

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

Estate of Margareta Berg, an Incapacitated Person

O.C. No. 1286 IC of 2016

Control No. 173478

Margaretta Berg, An Incapacitated Person



20160128606058

Estate of Edmund Berg, an Incapacitated Person

O.C. No. 1287 IC of 2016

Control No. 173477

OPINION SUR APPEAL

The appellant Gloria Byars had been appointed as guardian of the estate of two incapacitated persons, Margareta Berg and Edmund Berg, until she was permanently removed by this court by decree dated July 27, 2017 after a hearing that raised grave doubts about her administration of the Bergs' estates. In light of these concerns, Ms. Byars was ordered to file an account of her administration of those estates, which she filed on September 18, 2017. Objections were filed to this account by Josef Wituschek who was appointed as the replacement guardian of the person and estate of Margareta and Edmund Berg¹. A hearing was held to consider these objections on April 24 2018. Upon review of the record presented, the Accountant's request for \$4,487.50 in guardian fees was denied, she was surcharged \$34,112.80 for improper expenditures she made as the Bergs' guardian and she was charged \$24,479.50 for legal fees and costs incurred by the Objector. The rationale for this surcharge is set forth in great detail in a May 10, 2018 opinion that is the record for the appeal subsequently filed by Ms. Byars.

In response to the appeal of this surcharge by Ms Byars, this court issued a 1925(b) order requiring her to present a statement of matters complained of on appeal. This decree cautioned Ms. Byars that any issues not presented in her 1925(b) statement would be deemed waived. Significantly, Ms. Byars did not challenge the ruling that she should be surcharged \$24,479.50 for the legal fees and costs incurred by the Objector. Objection to that ruling, therefore, has been waived and is not presented for appellate review. See Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived"); McKeeman v. Corestates Bank, N.A., 2000 Pa. Super 117, 751 A.2d 655, 658 (Pa. Super. 200) ("An appellant's failure to include an issue in his 1925(b) statement waives that issue for purposes of appellate review").

In her 1925(b) statement, Ms. Byars objects to two surcharge rulings. First she objects to the denial of her request for Guardian Fees in the amount of \$4,487.50 "on the grounds that these fees were earned through her many actions as guardian that were to the benefit of her wards." Second, Ms. Byars appeals the surcharge of \$34,112.80 for improper expenditures from

¹ See July 27, 2017 decree. Joseph Wituschek is the brother of Margareta Berg and the brother-in-law of Edmund Berg.

the Bergs' estates "as she provided prior counsel with copies of checks and/or receipts for expenditures made, with the exception of payment(s) made to Asia Jones." The May 10, 2018 opinion, however, explains why the guardian fee was denied. It also outlines the accountant's failure to present the requisite documentation to support the \$34,112.80 claim for expenditures.

The primary excuse the accountant gives for her failure to present evidence to support her claims for guardian fees or for expenditures is that "Accountant was unavailable on April 24, 2018 to offer such testimony because she was in a car accident which required her hospitalization." This excuse was not raised during the April 24, 2018 hearing and is thus waived. Instead, at the April 24, 2018 hearing, counsel for the Accountant stated on the record that Ms. Byars had evaded all contact with him as her legal representative:

THE COURT: And I will turn to you, Mr. McElhatton, to take us through which objections are withdrawn and which are still contested.

But before you do that, Mr. Feliciani has indicated to the Court that his client, Ms. Byars, is not present.

And do you have any information as to why she is not present?

MR. FELICIANI (counsel for Ms. Byars): Your Honor, I do not. I have tried to contact her over the last couple of days. Her phone goes straight to voice mail. She is not responding to any text messages or telephone messages that I have left her, so I am unable to give the Court a clear picture as to why she is not here, but she is not present today.

4/24/2018 N.T. at 4-5.

Not only was counsel for the Accountant unable to explain her absence at the hearing, but he did not request a continuance. In light of this record, the Accountant's 1925(b) Statement is without merit and her appeal should be dismissed for the reasons set forth in the May 10, 2018 opinion.

BY THE COURT:

DATE:

July 31, 2018


John W. Herron, J.