COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Gloria G. Capobianco, Power of Attorney
O.C. No. 1371 PR of 2016
Control No. 184023

Sur First and Final Account of Nicholas Capobianco, Agent

The account was called for audit January 7, 2019 **Before: Herron, J.**
Counsel appeared as follows:
Lisa Shearman, Esquire, for the Accountant
Geraldine Capobianco Jones, *pro se*, Objectant

ADJUDICATION

Geraldine Capobianco Jones ("Objectant"), one of seven children of the late Gloria G. Capobianco ("Decedent"), objects to the First and Final Account of Nicholas Capobianco ("Accountant") of his term as agent under Decedent's power of attorney. For the reasons stated below, the Court overrules the objections and confirms the Account.

On September 5, 2003, Decedent executed a power of attorney naming Accountant as her agent. Accountant signed the acknowledgement form attached to the power of attorney at the time of execution but claims never to have acted as Decedent's agent. The 2003 power of attorney was later revoked when Decedent executed a second power of attorney on November 1, 2005, naming her son, Otto J. Capobianco, Jr., as her agent.

On May 16, 2018, Objectant filed a Petition to Compel an Accounting of Accountant's actions as Decedent's agent. On October 16, 2018, this Court issued a Decree ordering Accountant to file an Account of his time as agent under the 2003 power of attorney. Accountant filed his Account on November 15, 2018. The Account shows Accountant took no actions as Decedent's agent during the period of September 5, 2003, to November 1, 2005.

The Account was placed on the January audit list, and notice of the audit was given to all parties in interest. On December 24, 2018, Objectant filed objections to the Account. The Court consolidates and rephrases the objections as follows:

1. Accountant fails to provide bank statements to prove he did not act as agent under Decedent's power of attorney; and

2. Accountant fails to account for various personal property including "the coins that were in Gloria's safe for which only Nicholas Capobianco had the key," several coins belonging to Otto J. Capobianco, Jr., Decedent's diamond earrings, a Lionel train set, an engraved gold watch, and a Native American print.

See Objections ¶¶ 1–6. A hearing on the above objections was held on August 13, 2019.

First, the objection to Accountant's failure to provide bank statements to prove he did not act as agent under Decedent's power of attorney. Accountant testified he did not act as Decedent's agent pursuant to the 2003 power of attorney. N.T. 08/13/19, at 10–19. Accountant's inaction is also reflected in the Account. *See* Account at 1–15. Although no bank records were presented to bolster Accountant's testimony, counsel for Accountant stated she was unable to obtain bank records for the accounting period as Decedent's banks no longer had any records for those years. N.T. 08/13/19, at 139–40. Thus, this objection turns on Accountant's credibility.

In non-jury proceedings, "the factfinder is free to believe all, part, or none of the evidence." *L. B. Foster Co. v. Charles Caracciolo Steel & Metal Yard*, 777 A.2d 1090, 1093 (Pa. Super. Ct. 2001). When determining what weight to give a witness's testimony, if any, it is proper for a factfinder to consider the witness's "appearance, general bearing, conduct on the stand, demeanor, manner of testifying, such candor or frankness, or the clearness of his statement, and even intonation of his voice." *Danovitz v. Portnoy*, 161 A.2d 146, 149 (Pa. 1960)

(quotations omitted); *see also In re Estate of Gaston*, 62 A.2d 904, 908 (Pa. 1949) ("It is an elementary principle that in considering the credibility of witnesses their manner of testifying, their apparent candor, intelligence, personal interest and bias or lack of it, are to be considered in determining what weight shall be given to such testimony." (quotations omitted)).

Here, nothing about the Accountant's appearance, bearing, conduct, demeanor, or manner of testifying impugned his credibility, even on cross-examination. The Court consistently found Accountant's testimony candid, clear, and direct. While Accountant has an interest in being found to have not breached his fiduciary duty as Decedent's agent, the Court found him credible nonetheless. Therefore, the objection is OVERRULED.

Second, the objection to Accountant's failure to account for various personal property. As with the first objection, the inquiry here hinges on the credibility of Accountant's testimony. Accountant testified he did not know the whereabouts of Decedent's diamond earrings. N.T. 08/13/19, at 13. He also stated he never took any actions regarding those same earrings. *Id.* Accountant testified he was unaware of any gold watch except one his father received as a retirement gift and was now in the possession of his brother, Patrick. *Id.* at 14. As for a certain Michelangelo coin set, Accountant stated Decedent gave him the set as a gift in 2011 or 2012. *Id.* at 14, 48. Similarly, Accountant testified the Lionel train set was a gift from Decedent to her daughter, Johann Wible, when Johann was a child. *Id.* at 16. Lastly, Accountant testified the Native American print was given to him by Decedent as a gift in 2008. *Id.* at 17.

As with the first objection, the Court found Accountant's testimony credible. Moreover, in light of this testimony, any disposition of Decedent's personal property was at the hand of Decedent either long before or after Accountant's tenure as agent. These dispositions are beyond the scope of both the 2003 power of attorney and the Account. Likewise, any purported

disposition of Otto's personal property is beyond the scope of Accountant's fiduciary duty which was owed only to Decedent. Therefore, the objection is OVERRULED.

Near the close of the hearing, the question of who should bear the cost of the present litigation reared its head. N.T. 08/13/19, at 135. In the United States, each side typically pays their own attorney's fees. This is known as the "American rule." Under the American rule, the prevailing party cannot recover their attorney's fees from the opposing party "unless there is express statutory authorization, a clear agreement of the parties or some other established exception." *Mosaica Acad. Charter Sch. v. Bensalem Twp.*, 813 A.2d 813, 822 (Pa. 2002). The Judicial Code provides several exceptions to the American rule. *See* 42 Pa. C.S. § 2503. One of those exceptions allows a court to award attorney's fees "as a sanction against another participant for dilatory, obdurate or vexatious conduct *during the pendency of a matter*." *Id.* § 2503(7) (emphasis added). Another exception allows the imposition of attorney's fees "because the conduct of another party *in commencing the matter* or otherwise was arbitrary, vexatious or in bad faith." 42 Pa. C.S. § 2503(9) (emphasis added). The imposition of sanctions under Section 2503 is not meant to punish those who litigate in good faith but ultimately fail. This would create an unwelcome chilling effect. Rather, these sanctions are designed to punish those who either initiate or conduct litigation in a manner meant to produce more heat than light.

The Court is not prepared to find Objectant *commenced* the present litigation arbitrarily, with vexatious intent, or in bad faith. Objectant had standing to petition for an accounting and object to the Account, and so she did. Objectant's conduct *during* the hearing on the objections to the Account, however, does rise to the level of dilatory, obdurate, and vexatious conduct during the pendency of a matter.

Generally, conduct is "dilatory" where the party demonstrates a lack of diligence that "delay[s] proceedings unnecessarily and cause[s] additional legal work." *In re Estate of Burger*, 852 A.2d 385, 391 (Pa. Super. Ct. 2004). Conduct is "obdurate" where a party is "stubbornly persistent in wrongdoing." *Id.* And "vexatious" conduct means the litigation as a whole "served the sole purpose of causing annoyance." *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996). Objectant's conduct at the hearing satisfies all three definitions.

Objectant's overall performance suggested little in the way of preparation, organization, or understanding of either the rules of procedure, evidence, or decorum. Time and again the Court cautioned Objectant to narrow her focus, ask concise and probing questions, and refrain from outbursts, and Objectant consistently defied these warnings. N.T. 08/13/19, at 5–6, 20, 21–22, 23–25, 30, 31–33, 34–35, 41–43, 47, 50, 54, 55–58, 59, 61–64, 66, 67, 72–73, 75, 76–77, 78, 84–85, 86, 89, 93, 96, 100–05, 117, 119–22. Both the outbursts themselves and the Court stopping the proceeding to address them turned what should have been a straightforward hearing on two objections into a grueling, drawn-out farce.

Theatrics and hyperbole are no substitute for persuasive evidence and sound reasoning; nevertheless, Objectant regularly, and at length, launched into harangues covering several topics, including right and wrong.[1] *Id.* at 40; *see also id.* at 28–29, 39–41, 81–82. Later, having

[1] This is not the first time Objectant has made morals-based arguments before this Court, and the Court's response is always the same.

It is not the job of courts to do what is "moral"; it is to apply the law. The nation's Founders understood this. They believed it was vital courts "be bound by strict rules and precedent" in order to avoid "arbitrary discretion." THE FEDERALIST NO. 78 at 427 (Alexander Hamilton) (Joanne B. Freeman ed., 2001); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, C.J.) ("The government of the United States has been emphatically termed a government of laws, and not of men."). This principle, otherwise known as "the rule of law," constrains both individual and institutional conduct. It provides consistency, predictability, and legitimacy; it is what separates law from mere whim.

Courts reference several sources of law including constitutions, statutes, rules, regulations, and precedent. Courts do not consult morality, social practice, or any other source of "natural law" that exists independently of an established, temporal regime. In the words of Justice Oliver Wendell Holmes, "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it . . . ." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532 (1927) (Holmes, J., dissenting); *see also S. Pac. Co. v. Jensen*, 244

exhausted the English language, Objectant resorted to pantomime as she threw her arms in the air and held them there as a sign of her frustration. N.T. 08/13/19, at 59. Objectant lowered her arms only after a reprimand by the Court. *Id.* Later still, and once more capable of speech, Objectant knowingly, and repeatedly, made baseless objections which ground the proceeding to a halt. *Id.* at 94–96.

Clarity, concision, and tact are an indispensable part of litigation. A litigant dispenses with any or all of them at their own peril, and the present case is proof of that. Early in *The Merchant of Venice*, the character Bassanio describes his friend as follows:

> Gratiano speaks an infinite deal of nothing,
> more than any man in all Venice. His reasons are as
> two grains of wheat hid in two bushels of chaff: you
> shall seek all day ere you find them, and when you
> have them, they are not worth the search.[2]

Instead of illuminating the issues, Objectant spoke an infinite deal of nothing and, in doing so, buried the issues under a mound of chaff. The benefits of an excavation are dubious at best.

Consequently, Objectant failed to support her objections to the Account or undermine Accountant's credibility. In fact, as if to underscore the absurdity of the proceeding, Objectant completely abandoned several of her objections during her closing argument. *Id.* at 126, 128, 130. This alone demonstrates a staggering lack of concern for the time, energy, and money expended by all those involved in the hearing.

While Objectant's subpar performance at the hearing could be due to her status as a *pro se* litigant, the Court is not convinced this adequately explains her bizarre conduct. Moreover,

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U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .").

Thus, Objectant's suggestion the Court decide the present case according to her notions of right and wrong rather than positive law is at odds with centuries of American jurisprudence.

[2] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 1, l. 121–25.

pro se litigants are not entitled to any advantage because of their lack of legal training. *Triffen v. Janssen*, 626 A.2d 571, 573 (Pa. Super. Ct. 1993); *see also First Union Mortg. Corp. v. Frempong*, 744 A.2d 327, 337 (Pa. Super. Ct. 1999) ("Any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing."). Thus, a *pro se* litigant is not immune to sanctions under Section 2503 when they engage in dilatory, obdurate, and vexatious conduct during the pendency of a matter.

As Shakespeare once wrote, "Nothing emboldens sin so much as mercy."[3] The Court agrees. If ever a case warranted sanctions under Section 2503, this is it. Given the totality of the circumstances—Objectant's persistent disregard of the Court's instructions as well as her obstreperous behavior, scattershot presentation, and final abandonment of her objections—the Court finds Objectant's conduct during the hearing was dilatory, obdurate, and vexatious. Therefore, the Court awards Accountant his attorney's fees.

AND NOW, this 11th day of September 2019, the objections are OVERRULED, the Account is confirmed absolutely, and Objectant shall pay Accountant's attorney's fees.

A Motion for Reconsideration may be filed pursuant to Pa. O.C. Rule 8.2. An Appeal from this Adjudication may be taken to the appropriate Appellate Court within thirty (30) days from the issuance of this Adjudication. *See* Pa. R. App. P. 902, 903.

BY THE COURT:

JOHN W. HERRON, J.

[3] WILLIAM SHAKESPEARE, TIMON OF ATHENS act 3, sc. 5, l. 3.

Lisa Shearman, Esquire
Geraldine Capobianco Jones, pro se