram. (*Id.* at ¶ 3; Exhibit B). Decedent died on May 13, 2008 and the January 21, 2002 Will was admitted to probate. (07/18/14 Findings of Fact at 1).

[1] For a complete recitation of the facts, this Court references the Findings of Fact, Discussion, and Conclusion of Law filed by the Honorable Joseph D. O'Keefe on July 18, 2014 which was annexed to his September 3, 2014 1925(a) Opinion.

On August 14, 2014, Lynn Kearney filed a Notice of Appeal regarding the July 18, 2014 Findings of Fact, Discussion and Conclusions of Law issued by the Honorable Joseph D. O'Keefe denying her challenge to the Will of Sidney Rothberg. On June 26, 2015, the Superior Court of Pennsylvania affirmed the Court's July 18, 2014 Decree.

On March 14, 2016, Appellant filed a Petition for Declaratory Judgment stating that she should be considered an omitted heir under Section 2507 of the Probate, Estates and Fiduciaries ("PEF" Code). On April 4, 2016, Saranne Rothberg-Marger filed Preliminary Objections stating that Section 2507 does not apply to the instant case because Appellant was born before the Will was executed by Decedent on January 21, 2002. On April 18, 2016, Appellant filed an Answer again averring that she is entitled to relief under Section 2507.

On April 15, 2016, the Honorable George W. Overton issued a Decree sustaining the Preliminary Objections and dismissing the Petition for Declaratory Judgment without prejudice.

On May 2, 2016, Appellant filed a timely Notice of Appeal. Statements of Matters Complained of on Appeal were requested and properly tendered on June 2, 2016. Appellant raised the following issues in her Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b):

1. Orphans' Court erred and abused discretion by overlooking or ignoring that the Estate is the proper party addressed by the Petition. Neither the Estate nor two of three beneficiaries responded to the Petition from their perspectives and thus defaulted and approved granting the Declaratory Judgment Requested.
2. The elements of demurrer were not proven; therefore, Orphans' Court erred as a matter of law and abused its discretion by improperly sustaining Preliminary Objection in the

Nature of a Demurrer, when the Author failed to prove the statutory elements for demurrer.

3. Orphans' Court erred and abused discretion by granting the request that the Petition is a second attempt to claim an interest in Decedent's Estate. Marger's Assertion that Appellant's Petition is a second attempt is false.
4. Orphans' Court erred and abused discretion by failing to consider whether Statute 2507 encompasses children unknown but born before a will is executed.
5. Orphans' Court erred as a matter of law and abused discretion by failing to properly consider the plain meaning of the Statute. Considering legislative history is conjecture and unnecessary, because plain meaning here is obvious and should be properly decided thus.
6. Orphans' Court erred and abused discretion by failing to properly consider public policy.
7. Orphans' Court erred and abused discretion by failing to properly consider that inheritance is favored among all children when a Will is silent.
8. Orphans' Court erred and abused discretion by agreeing with an endless litigation argument that is not valid.

Discussion

A. The Estate of Sidney Rothberg Properly Responded to Appellant's Petition for Declaratory Judgment

Appellant asserts that the Estate of Sidney Rothberg did not respond to her Petition for Declaratory Judgment, and as a result, she is entitled to the relief sought. This claim is without merit.

On March 14, 2016, Appellant served her Petition for Declaratory Judgment upon Saranne Rothberg-Marger and Michael Sidney Rothberg. On April 4, 2016, Saranne Rothberg-Marger filed Preliminary Objections. In Paragraph 2 of those Preliminary Objections, it stated that Respondent Saranne Rothberg Marger is "Decedent's daughter and the named Executrix of Decedent's Will." (Prelim. Obj. at ¶ 2). Upon this assertion, the Court finds any response made by Saranne Rothberg-Marger to be both in her capacity as Executrix representing the Estate and her individual capacity as a beneficiary of the Estate. Furthermore, under the Pennsylvania Orphans' Court Rules, "[p]reliminary objections may be filed to any petition by any interested party or the interested party's representative." Pa. O.C. Rule 3.9 (a). Therefore, this claim is without merit.

B. Appellant Is Not An "Omitted Heir" Considered by 20 Pa.C.S. § 2507 (Claims 2-8 will be addressed together)

Appellant states that she properly asserted facts and a legal theory under 20 Pa.C.S. § 2507 that would entitle her to relief. Appellant also asserts that public policy supports her contention that Section 2507 should be read to include children born before the execution of a will. These claims are without merit.

Preliminary objections in the nature of a demurrer will be sustained when, on the facts averred, the law says with certainty that no recovery is possible. *Cardenas v. Schober*, 783 A.2d 317, 321–22 (Pa. Super. Ct. 2001). A demurrer requires the Court to resolve the issues solely on the basis of the pleadings such that no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. *Barton v. Lowe's Home Centers, Inc.*, 2015 PA Super 203, 124 A.3d 349, 354 (Pa. Super. Ct. 2015). All material facts set forth in the complaint as well as all inferences reasonably made are admitted as true for the

purposes of review. *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 714 (Pa. Super. Ct. 2005).

In the instant case, Saranne Rothberg-Marger objects to Appellant's Petition for Declaratory Judgment on the grounds that Appellant failed to plead facts or a legal theory entitling her to relief. (Prelim. Obj. at ¶ 7). Appellant asserts that even though she was born before the execution of the Will on January 21, 2002, because Decedent did not know of her existence at the time of the execution, she should be considered an "omitted heir" under 20 Pa.C.S. § 2507. (Pet. for Decl. Judg. at ¶¶ 5, 9, 12-13).

Section 2507 of the PEF Code states that wills shall be modified in the cases of divorce, marriage, birth or adoption, or slaying. 20 Pa. Stat. and Cons. Stat. § 2507 (West). In terms of the application of the "omitted heir" exception, Section 2507(4) is clear:

> **(4) Birth or adoption.** If the testator fails to provide in his will for his child *born or adopted after making his will*, unless it appears from the will that the failure was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

Id. (emphasis added).

Appellant asserts that the "among others" language of Section 2507 indicates that the Court may assume that "the reason for the statute is the ignorance of the parent of the child's existence" and that the statute should also apply to children born *before* the execution of the will. (Pet. for Decl. Judg. at ¶ 16). Appellant cites *Appeal of McCulloch* to support her contention that the purpose of this statute is "undoubtedly to include children inadvertently not provided for due to the will not being later changed." *Id.* However, *McCulloch* supports the exact opposite contention that children born before the execution of a will do not fall under to this statute. *Appeal of McCulloch*, 6 A. 253, 255 (Pa. 1886).

Appeal of McCulloch analyzed whether an illegitimate child should be considered an omitted heir[2] when she was born four months before the will was executed. *Id.* at 254-55. In *McCulloch*, the child in question was born in April 1883, four months before her parents were married in August 1883. *Id.* at 254. Two days before the wedding, the will was executed leaving $1,000 to the child's mother and the residue to the decedent's son, grandchildren, and sister, without any mention of the daughter born four months before. *Id. McCulloch* then contemplated whether the child should be considered an after-born child if she was "legitimized" after the execution of the will when her parents got married. *Id.* at 255. The *McCulloch* court unequivocally stated that "upon no reasonable construction of this act can it be held that appellee's ward was born after testator's will was executed. The conceded fact is, she was born four months before, and therefore, in no proper sense of the term, can she be regarded as an after-born child within the purview of the act." *Id.*

Similarly, in the instant case, Appellant admits that she was born on January 6, 1953. (Pet. for Decl. Judg. at ¶ 4(c)). Appellant was clearly born forty-nine years before the execution of the will on January 21, 2002. (*Id.* at ¶ 3). Just as in *McCulloch*, it is conceded that Appellant was born before the execution of the Will, so this Court simply cannot find that she is properly regarded in the same vein as an after-born child under Section 2507. Furthermore, Appellant does not attempt to explain why Decedent himself did not amend the January 21, 2002 Will to

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[2] This case analyzed the Act of April 8, 1833, § 15, the predecessor to Section 2507, which provided:

> When any person shall make his last will and testament, and afterwards shall marry, or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after-born, shall be deemed and construed to die intestate; and such widow, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will.

Id at 254.

include her if he learned of her existence in 2004 and did not pass until 2008. This Court is unwilling and unable to assume that Decedent did actually intend for her to take as an heir to his estate without any evidence to support that intention.

The Court did not contemplate the "among others" language because Section 2507(4) is unambiguous and squarely on point, making it dispositive of the statutory construction argument put forth by Appellant. (*See* 1925(b) Statement at ¶¶ 29-30). Appellant admitted that she was born before the Will, so upon consideration of the facts stated in the Petition for Declaratory Judgment and Section 2507, the Court finds that Appellant is not an omitted heir under Section 2507 and is not entitled to relief as a matter of law.

The Court notes that public policy supports the reason why children born before a will are not included under Section 2507. "It has always been the law of Pennsylvania that a parent does not have to leave any of his property to any of his children." *In re Sommerville's Estate*, A.2d 496, 499 (Pa. 1962). As such, "a testator with children can disinherit some or all of them for any reason whatsoever." *In re Agostini's Estate*, 457 A.2d 861, 865 (Pa. Super. Ct. 1983). The public policy of Pennsylvania in regard to disinheritance of relatives is guided by the law which states "the only person who cannot be disinherited is the surviving spouse." *In re Houston's Estate*, 89 A.2d 525, 526 (Pa. 1952). Therefore, under the facts submitted in the Petition for Declaratory Judgment as well as the laws and public policy of Pennsylvania, the Preliminary Objections in the Nature of a Demurrer were properly sustained by the Court because Appellant is not entitled to relief as a matter of law.

Conclusion

Based on the record, this Court's Decree dated April 15, 2016 sustaining the Preliminary Objections should be **AFFIRMED**.

BY THE COURT:

Date: 9/8/16

OVERTON, J.

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