COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

O. C. No. 646 of 1999

Estate of BERNHARD S. BLUMENTHAL, Deceased

Before: O'KEEFE, ADM. J.

OPINION SUR EXCEPTIONS

O'KEEFE, ADM. J.

This court has before it exceptions to an Adjudication of Senior Judge Pawelec dated January 23, 2001.

Bernhard S. Blumenthal, died February 22, 1998, leaving a Will dated August 16, 1995, which was duly probated. He was survived by his wife, Ellin S. Blumenthal, and, by his two children, Leo D. Blumenthal and Anne B. Proffit. Bernhard was also survived by Ellin's four children, Eric, Gary, Mark and Larry Michelson.

Bernhard and Ellin Blumenthal entered into an Antenuptial Agreement which is dated April 29, 1974. They were married on May 1, 1974. They lived together, as husband and wife, from May 1, 1974 until Bernhard's death on February 22, 1998.

Ellin S. Blumenthal made a claim against her husband's estate under Subparagraph 5 (b) of the aforementioned Antenuptial Agreement, which reads as follows,

> **" (b) Bernhard agrees that on or before his marriage to Ellin she shall be irrevocably designated as beneficiary of his life insurance policy which is identified as the Ward**

Foods policy on Exhibit "A", which is attached to this Agreement, in the face amount of $200,000.00. If for any reason that policy is not in force and payable to Ellin at the time of Bernhard's death, Ellin shall be entitled to receive the sum of $200,000.00 from Bernhard's estate in lieu of such insurance proceeds, * (See below)

____
Provided that Ellin and Bernhard are married and living together at the time of Bernhard's death. If Ellin and Bernhard are married and living together at the time this insurance policy may lapse, for whatever reason, prior to Bernhard's death, Bernhard agrees to give to Ellin $200,000.00 in cash or securities having that value."

Ellin collected only $38,700.00 under the "Ward Foods" policy at Bernhard's death. She then demanded that his estate pay her $161,300.00, that is, the difference between $200,000.00 and $38,700.00.

As executor's of their father's estate, Bernhard's children resisted Ellin's claim under Subparagraph 5 (b) of the Antenuptial Agreement. They asserted that Ellin had no claim against the estate under Subparagraph 5 (b) because the "Ward Foods" policy was in force and payable to Ellin, albeit at a lesser face amount of $38,700.00, at the time of Bernhard's death, and, because the policy did not lapse in Bernhard's lifetime. They noted that Ellin collected a total of $191,415.91 in insurance on their father's life, and, asserted that Ellin should therefore recover no more than $8,584.09 from the estate under Subparagraph 5 (b). They asserted affirmative defenses of estoppel, waiver and unjust enrichment. They asserted that

the Antenuptial Agreement must be construed against Ellin because her attorney drew the Agreement.

The four children of Ellin S. Blumenthal made a claim against her husband's estate under Subparagraph 5 (d) of the aforementioned Antenuptial Agreement which reads as follows:

> **" (d) In any calendar year in which Bernhard makes a gift or gifts to a child or grandchild of Bernhard, he shall also make gifts to each of Ellin's sons. The gift or gifts made in any year to a child or grandchild of Bernhard shall not exceed in amount or fair market value the gift or gifts to any child of Ellin in that year. Bernhard's obligation, under the provisions of this subparagraph (d) to make gifts to Ellin's children shall continue only during such time or times as Bernhard and Ellin are married and living together."**

Asserting that Bernhard made a total of $368,917.00 in gifts to his children and grandchildren during his marriage to Ellin, but, only $14,917.00 in gifts to themselves, Ellin's children claimed the sum of $354,000.00 from Bernhard's estate under Subparagraph 5 (d) of the Antenuptial Agreement.

Bernhard's children resisted the claim of Ellin's children under Subparagraph 5 (d) of the Antenuptial Agreement. They asserted that their father and Ellin did not intend that Ellin's children should be third party beneficiaries of the Agreement. They asserted that Ellin's children did not prove the amount of gifts which Bernhard made to them. They asserted affirmative defenses of estoppel, waiver, novation and unjust enrichment. They asserted the bar of the statute of limitations.

Bernhard's children took the position that the claims of Ellin and her children, totaling $515,300.00, should be paid out of the gift to Ellin under Item FOURTH of Bernhard's Will of August 16, 1995. Ellin and her children took the position that their claims should be paid from the residue which passes to Bernhard's children under Item FIFTH of the Will. Items FOURTH and FIFTH of the Will read as follows:

> **"   Cash Bequest to Wife**
>
> **<u>FOURTH</u>: I give to my wife, ELLIN S. BLUMENTHAL, pursuant to the provision of an Antenuptial Agreement entered into with her on April 29, 1974, a sum of money equal to the amount, if any, by which the fair market value (as finally determined for Federal Estate Tax purposes) of the assets comprising my gross estate, exclusive of insurance on my life and real or personal property owned by my wife and me as tenants by the entireties, shall be greater than Eight Hundred Thousand Dollars ($800,00.00).**
>
> **Distribution of Residue**
>
> **<u>FIFTH</u>: I give the rest of my estate in equal shares to my son, LEO D. BLUMENTHAL, and my daughter, ANNE B. PROFFIT. If my son does not survive me for a period of thirty (30) days, however, his share shall be distributed per stirpes, to his issue who do so survive me. If my daughter does not so survive me her share shall be added to the share going to my son or his issue as the case may be."**

In his Adjudication, the hearing judge noted that Item FOURTH of Bernhard's Will is taken from Subparagraph 5 (f) of the Antenuptial Agreement, which Subparagraph 5 (f) reads as follows, to wit,

> **" (f) Bernhard agrees to give Ellin, by appropriate provision in his will, free of all inheritance and estate taxes, a sum of money equal to the amount, if any, by which the fair market value (as finally determined for federal estate tax purposes) of the assets comprising Bernhard's gross estate, exclusive of insurance on Bernhard's life and real or personal property owned by Bernhard and Ellin jointly or as tenants by the entireties, shall be greater than $800,000.00"**

In support of their position on the source of payment of the disputed claims, Bernhard's children asserted that their father wanted them to receive no less than $800,000.00 from his estate, and, that said intention is reflected in Items FOURTH and FIFTH of the Will.

Ellin and her children offered the testimony of Ellin, and, fifteen Exhibits, in support of their claims. Bernhard's children offered the testimony of two attorneys, Frank E. Hahn, Jr., Esquire, and Paul C. Heintz, Esquire, and, five Exhibits, in opposition to the claims. At one point during direct examination of Ellin, an objection was made on the ground that her testimony was barred by the so-called "Dead Man's Rule". Since the estate had taken Ellin's deposition, this objection was overruled. Bernhard's children made no other objections to Ellin's testimony, and, no objections to the admission of any of the claimants' Exhibits. When Bernhard's children attempted to use their Exhibit R-1 in cross-examining Ellin, the

following colloquy ensued between Mr.Hayes, counsel for the claimants, Mr.Feldman, counsel for the estate, and, the hearing judge:

> **" MR. HAYES: Your Honor, if I may just object, something I anticipate we will be dealing with through cross-examination, as well as the executors' case, is parole evidence. We have, in our opinion, Your Honor, an Antenuptial Agreement and a Will which are clear and unambiguous. I believe that under the law, both with respect to contracts, as it applies to Antenuptial Agreements and Wills, that if the document is clear and unambiguous, no extrinsic evidence, no parole evidence, no prior drafts, no communications would be admissible to vary the terms of the document. I believe that's what we are getting into.**
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> *** * * * * ***
>
> **MR. FELDMAN: First of all, it goes to credibility. She is saying that all of these suggestions were his. It goes to the interpretation of the marital agreement, which I don't say is clear and unambiguous. I believe it is ambiguous, and that the testimony will prove that he intended something different. ......**
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> *** * * * * ***
>
> **MR. HAYES: And my fear, Your Honor, is what we are now going to get into, what was told to the lawyers, the scriveners, the negotiations that ended up with this document. To me, that's a classic case of extrinsic parole evidence.**
>
> **THE COURT: What I'm going to do is permit it, subject to your objection, and then you can argue about it in your brief.**
>
> **MR. HAYES: I assume, so we don't clutter the record, that we can have a continuing objection to any extrinsic or parole evidence.**

THE COURT: Yes.” <u>NT 74 TO 77</u>

When Bernhard’s children offered the testimony of Frank E. Hahn, Jr., Esquire, the following colloquy ensued between counsel and the hearing judge:

> **“ MR. FELDMAN: At this time, I have two witnesses. One is Mr. Hahn, and he is here. ......**
>
> **MR. HAYES: Again, Your Honor, just to reiterate what I raised before with respect to Mr. Hahn, the draftsman of the Antenuptial Agreement, along with Mr.Cantor, if we are going to get into discussions between the decedent and Mr. Hahn, I believe they would be inappropriate and barred by the parole evidence rule.**
>
> **THE COURT: It may. They may be, but I’m going to permit it anyway, and we can argue about it later.” <u>NT 106 to 107</u>**

When Bernhard’s children offered their Exhibits R-1 to R-5, at the close of the estate’s testimony, the following colloquy ensued between counsel and the hearing judge, to wit,

> **“ MR. FELDMAN: Your Honor, I don’t have any more testimony, and I would like to rest my case and move my exhibits into evidence.**
>
> **THE COURT: Any objection to his exhibits?**
>
> **MR. HAYES: I have no objection to R-5. I have objections, which I previously raised, to the other documents as being extrinsic evidence, but I understand Your Honor is taking them in, subject to that objection.” <u>NT 160 to 161</u>**

Bernhard's children never took the position, before the hearing judge, that the terms of the Antenuptial Agreement and Will are clear and unambiguous.

In his Adjudication, the hearing judge made twenty-five findings of fact based upon his consideration of all of the testimony and Exhibits. Relevant findings of fact read as follows:

> **"14. Bernhard left the employ of Ward Foods in 1981, and, chose not to pay the premiums to keep the face amount of the "Ward Foods" policy at $200,000.00. Accordingly, the face amount of said policy dropped from $200,000.00 to $38,700.00.**
>
> **15. Bernhard and Ellin discussed the fact that the face amount of the "Ward Foods" policy had dropped from $200,000.00 to $38,700.00. During their discussion, Bernhard assured Ellin that, no matter what, she absolutely would get $200,000.00 from the "Ward Foods" policy. During their discussion, Bernhard told Ellin that she was the beneficiary of other policies of insurance on his life, but, he did not say that he intended to meet his obligation in regard to the "Ward Foods" policy by substituting the proceeds of these other policies.**
>
> **16. Ellin collected $191,415.91 in life insurance proceeds on Bernhard's death. Said sum included: $38,700.00 on the "Ward Foods" policy; $106,460.79 on two policies issued by Massachusetts Mutual; $31,065.77 on a policy issued by Equitable; and, $15,189.35 on a policy issued by the Veterans Administration.**
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> *** * * * * ***
>
> **19. Bernhard and Ellin discussed the disparity in gifts which Bernhard had made to his children and grandchildren as opposed to the gifts which he had made to her children and grandchildren.**

During their discussion, Bernhard told Ellin that it was better that he control and invest the money until he died; that her children did not need the money; and, that her children would receive the money on his death. Ellin accepted Bernhard's statements at face value, and, did not object or insist upon enforcement of his obligations to her children under Subparagraph 5 (d) of the Antenuptial Agreement.

20. Bernhard never told Ellin that he wanted his children to receive no less than $800,000.00 from his estate. He never told her that his obligations to her and her children, under Subparagraphs 5 (b) and 5 (d) of the Antenuptial Agreement, would be paid out of the testamentary gift which he was obligated to make to her under Subparagraph (f) of the Agreement.

21. When she signed the Antenuptial Agreement on April 26, 1974, Ellin did not expect to receive anything under Subparagraph 5 (f) thereof. During her marriage to Bernhard, she did not think about what she might receive by way of a testamentary gift because of Subparagraph 5 (f) of the Agreement. In Bernhard's lifetime, Ellin did not know that the value of his estate had more than doubled during their marriage.

22. Mr.Hahn proposed that the following language be included in the Antenuptial Agreement, to wit,

> **" Bud is to give Ellin under his Will the sum of money equal to the excess of the value of his gross taxable Estate for Federal Estate Tax Purposes, exclusive of life insurance and property owned jointly with his wife, above $800,000.00". See Exhibit "R-3".**

Mr. Cantor incorporated Mr. Hahn's proposal into Subparagraph 5 (f) of the Antenuptial Agreement.

23. In 1985, Mr. Hahn drew a Will for Bernhard. In drawing this 1985 Will, Mr. Hahn incorporated the language of Subparagraph 5 (f) of the Antenuptial Agreement into a gift to Ellin.

24. In 1994, Paul C. Heintz, Esquire, drew a Will for Bernhard. In drawing this 1994 Will, Mr. Heintz consulted the Antenuptial Agreement and the Will which had been drawn by Mr.Hahn in 1985. Mr. Heintz then repeated the gift to Ellin which Mr. Hahn had taken from Subparagraph 5 (f) of the Antenuptial Agreement.

25. In 1995, Mr. Heintz drew the Will which has been admitted to probate. Item FOURTH of the probated Will was taken directly from the Will which Mr. Heintz had drawn for Bernhard in 1994. In discussing the contents of the probated Will with Mr. Heintz, Bernhard focused almost entirely on his works of art. Because Item FOURTH of the probated Will was taken directly from the 1994 Will, Mr. Heintz and Bernhard did not discuss whether Bernhard's debts, if any, should be paid from the gift to Ellin under Item FOURTH."

Upon a consideration of all of the testimony and Exhibits, the hearing judge concluded that the decedent's surviving spouse is entitled to receive the sum of $161,300.00 from his estate under Subparagraph 5 (b) of the Antenuptial Agreement. Relevant portions of the Adjudication read as follows,

"...... Since the 'Ward Foods' policy did not lapse in Bernhard's lifetime, Ellin had no right to demand payment of $200,000.00 in cash or securities in his lifetime. While they both understood that the face amount of the 'Ward Foods' policy would drop on Bernhard's retirement, unless he chose to pay the premiums to maintain the coverage, the language of Subparagraph 5 (b) shows Bernhard's clear intent that Ellin should receive $200,000.00 from his

estate if she did not receive that amount under the 'Ward Foods' policy. After describing the 'Ward Foods' policy as being, '......in the face amount of $200,000.00', Subparagraph 5 (b) provides that Ellin is to receive the sum of $200,000.00 from Bernhard's estate, "......in lieu of such insurance proceeds', if 'that policy' is not in force and payable to Ellin at the time of Bernhard's death. Clearly 'that policy' means a policy having a face amount of $200,000.00, which face amount is to be paid to Ellin from the estate if it is not paid to her under the policy. Subparagraph 5 (b) makes no reference to policies of insurance other than the 'Ward Foods' policy. Nothing in Subparagraph 5 (b) permits the substitution of other insurance proceeds to satisfy the obligation with regard to the 'Ward Foods' policy. There is no extrinsic evidence which shows an intent to substitute insurance proceeds. ......

There is no evidence in this record to support the affirmative defenses of estoppel, waiver and unjust enrichment.

*** * * * * ***

...... Having told Ellin that, notwithstanding the reduced face amount of the "Ward Foods" policy, she would receive $200,000.00 from that policy, Bernhard could not justifiably rely upon her acceptance of his assurances to excuse his failure to resolve this issue in his lifetime. ......

Subparagraph 5 (b) of the Antenuptial Agreement cannot be construed against Ellin because the extrinsic evidence shows that Bernhard wanted Ellin to receive $200,000.00 from his estate if she did not receive that sum from the 'Ward Foods' policy. ......" <u>Adjn 15 TO 18</u>

Upon a consideration of all of the testimony and Exhibits, the hearing judge concluded that the decedent's stepchildren are entitled to

receive the sum of $354,000.00 from his estate under Subparagraph 5 (d) of the Antenuptial Agreement. Relevant portions of the Adjudication read as follows,

> **"...... The language of Subparagraph 5 (d), and, the extrinsic evidence, show that both Ellin and Bernhard intended that he must make gifts to her children if he made gifts to his own children and grandchildren. Ellin's children are thus third party beneficiaries of the Agreement between their mother and Bernhard. See <u>Deeter v. Dull Corporation, Inc.</u>, 420 Pa.SuperiorCt. 576, 617 A2d 336 (1992). Exhibit "O-14" was received into evidence without objection, and, lists gifts which Bernhard made to Ellin's children and grandchildren. Ellin's children have met their burden of proving the amount of gifts which Bernhard made to them, and, the amount of the difference between gifts made to the children and grandchildren of Bernhard and Ellin.**
>
> **There is no evidence in this record to support the affirmative defenses of estoppel, waiver, novation and unjust enrichment.**
>
> **...... In discussing the disparity in gifts with Ellin, Bernhard told her it was better that he control and invest the money until he died; that her children did not need the money; and, that her children would receive the money on his death. ......**
>
> *** * * * ***
>
> **Given Bernhard's statements that Ellin's children would get their money on his death, this Court holds that his estate is estopped from asserting that the statute of limitations began to run in his lifetime. <u>Schwab v. Cornell</u>, 306 Pa. 536, 160 A2d 449 (1932)." <u>Adjn 19 to 21</u>**

Ellin and her children, as claimants, have not filed exceptions to the Adjudication of the hearing judge.

Bernhard's children, as executors, have filed exceptions to the conclusion that their father's estate must pay $161,300.00 to Ellin, and, to the conclusion that their father's estate must pay $354,000.00 to Ellin's children. In said exceptions, for the first time in these proceedings, the executors take the position that the terms of the Antenuptial Agreement and Will are clear and unambiguous, and, that extrinsic evidence may not be used to alter or change said clear and unambiguous terms.

In disposing of exceptions to an Adjudication, this court is, "....performing an essentially appellate function." <u>In Re Duncan Trust</u>, 480 Pa. 608 (1978) The scope of our review is set forth in <u>Estate of Dembiec</u>, 321 Pa.SuperiorCt. 515, 519-520 (1983), to wit,

> **" On appeal, the findings of an Orphans' Court judge who hears testimony without a jury are entitled to the weight of a jury verdict. *In re: Masciantonio's Estate,* 396 Pa. 16, 151 A.2d 99 (1959). This rule is particularly applicable to 'findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony' *Herwood v. Herwood,* 461 Pa. 322, 336 A.2d 306 (1975). In reviewing the Orphans' Court's findings, our task is to ensure that the record is free from legal error and to determine if the Orphans' Court's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence. *In re: Estate of Damario,* 488 Pa. 434, 412 A.2d 842 (1980). However, we are not limited when we review the legal conclusions**

> that Orphans' Court has derived from those facts. *In re: Ischy Trust,* 490 Pa. 71, 415 A.2d 37 (1980)."

Exceptants may not raise questions which could have been raised before the hearing judge but were not so raised. See Phila. O.C. Rule 7.1.A. (B) (2), as amended. This Court may not sustain exceptions unless the grounds thereof were raised before the hearing judge. See Pa. O.C. Rule 7.1 (b), as amended.

In their exceptions, Bernhard's children assert that, under the clear and unambiguous language of Subparagraph 5 (b) of the Antenuptial Agreement, Ellin is entitled to receive the sum of $200,000.00 from Bernhard's estate only if the "Ward Foods" policy is not in force and payable to Ellin at the time of Bernhard's death. The exceptants see a conflict between the statement at page 15 of the Adjudication that, "......the 'Ward Foods' policy did not lapse in Bernhard's lifetime, ...", and, the conclusion that Ellin is entitled to receive $200,000.00 from the estate. The exceptants argue that the conclusion that the estate must pay $200,000.00 to Ellin is contrary to the plain meaning of the clear and unambiguous language of Subparagraph 5 (b). They further take issue with the statement at page 16 of the Adjudication, that,

> "Clearly 'that policy' means a policy having a face amount of $200,000.00, which face amount is to be paid to Ellin from the estate if it is not paid to her under the policy.",

on the ground that said statement is also contrary to the plain meaning of the clear and unambiguous language of Subparagraph 5 (b). Having read

Subparagraph 5 (b) of the Antenuptial Agreement and the discussion of the hearing judge at pages 15 and 16 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. The language of Subparagraph 5 (b) fully supports the construction which has been placed upon it by the hearing judge.

In their exceptions, Bernhard's children make the following assertion:

> **" In fact, notwithstanding its statement that Subparagraph 5 (b) of the Antenuptial Agreement requires payment of $200,000 rather than the proceeds of the policy, the Court actually relied upon extrinsic evidence, in the form of Ellin's testimony, to conclude that Bernhard altered, or intended to alter, the terms of Subparagraph 5 (b) of the Antenuptial Agreement by agreeing to provide a specific amount to Ellin from the policy, contrary to the explicit terms of subparagraph 5 (b) of the Antenuptial Agreement." Expns 2**

Having made the foregoing assertion, the exceptants then argue that the hearing judge erred by relying upon extrinsic evidence to alter the terms of Subparagraph 5(b) without first making an express holding that the language of Subparagraph 5 (b) is ambiguous. Having read the discussion of the hearing judge at pages 15 through 19 of the Adjudication, this Court finds that the hearing judge did not reach a conclusion that, at some time after the execution of the Antenuptial Agreement, Bernhard agreed to alter the terms of Subparagraph 5 (b). The hearing judge did nothing more than construe the language of Subparagraph 5 (b) as it is written. Furthermore, since Bernhard's children never took the position, before the hearing

judge, that the terms of the Antenuptial Agreement are clear and unambiguous, they have waived the right to argue that the hearing judge erred by relying upon extrinsic evidence. See Phila. O.C. Rule 7.1.A. (B) (2) and Pa. O.C. Rule 7.1 (b), as amended.

In finding of fact No. 13, at pages 11 and 12 of the Adjudication, the hearing judge made selective quotes from a letter which Bernard wrote to his attorney, Mr. Hahn, on October 8, 1980. This letter was offered by Ellin in support of her claim, and, marked Exhibit O-8. In their exceptions, Bernhard's children make the following assertions:

> **" The Court's finding of fact #13, (Court's Memorandum Decision at 11, 12), establishes Bernhard's intention to discharge any obligation that he may have had to Ellin arising from the decline in value of the Ward Foods policy by transferring other assets to her. The excerpts from Bernhard's October, 1985 memo to Frank Hahn, Jr., quoted by the Court in finding #13, demonstrates Bernhard's belief that inter vivos transfers of property equal to or in excess of $100,000 would discharge his obligation to her with respect to the Ward Foods policy, and there was substantial evidence in the record that assets in excess of that amount were transferred to Ellin between the time the value of the Ward Foods policy declined and Bernhard's death." <u>Expns 3</u>**

At pages 9 and 10 of their brief in support of exceptions, Bernhard's children make the further assertions that,

> **" The foregoing quote in Finding of Fact #13 demonstrates Bernhard's belief that other life insurance policies he intended to acquire, and or transfers of other property, either by *inter vivos* gifts or through his estate equal to or in excess of $100,000 would discharge his obligation to Ellin**

> **with respect to the Ward Foods policy. The life insurance payments to Ellin of approximately $191,000.00, as well as the substantial additional assets that passed to her under Items THIRD and FOURTH of the probated Will, including artwork valued for inventory purposes at $325,000, amply demonstrate that any obligation Bernhard may have had to Ellin arising from the Ward Foods policy was discharged as contemplated in his October, 1980, memo."**

Having made the foregoing assertions, the exceptants then argue that the hearing judge erred in stating, in his discussion at page 16 of the Adjudication, that, "There is no extrinsic evidence which shows an intent to substitute insurance proceeds." Having read Exhibit O- 8 and the discussion of the hearing judge at pages 15 and 16 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. The language of Exhibit O-8 fully supports the construction which has been placed upon it by the hearing judge, and, refutes the assertions and arguments which have been made by the exceptants. Furthermore, since Bernhard's children never took the position, before the hearing judge, that Bernhard's obligation under Subparagraph 5 (b) of the Antenuptial Agreement could be satisfied by assets passing to Ellin under Bernhard's Will, they have waived the right to argue that the hearing judge erred by failing to hold that gifts under the Will satisfied said obligation. See Phila. O.C. Rule 7.1.A. (B) (2) and Pa. O.C. Rule 7.1 (b), as amended.

In their exceptions, Bernhard's children assert that their father's obligation to make gifts to Ellin's children is not enforceable

against his estate because Subparagraph 5 (d) of the Antenuptial Agreement clearly and unambiguously states that,

> **"...... Bernhard's obligation, under the provisions of this subparagraph (d) to make gifts to Ellin's children shall continue only during such time or times as Bernhard and Ellin are married and living together."**

After noting that Bernhard and Ellin ceased living together at the moment of Bernhard's death, the exceptants further assert that,

> **"Once Bernhard died, ..., any obligation he may have had to equalize gifts was extinguished, since he and Ellin were no longer living together." <u>Expns 5</u>**

Having made the foregoing assertions, the exceptants argue that the hearing judge erred in failing to agree with said assertions. Having read Subparagraph 5 (d) of the Antenuptial Agreement and the discussion of the hearing judge at pages 19 through 21 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. In his Adjudication, the hearing judge addressed the arguments which were made to him. The exceptants never took the position that death extinguished Bernhard's obligations under the clear and unambiguous language of Subparagraph 5 (d). Accordingly, the exceptants have waived the right to argue that the hearing judge erred by failing to hold that death extinguished Bernhard's obligations under the clear and unambiguous language of Subparagraph 5 (d) of the Antenuptial Agreement. See Phila. OC. Rule 7.1.A. (B) (2) and Pa. O.C. Rule 7.1 (b), as amended.

In their brief in support of their exceptions, Bernhard's children assert that their father's obligation to make gifts to Ellin's children is not enforceable against his estate because the clear and unambiguous language of Subparagraph 5 (d) of the Antenuptial Agreement makes no provision for enforcement against the estate. The exceptants next assert that the hearing judge relied on unspecified extrinsic evidence in reaching his conclusion that the decedent's estate must pay $354,000.00 to Ellin's children under Subparagraph 5 (d), and, argue that the hearing judge committed, "......a plain error of law", in so relying upon extrinsic evidence. <u>Brief 14.</u> Having read Subparagraph 5 (d) of the Antenuptial Agreement and the discussion of the hearing judge at pages 19 through 21 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. Breach of the Antenuptial Agreement creates a debt which is payable from the decedent's estate whether or not the Agreement so provides. In his Adjudication, the hearing judge addressed the arguments which were made to him. The exceptants never took the position that the decedent's obligation to make gifts to Ellin's children is not enforceable against his estate because the clear and unambiguous language of Subparagraph 5 (d) of the Antenuptial Agreement makes no provision for enforcement against the estate. They never took the position that the terms of the Antenuptial Agreement are clear and unambiguous. Accordingly, the exceptants have waived the right to argue that the hearing judge erred by failing to hold that the decedent's obligation to make gifts to

Ellin's children is not enforceable against his estate because the clear and unambiguous language of Subparagraph 5 (d) of the Antenuptial Agreement makes no provision for enforcement against the estate. They have also waived the right to argue that the

hearing judge erred by relying upon extrinsic evidence. See Phila. OC. Rule 7.1.A. (B) (2) and Pa. O.C. Rule 7.1 (b), as amended.

Finding of fact No. 19, at page 13 of the Adjudication, is based upon Ellin's recount of her discussion with Bernhard about the disparity in gifts made to their children and grandchildren. In their exceptions, Bernhard's children assert that the hearing judge improperly relied upon extrinsic evidence, in the form of Ellin's testimony, to alter the clear and unambiguous terms of the probated Will by adding a bequest to Ellin's children in the amount of the disparity in gifts, that is, in the amount of $354,000.00. Having read the Will and the discussion of the hearing judge at pages 19 through 21 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. Nothing in the Adjudication suggests that the hearing judge added a bequest to the decedent's Will. The hearing judge simply held that the decedent's estate must pay $354,000.00 to Ellin's children under Subparagraph 5 (d) of the Antenuptial Agreement. A debt is not a bequest under a Will. The holding that the decedent's estate must pay $354,000.00 to Ellin's children, under Subparagraph 5 (d) of the Agreement, did not add a bequest to the Will.

Instead, it recognized that breach of the Agreement created a debt which is payable from the decedent's estate.

In their brief in support of their exceptions, Bernhard's children assert that the hearing judge improperly relied upon vague representations and insufficient evidence, in the form of Ellin's testimony, to hold that Bernhard had made an enforceable oral contract, "......to provide a testamentary gift to the Michelsons in order to fulfill the terms of ¶5 (d) of the Antenuptial Agreement." <u>Brief 13.</u> Having read finding of fact No. 19 and the discussion of the hearing judge at pages 19 through 21 of the Adjudication, this Court finds no conflicts or errors of law in the reasoning of the hearing judge. The hearing judge did not hold that Bernhard made an enforceable oral contract to change his Will. The hearing judge simply held that the decedent's estate must pay $354,000.00 to Ellin's children under Subparagraph 5 (d) of the Antenuptial Agreement. To repeat, the hearing judge did not hold that Bernhard made an enforceable oral contract to change his Will.

Upon a consideration of Items FOURTH and FIFTH of Bernhard's Will, the earing judge held them to be clear and unambiguous. The hearing judge further held that all payments to Ellin and her children, under Subparagraphs 5 (b) and 5 (d) of the Antenuptial Agreement, must be paid out of the residue which passes to Bernhard's children under Item FIFTH of the Will. Relevant portions of the Adjudication read as follows:

> **"This Court further holds that Items FOURTH and FIFTH do not reflect an intent that Bernhard's children should receive no less than $800,000.00 from his estate. Mr. Hahn testified that Bernhard wanted his children to get no less than $800,000.00 from his estate. However, this Court has not been presented with a single document which bears the signature of Bernhard, and, expresses such an intent. The Antenuptial Agreement which Mr. Hahn negotiated on Bernhard's behalf, in 1974, does not express such an intent. The Will which Mr. Hahn drafted for Bernhard, in 1985, does not express such an intent. The Will which Mr. Heintz drafted for Bernhard, in 1994, does not express such an intent. The probated Will, drawn by Mr. Heintz and signed by Bernhard on August 16, 1995, does not express such an intent. This Court cannot accept the oral testimony of Mr. Hahn to vary the terms of a clear and unambiguous Will. As was noted by our Supreme Court in <u>Estate of Kelly</u>, 473 Pa. 48, 54, 373 A2d 744, 747 (1977), "Declarations alleged to have been made by a testator to the scrivener who drew his will are not admissible to alter or add to the terms of the will."**
>
> **...... This Court rejects the position of Bernhard's children that any payments to Ellin and her children, under Subparagraphs 5 (b) and 5 (d) of the Antenuptial Agreement, should be paid out of the gift to Ellin under Item FOURTH of Bernhard's Will. ......"**

In their exceptions and brief in support thereof, Bernhard's children assert that their father wanted them to receive no less than $800,000.00 from his estate; that their father intended that Ellin should receive nothing by way of the testamentary gift provided for in Subparagraph 5 (f) of the Antenuptial Agreement and Item FOURTH of his Will; and, that their father did not intend that Ellin's children should receive

any gifts under his Will. The exceptants next assert that their father's aforementioned intentions are reflected in the language of the Antenuptial Agreement; in the language of Items FOURTH and FIFTH of the Will; in the claimant's Exhibits; in their own Exhibits; and, in Ellin's testimony. Then exceptants use the foregoing assertions to support arguments that the conclusion of the hearing judge, as to the source of payment of the contested claims, has effectively disinherited them; made a gift to Ellin under Item FOURTH of the Will when she was not intended to receive anything thereunder; and, re-written the Will by adding a bequest to Ellin's children when they were not intended to receive anything under the Will. Having read the Antenuptial Agreement, the Will, the Exhibits, the testimony, and, the discussion of the hearing judge at pages 21 and 22 of the Adjudication, this Court finds no errors of law in the reasoning of the hearing judge. The language of Items FOURTH and FIFTH of the Will is clear and unambiguous. The hearing judge correctly applied the language of the Will, as written, in determining the source of payment of contested claims against the estate. As Judge Judith J. Jamison noted in her opinion for our court en banc in <u>Fiorillo Estate</u>, 7 Fiduc. Rep. 2d 204 (1987), at 207, "The unambiguous language of a will cannot be varied by extrinsic evidence which purports to set forth testator's 'true' intention."

In their exceptions, Bernhard's children assert that the hearing judge found that Bernhard engaged in wrongdoing, fraud or concealment so as to toll the running of the statute of limitations against the claim of

Ellin's children under Subparagraph 5 (d) of the Antenuptial Agreement. The exceptants next assert that there is no evidence in the record to support a finding that Bernhard engaged in wrongdoing, fraud or concealment. Then exceptants use the foregoing assertions to argue that the hearing judge erred in failing to hold that the statute of limitations barred the claim of Ellin's children. Having read finding of fact number 19 and the discussion of the hearing judge at page 21 of the Adjudication, this Court finds no errors of law in the reasoning of the hearing judge. The Adjudication does not contain any finding that Bernhard engaged in wrongdoing, fraud or concealment so as to toll the running of the statute of limitations. Instead, the hearing judge correctly held that, "Given Bernhard's statements that Ellin's children would get their money on his death, ...his estate is estopped from asserting that the statute of limitations began to run in his lifetime. <u>Schwab v. Cornell</u>, 306 Pa. 536, 160 A2d 449 (1932)." The hearing judge did not err in failing to hold that the statute of limitations barred the claim of Ellin's children.

> **In their exceptions, Bernhard's children argue that,**
>
> **"......, it was plain error for the Court to conclude that the Michelsons had a claim against the estate at all, when any potential claim must, of necessity, be asserted against Ellin, ..." <u>Expns 10</u>**

Having read the record in this matter, this Court finds that the foregoing argument was never made before the hearing judge. Accordingly, the exceptants have waived the right to argue that the hearing judge erred by

failing to hold that any claim of Ellin's children would be against Ellin and not against Bernhard or his estate.

Having considered the record in this matter and all of the exceptions of Bernhard's children, this Court finds that there is no merit to any of the exceptions. The findings and conclusions of the hearing judge are fully supported by the Exhibits and testimony. There is no error of law in the reasoning and holdings of the hearing judge. Accordingly, the exceptions must be dismissed.

BY THE COURT:

O'KEEFE, ADM. J.

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