NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF: SAMUEL B. MILLINGHAUSEN, JR.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: SAMUEL W. B. MILLINGHAUSEN, III	:	No. 57 EDA 2005

Appeal from the Order entered in the
Court of Common Pleas of Montgomery County,
Orphans' Court Division, No(s): 46-03-0700

BEFORE: MUSMANNO, GANTMAN and TAMILIA, JJ.

MEMORANDUM: **FILED OCTOBER 13, 2005**

Samuel W. B. Millinghausen, III, appeals from the December 23, 2004 Order sustaining appellees' preliminary objections and dismissing his petition to appeal the Register of Wills' decision to probate his father's 2002 will. After careful review, we affirm.

Samuel B. Millinghausen, Jr. died on February 3, 2003 and is survived by his two daughters, appellees Helen M. Rotzell and Dorothy A. Stadfelt, and his son, appellant Samuel W. B. Millinghausen, III. Decedent's wife, Dorothy Millinghausen, died on January 5, 2003. His will, dated August 15, 2002, was probated by the Register of Wills on March 4, 2003, and Letters Testamentary were granted to appellee Rotzell as Executrix. Record, Nos. 1, 2. The will provides that if the decedent's wife predeceased him, his decedent's estate was to be distributed in equal shares to his two daughters.

Trial Court Opinion, *Findings of Fact,* Drayer, J., 2/23/04, at 1-2. The will explicitly excluded appellant from receiving any share of the estate:

> For reasons which I do not care to disclose, I have made no provisions in this Will for my son, SAMUEL B. MILLINGHAUSEN, III. It is my intention that he should not receive anything under this Will.

Id.; Item Second (B) of 2002 will.

A prior will executed by decedent on November 25, 1983 contained a similar exclusionary provision. ***Id.;*** Exhibit R-2. On December 15, 2003, appellant filed a petition for citation *sur* appeal from the March 4, 2003 probate decree. Record, No. 7. Thereafter, on April 12, 2004, appellant filed an amended petition appealing the Register of Wills' decision to probate decedent's will. Record, No. 16. Appellant alleges that the execution of the August 15, 2002 will was procured by fraud, misrepresentation, undue influence, duress, and constraint. ***Id.*** Appellant further argues that appellees, together with attorneys Katherine L. Paul and Peter C. Paul, intentionally interfered with his testamentary expectancy. ***Id.***

On May 25, 2004, appellees filed preliminary objections to appellant's amended petition. Record, No. 20. Appellees argued, *inter alia,* that appellant was explicitly excluded from a 1983 will executed by decedent, and therefore lacked standing to challenge the probate of the 2002 will. Appellant filed an answer to appellees' preliminary objections, and on June 21, 2004, the court held a hearing on the matter. Record, No. 24. Following the hearing, the court sustained appellees' preliminary objections

and dismissed appellant's amended petition by Order of December 6, 2004. Record, No. 27. According to the parties' briefs, appellees filed additional exceptions, and on December 23, 2004, the court vacated the December 6, 2004 Order and dismissed appellant's amended petition on the grounds he had no standing to appeal the Register of Wills' decision to probate the 2002 will.[1] Record, Nos. 28, 29. In so ruling, the court reasoned appellant was not an "aggrieved" party within the meaning of § 908(a) of the Probate, Estates and Fiduciaries Code. ***Id.*** The court further dismissed appellant's intentional interference with a testamentary expectancy claim. ***Id.*** This timely appeal followed. Record, No. 30.

Appellant first argues the court erred when it **"failed to decide the merits of the preliminary objections solely on the basis of the pleadings."** Appellant's brief at 5, 11. Appellant raises two sub-issues with regard to this claim:

> A. Was it error for the court to find that there is no realistic possibility that Contestant successfully can challenge Decedent's 1983 will solely on the basis of the Amended Petition?
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> B. Was it error for the court to sustain the demurrer in Preliminary Objection No. 3 where the court could not be free from doubt, solely on the basis of the pleadings and not on testimony or evidence outside the complaint,

[1] This Court is somewhat unclear as to the purpose for the additional preliminary objections as they are not included in the original record. Further, we note that the court's Orders and Opinions of December 6, 2004 and December 23, 2004 are identical but for two sentences (pages five and fourteen) and the filing dates.

> that it was certain that no recovery was possible under the law?

Id. at 11, 14.

Similarly, appellant argues it was **"error to sustain Preliminary Objection No. 1 where Appellant was aggrieved by the probate of the 2002 will under §908 of the PEF Code and Appellees have not met their burden to establish by the required proof that the 1983 will could be admitted for probate."** Appellant's brief at 5, 17. Appellant also raises additional sub-issues with regard to this claim:

> A. Was it error to find that it was a realistic possibility that the Register would probate the 1983 will where Appellees did not meet their burden to establish by positive, clear and satisfactory evidence from two independent witnesses that (1) Decedent duly and properly executed the original will; (2) that the contents of the executed will were substantially as appears on the copy of the will presented for probate; (3) that, when Decedent died, the will remained undestroyed or unrevoked by him and the writing offered could not realistically be probated?
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> B. Was it was (sic) manifestly unreasonable for the court below to find credible Appellees' account of the destruction of the 1983 will?

Id. at 5, 17, 25.

Our standard of review with respect to an Orphans' Court decision in will contests is well-settled. "[T]he Orphans' court decision will not be reversed unless there has been an abuse of discretion or a fundamental error in applying the correct principles of law. If the record supports the

court's factual findings, we will defer to these findings and will not reverse absent an abuse of discretion." ***In re Estate of Luongo,*** 823 A.2d 942, 951 (Pa. Super. 2003) (citations omitted). "This rule is particularly applicable to findings of fact which are predicated upon the credibility of witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony." ***Estate of Lakatosh,*** 656 A.2d 1378, 1381 (Pa. Super. 1995) (citations omitted). We are not constrained, however, to give the same deference to the court's legal conclusions. ***In re Estate of Blumenthal,*** 812 A.2d 1279 (Pa. Super. 2002). "[W]here the rules of law on which the [court] relied are palpably wrong or clearly inapplicable, we will reverse the [court's] decree." ***Id.*** at 1286 (citations omitted).

Relying on our recent decisions in ***In re Estate of Briskman,*** 808 A.2d 928 (Pa. Super. 2002) and ***Luongo, supra,*** we find the lower court's determination that appellant lacked standing as an heir at law to challenge the probate of decedent's August 15, 2002 will was proper.

The right to appeal from the Register of Wills' decision to probate a will is granted under § 908(a) of the Probate, Estates and Fiduciaries Code which provides "[a]ny party in interest who is aggrieved by a decree of the register…may appeal therefrom to the court within one year of the decree…." 20 Pa.C.S.A. § 908 **Appeals,** (a) **When allowed.** In ***Briskman, supra,*** this Court was faced with determining whether an heir at law had standing

to contest the probate of a will even though there existed a prior testamentary document excluding the heir as a beneficiary. ***Id.*** at 931. Noting that the Legislature did not specifically include "heirs at law" among the class of individuals permitted to appeal under § 908, the ***Briskman*** Court held "the clear and unambiguous language of the statute permits a party to appeal a Register's decision only if that party has an interest that has been aggrieved." ***Id.*** at 932-933.

The ***Briskman*** decision was revisited by this Court one year later in ***Luongo, supra.*** In ***Luongo,*** a decedent's son sought to challenge the decedent's final will, which bequeathed pecuniary amounts to him and his siblings, and left the residue to decedent's long-time female companion. ***Id.*** at 949. The decedent's prior wills dated 1993 and 1987, however, had excluded his children completely. ***Id.*** The ***Luongo*** Court concluded decedent's son did not have standing to contest the whole of decedent's last will because of the two prior wills that denied him share in the estate. ***Id.*** at 958. In ***Luongo,*** we reiterated that the "mere status of a contestant as an heir-at-law does not confer standing to file appeal from probate of a will in which the heir-at-law is not a beneficiary, where there is a prior will in which the heir-at-law is also not a beneficiary." ***Id.*** at 955. The ***Luongo*** Court further emphasized the need for the lower court to verify that a valid prior will exists, noting that once evidence of a valid will has been established, the contestant of the will has a burden of producing evidence which would allow

the court to confirm he has "realistic possibility of…success in challenging the prior will." ***Id.*** at 958.

Here, because the invalidation of decedent's 2002 will would necessarily revive the 1983 will, the lower court was required to determine if there was a "realistic possibility" appellant could challenge decedent's 1983 will. The court found appellees "satisfied…that the 1983 will was valid and was not revoked by the Decedent," and "there is no realistic possibility" that appellant could successfully challenge it. Trial Court Opinion at 8-9, 11. Based on our review of the record, we find there was sufficient evidence to support such a decision. The court reasoned,

> Helen Rotzell established that there was a 1983 will, that there were original signatures on the original document, and that it was the will of the Decedent. (N.T., 06/21/04, at pp. 70-71). Moreover, the destruction of the original 1983 will was not a revocation effective under 20 Pa. C.S.A. section 2505. The testimony of Katherine Paul, Esq. and Helen Rotzell established that the shredding was performed at Mrs. Paul's suggestion, not Decedent's direction, and was accomplished by Mrs. Rotzell in her office and outside Decedent's presence. The physical destruction of the original 1983 will was not a valid revocation for the document. Hence, it is a realistic possibility that the Register would probate a photocopy of the 1983 will if such were presented.

Id. at 9 (footnotes omitted).

Appellant, likewise, presented virtually no concrete evidence at the hearing which called into question the validity of the 1983 will. Rather, appellant's own admissions seemingly contradict the claims of fraud,

misrepresentation, undue influence, duress, and constraint which he seeks to prove. Appellant testified decedent did not suffer from a weakened intellect at the time he executed the 1983 will, and he has no evidence that his sisters exerted fraud, misrepresentation, duress and constraint upon decedent. N.T., 6/21/04, at 26-28, 40. Further, appellant conceded he is unaware of any additional pecuniary benefit his mother received by allegedly influencing decedent to exclude appellant. ***Id.*** at 32-33. It is well-settled that a party is aggrieved "by a judgment, decree or order of the register" when "some pecuniary interest of that party has been injuriously affected." ***Luongo, supra*** at 953 (citations omitted). Based on the foregoing, we agree with the lower court that this is not such a case. Appellant clearly lacked standing to challenge the probate decree, and the lower court's decision to sustain appellees' preliminary objections was correct.

Appellant next argues **"it error** (sic) **for the trial court to take evidence on June 21, 2004 when Appellant was not apprised of the issues involved at the hearing."** Appellant's brief at 5, 28. In support of this argument, appellant raise four distinct claims:

> A. Appellant reasonably believed the court would address other matter[s] at the hearing on June 21, 2004.
>
> B. Appellant could not present a meaningful response where he was not apprised of the issue to be addressed at the hearing on June 21, 2004.

> C. Procedural defects supported Appellant's reasonable expectation that the hearing would address preliminary issues on June 21, 2004? (sic)
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> D. The Decree dated May 25, 2004 did not inform Appellant of the issues to be addressed at the June 21, 2004 hearing.

Id. at 28, 31, 33, 34. After careful review, we find the claims raised by appellant are both disingenuous and without merit.

As previously noted, appellees filed preliminary objections arguing, *inter alia,* that appellant was not aggrieved by the Register of Wills' probate decree and lacked standing to challenge the probate of decedent's 2002 will. *See* Record, No. 20; Preliminary Objection No. 1. In support of this claim, appellees attached to the pleadings a photocopy of decedent's 1983 will, which also explicitly excluded appellant from receiving any share of decedent's estate. Exhibit R-2. Appellant, in turn, filed an answer denying that the 1983 will belonged to the decedent, and the court scheduled "a hearing on Preliminary Objection No. 1 to the Amended Petition sur Appeal from Probate" by Order dated May 25, 2004. Record, No. 21. Appellant—a licensed attorney familiar with the rules of civil procedure—was placed on notice of this hearing, and accordingly, his claims of ignorance must fail. We reiterate the well-reasoned Opinion of the lower court:

> As an attorney representing himself pro se, Contestant has only himself to blame. Contestant was informed by Court Order dated May 25, 2004 that a hearing was to be held on June 21, 2004 concerning the issue of whether he had standing to

> proceed with his Amended Petition. This Court previously informed Contestant of the ***Briskman*** decision and gave him an opportunity to amend his original Petition accordingly. With knowledge of the decision in ***Briskman,*** Contestant decided to proceed by filing an Amended Petition. *Contestant knew we would be required at some time to present evidence suggesting the invalidity of the 1983 will.* This Court will not indulge Contestant's theories and conclusory accusations any longer.

Trial Court Opinion at 11 (emphasis added).

Lastly, appellant argues "**it error** (sic) **for the court to make certain Findings of Fact or findings within the Opinion where such findings constituted an abuse of discretion, a capricious disregard for evidence and/or the findings lack evidentiary support on the record."** Appellant's brief at 6, 35. Specifically, appellant maintains the court erred in making Findings of Fact 5, 6, 7, 8, 12, 13, 14, 15, 16, and 17, which provide:

> 5. Decedent executed an earlier will dated November 25, 1983 ("1983 will"). Respondents, Helen M. Rotzell, Dorothy A. Stadfelt, Katherine Paul, Esq. and Peter Paul, Esq. appended a copy of this will to their Answer and New Matter filed in response to Contestant's original Petition. A copy of the 1983 will also was introduced into evidence at the hearing as Respondents' Exhibit R-2.
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> 6. The 1983 will contained the same provision as the 2002 will; namely, "For reasons that I care not to disclose, I have made no provision for my son, Samuel B. Millinghausen III. It is my intention that he should take nothing under this, my Last Will and Testament." (ITEM 4 of 1983 will).

7. A copy of the 1983 will was submitted to the Court because the original will had been destroyed.

8. Decedent, his wife and Helen Rotzell visited Katherine Paul, Esq., scrivener of the 2002 will, in Maryland in August of 2002. Copies of the fully executed 2002 will were brought to that visit. When Helen Rotzell asked what should be done with the 1983 will, Attorney Paul suggested that the 1983 will should be destroyed so that there was no confusion about which is the most recent will. In accordance with Attorney Paul's advise, Helen Rotzell took the original 1983 will to work and, after noting the original signatures on the will and that it was a will of the decedent, shredded it in her shredder at her place of employment.

12. According to Contestant's testimony, over the course of twenty years, Decedent's Spouse misled Decedent about the family relationship with son, misled Decedent about the appropriateness of her discipline towards son (i.e., beating him with a fan belt), the need for family counseling and that son was to blame for all of these problems.

13. There was testimony by other witnesses who testified that Mrs. Millinghausen was a milquetoast and Mr. Millinghausen was very much in charge of the family.

14. Contestant admitted on cross-examination that he could not name and did not know of any specific incident where his mother exerted duress, misrepresentation, undue influence or constraint over Decedent with respect to the 1983 will.

15. Contestant testified that Decedent did not suffer from a weakened intellect at any time during 1983.

> 16. Contestant admitted during cross-examination that Mrs. Millinghausen was the sole residuary beneficiary under both the 2002 and 1983 wills. Contestant also admitted that Mrs. Millinghausen did not receive any additional pecuniary benefit by having Contestant excluded from Decedent's will. The only benefit she received was the benefit of further punishing Contestant.
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> 17. Finally, Contestant admitted that there is no evidence that his sisters, Dorothy Stadfelt and Helen Rotzell, exerted fraud, misrepresentation, undue influence, duress or constraint over their father with respect to the 1983 will.

Trial Court Opinion at 2-4 (citations omitted).

"Our standard of review of the findings of an orphans' court is deferential." ***In re Ware,*** 814 A.2d 725, 731 (Pa. Super. 2002). "The findings of a judge of the Orphans' court, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury." ***In re Estate of Inter,*** 664 A.2d 142, 144-145 (Pa. Super. 1995). Proper appellate review mandates this Court "modify an Orphans' Court decree only if the findings upon which the decree rests are not supported by competent or adequate evidence or if there has been an error of law, an abuse of discretion, or a capricious disbelief of competent evidence." ***In re Estate of Fleigle,*** 664 A.2d 612, 615 (Pa. Super. 1995) (citation omitted). In ***In re Estate of Schultheis,*** 747 A.2d 918 (Pa. Super. 2000), we further noted:

> 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.

Id. at 922 (citations omitted). Here, our review of the record reveals that the findings of fact at issue were based in large part on the trial judge's credibility determinations, and are clearly supported by an abundance of competent evidence in the record, including a photocopy of decedent's prior 1983 will. Accordingly, we reject appellant's claim of trial court error.

Order affirmed.