

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

**O.C. No. 1458 IC of 2014
Control Nos. 153885 and 154071**

Estate of ANNA NICOLO, An Incapacitated Person

OPINION SUR DECREE

OVERTON, J.

Date: July 11, 2016

Before the Court are: (1) a Petition for Turnover and For Imposition of a Surcharge requesting that this Court order Maria Nicolo, Nicoletta DeMuro, and Domenick DeMuro to return \$10,000.00 each to the Estate of Anna Nicolo and be surcharged for economic losses incurred by the Estate; and (2) a Petition for Allowance for the payment of attorney's fees in the total amount of \$21,110.20. A two-day trial was held on June 29, 2016 and June 30, 2016 to decide the matters.

Factual Background and Procedural History

On October 9, 2014, Petitioner Marco Nicolo filed a Petition for Emergency Guardianship due to his concern that several days before on October 6, 2014 his mother, Anna Nicolo, accompanied by Respondents Nicoletta DeMuro and Domenick DeMuro, went to Merrill Lynch and signed documentation to withdraw funds from Merrill Lynch. At the time, he believed that his mother was suffering from significant cognitive impairment and was about to liquidate approximately \$1,100,000.00 of her assets at Merrill Lynch to distribute those assets to her children. Included in that sum is approximately \$600,000.00 in annuities with Transamerica and Jackson National Life Insurance. On October 9, 2014, the Court issued an Interim Decree



stating that “pending further Order of this Court, Merrill Lynch, and any/all other financial institutions that may hold an account in Anna Nicolo’s name, may not distribute any funds or assets in Anna Nicolo’s name.” (10/9/14 Interim Decree). On November 26, 2014, the Court issued a Decree stating that “Anna Nicolo may have access to, including the ability to withdraw funds, from her Beneficial savings account.” (11/26/14 Decree).

The Transamerica and Jackson National Life Insurance annuities were jointly owned by Giuseppe Nicolo and Anna Nicolo until his death on September 15, 2014. At some point before October 6, 2014, Merrill Lynch sent Anna Nicolo paperwork to close the annuities. On October 6, 2014, Anna Nicolo signed paperwork to release funds from the Transamerica and Jackson National Life Insurance annuities. As of December 31, 2014, Anna Nicolo’s Merrill Lynch balance was \$83,693.29. This was the result of the removal of funds from the Transamerica annuity in the amount of \$333,314.68 and the Jackson National Life Insurance annuity in the amount of \$240,313.37. In addition to these withdrawals, Petitioner was unable to account for \$11,944.09. In total, this amounted to a \$585,572.14 decrease from Anna Nicolo’s November 2014 balance of \$669,265.43.

Petitioner alleged that Respondents Maria Nicolo, Nicoletta DeMuro, and Domenick DeMuro were aware of the Court’s October 11, 2014 Interim Decree and knowingly and intentionally arranged and/or facilitated the liquidation of the Transamerica and Jackson National Life Insurance annuities in “blatant contravention” of the October 11, 2014 Interim Decree. (Pet. For Turnover and for Imposition of Surcharge ¶ 16).

The proceeds from the two liquidated annuities were put into a Citizens Bank account ending in 1405. Nicoletta DeMuro and Maria Nicolo were added as joint owners of that bank account. On December 31, 2014, Nicoletta DeMuro signed three withdrawal slips for \$10,000.00 each to be withdrawn from the Citizens’ Bank Account. On December 31, 2014, a

check for \$10,000.00 paid to the order of Domenick DeMuro posted to be withdrawn from the Citizens Bank account. On January 5, 2015, a check for \$10,000.00 paid to the order of Nicoletta DeMuro posted to be withdrawn from the Citizens Bank account. On February 10, 2015, a check for \$10,000.00 paid to the order of Maria Nicolo posted to be withdrawn from the Citizens Bank account.

On February 4, 2015, this Court adjudicated Anna Nicolo an incapacitated person as to her estate **only** and appointed Marco Nicolo and Maria Nicolo as plenary co-guardians of the estate. Anna Nicolo was never adjudicated incapacitated as to her person by this Court.

At trial, Petitioner presented Andrew Verzilli, an expert in economics, to testify about the financial consequences of the withdrawal of the Merrill Lynch funds. He testified that by moving the funds from the Merrill Lynch accounts with 3.3% interest rate to the Citizens Bank account with a .01% interest rate, there was a loss of potential interest earned in the amount of \$13,211.00 in a period of 8.4 months. He testified that while the 2014 income tax return for Anna Nicolo had not yet been filed, he estimated that an income tax payment of \$9,994.40 would be due for the withdrawal of the funds.

Marco Nicolo testified that his mother was not fluent in English. He further testified that the financial advisor advised Anna Nicolo to wait until her 81st birthday to withdraw the Merrill Lynch funds.

Nicoletta DeMuro testified that while she and Domenick DeMuro drove Anna Nicolo to Merrill Lynch to withdraw the funds, Anna Nicolo alone signed for the release of the Merrill Lynch funds. Nicoletta DeMuro further testified that she and her husband drove Anna Nicolo to Merrill Lynch because her mother had expressed a strong interest in withdrawing the funds. She also testified that she returned the \$10,000.00 to the Estate that she received earlier from the Citizens Bank account.

Maria Nicolo testified that she had documentation to support that the \$10,000.00 given to her was spent for the health and welfare of Anna Nicolo. As a result, Petitioner withdrew his claim as to Maria Nicolo only.

Domenick DeMuro testified that he returned \$5,002.00 to the Estate and had spent in excess of \$5,000.00 for Anna Nicolo, including providing her with a \$450.00/week allowance.¹

Finally, Raymond A. Dorizio, Esquire testified that he had received payment in cash from Domenick DeMuro. Mr. Dorizio also testified that he had facilitated multiple cash payments to for the mental health evaluations of Anna Nicolo and for an interpreter.

The Petition for Allowance for the payment of the attorney's fees of Carl G. Archer, Esquire in the amount of \$14,280.20 and the payment of the attorney's fees of David A. Jaskowiak, Esquire in the amount of \$6,830.00 was unopposed by Respondents.

Discussion

Petitioner requests that the Court order Respondents to return \$10,000.00 each to the Estate of Anna Nicolo and be surcharged for any economic losses incurred by the Estate as a result of the withdrawal of funds from the Transamerica and Jackson National Life Insurance annuities. Petitioner also seeks the return of \$11,944.09 of Merrill Lynch funds that could not be accounted for, according to the December 2014 account balance. Petitioner also requests that the Court approve the payment of the attorney's fees of Carl G. Archer, Esquire and David A. Jaskowiak, Esquire and reimburse him for the payments he previously made.

¹ Domenick DeMuro testified that he made these cash payments to Raymond Dorizio, Esquire. The testimony of record indicates that the payments made by Domenick DeMuro far exceeded the \$4,998.00 that was sought by way of turnover

The record is clear that at the time of the withdrawal of funds from Merrill Lynch on December 23, 2014, Anna Nicolo had not yet been adjudicated an incapacitated person as to her estate.

Raymond A. Dorizio, Esquire credibly corroborated Domenick DeMuro's testimony that he had made multiple cash payments for the benefit of Anna Nicolo. The Court finds that Domenick DeMuro is not responsible for returning the remaining \$4,998.00 balance of his \$10,000.00 distribution to the Estate because it was spent for the health and welfare of Anna Nicolo.

At the time of trial, Nicoletta DeMuro had already returned her \$10,000.00 distribution in full. During the trial, Petitioner withdrew his claim against Maria Nicolo because her \$10,000.00 distribution was spent solely on the health and welfare of Anna Nicolo. Consequently, the Court does not require Nicoletta DeMuro or Maria Nicolo to return any funds to the Estate. The Court also finds that no evidence was provided to prove that Respondents were responsible for the additional \$11,944.09 that was unaccounted for on the December 2014 Merrill Lynch balance statement.

Assuming *arguendo* that Respondents were involved in the transfer of the Merrill Lynch funds in some way, there was insufficient evidence to support a finding of liability against any of them for the alleged willful contravention of the October 9, 2014 Interim Decree. The Interim Decree stated that "Merrill Lynch, and any/all other financial institutions that may hold an account in Anna Nicolo's name, may not distribute any funds or assets in Anna Nicolo's name." *See* 10/9/14 Interim Decree. However, the Decree did not preclude Respondents from receiving any funds from the Estate that had been released from financial institutions holding an account in Anna Nicolo's name. The Court finds that Nicoletta DeMuro credibly testified that Anna Nicolo signed for the release of the Merrill Lynch funds as the sole signator and of her own volition.

As to the surcharge for tax losses and potential lost interest income to the Estate, the Court would not assess Anna Nicolo for any losses she herself caused. To hold outside parties responsible for the sole actions of Anna Nicolo would result in a windfall for the Estate.

The Court further finds that no evidence was presented to controvert the entitlement of Carl G. Archer, Esquire and David A. Jaskowiak, Esquire to attorney's fees.

Conclusion

Based on the testimony and evidence of record, this Court hereby denies the Petitioner's request for a surcharge against Nicoletta DeMuro and Domenick DeMuro, as it finds that Anna Nicolo had not yet been declared incapacitated as to her financial affairs or otherwise at the time of the Merrill Lynch withdrawals, and that she alone endorsed her own documents. Therefore, the losses attributable to the Merrill Lynch withdrawals can be attributable only to Anna Nicolo. The denial of said request is set forth in a separately issued decree which will bear even date with this Opinion.

The attorneys' fees of David A. Jaskowiak, Esquire and Carl G. Archer, Esquire were not opposed by Respondents. Therefore, the Petition for Allowance is hereby granted, as set forth in a separately issued decree which will bear even date with this Opinion.



OVERTON, J.

David A. Jaskowiak, Esquire
Debra G. Speyer, Esquire
Timothy J. Holman, Esquire
Jon Marshall, Esquire