PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Rose Kollock, Deceased
O.C. No. 1557 DE of 2014
Control No. 143400
Control No. 150561

Rose T. Kollock, Deceased

20140155705028

OPINION

Introduction

This dispute between two brothers who were co-administrators of their mother's estate involves a comparatively small amount of money but a great deal of rancor. One administrator, William Kollock ("William"), took responsibility for paying out of his own funds funeral expenses and expenses for maintaining his deceased mother's home until it was sold. After the property sold, William sought reimbursement from the estate. His brother Kenneth Kollock ("Kenneth"), however, objected to certain claims for reimbursement. Kenneth argues that William unnecessarily delayed the sale of the house and consequently should be personally responsible for certain home maintenance expenses incurred after 2013. This stance, however, lacks foundation. Based on the record and precedent, William is entitled to reimbursement for his expenditures to maintain the estate property until its sale for the reasons set forth below.

Background

Ruth Kollock died in January 2011. At the time of her death, she resided at 3014 Derry Terrace in Philadelphia.[1] Ruth was survived by her two sons, Kenneth and William, who were appointed as co-administrators of her estate on July 29, 2011. The property at 3014 Derry Terrace was sold on April 14, 2014 for $113,689 and the proceeds were deposited into the estate account. The signatures of both co-administrators were necessary for a check or withdrawal.[2]

In late October 2014, Kenneth filed a petition seeking to compel his brother and co-administrator William to make final distribution of the proceeds from this sale. William responded by filing a notice of claim seeking reimbursement in the total amount of $38,748 for the funds he had personally spent on funeral expenses and the maintenance of 3014 Derry Terrace for such expenses as insurance, utilities, cleaning out the house, grass and snow removal.

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[1] 4/29/15 N.T. at 12 (William Kollock).

[2] 10/22/14 Kenneth Kollock Petition, ¶¶ 3-5; 2/11/15 Kenneth Kollock Answer, ¶¶3-5.

In addition, William filed an answer to the petition. A hearing was thereafter scheduled and William was ordered to provide receipts for all the expenses for which he sought reimbursement.

At the hearing, many of the claims were resolved either by stipulation or withdrawal. William agreed to withdraw his claim for a 3% carry charge and for the miscellaneous expenses of grass and snow removal because he lacked receipts.[3] Kenneth stipulated to William's claim for payment of various funeral expenses in the amount of $ 14,220.[4] William presented receipts to support a claim of $210 for locksmith and ceiling repair.[5] Because he lacked receipts for the cleaning out of his mother's house, William Kollock testified as to the work he performed in cleaning out his mother's house so that it could be sold. His testimony was highly credible and sufficient to support his claim for $2,000 as reimbursement for this work.[6]

The parties were unable, however, to resolve at the hearing William's claim for reimbursement relating to his payment of real estate taxes, home owner insurance and utilities. Although William presented receipts to support his claim for reimbursement of real estate tax payments in the amount of $8,643.77, home owner premiums in the amount of $2,685.15 and utility payments in the amount of $4,637.97,[7] Kenneth asserted that William should not be reimbursed for any of those expenses incurred after 2013 because of William's unwarranted delay in selling the house. At the conclusion of the hearing, in fact, Kenneth requested permission to file a brief outlining both the disputed claims and his arguments against them.

In that brief, Kenneth in effect challenges $6,983.76 of the payments William made after January 31, 2013 for utilities, homeowner's insurance and real estate taxes.[8] He asserts that William should be "surcharged" that amount, somewhat muddying the issues of reimbursement and surcharge. Kenneth asserts that William thwarted the timely sale of 3014 Derry Terrace for three years by refusing to employ realtors or accept offers for the property. He notes that his

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[3] 4/29/15 N.T. at 9-10 & 6-7.

[4] 4/29/14 N.T. at 14-17. See also Exs. R-1 through R-3.

[5] 4/29/15 N.T. at 25. See also Ex.R-7.

[6] 4/29/15 N.T. at 26-31 (William Kollock).

[7] See 6/8/15 William Kollock Memorandum at 17 (outlining reimbursement claims for real estate tax payments, utility payments and home insurance payments); 4/29/15 N.T. at 21-24. See Ex. R-4 (real estate taxes); Ex. R-5 (homeowner's insurance) and Ex. R-6 (utilities).Both parties stipulated that the total home owner insurance premiums paid after the death of Rose Kollock was $2,685.15, although Kenneth challenged reimbursement for any payments after January 2013 which he maintained totaled $462. The voluminous insurance exhibits are far from clear and seem to indicate total payments of $2946.66. The stipulation of counsel as to $2,685.15 for this insurance expense will nonetheless be accepted.

[8] 5/11/15 Kenneth Kollock Memorandum, Ex. C.

attorney sent William a threatening letter dated November 26, 2012 warning that if he did not provide a listing contract by December 14, 2012, Kenneth would be forced to seek a citation against him to force the sale. Ex. P-1. Kenneth never followed through with this threat. He never filed a petition to compel sale of the property nor did he file a petition to have William removed as co-administrator. He nonetheless argues that the sum of all of William's expenditures on the estate property after January 31, 2013 should be disallowed and charged to William. Kenneth calculates the total amount for this period as $6,983.76. Somewhat quixotically, Kenneth argues that the sale proceeds from 3014 Derry Terrace should be divided so that Kenneth would receive $63,828.26 while William would receive $48,860.74.[9] As justification for this distribution scheme, Kenneth argues that William had sole possession of the property and by keeping the property until April 2014, William enjoyed an unfair "free ride."

At the hearing, William testified convincingly that he did not reside at 3014 Derry Terrace after his mother's death, but instead moved to his home in New Jersey just weeks after his mother's death.[10] He recounted the work he performed in preparing the property for sale by cleaning it out and maintaining the utilities to prevent vandalism of an otherwise vacant property. He also paid for home insurance and real estate taxes. Significantly, the petition filed by Kenneth lends credence to William's testimony since it characterizes William as "an adult individual residing at 124 West 16th Avenue, North Wildwood, New Jersey."[11]

Legal Analysis

In his legal argument, Kenneth asserts that William should be "surcharged' for the expenses that were not necessary or reasonable for the maintenance of the estate. This perspective, however, skews the issue which is simply whether William should be reimbursed for the expenses he paid on behalf of the estate. Under Pennsylvania law, a surcharge is imposed upon a fiduciary who fails to exercise "common prudence, skill and caution" in the performance of a fiduciary duty in order to compensate beneficiaries for the loss to the estate caused by the lack of due care. In re Munro Trust, 373 Pa. Super. 448, 452, 541 A.2d 756, 758 (Pa. Super. 1988), *app. denied,* 520 Pa. 607, 553 A.2d 969 (Pa. 1988).. The person seeking to surcharge a fiduciary must therefore establish both breach of fiduciary duty and loss to the estate. Estate of

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[9] See 5/11/2015 Kenneth Kollock Memorandum at 6 & Proposed Order.

[10] 4/29/15 N.T. at 12 (William Kollock).

[11] 10/22/14 Kenneth Kollock Petition, ¶2.

Warden, 2010 Pa. Super. 121, 2 A.3d 565, 573 (Pa. Super. 2010), *app.denied,* 610 Pa. 580, 17 A.3d 1255 (Pa. 2011)..

In this case, Kenneth seeks to surcharge William for the delay in selling their deceased mother's property. This claim must fail, however, due to Kenneth's failure to present evidence to establish that the sale in April 2014 constituted a loss to the estate. Although he implied that William had rejected offers, he provided no details as to the nature of the offer, and how they compared to the ultimate sale price of $113,689. Kenneth also failed to present any appraisal to support the innuendo that the property had sold to a low ball bid.

To support his surcharge argument, Kenneth asserts that a personal representative may not unreasonably delay the sale of a property, and occupy it to the exclusion of another heir, thereby depriving a beneficiary of his interest in the estate.[12] This misrepresents the facts in this case because William resided in New Jersey and not in the estate property. Moreover, the cases petitioner cites to support this argument are inapposite. One case cited by petitioner, Estate of Bouks, 2008 Pa. Super. 273, 964 A.2d 4 (Pa. Super. 2008), *app.denied* 606 Pa. 643, 952 A.2d 888 (Pa. 2010) focused on whether a beneficiary should be charged rent for the period he resides in a decedent's house after her death. While the Bouks court concluded that an executor and heir who resided in decedent's house for 4 years after her death was obliged to pay rent, that issue of rent payments is not before this court. Kenneth is not making a claim for rental payments from William; instead, he is resisting reimbursing his co-administrator for expenditures to maintain the property. Moreover, Kenneth's failure to seek rent payments is a tantamount acknowledgement that William had not resided there. In another case petitioner invokes, Lang Estate, 2 Fid. Rep.3d. 225, 237 (Mont. Cty. O.C. 2012), Judge Ott concludes that a beneficiary who resides in decedent's property rent free for years after her death should be assessed the carrying costs of home insurance, real estate tax and utility bills. Once again, no such residency has been shown here. The record supports the conclusion that William paid the utility bills, real estate taxes and insurance on the property prior to the sale not for his own comfort or use but to preserve the estate asset.[13]

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[12] 5/11/15 Kenneth Kollock Memorandum at 4.

[13] A third case petitioner cites Longo Estate, 1 Fid. Rep. 3d 266 (Mont. Cty. O.C. 2011) is at best tangentially relevant in its discussion of the necessity of receipts to support claims. In the present case, William generally proffered receipts for those claims that merit reimbursement.

During his brief testimony and in his memorandum of law, Kenneth suggests that as co-administrator of his mother's estate he was not obligated to assume responsibility—or initial expense—for maintaining the house and assuring its sale. The record establishes that it was William alone who took responsibility as a co-administrator for cleaning out the house and paying its attendant expenses. In response to a question as to his role in fixing up the house, Kenneth admitted he had done nothing:

> Q: You heard your brother indicate that you gave no assistance in trying to fix the house up; is that correct?
> A: Yeah.[14]

In fact, Kenneth expressed hostility towards his brother's suggestion that they work together to improve the house to "flip it:"

> Q: Was there a discussion about whether or not the property should be sold as is or whether repairs were going to be made?
> A: He called me once. He wanted to flip the house---
> Q: I didn't hear you. Can you repeat it?
> A. Bill called me once to see if I wanted to flip the house with him. I told him by that time I was so fed up with him I didn't want any part of him or any of it.[15]

Not only did Kenneth admit that he did not cooperate in the preparation of the house for sale but he acknowledged that he never took legal action as co-administrator to compel such as sale after his attorney sent the November 26, 2012 letter that threatened to file a citation against William to compel sale of the house. Kenneth did not file a petition to compel a sale nor to remove William as co-executor.[16]

There is a plethora of Pennsylvania cases emphasizing the shared responsibility of co-administrators or co-executors in the administration of a decedent's estate. It is well established that '[o]ne's appointment as an estate executor confers an honor and trust and commensurately, the duty to oversee the administration with competence so as to avoid compromising the probity of the estate." Estate of Frey, 693 A.2d 1349, 1353(Pa. Super. 1997), *app.denied* 549 Pa. 717, 701 A.2d 578 (Pa. 1997). The same would hold true for administrators of an estate. A co-administrator does not absolve himself from responsibility for the maintenance of an estate through supine inactivity. Pennsylvania precedent makes it clear that co-administrators are held

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[14] 4/29/15 N.T. at 51 (Kenneth Kollock).
[15] 4/29/15 N.T. at 52 (Kenneth Kollock).
[16] See, e.g. 4/29/15 N.T. at 52-53, 55 (Kenneth Kollock).

jointly liable for a loss resulting to an estate where one co-administrator plays a passive role. This dates back to earliest case law where the Pennsylvania Supreme Court held passive co-administrators liable for losses to an estate caused by the actions of a fellow co-administrator. See, e.g., Irvine's Estate, 203 Pa. 602, 53 A. 502 (Pa. 1902)(where testator named three co-executors, trial court erred in surcharging only one rather than all surviving co-executors for losses to the estate due to laxity or inattention); Appeal of Weldy, 102 Pa. 454, 1883 WL 14005 (Pa. 1983)(where 2 co-executors divide their responsibilities for estate management between them, both would be liable for loss to a beneficiary). As the Pennsylvania Supreme Court observed in one of these early cases regarding the joint responsibility of co-executors:

> They were all bound to use diligence in protecting the estate against the careless or improper conduct of one of their number. The wise precaution of the decedent in providing for his estate the joint services of three men of special capacity cannot be defeated by allowing them to escape responsibility by charging against each other the failure of duty which they were jointly and severally under obligations to perform. Irvine's Estate, 203 Pa. at 606, 53 A. at 503.

More recent cases reiterate this joint responsibility of co-executors to protect estate interests. Where one co-executor, an attorney, merely serves as a figurehead, he has nonetheless been held liable for failure to marshal estate assets and for the bad actions by his co-executor resulting in a $765,000 loss to the estate. Loher Estate, 3 Fid. Rep. 3d 71 (Chester Cty. O.C. 2012). If a co-executor plays a passive role, she may nonetheless be held responsible for the actions of the "active" co-executor. Rappaport Estate, 3 Fid. Rep. 3rd 115, 127 (Mont. Cty. O.C. 2012). While this precedent serves typically as a sword to impose liability on a passive fiduciary, it can also shield the proactive fiduciary from attacks by the passive fiduciary. In this case, Kenneth seeks to justify his failure to take a more active role in the marketing of the property, noting "the time and expense which would be involved in seeking legal redress to force Respondent (William) to act."[17] Kenneth nonetheless seems unconcerned about the time and expense William incurred in his care of the property. As a matter of equity, William should be reimbursed in the total amount of $32,396.89. This total amount includes those expenses conceded by Kenneth for funeral expenses, locksmith and ceiling repair expenses, and the pre 2103 payments for real estate taxes, utilities and homeowner's insurance. It also includes the

[17] 5/11/15 Kenneth Kollock Memorandum at 5.

disputed $6,983.76 in post 2013 expenses for utilities, real estate taxes and homeowner insurance.

The parties present different computations for the final distribution to each heir of the proceeds from the sale of decedent's property. They both agree that the total amount of sale proceeds at issue is $113,689. William's reimbursement in the amount of $32,396.89 should be subtracted from the total sale proceeds of $113,689. After he has been reimbursed that $32,396.89, the remaining $81,292.11 would be equally divided between the two heirs, with each receiving $40,646.05.[18]

Date: September 1, 2015

BY THE COURT:

John W. Herron, J.

[18] Kenneth advocates a different computation that would result in a higher distribution to him ($63,828.26) than to William ($49,860.74). He seems to suggest that the property sale price of $113,689 should be divided in half or $56,844.50 for each heir. He then maintains that the disputed $6,983.76 for post 2013 payments be subtracted from William's share. These computations err in two regards: (1) they fail to account for the $25,397.09 in expenses already awarded to William as reimbursement in this court's April 29, 2015 decree and (2) they are premised on a finding that William should not be reimbursed for the payments he made after 2013 for utilities, home insurance and real estate taxes.