IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

No. 59,813

ESTATE OF MAX KRAVITZ, DECEASED

MEMORANDUM OPINION AND ORDER SUR PETITION FOR ACCOUNT AND SCHEDULE OF DISTRIBUTION

OTT, J. **August 10, 2006**

The history of this estate to date, as set forth in our previous memorandum opinion and order of November 16, 2005, is as follows:

> The decedent, Max Kravitz, died on July 4, 1958. His widow, Ethel Kravitz, was convicted of second degree murder of her husband in 1958 and was sentenced to prison. In August of 1959, the decedent's brother-in-law, Morris Passon, was issued letters testamentary for the estate of Max Kravitz, in accordance with his will dated August 23, 1955.
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> Morris Passon filed an account of his administration for the period through October 7, 1963. The account appeared on this Court's audit list of June 17, 1964. The Late Honorable Alfred L. Taxis, Jr., issued an adjudication on July 13, 1964, confirming the account and directing the executor to file a schedule of distribution. Exceptions, the substance of which are not relevant for our purposes, were filed and disposed of, and the adjudication became final, and was affirmed by the Supreme Court. *See* Kravitz Estate, 418 Pa. 319, 211 A.2d 443 (1965). Morris Passon never filed the schedule of distribution as directed.
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> On October 15, 2000, Morris Passon died in Broward County, Florida. The probate court there appointed his widow and Marcus Levy, Esquire, as his personal representatives. Thereafter, the widow died and attorney Levy became the sole fiduciary of Mr. Passon's estate[1].

[1] In their post-hearing memorandum, counsel for Mr. Levy advise that Neil A. Milestone, Esquire, was appointed by the Florida probate court on March 22, 2006, to serve as personal representative along with Mr. Levy. Counsel further notes that Mr. Milestone has not, to date, been named as a respondent and is not currently represented by counsel in these proceedings.

> On January 24, 2001, James Kravitz, a nephew of Max Kravitz and a beneficiary under his will, petitioned this Court to re-open the Kravitz estate. The Court granted his petition and James Kravitz (hereinafter "the petitioner") applied for and received letters of administration d.b.n.c.t.a.
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> Shortly thereafter, the petitioner brought proceedings in Florida against the estate of Morris Passon, raising claims of breach of fiduciary duty, negligence, conversion, tortious interference with expectancy of inheritance, constructive fraud, and for an account of Morris Passon's administration of the Kravitz estate. The Florida suit is based on allegations that Morris Passon never distributed the residuary estate properly, and used the residue, as well as other estate assets for which he never accounted to this Court, as his own property. To date, the Florida court has dismissed all but two of the counts (constructive fraud and for an account) and is expected to proceed on the remaining counts shortly[2].
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> On April 22, 2005, the petitioner filed the instant petition for citation to show cause why Marcus Levy (hereinafter "the respondent") should not file a corrected and supplemental account in the Kravitz estate, why a surcharge should not issue against the estate of Morris Passon, deceased, and why a schedule of distribution should not be filed on behalf of the deceased executor. On June 29, 2005, the respondent filed preliminary objections to the petition, in the nature of a motion for improper venue and lack of jurisdiction. The respondent also filed an answer to the petition on the same day. Counsel filed comprehensive briefs and argued the matter before the undersigned on October 4, 2005.

Kravitz Estate, 26 Fiduc. Rep. 2d. 20, 20-21. In the November 16, 2005 order, we overruled the preliminary objections to the petition.

The above-mentioned answer and new matter filed by the respondent to the petition raised a wide variety of issues, including the defenses of laches, estoppel, release, waiver, *res judicata,* and "unclean hands," as well as assertions of "negligence to pursue any cause [of action] that [the petitioner] may have had at the time of the audit," previous

[2] The Florida court dismissed the remaining two counts alleging constructive fraud and seeking an account by order dated November 8, 2005, and denied the instant petitioner's motion to stay proceedings pending the resolution of the Pennsylvania litigation. For reasons unclear to this Court and despite having dismissed all of the counts of the complaint before it, the Florida court awarded the petitioner the sum of $1,250.00, plus statutory interest from the estate of Morris Passon, by judgment dated February 23, 2006. This judgment has been appealed by the instant petitioner. The respondent requested that the Florida court unfreeze the assets of the Passon Estate without success, and has filed a cross-appeal from the Florida court's unfavorable ruling on this issue.

discharge of Morris Passon by the Court, inappropriate petition for review under 20 Pa. C.S.A. §3521, failure to join other interested parties[3], collateral estoppel, and *forum non conveniens*[4]. The petitioner replied to the respondent's new matter in due course. After a period of discovery, the matter proceeded to a hearing before the undersigned on May 22, 2006. Thereafter, the parties filed comprehensive memoranda of law and reply memoranda for our consideration.

The evidence presented at the hearing consisted of the testimony of the petitioner and the introduction of various documents. The petitioner testified that he is the nephew of the decedent. He was 16 years old at the time of the decedent's death. Under the decedent's will and because of the operation of the Slayer's Act, the petitioner and his sister, Barbara Kravitz, were to share the residue of the estate with Elaine Passon (the petitioner's cousin and daughter of Morris Passon, the now-deceased executor of the decedent's will.)

The petitioner stated that he received approximately $25,000 from the estate in the middle 1960s when he was in his early 20s. (N.T. 12.) He testified that he believed he was entitled to additional money, but never discussed the matter with his uncle. He stated that Morris was "the family lawyer" who handled all of the family's legal matters, including the petitioner's divorce in the 1960s. The petitioner grew up to be a businessman and Morris represented him in his business affairs. The petitioner stated

[3] Nonjoinder of a necessary party must be raised in preliminary objections, pursuant to Pa.R.C.P. 1028(a)(5); accordingly, this issue is not discussed herein.

[4] Technically, *forum non conveniens* is raised by petition under Pa. R.C.P. 1006(d)(1) and (2), and not as new matter. *See* note following Pa. R.C.P. 1028(a)(1). Nevertheless, we touch on this issue briefly *infra*.

that he never got a copy of Morris' account that was audited and adjudicated by this Court, and did not know that the account had been filed in the 1960s. He testified that he did not read the decedent's will until he was appointed administrator of the estate.

The petitioner stated that he sought letters in this estate after Morris died and his executor, Marcus Levy, contacted him and the other residuary beneficiaries about certain assets he had uncovered belonging to the estate of Max Kravitz. After receiving the letters, the petitioner traveled to Florida to see Mr. Levy, who turned over stocks, bonds and a bank account belonging to the estate of Max Kravitz. (N.T. 18.) The petitioner also testified that a review of this Court's file revealed that Morris took additional counsel fees after his account was adjudicated by the Court. (Exh. P-58.) The petitioner testified that Morris Levy turned over additional assets to him after he (the petitioner) returned from Florida. Among the documents subpoenaed by counsel for the petitioner were dividend checks payable to "Max Kravitz C/O Morris Passon Exec" that were issued in the late nineties and the year 2000. (*See, e.g.*, Exh. P-40 @ pp. P-0000120 through 0000127.)

The petitioner testified that he employed a title company to research the decedent's real estate holdings. He produced copies of deeds showing that Morris, as executor of Max Kravitz's estate, transferred some of the decedent's properties to third parties into the 1980s. There is at least one piece of real estate owned by Max Kravitz that was omitted from Morris's account. (Exh. P-45.) In addition, one property in

Philadelphia that appeared in the account had been sold by the decedent during his lifetime. (Exh. P-57.)

During cross examination by counsel for Mr. Levy, the petitioner stated that he had experience with the workings of the Orphans' Court in connection with his father's estate in the early 1990's. He also reiterated that, despite Morrris Passon's acting as his personal and business attorney for many years, the two men never discussed the Max Kravitz estate.

After the petitioner rested, the respondent presented his case, which consisted of documents which are of record in this Court and in the Florida probate court and which were introduced by agreement of counsel.

Before deciding whether an account and/or schedule of distribution can be ordered at this late date, we must first consider the issue of notice as it relates to the 1964 account filed by Morris Passon. The statutory section in effect at the time in question was Section 703 of the Fiduciaries Act of 1949, 20 P.S. §320.703, which provided that written notice of the filing and audit of an account had to be given "to every other person known to the accountant to have an interest in the estate as beneficiary, heir or next of kin." Similarly, the then-operative Supreme Court Orphans' Court Rule (Rule 3, Section 6) required written notice "to every other person of whom the accountant has notice or knowledge who claims an interest in the estate as beneficiary or next of kin."

The petitioner argues that Morris' failure to give the required notice renders the 1964 adjudication void, citing Estate of Stewart, 413 Pa.190, 196 A.2d 330 (1964), Galli's Estate, 340 Pa. 561, 17 A.2d 899 (1941), Shugars' Estate, 312 Pa. 472, 167 A. 567 (1933), and Estate of Alexander, 758 A.2d 182 (Pa. Super. 2000). In the Galli case, the Supreme Court stated the statutorily required notice is "indispensably necessary to give jurisdiction, and without such notice and an opportunity for [a party in interest] to be heard, the decrees of the court [are] absolutely void." 340 Pa. at 570, 17 A.2d at 903. Petitioner therefore argues that, because he got no notice of the audit in 1964, the adjudication is a nullity and laches can not be asserted by the respondent.

The respondent suggests we can infer that the petitioner had actual notice of the 1964 proceedings. This is based on the transcript from the call of audit on June 17, 1964, wherein Judge Taxis and counsel refer to certain notice letters. The respondent asks us to conclude from the transcript that all parties in interest received proper notice of the audit. After reviewing the transcript, we conclude Judge Taxis was referring only to notice to Pauline Mitchell and Pauline Tadlock, both of whom were to receive specific bequests if in the decedent's employ at the time of his death. They were not so employed, and counsel for the accountant took the position that they should receive nothing. We have uncovered, in the Orphans' Court file, a copy of counsel's letter[5] to Pauline Mitchell, dated December 20, 1963, stating this position and advising of the audit. While there is no copy of the letter to Pauline Tadlock in the file, both she and Pauline Mitchell are listed in paragraph 6 of the petition for adjudication among the parties who received

[5] It appears that the copy of the letter was supplied to the Court by Ms. Mitchell herself to register an objection to the accountant's position. From Judge Taxis' adjudication, we know she did not appear at audit to press her claim, and it was dismissed.

notice. The Court's file contains no copy of a notice letter to the petitioner; and paragraph 6 of the petition for adjudication does not list the petitioner as an interested party. We conclude, therefore, that the petitioner did not have actual notice of the filing and audit of the account.

The respondent also argues that the petitioner had constructive notice, on the theory that his "indolent conduct" in not taking positive action during the past forty years "raises the indubitable presumption that he received proper notice of the audit." (Respondent's Memorandum of Law, p. 12.) We fail to see how petitioner's failure to act establishes anything about what he knew or didn't know. Moreover, respondent has referred us to no cases where constructive notice was deemed adequate. Counsel for the petitioner offers Shugars' Estate, cited *supra,* for the proposition that notice by publication will not suffice when the rule requires actual written. We agree that the Court is bound by the holding in Galli's Estate that actual notice is required to prevent previously adjudicated issues from being reopened by a party in interest.

The respondent contends the petitioner is guilty of laches for failing to act promptly after Judge Taxis' adjudication became final in 1966 (when the exceptions of Ethel Kravitz were withdrawn.) Again, respondent can not overcome the no-notice hurdle vis-à-vis the petitioner.

Counsel for the respondent also argue the matter must remain closed because receipt and release agreements were signed by the residuary beneficiaries. (*See* Respondent's Answer, ¶¶ 13, 23; Respondent's Memorandum of Law, p. 14.) It is unclear to the Court whether counsel is referring to releases for assets distributed by Morris Passon or by Marcus Levy after Morris' death. In either case, if such documents exist, they were not introduced at the hearing and do not appear in the Court's file or on the dockets. Thus, on the record before us, we cannot find that the defense of "release" has been established.

Counsel for the respondent offer up another twist on the laches defense. They argue the petitioner's testimony established that he knew he did not receive as much of an inheritance as he was owed, but, despite constant contact with Morris Passon, he did not pursue the issue during his uncle's life. The respondent suggests petitioner's "unreasonable silence" over these many years should lead to the presumption that he received his entire inheritance. We are unable to accept this proposition, because it is beyond argument at this point that Morris Passon did not distribute the entire estate, and the petitioner acted promptly when he learned this to be the case, *i.e.,* when Marcus Levy advised him of the existence of additional estate assets.

Respondent's counsel also raise a spirited defense of unclean hands. They question the petitioner's motives in filing suit in Florida and then seeking letters in Pennsylvania, and raise the specter of a conflict of interest between him and the other beneficiaries of this estate. Even if his motives were improper and the conflict clear,

these would not be reasons for the Court to conclude its inquiry. This would still be an open estate, even if no "new" assets had surfaced. No schedule of distribution was ever filed, as directed in Judge Taxis's adjudication, and, to reiterate what was stated in our November 16, 2005 opinion, this and only this Court can direct its filing -- which fact is also fatal to the respondent's other arguments that this Court is *forum non conveniens,* that the defenses of judicial estoppel, *res judicata*, and collateral estoppel should apply, and that this petition is merely an untimely "petition for review" under Section 3521 of the PEF Code.[6]

Having found no meritorious defenses to the instant pleading, we conclude it should be granted. In light of the passage of time since the account of Morris Passon was filed, we will exercise the broad power granted under the PEF Code to order an account "at any time,"[7] and direct the respondent to do so. We recognize that this may be a difficult task and the resulting account may likely have holes in it; however, we will grant a long lead-time and we will hold the respondent and his counsel to the standards of good faith and due diligence required of all fiduciaries.

ORDER

AND NOW, this 10th day of August, 2006, after hearing and consideration of memoranda of counsel, the petition filed on behalf of James Kravitz on April 22, 2005

[6] This section provides that an account can be re-opened within five years after final confirmation.
[7] *See* Section 3501.1 of the PEF Code.

is GRANTED. The respondent, Marcus Levy, Esquire, is hereby DIRECTED to file a second account of the administration of the personal representatives of the above-captioned estate, including the administration of any assets omitted from the first account and the transactions dating from October 8, 1963 forward. The account shall be filed with the Clerk of the Orphans' Court on or before January 3, 2007.

BY THE COURT:

J.

Copies of the above mailed
August 10, 2006, to:
Mason Avrigian, Esquire, for Marcus Levy
Anne L. Griffin, Esquire, for Marcus Levy
James F. Mannion, Esquire, for James B. Kravitz
Adam T. Gusdorff, Esquire, for James B. Kravitz